FACILITATING AND REGULATING EMPLOYMENT

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It has been my privilege to appear before Sir Ivor on many occasions, at first in criminal appeals and, over the last two decades, in employment cases. They have always been challenging and stimulating experiences. It is fair to say that in advising clients and preparing for cases on industrial and employment issues, some of them significant, I have been greatly influenced by Sir Ivor's judgments. I am honoured to be here.

I INTRODUCTION - THEN AND NOW

It is arguable that, in the nearly 25 years of Sir Ivor Richardson's distinguished career as a member of the New Zealand Court of Appeal, no aspect of our jurisprudence has seen greater change in legislation and judge-made law than the field of industrial and employment law.

In 1977, legislative intervention which went beyond providing statutory minima for wages, annual and public holidays, wages protection, and safety in the workplace was extended only to employees whose terms and conditions of employment were provided in nationally negotiated awards or collective industrial agreements. Under the Industrial Relations Act 1973, workplace disputes and grievances were resolved primarily by committees of employers and union representatives, with the Arbitration Court exercising a largely supervisory jurisdiction. The Court's workload was handled by two or three judges sitting with lay representatives. Challenges to the lawfulness of industrial action involved recourse to the injunctive jurisdiction of the ordinary courts. For more than half the workforce, the common law provided the only significant remedies for alleged breaches of employer obligations and recourse to them was infrequent. The Court of Appeal was rarely called on to deal with industrial matters. Notably, practising barristers and solicitors had limited rights of audience before the specialist employment institutions. It is unlikely that a conference of this kind would have included a topic devoted to industrial law.

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In the ensuing 25 years, there have been three significant legislative changes.[1] The Employment Contracts Act and the Employment Relations Act were enacted after changes in government, in each case with the successful party having campaigned vigorously on employment relations policies. The changes in legislative philosophy are exemplified by reference to the Long Titles and objects sections:

Labour Relations Act 1987

An Act to reform the law relating to labour relations and, in particular,—

(a) To facilitate the formation of effective and accountable unions and effective and accountable employers organisations:
(b) To provide procedures for the orderly conduct of relations between workers and employers:
(c) To provide a framework to enable agreement to be reached between workers and employers:
(d) To repeal the Industrial Relations Act 1975 and certain other enactments

Employment Contracts Act 1991

An Act to promote an efficient labour market and, in particular,—

(a) To provide for freedom of association:
(b) To allow employees to determine who should represent their interests in relation to employment issues:
(c) To enable each employee to choose either—
  (i) To negotiate an individual employment contract with his or her employer; or
  (ii) To be bound by a collective employment contract to which his or her employer is a party:
(d) To enable each employer to choose—
  (i) To negotiate an individual employment contract with any employee:
  (ii) To negotiate or to elect to be bound by a collective employment contract that binds 2 or more employees:
(e) To establish that the question of whether employment contracts are individual or collective or both is itself a matter for negotiation by the parties themselves:
(f) To repeal the Labour Relations Act 1987

Employment Relations Act 2000

3 Object of this Act

The object of this Act is—

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1 Labour Relations Act 1987; Employment Contracts Act 1991; Employment Relations Act 2000.

(a) to build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment and of the employment relationship—
  (i) by recognising that employment relationships must be built on good faith behaviour; and
  (ii) by acknowledging and addressing the inherent inequality of bargaining power in employment relationships; and
  (iii) by promoting collective bargaining; and
  (iv) by protecting the integrity of individual choice; and
  (v) by promoting mediation as the primary problem-solving mechanism; and
  (vi) by reducing the need for judicial intervention; and

(b) to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively.

It is also instructive to compare the number of sections in the three enactments which deal with unions and bargaining, or the related issue of freedom of association:

- Labour Relations Act 1987 210
- Employment Contracts Act 1991 21[2]
- Employment Relations Act 2000 62

The 13 full-time members of the Employment Relations Authority, established under the new Act have exclusive jurisdiction over "employment relationship problems", and in that respect the right to exercise all of the common law and statutory powers of the High Court and District Courts in relation to contracts.[3] In contrast to the relative lack of industrial or employment litigation at the start of Sir Ivor's career as an appellate judge, we now have the rump of the Employment Tribunal yet to deal with a back-log of some 200 cases arising under the 1991 Act; the Employment Relations Authority having issued 424 considered determinations under the ERA in the 12 months to 11 March 2002 (239 of them out of its Auckland office alone); and an Employment Court comprising five permanent judges hearing appeals from the Tribunal and dealing with challenges to decisions by the Authority. Whereas 25 years ago the legal practitioners claiming any degree of expertise in industrial law would have been numbered in single digits, the New Zealand Law Society's biennial Employment Law Conference now attracts well over 300 registrants for two full

2 Of which only four dealt exclusively with collective employment contracts. The only references to unions in the ECA were in relation to consequential repeals; "employees (sic) organisation" appears in seven sections.

3 Sections 161 & 162 Employment Relations Act 2000.

days of discussion. The 2002 Employment Law course at the University of Auckland has 198 students and is, again, the biggest optional class in the Law School - bigger than Commercial Law, Company Law, Evidence, and Family Law, for example.

II THE NEW JURISPRUDENCE FLOURISHES

The inherent lack of certainty in the obligation of fair dealing - the point made capably by Jack Hodder in his companion paper to this Conference - explains a great deal about the growth of employment jurisprudence since the concept was first developed. In New Zealand, the single most significant cause of the growth of activity in the industrial/employment law field was the introduction in 1991 of statutory bargaining and grievance regimes which applied to all employees, whether union members or not and whether employed under collective or individual arrangements. The 1991 Act was described by the Court of Appeal in 1998 as "major social and economic legislation having a daily impact on the lives of New Zealanders".[4] Bringing all employment contracts under the statutory umbrella meant, for the more than 50 per cent of employees who were not union members, that the narrower perspectives of the common law in relation to dismissals and other unlawful conduct by an employer were replaced by wider considerations of moral justice and reasonableness. And with many of the employees newly eligible to take grievance proceedings generally being better remunerated than those employed under awards or registered agreements, both employee and employer had greater incentive to take a case to appellate level.

Two briefly stated concepts - unjustifiable action and unjustifiable dismissal - lie at the heart of the personal grievance regime. It is tempting to mis-quote a phrase and speculate that never in the field of New Zealand jurisprudence has so much been written by so many about so few words.

The principal grievance provisions, which have remained materially unchanged since 1973, read as follows:

> For the purposes of this Act, personal grievance means any grievance that an employee may have against the employee's employer or former employer because of a claim–
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> (a) that the employee has been unjustifiably dismissed; or
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> (b) that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer.

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4 *Aoraki Corp Ltd v McGavin* [1998] 1 ERNZ 601, 616 (CA).

One of the most-often quoted statements of the philosophy of the statutory grievance regime is found in Sir Ivor's judgment in the *Devlin* case in 1991:[5]

> Clearly Parliament has departed from the common law approach not only in relation to procedures and remedies but also in formulating the basic concept of unjustifiable conduct within the employment relationship under the Act. The contract of employment cannot be equated with an ordinary commercial contract. It is a special relationship under which workers and employers have mutual obligations of confidence, trust and fair dealing. The statutory enquiry necessarily involves a balancing of competing considerations. Those mutual obligations must respect on the one hand the importance to workers of the right to work and their legitimate interest in job security, and on the other hand the importance to employers of the right to manage and to make their own commercial decisions as to how to run their businesses.
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> A dismissal is unjustifiable if it is not capable of being shown to be just in all the circumstances. Justifiability is directed at considerations of moral justice. Whether a dismissal is justifiable can only be determined by considering and balancing the interests of worker and employer. It is whether what was done and how it was done, including what recompense was provided, is just and reasonable to both parties in all the circumstances including, of course, the reason for the dismissal. Where it does not meet that test and the primary remedy of reinstatement is not available, the awarding of compensation recognises the reality that the employment is at an end and life must go on. And a just and reasonable award must reflect the circumstances and the legitimate interests of both parties.

In 1991, the responsibility for supervising relationships between employers and their employees was placed in the hands of specialist institutions having substantial discretionary powers and jurisdiction to decide matters "in equity and good conscience",[6] with limited rights of appeal to the Court of Appeal on questions of law only. Overseas precedents have provided little assistance. There has been, therefore, fertile ground for the growth of a new and uniquely New Zealand jurisprudence, and the Employment Court under Chief Judge Goddard has demonstrated no reluctance to cultivate it. The cases since 1990 are reported in 24 bulky volumes of the Employment Reports of New Zealand.

The inherent uncertainty of the fair dealing obligation; the paucity of statutory guidelines; the absence of settled precedent; the need for judicial interpretation reflecting the broad legislative principles; and the changing legislative landscape had a combined potential for considerable uncertainty in a sector of the economy in which it might have been thought desirable for commercial decisions to be made against a generally stable

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5 *Telecom South v Post Office Union* [1992] 1 ERNZ 711, 722 (CA).

6 Sections 79(2) & 104(3) Employment Contracts Act 1991.

background of applicable principle. But as Sir Ivor said in one of the leading cases, "(t)he nature and circumstances of the particular case must be of paramount importance and this Court has deliberately avoided the temptation to formulate detailed principles and rules by which the justifiability or unjustifiability of dismissals is to be determined".[7]

The Court of Appeal has long recognised that the specialist institutions established under industrial or employment legislation should be given the principal responsibility for administering it,[8] but Parliament has always given the Court of Appeal the ultimate right of decision on questions of law.[9] It is the purpose of this paper to consider the extent to which, despite its reluctance to establish guidelines, the Court of which Sir Ivor has been one of the two most influential members since the late 1970s has sought to provide consistency, certainty and predictability in the development of New Zealand's employment jurisprudence.

The paper draws on one facet of employment law - the law relating to redundancy - to illustrate Sir Ivor's particular influence on the development of applicable legal principles to a point where it may now be said that most of the principles are well established and ought to be capable of straightforward application. In each of the leading cases discussed, Sir Ivor either delivered the judgment of the Court or a separate judgment, or was the presiding member of the Court who heard the case.

III 1990 - THE HALE *CASE*

The first decision of the Court of Appeal to deal authoritatively with the principles of justification for termination of employment on the grounds of redundancy was the *Hale* case.[10] The complexities of the topic were identified by Richardson J in the opening paragraph of his judgment in that case: "Redundancy is a difficult area of labour law as it is of industrial relations. It raises considerations of economic efficiency, individual autonomy and social justice".

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7 *G N Hale & Sons Ltd v Wellington etc Caretakers etc IUOW* [1991] 1 NZLR 151, 157; (1990) ERNZ Sel Cas 843, 851 (CA).

8 See, for example, the detailed discussion of the issue by Richardson P in *NZ Van Lines Ltd v Gray* [1999] 1 ERNZ 85, 91-94.

9 In the light of contemporary discussion over the removal of rights of appeal to the Privy Council, it is pertinent to observe that no such right exists (nor has existed) in relation to decisions of the Court of Appeal exercising its supervisory appellate jurisdiction over the specialist industrial/employment institutions: see s 312(6) Labour Relations Act 1987; s 135(5) Employment Contracts Act 1991; s 214(7) Employment Relations Act 2000; and *Sears v A-G* [1997] 3 NZLR 385; [1998] 2 WLR 427 (PC), affirming *Sears v A-G* [1995] 2 ERNZ 121; (1995) 8 PRNZ 571 (CA).

10 *G N Hale & Sons Ltd v Wellington etc Caretakers etc IUOW* [1991] 1 NZLR 151, 157; (1990) ERNZ Sel Cas 843, 851 (CA).

Against the background of that observation, and in the absence of any significant statutory guidance, it is hardly surprising that the separate judgments of the five members of the Court not only failed to establish a list of settled principles for dealing with personal grievances arising out of redundancy, but foreshadowed the differences of judicial opinion among the members of the Court, and between the Employment Court and the Court of Appeal, which have been a feature of the redundancy decisions of the courts in the ensuing 12 years. This implies no criticism of the learned Judges: the lingering uncertainty was a product of the narrow (albeit important) issue which the Court was required to decide in that case and the breadth of the largely unblemished canvas upon which the members of the Court felt it appropriate to brush a few strokes.

Hale concerned an employer which resolved to implement a series of cost saving measures, one of which was replacing its cleaner, Mr Shrubshall, with a contract cleaner and redistributing Mr Shrubshall's other duties among the company's production workers. Mr Shrubshall was dismissed on the grounds of redundancy upon the giving of four weeks' notice. Mr Shrubshall's employment conditions did not require his employer to make any payment by way of redundancy compensation; nevertheless the employer offered $2,000 on that account.

The Labour Court[11] upheld the union's claim of unjustifiable dismissal, finding that the company had acted in a procedurally unfair manner (a finding not challenged by the company on the subsequent appeal) but also holding that:

> generally speaking, a dismissal for redundancy will be justifiable only if, at the time of dismissal, the dismissal is proved by the employer to have been commercially necessary in the interests of the viability of the employer, using the word "viability" in the sense of capacity for survival.

Not surprisingly, employers generally were alarmed at the prospect that, in the absence of precise contractual arrangements defining both the circumstances and financial implications of redundancy terminations, they might only justify dismissal on the grounds of redundancy where their business was going to the wall. It is equally unsurprising that the Court of Appeal determined unanimously that an employer was entitled to make its business more efficient, even if doing so meant loss of jobs, and that if the employer decided on redundancy for genuine commercial reasons, it was not for the Courts or others to second guess that decision. This finding was enough to dispose of the appeal and require the Labour Court to reconsider its decision.

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11 *Wellington etc Caretakers etc IUOW v G N Hale & Sons Ltd* [1990] NZILR 752.

The Labour Court had made evidential findings on the unfairness of the procedure adopted by the employer which could not be challenged on appeal.[12] No doubt because of the importance and novelty of the issue, the five separate judgments of the Court contained *obiter dicta* touching on procedural issues and the extent to which a termination on the grounds of redundancy for genuine commercial reasons might nevertheless be rendered unjustifiable by reason of some unfairness in the way in which the employee was treated. There was no consensus view apparent, but some of the judgments referred to the obligation of fair treatment in the absence of an express requirement to pay compensation as including consideration of whether the circumstances called for such a payment.

Richardson J's contribution on the topic, while tentative, indicated the direction in which his views were to develop over the next decade or so. He said:[13]

> . . . it is not the function of the Courts to construct an overriding extra-statutory concept of social justice applicable in redundancy situations. Whether there is any scope for importing any considerations of general fairness into the assessment of the justification for a dismissal for redundancy is doubtful but it has not been the subject of argument and does not require final decision in this case. Nor is it necessary to rule on the content of procedural fairness in redundancy situations. But it may well be that consideration of the best means of implementing planned costs savings and of the feasibility of redeploying workers should be viewed as matters of business judgment, not procedural fairness concerns.

These comments should not be seen as any retreat by Sir Ivor from the fairness principles referred to by him in the *Devlin* case;[14] *Devlin* was not a redundancy case and, as the Court of Appeal has reinforced recently,[15] special considerations apply in the balancing of interests between employee and employer in cases where redundancy forms the basis of the dismissal.

As early as its reconsideration of the *Hale* case upon remission by the Court of Appeal,[16] the Labour Court took the opportunity to put Sir Ivor's reservations to one side. But it had little difficulty in relying on similarly *obiter* remarks of other members of the Court to develop a jurisdiction for the imposition of an obligation upon employers to pay redundancy compensation as a matter of fairness in the absence of any express contractual

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12 Section 312, Labour Relations Act 1987.

13 [1991] 1 NZLR 151, 157; (1990) ERNZ Sel Cas 843, 851.

14 *Telecom South v Post Office Union* [1992] 1 ERNZ 711, 722 (CA).

15 *Charta Packaging Ltd v Howard* [2002] 1 ERNZ 10 (CA), discussed briefly later in this paper.

16 (1991) ERNZ Sel Cas 1024; [1990] 3 NZILR 836.

obligation.[17] For this, the hapless counsel for the employer[18] must accept some responsibility. In the Court of Appeal it had been argued for the employer that an offer to pay redundancy compensation when the contract did not require it was relevant to the assessment of the fairness of the employer's approach. By the time the case was back in the hands of the Labour Court, counsel had fallen into the trap of drawing on the dicta of individual judges rather than the ratio of the case and conceded that it was apparent from the judgments of the Court of Appeal that in considering the overall duty of fair treatment the Court may inquire whether the case calls for compensation for redundancy. It was acknowledged that in the absence of a prior agreement to pay compensation the answer to the question of whether the duty of fairness calls for such a payment will depend on circumstances such as the reasons for the redundancy, the length of service of the employee, the period of notice of dismissal and the means of the employer to pay. The Labour Court readily accepted this suggestion and, as we shall see in the next section of this paper, so did three members of the Court of Appeal's *Hale* bench when the issue came before them in a later case.

In the result, the Employment Court and the Employment Tribunal had no difficulty in relying on the *Hale* case as the foundation of a principle that procedural unfairness (which included the failure of an employer to pay redundancy compensation where fairness called for it even if the contract did not) would render a genuine redundancy unjustifiable. In one case, a genuine redundancy cost the employer a total of $73,421.83, including $20,000 for distress compensation.[19]

This led to a situation in which an experienced adjudicator in the Employment Tribunal observed in 1992:[20]

> The law of redundancy is in utter disarray . . . Some industrially strong groups have extraordinarily generous compensation. Weak groups and individuals often have nothing at all and have sought the intervention of the Courts in various ways. Intervention by the Courts has run a zigzag path . . .
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> Development on a case-by-case basis is a very inefficient way to make business law. Uncertainty and unpredictability dog every important decision affecting employment. Millions of dollars are being spent on litigation. Days and days of management time are being diverted into the preparation of defences and into attendance at Tribunal or Court hearings.

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17 *Hale,* above, 1033; 842.

18 This author.

19 *NZ Merchant Service Guild IUOW v Auckland Stevedoring Company (1977) Ltd* [1991] 3 ERNZ 785 (EC).

20 B W Stephenson in *Redgwell v Morrison Printing Inc & Machinery Ltd* [1992] 3 ERNZ 235, 241.

> The stress and anxiety experienced by dismissed employees is multiplied by the uncertainty as to their rights.

IV 1993 - THE BRIGHOUSE *CASE*

In *Bilderbeck v Brighouse Ltd*,[21] Mr Bilderbeck and three colleagues were dismissed for redundancy. It was not disputed that a genuine redundancy situation existed as the business had been sold. The employment contracts between the respondents and the appellant did not provide for redundancy compensation but when the employees inquired about the availability of compensation they were paid an amount unilaterally fixed by the employer. Consistently with Employment Court and Employment Tribunal decisions since *Hale*, the Employment Tribunal held that the circumstances called for the payment of redundancy compensation and that as a result of the unfair process, and the inadequacy of the amount of compensation offered, the dismissals were unjustifiable. On appeal, the Employment Court considered that the judgments in *Hale* authorised a finding that dismissals for a redundancy could be held unjustifiable unless they were "accompanied by fair and reasonable treatment, including the payment of compensation where the circumstances call for it even if there was no pre-existing agreement that compensation would be paid in the event of redundancy".

On a further appeal confined to matters of law,[22] the Court of Appeal was unanimous in the view that there was no general requirement for an employer to pay compensation in every redundancy situation. Three of the five Judges[23] held, however, that the Employment Court and the Tribunal were entitled to find (on the basis of the *obiter dicta* in *Hale* and the general principles of an employer's duty of fairness) that in some situations, despite there being no agreement regarding redundancy compensation, the employer's implied obligation of fair treatment would require the payment of compensation to justify a dismissal for redundancy.

Bearing in mind that, unlike *Hale*, *Brighouse* was decided under legislation enacted expressly "to promote an efficient labour market",[24] it is hardly surprising that employers expressed as much concern about the uncertainties perpetuated by the majority decision in that case as they had done about the decision of the Labour Court in *Hale*. What was the point in resisting attempts by employees, whether collectively or individually, to negotiate express provisions for the payment of redundancy compensation if, despite the absence of

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21 *Bilderbeck v Brighouse Ltd* [1993] 2 ERNZ 74 (EC).

22 *Brighouse Ltd v Bilderbeck* [1994] 2 ERNZ 243.

23 Cooke P, Casey J and Sir Gordon Bisson.

24 Sub-paragraph (a), Long Title, Employment Contracts Act 1991.

any statutory or express contractual obligation, the employment institutions were able to impose a requirement to pay? And worse, from the point of view of assessing the commercial imperatives in a potential redundancy situation, the amount of compensation properly payable could not be determined with any certainty, in the absence of agreement, until the Tribunal or Court gave its ruling in a subsequent personal grievance setting.

Such concerns were addressed in *Brighouse* by Richardson J (in a minority with Gault J):[25]

> Redundancy is an area of employment law and industrial relations where those concerned, employee and employer, ought to be able to determine at the time what their respective rights and obligations are. They should be able to plan with confidence. The governing legislation states as the test whether the dismissal or the action involved is unjustifiable. That should lend itself to a short statement of governing principles and their ready application to the particular circumstances without the need for the detailed involvement of lawyers, reference to numerous decisions of the Employment Court or resort to the Employment Tribunal, the Employment Court, and this Court, in a process which can take years.

Building on his tentative remarks in *Hale*, Sir Ivor set out what he described as "a principled approach to redundancy cases". He re-affirmed the view that the mutual obligations of confidence, trust and fair dealing inherent in a contract of employment did not warrant the application of any different principles to the implication of terms in collective or individual employment contracts than are applicable to other contracts.[26] He noted that it was a statutory objective of the bargaining provisions of the Employment Contracts Act to establish that the contents of an employment contract were a matter for negotiation.[27] Recognising that the negotiation of terms and conditions of employment involved an exchange of claim and counterclaim and a "totality of compromises", the learned Judge concluded that:[28]

> To impose obligations on an employer to pay redundancy where the parties have chosen not to provide for redundancy in their contract and to do so in the guise of giving effect to the mutual trust requirement, would run counter to the statutory intent. It is for the parties to negotiate the content of their employment contract and thereby to create enforceable rights and obligations. Requiring an employer to pay redundancy compensation in those circumstances is to alter the substantive obligations on which they agreed.

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25 *Brighouse Ltd v Bilderbeck* [1994] 2 ERNZ 243, 256-257.

26 As the Court had held in *A-G v NZ Post Primary Teachers Association* [1992] 1 ERNZ 1163 (CA).

27 Section 9(b) Employment Contracts Act 1991.

28 *Brighouse* [1994] 2 ERNZ 243, 258.

> In short, it is not open to the Courts to construct an extra-statutory concept of social justice applicable in redundancy situations. In principle, there is no basis for concluding that a dismissal for genuine redundancy reasons which meets any fair procedural requirements is nevertheless unjustifiable.

The effect of the *Brighouse* decision on the labour market was significant. As the Court of Appeal noted later,[29] approximately one third of the collective employment contracts lodged with the Department of Labour down to the end of 1992 contained a redundancy formula. By 1997, surveys indicated that between 78 per cent and 88 per cent of employees who were parties to collective employment contracts had negotiated redundancy clauses and over 50 per cent of employers reporting all or predominantly individual employment contracts reported that a redundancy provision was included in their employment contracts. Rather than remain at the mercy of the Employment Tribunal and the Employment Court in the event of redundancy, many employers preferred the certainty of negotiated arrangements. They were perhaps wise to do so: in one of the more extreme examples of the application of *Brighouse* principles,[30] Chief Judge Goddard awarded $25,000 compensation ($15,000 for distress and $10,000 for "job loss") in a case where there had been a genuine redundancy rendered unjustifiable because the employee was not consulted about the decision to disestablish her position and allocate her duties to other employees. In effect, the Court held that the employer had no right to make such a decision without taking account of the employee's views.[31]

While the judicial proponents of the views of the *Brighouse* majority disavowed any suggestion that they were setting terms and conditions of employment, dressing up their decisions as a consideration of compensation for an unjustifiable dismissal was a thin disguise. The approach made it inevitable that employers who did not renegotiate their employment contracts would be under pressure to make significant offers to pay redundancy compensation, despite no express contractual obligation to do so. Such a course was considered necessary in order to avoid personal grievance proceedings which might result in the Tribunal or Employment Court declaring the dismissal unjustifiable and awarding compensation which took account of loss of future earnings as well as distress and humiliation.

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29 *Aoraki Corp Ltd v McGavin* [1998] 1 ERNZ 601, 621 (CA).

30 *Phipps v NZ Fishing Industry Board* [1996] 1 ERNZ 195.

31 And as will be seen later, in the discussion of the Employment Court's decision in *Baguley v Coutts Cars Ltd* [2000] 2 ERNZ 409, the Chief Judge sought to resurrect that principle under the Employment Relations Act.

In *Hale*, Somers J had doubted that it was appropriate for the Courts to develop the principles of fairness relative to dismissals on the grounds of redundancy and suggested such matters were more suited to legislation.[32] As is noted above, the Court in *Brighouse* was unanimous that there was no general requirement for an employer to pay compensation in every redundancy situation. It is undeniable, however, that by the mid-1990s judge-made law had created a regime which meant that any employee made redundant could count on being offered compensation in addition to notice or a payment in lieu, despite the absence of a statutory or express contractual right to it. On the relatively rare occasion on which no offer was made, a successful personal grievance claim looked assured.

V 1995-1996 CHRISTCHURCH CITY V DAVIDSON

One of the consequences of the inquiry which led to the conviction of Peter Ellis on charges of sexual misconduct was the closure of the City Crèche where he had worked, following the withdrawal of the crèche licence by the Education Department. In personal grievance proceedings which were subsequently taken by Ellis's former colleagues, the Employment Court held[33] that the council had not discharged the burden of proving that redundancy, and not untested suspicion of serious misconduct by employees other than Ellis, was the true reason for the dismissal. The Court had also determined that, even if there was a genuine redundancy situation, the dismissals would have been substantively unjustified because of non-compliance with the procedural provisions of the collective employment contract. In delivering the judgment of the Court of Appeal,[34] Richardson P held that the Employment Court had erred in law in that there was no basis on the evidence for a finding that the council saw the crèche closure as anything other than a genuine redundancy. The personal grievance claim resulting from the failure to follow the process set out in the employment contract was thus limited to the consequences following from the wrongful issue of the earlier notice (a defect which the council had sought to cure by issuing fresh notices). The remedy for the grievance was confined to payment for humiliation, loss of dignity, and injury to feelings, and any loss of benefits that would have been obtained had the grievance not arisen.

This judgment presaged what was to become a key principle in the reasoning which saw the *Brighouse* decision discarded: that a procedural error in relation to a genuine redundancy did not render an otherwise justifiable dismissal unjustifiable, but might result in a remedy for a disadvantage unjustifiably inflicted.

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32 (1990) ERNZ Sel Cas 843, 853; [1990] 2 NZILR 1079, 1087-1088.

33 *Davidson v Christchurch CC* [1995] 1 ERNZ 172.

34 *Christchurch CC v Davidson* [1997] 1 NZLR 275; [1996] 2 ERNZ 1.

VI 1996 - THE AORAKI *CASE*

Just under four years after *Brighouse*, the Court of Appeal led by Richardson P took the opportunity of a comprehensive revisiting of the approach to dismissals and compensation in redundancy cases.

A The Employment Court's view in Aoraki

Aoraki Corporation Limited was a computer software company which experienced a downturn in some areas of its work and by early 1995 was experiencing considerable financial problems. It was decided that the company would be restructured with redundancies being inevitable. This was well known to employees. Mr McGavin was an employee of some 11 years standing who was, in March 1995, appointed to an important marketing position with the company. He gained the impression in the course of discussions with superiors that his job was more secure than others. In the end, however, he was one of 96 employees out of a total staff of 436 who were made redundant with effect from 30 June 1995. The Employment Court held[35] that Mr McGavin's position had disappeared as part of the restructuring and that it was a genuine redundancy situation, but it also found, consistent with the majority view in *Brighouse*:[36]

> that even where dismissals were genuinely based on redundancy the Employment Court and the Employment Tribunal were entitled to take account of such aspects as whether the employer had taken steps to make a just choice if there were some redundancies; whether counselling or payment for it had been made available to the redundant employees; and whether possibilities of redeployment had been adequately explored.

The Employment Court also considered on the evidence before it that a person of Mr McGavin's age, skills and experience in a narrow field such as the IT market was unlikely to find a comparable position in the city where he lived. This should have been taken into account, the Judge held, in assessing a reasonable period of notice which would have been between six to nine months' notice or payment in lieu. Further, the Employment Court held that the employer ought to have accepted its consultants' recommendation of a redundancy compensation payment which would have provided Mr McGavin with an additional $30,000 in compensation.

B Brighouse *overruled*

On appeal,[37] the seven permanent judges of the Court of Appeal were unanimous in holding that *Brighouse* should be overruled.[38] Thomas J dissented on the quantum of the

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35 *McGavin v Aoraki Corp Ltd* [1996] 2 ERNZ 114 (EC).

36 *Aoraki* above, 129.

37 *Aoraki Corp Ltd v McGavin* [1998] 1 ERNZ 601 (CA).

remedy awarded. Echoing the approach of Richardson and Gault JJ in their minority judgments in *Brighouse*, the majority held that because redundancy was:[39]

> an important area of the law affecting large numbers of New Zealanders every year . . . (it was) imperative that employees and employers be able to plan with confidence and determine what their respective rights and obligations are. Redundancy should lend itself to a short statement of governing principles drawn from the straightforward application of the 1991 Act.

It is not clear from the report which of the six Judges comprising the majority took principal responsibility for drafting the Court of Appeal's decision, but the Richardson heritage is unmistakable. The judgment meticulously analyses the statutory environment, including making a reference to section 46(3) Employment Contracts Act 1991 which gave a significant indication of legislative intent by providing that where a provision of an employment contract dealt with redundancy without specifying either the level of redundancy compensation payable or a formula for fixing that compensation, neither the Employment Tribunal nor the Employment Court had jurisdiction to fix that compensation or specify a formula for fixing that compensation. This provision had been enacted in 1991 in response to employer concerns about decisions of the Employment Court and Court of Appeal under the Labour Relations Act 1987 which had held that in a dispute over the interpretation, application or operation of an award or industrial agreement, the Courts were empowered to fix the level of or a formula for fixing redundancy compensation where the parties had failed to agree.[40] The judgment re-affirms that the equity and good conscience jurisdiction of the Employment Court[41] could not frustrate the policy of legislation and did not allow the Employment Court to substitute for the employment contract actually entered into a contract which the parties could have entered into.[42]

Noting that the 1991 Act represented a substantial departure from the collectivist principles of previous industrial relations legislation in favour of a model of free contractual bargaining, the majority nevertheless emphasised that the personal grievance provisions were part of the overall balance reflecting the special characteristics of employment contracts under which employees and employers had mutual obligations of

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38 Lord Cooke of Thorndon, Sir Gordon Bisson and Sir Maurice Casey, the majority in *Brighouse,* were no longer members of the Court.

39 *Aoraki,* above, 617.

40 *Timbercraft Industries Ltd v Otago etc Federated Furniture etc IUOW* [1990] 2 NZILR 626; (1990) 3 NZELC 98,124 (CA).

41 Section 104(3) Employment Contract Act 1991.

42 A point Richardson P had made in *Principal of Auckland College of Education v Hagg* [1997] 2 NZLR 537, 546; [1997] ERNZ 116, 123 (CA).

confidence, trust and fair dealing. Inevitably there was "a tension between a pure contract approach and social and economic concerns inherent in the relationship."[43]

All seven Judges of the Court concluded that it was proper and timely to reconsider the application of the Employment Contracts Act to redundancies:

- it was difficult to discern a single ratio running through each of the majority judgments in *Brighouse* (noting that the Employment Court had focussed on the judgment of Cooke P rather than those of Casey J and Sir Gordon Bisson).
- the judgments of the President and Casey J in *Brighouse* had left the Employment Court with "considerable flexibility to develop a concept of unjustifiable dismissal". Reference was made to *Phipps*.[44] The Court noted that the Chief Judge had found in that case that no genuine reasons could be formed about redundancy in the absence of input from the employee concerned, or at least a reasonable opportunity in which to contribute it, and that a failure to enquire or consult is fatal to justification.
- redundancy was an important area of the law affecting large numbers of New Zealanders every year and that it was imperative that employees and employers be able to plan with confidence and determine what their respective rights and obligations are.

The majority, with Thomas J's concurrence, crystallised the principles of the statutory scheme in what it described as "a series of seven steps." For present purposes it is sufficient to note that the seeds of doubt about the place of procedural fairness in redundancy cases which had been sown by Richardson J in his judgment in *Hale* blossomed fully into emphatic statements of principle:

- It cannot be mandatory for the employer to consult with all potentially affected employees in making any redundancy decision. To impose an absolute requirement of that kind would be inconsistent with the employer's prima facie right to organise and run its business operation as it sees fit. Consultation would often be impracticable, for example, where the circumstances required mass redundancies. However, an absence of consultation where it could reasonably be expected, or its timing and so too may a failure to consider any redeployment possibilities may cast doubt on the genuineness of an alleged redundancy.

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43 *Aoraki Corp Ltd v McGavin* [1998] 1 ERNZ 612(CA).

44 *Phipps v NZ Fishing Industry Board* [1996] 1 ERNZ 195.

- 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, modified to recognise that the employment is being terminated in a redundancy situation may help in striking a balance between employee and employee.
- Whether or not a redundancy tainted by procedural unfairness should be classified as an unjustifiable dismissal or a disadvantage arising from unjustifiable action, it is crucial to recognise that the remedy can relate only to the procedural wrong, to what has been lost or suffered as a result of the particular breach or failure, and that in the cases of genuine redundancy, the personal grievance is not that the employment was terminated, but the manner of implementation of the decision to terminate was procedurally unfair. That is the wrong to which remedies may be directed.
- Except where the employment contract requires payment of compensation for redundancy, the statute does not empower the employment institutions to require any such payment. To do so would alter the substantive rights and obligations on which the parties agreed; it would change the economic value of their overall agreement; and it would erode the statutory emphasis on the free negotiation of employment contracts.

Against these principles, the Court in *Aoraki* then dissected the judgments of the majority in *Brighouse*. Drawing on statistical evidence of the impact of the *Brighouse* decision on contractual arrangements, it held that *Brighouse* should no longer be followed and the judgment in favour of Mr McGavin was set aside accordingly.

The Court upheld the employer's grant of three months' salary by way of *ex gratia* compensation and reduced the amount payable for distress to $15,000 "in the special circumstances" of the case. In case it should be thought that the three months' redundancy compensation upheld by the Court represented a benchmark, their Honours observed, on the basis of statistical data, that in the absence of a contractual stipulation as to the period of notice there was no support for fixing the period of notice in a redundancy case at much in excess of one month. And the amount of distress compensation may be seen as higher than that usually available in such cases.[45]

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45 See, for example, *McKechnie Pacific (NZ) Ltd v Clemow* [1998] 3 ERNZ 245 (CA) and *Coutts Cars Ltd v Baguley* [2001] 1 ERNZ 660 (CA) (discussed more fully below).

*C Redundancy principles post-*Aoraki

In recognition that the consequences of the *Brighouse* decision had been a Court-imposed obligation in practice to pay some amount of redundancy compensation (despite the disavowals of the Court) and a period of considerable uncertainty, the sighs of relief from employers following the release of the *Aoraki* decision were palpable. Post-*Aoraki,* employers and employees who did not have redundancy provisions in their contracts could be reasonably assured that, in a redundancy setting:

- the Tribunal or the Court could not impose an obligation to pay redundancy compensation;
- a failure to consult where this was appropriate would not render a genuine redundancy dismissal unjustifiable but might give rise to compensation for distress;
- in the absence of a contractual stipulation, notice or a payment in lieu of notice would not normally be expected to exceed one month for a genuine redundancy.

VII NZ FASTENERS V THWAITES

Following the *Aoraki* decision, employers were nevertheless expected to observe their obligations of fair dealing and to deal with redundancy in "just" manner. One of the issues not finally disposed of by the Court of Appeal's judgment in *Aoraki* was the extent to which an employer was obliged to consider redeployment of an employee as part of following a fair redundancy process. In *NZ Fasteners Stainless Ltd v Thwaites,*[46] the Court of Appeal emphasised that in a genuine redundancy, where the position truly is surplus to requirements, it could not constitute unjustified dismissal not to offer the employee a different position unless there was some contrary contractual provision. The obligation to deal fairly with an employee does not extend beyond the job in which they were employed.

VIII CHARTA PACKAGING

The point made in *Aoraki* relating to the period of redundancy notice which was implied by the common law as "reasonable notice", has been reinforced by the Court in the *Charta Packaging* case, which was decided this year but which fell for determination under the Employment Contracts Act.[47] On appeal from the Employment Tribunal, the Employment Court had held[48] that, in reliance on the *Devlin* case[49] the common law

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46 *NZ Fasteners Stainless Ltd v Thwaites* [2000] 1 ERNZ 739 (CA).

47 *Charta Packaging Ltd v Howard* [2001] 2 ERNZ 10 (CA).

48 WC 20 /01, 17 May 2001, Shaw J.

requirement to give reasonable notice supported the conclusion that in the case of senior employees, six months' notice was required and, in the case of less senior employees, three months' notice was appropriate. The Court of Appeal concluded that despite the genuineness of the redundancy, the employer might be liable under the Employment Contracts Act if it failed to observe certain standards in dealings with the employees who were to be made redundant ie if the employer's conduct was not just in all the circumstances. The Court made particular reference to its observations in *Aoraki* that, where there was no provision in an employment contract for redundancy notice:

> [t]he 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. (Emphasis added)

The Court referred to and reinforced the view it had taken in *Aoraki* that practice provided no support for a reasonable notice period, in redundancy cases, much in excess of one month. It said that in deciding whether the circumstances justify notice beyond prevailing practices it is also necessary to consider that they reasonably warrant a longer period to address the situation, perhaps to retrain, to seek re-employment or to become self employed. All these factors must be weighed against the financial circumstances of the company.

In the result, one of the employees who had given lengthy service was held to be entitled to three months' notice; the other employees were entitled to two months' notice.

IX CRITICISM AND DEFENCE OF THE RICHARDSON COURT

As might have been expected, approbation of the *Aoraki* decision was not universal. Employee organisations and some academics complained about the Court of Appeal having adopted a "New Right" or "Business Roundtable" approach to employment law, to such an extent that Sir Ivor found it appropriate to respond in an address to the

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49 *Telecom South v Post Office Union* [1992] 1 ERNZ 711, 722 (CA).

Employment Law Institute in August 1999.[50] The learned President countered the suggestion that his Court of Appeal was "determined to place its own stamp on . . . (the) legislation and to give it an interpretation that promotes what the Court sees as the appropriate view of the employment relationship".[51] He considered that it was not a question of what Judges themselves regarded as an appropriate view of the employment relationship, but of exercising the responsibility to give effect to Parliament's intent - the Court of Appeal was "putting the stamp of the ECA on employment law".

With an election only three months away and the opinion polls looking favourable, Margaret Wilson and Laila Harre might have been heard to mutter, "Well we'll just see about that, then".

X IMPLICATIONS OF THE EMPLOYMENT RELATIONS ACT 2000

When a Labour/Alliance coalition government was elected in November 1999 following a campaign which drew heavily on criticism of the Employment Contracts Act and a promise to repeal it, it was widely expected that the legislature would give effect to the *Brighouse* principles which were seen as being more employee-friendly. The supporters of a return to a *Brighouse* regime must have been disappointed by the Employment Relations Act 2000 when it came into force nearly a year after the election. Redundancy dismissals were not singled out for special provision, but the introduction of a statutory regime dealing with the requirement for good faith dealings in employment relations would have provided some encouragement. The relevant parts of the "Key Provisions" in the new Act are these:

> **3 Object of this Act**
>
> The object of this Act is–
>
> (a) to build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment and of the employment relationship–
>
> (i) by recognising that employment relationships must be built on good faith behaviour; and
>
> (ii) by acknowledging and addressing the inherent inequality of bargaining power in employment relationships . . . .
>
> 4 Parties to employment relationship to deal with each other in good faith

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50 Rt Hon Sir Ivor Richardson "Myth or Reality: Employment Cases in the Court of Appeal", (Employment Law Institute, Wellington, 20 August 1999).

51 [1998] ELB 96, 100.

(1) The parties to an employment relationship . . .
  (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 . . .

(4) The duty of good faith in subsection 1 applies to the following matters: . . .
  (c) consultation (whether or not under a collective agreement) between an employer and its employees, including any union representing the employees, about the employees' collective employment interests, including the effect on employees of changes to the employer's business:
  (d) a proposal by an employer that might impact on the employer's employees, including a proposal to contract out work otherwise done by the employees or to sell or transfer all or part of the employer's business:
  (e) making employees redundant . . .

(5) The matters specified in subsection 4 are examples and do not limit subsection 1.

Given the level of judicial and academic debate over redundancy issues under the Employment Contracts Act, it was probably appropriate and not altogether surprising that the first case heard by the Employment Court in a *de novo* hearing challenging a decision of the new Employment Relations Authority[52] concerned redundancy principles and, in particular, the obligations of an employer to consult an employee whose employment was threatened by potential redundancy.

XI 2001 - COUTTS CARS LTD V BAGULEY

An employer astute to the possibilities for fresh argument under the new Act may have organised its affairs a little better but Coutts Cars elected to give one of its four car groomers, Mr Baguley, notice of dismissal on the grounds of redundancy on 3 October 2000, the day after the new legislation came into force. Following the termination of his employment on 31 October, Mr Baguley commenced personal grievance proceedings claiming unjustifiable dismissal and seeking reinstatement and compensation. In

52 Under the Employment Relations Act there is no right of appeal against determinations of the Authority; a dissatisfied party "may elect to have the matter heard by the Court", either on the basis of a hearing *de novo* or by way of a challenge to the determination or any part of it on the grounds of error of law or fact which does not involve the Court in a full hearing of the respective cases of the parties: see s 179. The Court is enjoined to "make its own decision" in a matter which it hears *de novo* (s 183), but the judgment of the majority of the Court of Appeal in *Coutts Cars Ltd v Baguley* [2001] 1 ERNZ 660, 663 (CA) indicates that the Judges did "not take from those provisions . . . that the determination of the Authority is to be completely ignored."

accordance with the procedure under Part Nine of the ERA, the parties attempted mediation. That being unsuccessful, the Authority conducted an investigation and made a determination in writing on 2 November. The dismissal was found to be justified. Under section 179 ERA, Mr Baguley elected to challenge the determination by commencing proceedings in the Employment Court seeking a *de novo* hearing of the entire matter, alleging four causes of action:

- failure by the employer to act in good faith in its procedure to make him redundant;
- failure by the employer to give adequate notice;
- failure by the employer to substantively justify the dismissal;
- failure by the employer to consider or investigate alternative employment opportunities within the group of companies to which it belonged.

No doubt encouraged by the restoration of reinstatement as the primary remedy for a successful personal grievance claim,[53] Mr Baguley sought reinstatement, compensation of $10,000 for breach of good faith and $10,000 for hurt and humiliation plus one month's additional wages in lieu of notice.

XII THE EMPLOYMENT COURT'S VIEW

A full Court of the Employment Court[54] accepted the invitation to consider the applicability of *Aoraki* in light of what it described as the "markedly different regime" established by the new Act. Referring to the "Key Provisions" in Part one of the Act (quoted above) with the emphasis on good faith and building and supporting successful employment relationships, the Court concluded that the pure contract approach sanctioned by *Aoraki* no longer applied, the balance having been changed by Parliament with the result that it no longer mattered that the contract may be silent on the employer's obligations in the events that had arisen in the case. The Court held that the provisions of the Act required "a new approach" to the question whether the particular employer acted as a fair and reasonable employer would; the question of fact and degree in each case was "informed and illuminated by Parliament's declared intention to reform the **nature of the employment relationship**."[55] The Court considered that common sense assessment of the situation required consideration of:

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53 Section 125 Employment Relations Act 2000.

54 *Baguley v Coutts Cars Ltd* [2000] 2 ERNZ 409.

55 (Emphasis added) It is not immediately obvious to this author just where in the statute that declaration appears.

- the employer's business requirements;
- the employee's right to relevant information;
- the employer's ability to mitigate a blow to the employee;
- the nature of the employment relationship as one calling for good faith.

The Employment Court held that, although the employer wanted to make a commercial decision, it could reasonably be expected to postpone it for short time in order to accommodate the other factors which it was required to take into account. The employer's right to relevant information would "usually require some real dialogue with the employee"; the employer should provide accurate information, find out what would cause the greatest havoc to the employee in order to try to avoid it, what would injure the employee least in order to try and achieve it, whether redeployment was possible and which employees should be selected for redundancy if there was a choice. While such consultation did not imply that the employer has to seek the employees' concurrence in the commercial decision, it noted that "some times employers may have found other solutions as a result of the employees' input."

Applying those principles to the present case, the Employment Court was critical of the decision-making process which it said displayed a total disregard for the position and feelings of the applicant; it refused to show him the redundancy selection criteria and misled him into thinking that the selection lay ahead when it had already been made. In essence, it found that the company went through a charade, acting out a script conceived in advance: not a genuine process but a mockery. Unsurprisingly against that background it held the dismissal unjustifiable not least because, the Court said, the employer had failed to act in good faith, falling way short of the required standard of fair dealing to a degree that it was guilty of deceptive conduct.

Nevertheless, reinstatement was declined. The Court accepted that Coutts had reduced its groomer workforce to two persons and that if Mr Baguley were reinstated in order to require Coutts to go through the proper process, he would have one chance in three of again being made redundant.

It can be seen that the Employment Court would have been obliged to take a different view if it had applied *Aoraki* principles. Under *Aoraki*, the fact that the employer had decided to reduce its groomer workforce from four to two inevitably created a genuine redundancy - any proved procedural errors would go only to such remedies as would appropriately compensate for the effects of procedural failures.

The full amount of $10,000 claimed as compensation for hurt and humiliation was awarded to Mr Baguley. The one month's notice provided by the company was held not to be deficient but the Employment Court awarded an additional sum equivalent to three

months' wages by way of loss of benefit that the employee might reasonably have been expected to obtain if the personal grievance had not arisen because, as a result of the grievance, Mr Baguley was left in a frame of mind such that he was unable to look for other work.

XI COUTTS CARS *IN THE COURT OF APPEAL*

The decision of a full Court of the Employment Court was reviewed by five Judges in the Court of Appeal[56], four of whom[57] had been members of the *Aoraki* court. The appeal was allowed.

Although highly critical of the Employment Court's approach to the evidence, the majority of the Court of Appeal considered that it could "resolve the appeal satisfactorily disregarding the excesses of inference and language" which they considered the judgment to contain. In essence, the majority held that an employer's obligations in a redundancy setting did not differ significantly under the ERA from those referred to in the judgments in *Aoraki*. In referring to the statutory application of good faith principles to redundancies and proposals "by an employer that might impact on the employer's employees", the Court considered that the relationship between employer and employee still rests on agreement or contract. The obligation to deal with each other in good faith is not so much a stand alone obligation as a qualifier of the manner in which those dealings are to be conducted. Importantly for present purposes, the Court was not prepared to find in the new statutory provisions

> a warrant to introduce into what is still a contractual relationship terms and conditions the parties have not agreed to but which the Authority or a court might think it fair to impose. That would be to detract from the process of bargaining the Act so clearly promotes and protects.

The Court further noted that it had long been the law that the special nature of the employment relationship incorporates mutual obligations of trust and confidence. It did not consider that the new legislation introduced any significantly different obligation to that which the Courts had placed upon parties to employment contracts over recent years. The description of the mutual fair dealing obligation and its origins in Jack Hodder's paper amply justifies that view.

While recognising that the statutory duty to deal in good faith would have a new impact in areas such as negotiations and collective environments, the Court considered that the law in relation to redundancy already required the observation of good faith and

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56 *Coutts Cars Ltd v Baguley* [2001] 1 ERNZ 660 (CA).

57 Richardson P, Gault, Tipping, and Blanchard JJ.

that there was no reason why the decision in *Aoraki* should not continue to provide guidance on the applicable principles. In particular, the Court considered that in redundancy cases it remained necessary to distinguish between procedure and substance.

In a separate concurring judgment, Tipping J emphasised the importance of the provision of information and concluded that Coutts had failed to meet the requisite standards to disclosure of the criteria for selecting which of the car groomers were to be made redundant. He was also inclined to the view that Coutts had failed to meet the duty of consultation which arose in the circumstances.

McGrath J dissented, not because he considered that the new Act called for a fundamentally different approach to the content of good faith dealings, but because he regarded the employer's obligation to consult to be more onerous than that contained in the *Aoraki* principles. He also considered that such a failure went to the genuineness of the redundancy and extended to remedies going beyond hurt feelings to compensation for loss of opportunity.

XIII THE OBLIGATION TO INFORM AND CONSULT IN REDUNDANCY CASES

On the need for consultation, McGrath J and the majority of the Court may not be far apart. McGrath J said that the provisions of the new Act indicated that "the legislature intended that the duty of good faith would require consultation with affected employees in a situation of threatened redundancy whenever that was reasonably practicable." The majority judgment contains the following pertinent observation:[58]

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

In this respect, the Court of Appeal may be seen to have introduced an additional element into the approach to be taken by an employer faced with potential redundancies in circumstances where there are no relevant contractual provisions: a requirement to provide information and an associated presumption that there should be consultation if it is practicable in the circumstances.

The unanswered question is at what point in the decision-making process the obligation to inform and consult arises.

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58 Section 101 Employment Relations Act 2000 provides that in respect of Part 9, dealing with personal grievances, one object of the Part is to recognise that access to information is more important than adherence to rigid formal procedures.

It is this author's view that a Court of Appeal influenced by the principles expressed in the judgments of Sir Ivor Richardson on the topic would conclude that where the issue is one of mass redundancies as a result of the sale of the employer's business or part of it, or of a restructuring or downsizing, the point at which employees should be provided with information and consulted about the consequences of the company's proposals for them is reached when the company is in a position to reveal its plans without compromising commercial imperatives; that is, after the decision to sell or restructure but before a determination of the details of how that decision is to implemented. Such an approach would be consistent with the recognition of an employer's right to manage its business, a feature of the Court of Appeal's judgments in *Hale* and *Aoraki*. It is suggested that the statutory application of good faith principles does not require consultation until after a sale/restructure/downsize decision is made as a matter of policy at board or senior management level, but before final decisions are made as to the impact of the policy decision on groups of employees or individual employees.

At that point, if it is practicable consistently with the commercial realities of the case, the employer should be in a position to receive and consider in good faith any suggestions which may be made by affected employees or their representatives which might result in a reduction in the number of redundancies or even no redundancies at all. In other words, to adhere to the readily understood principles of consultation described in *Wellington International Airport Ltd v Air NZ*[59] and applied in an industrial setting in *Communication & Energy Workers Union Inc v Telecom NZ Ltd*.[60] The employer should be open about selection criteria and processes and be willing to receive representations on such issues. Where the circumstances reasonably permit, issues such as the appropriate period of redundancy notice, re-training and redeployment should also be discussed at that stage before final decisions are made.

None of this suggests any abdication of an employer's right to manage and decide but recognises an appropriate balance between that right and the rights of the employees whose jobs are under threat through no fault of their own.

An employer who fails to take this approach will be at risk of a finding in a personal grievance claim that the resulting redundancies, or one or more of them, were not genuine, in which case any resulting dismissal may be held to be unjustifiable. However, if notwithstanding an absence of consultation, an employer can establish the redundancies as genuine, then a failure to consult will not render the dismissal unjustifiable but will lead to a consideration of what, if any, remedies are appropriate to compensate the employees for

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59 *Wellington International Airport Ltd v Air NZ* [1993] 1 NZLR 671 (CA).

60 *Communication & Energy Workers Union Inc v Telecom NZ Ltd* [1993] 2 ERNZ 429 (EC).

the results of that failure. Normally, this would sound in compensation for humiliation, loss of dignity and injury to feelings in accordance with *Aoraki* principles.

Similarly, in cases where only one employee, or a small number of employees, will be affected by an employer's redundancy proposal, the obligation to consult must arise at a stage where the employer has left open a real opportunity for genuine consultation before reaching a final decision. The nature of the matters to be discussed will necessarily vary from those where a large number of redundancies are likely, but a failure to consider the possible redeployment of an employee may go to casting doubt on the genuineness of the decision. If an alternative position for which the employee is qualified is available and the employee is willing to take it, redundancy may be only a thin disguise for a dismissal on undisclosed performance grounds.

XIV CONCLUSION

Despite the inherent uncertainties of the mutual obligations of trust and confidence, and those features of the personal grievance regime which have contributed to a roller-coaster ride of litigation since 1990, it may now be said with a reasonable degree of confidence that, if the employment institutions apply the principles identified in the strong consensus of authoritative judicial opinion in *Aoraki* and *Coutts Cars*, employees have the right to insist on fair treatment, including the provision of relevant information and consultation whenever such is reasonably possible. In the absence of a negotiated redundancy package or *ex gratia* payment, however, they should have no expectation that they will receive anything by way of compensation for which their employment agreements do not expressly provide. Well-advised employers may feel confident that if they follow a considerate process in implementing a redundancy decision, they will not be at risk of having their decisions second-guessed. Sir Ivor Richardson has been the leading contributor to that state of affairs.