New Zealand Employment Relations Authority Decisions

Arrowsmith v Brightwater Engineers Limited (Christchurch) [2012] NZERA 1275; [2012] NZERA Christchurch 275 (17 December 2012)

Last Updated: 18 April 2017

Attention is drawn to the order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2012] NZERA Christchurch 275
5311081

BETWEEN BRIAN ARROWSMITH STUART ARROWSMITH ANDREW DOOCEY MICHAEL COLQUHOUN Applicants

A N D BRIGHTWATER ENGINEERS LIMITED

Respondent

Member of Authority: Helen Doyle

Representatives: Anjela Sharma, Counsel for Applicants

Ralph Webster, Advocate for Respondent

Investigation Meeting: 2 March 2012 and 3 August 2012

Submissions Received: 3 August 2012

Date of Determination: 17 December 2012

DETERMINATION OF THE AUTHORITY

A I have found that the four applicants were unjustifiably dismissed.

B I have ordered payment by Brightwater Engineers Limited to Brian Arrowsmith of the sum of $18,224.09 gross for lost wages together with interest from 12 July 2011 until the date of payment at 5%, reimbursement of the lost benefit related to his holiday of $1519.65 together with interest also from 12 July 2011 at 5%, loss of Kiwsaver benefit in the sum of $22.40 on the first week of full lost wages and compensation in the sum of $12,000.

C I have ordered payment by Brightwater Engineers Limited to Stuart

Arrowsmith of the sum of $2700 gross lost wages together with interest on

that sum from 12 July 2011 until the date of payment at 5% and compensation in the sum of $12,000.

D I have ordered payment by Brightwater Engineers Limited to Andrew

Doocey of the sum of $10,000 compensation.

E I have ordered payment by Brightwater Engineers Limited to Michael Colquhoun of the sum of $8643.69 gross for lost wages together with interest from 12 July 2011 at 5% and compensation in the sum of $12,000.

F I have reserved costs and have timetabled in the event agreement cannot be reached for an exchange of submissions.

Prohibition from publication

[1] I prohibit from publication, except to the limited extent referred to in this determination, all of the confidential financial information provided on behalf of the respondent to the Authority and Ms Sharma on 9 March 2012.

Employment relationship problem

[2] The four applicants were all employees of Brightwater Engineers Limited. Brightwater Engineers Limited (Brightwater) is part of the inter national Brightwater Group and is a duly incorporated company having its registered office in Auckland and carrying on the business of engineering, design, construction, project management and a service company. Three of the applicants were employed at the material time by Brightwater as fitters and welders and Andrew Doocey was employed as a yardman. The applicants were employed on the Brightwater Nelson site.

[3] Three of the applicants were advised that their positions were redundant by letter dated 18 February 2010 and that their employment would terminate on

26 February 2010. They were not required to work out their notice but were paid one week in lieu of notice being their contractual entitlement. Mr Doocey was advised that his position was redundant by letter dated 18 February 2010 and that his employment would terminate on 5 March 2010. He had a contractual entitlement to two weeks' notice and he was not required to work out his notice period but was paid in lieu.

[4] The applicants each say that their dismissal for redundancy was procedurally and substantively unjustified. They seek remedies as follows.

[5] Brian Arrowsmith seeks reimbursement of lost income in the sum of

$19,344.09 plus interest, a fee for cancellation of a holiday in the sum of $1,520.36, loss of Kiwisaver benefits in the sum of $386.88, loss of future earnings in the sum of

$17,160 and the sum of $20,000 compensation.

[6] Stuart Arrowsmith seeks reimbursement of three weeks loss of income for the period 25 February – 21 March 2010 in the sum of $2,700 plus interest and the sum of

$20,000 compensation.

[7] Mr Doocey seeks reimbursement of lost income in the sum of $31,579.40 together with interest, loss of tool allowance in the sum of $1,080 and the sum of

$20,000 for hurt, humiliation and loss of dignity.

[8] Mr Colquhoun seeks reimbursement of lost income in the sum of $9,793.69 together with interest, reimbursement of the cost of obtaining a licence to drive a truck of $1,683, loss of Kiwisaver benefit of $277.18, loss of tool allowance of $1,080 and

$20,000 for hurt, humiliation and loss of dignity. [9] All four applicants seek costs.

[10] Brightwater say that all four applicants' redundancies were genuine and that the process used to implement the redundancies was fair and reasonable. It does not accept that the applicants should receive any remedies.

[11] The parties attended mediation but the matter was not able to be resolved.

The relevant test of justification

[12] The dismissals took place before the statutory amendment to s103A in the Employment Relations Act 2000 which came into effect on 1 April 2011. Justification for the dismissals falls to be determined under the earlier test of justification in s 103A. That test requires the Authority to consider on an objective basis whether the decisions made by Brightwater, and how they were made, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissals took place.

[13] The Employment Court in *Simpsons Farms Ltd v Aberhart* [2006] NZEmpC 92; [2006] ERNZ 825 dealt with the application of the earlier s 103A to redundancy dismissals and held that s 103A was not intended to revisit long-standing principles about substantive justification for redundancy in judgments such as *G N Hale v Wellington Caretakers* (1990) ERNZ Sel Cas 843; [1991] 1 NZLR 151(CA). It was held that as long as an employer acts genuinely and not for ulterior motives, a business decision to make positions or employees redundant was for the employer to make and not for the Authority or for the Court.

[14] It was also held in *Simpsons Farms Ltd* that fundamental elements of consultation were strengthened and required by s 4 of the Employment Relations Act

2000 in redundancy cases and that the statutory dealings of good faith in the Employment Relations Act 2000 and in particular, those under s 4(1A)(c) inform the decision under s 103A about how the employer acted. It was held a fair and

reasonable employer will always comply with both contractual and statutory obligations.

[15] Section 4(1A) of the Employment Relations Act 2000 provides that:

The duty of good faith in subsection (1) –

(a) is wider in scope than the implied mutual obligations of trust and confidence; and

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and

(c) without limiting paragraph (b) requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected –

(i) access to information, relevant to the continuation of

the employee's employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before the decision is made.

The issues

[16] The issues for the Authority to determine are as follows:

• Were the dismissals for reason of genuine redundancy?

• Did Brightwater follow a fair and proper process before making the applicants redundant and in particular:

• Was the process used in the selection of the applicants for redundancy consistent with the good faith obligations in section 4(1A) and a process that a fair and reasonable employer would use?

• Whether the decision to make each of the applicants redundant was justifiable.

• If the dismissal was unjustified, then what remedies is each of the four applicants entitled to, and are there issues of contribution or mitigation?

The individual employment agreements

[17] Each of the applicants had an individual employment agreement.

[18] Brian Arrowsmith's employment agreement was signed by him on 6 May

2009. It provided in clause 23 a description of a redundancy situation being one where his position is surplus to the need and/or requirements of the company. In the event that there was a termination on the basis of redundancy, the employment agreement provided in clause 23.2 that Mr Arrowsmith would be entitled to notice of termination as specified in the agreement which was one week. There was no entitlement to any additional payment by way of redundancy compensation.

[19] Stuart Arrowsmith is the son of Brian Arrowsmith. He signed an individual employment agreement on 10 May 2009. It contained an identical clause 23 to that of Brian Arrowsmith and he had the same one week notice period.

[20] Mr Doocey signed his individual employment agreement on 16 October 2008. He had an identical provision in clause 23 to that of the Arrowsmiths except that his notice period was two weeks.

[21] Mr Colquhoun signed his employment agreement on 9 March 2008. He had the same clause 23 as the other applicants and his notice period was also one week.

Work history of each of the applicants with Brightwater

Brian Arrowsmith

[22] Brian Arrowsmith commenced his employment with Brightwater as a fitter/welder in 2001. Mr Arrowsmith had previously had experience as a welder and construction engineer in the United Kingdom and working as a welder for various oil and petroleum companies both in the United Kingdom and offshore in international sites. When employed by Brightwater as a fitter/welder he undertook onsite and offsite fabrication work and was asked to assist with identifying problems with welding machinery. As time went on Mr Arrowsmith was asked to assist with training apprentices so they could meet the criteria for obtaining their welding certification and was approached for his opinion on the best approach for a welding job. At the time of the Authority investigation meeting Brian Arrowsmith had almost

47 years experience as a welder and construction engineer. This included on-site supervision and staff training.

Stuart Arrowsmith

[23] Stuart Arrowsmith came to work at Brightwater in or about 2001 straight from school. He started out as a trade's assistant and then after about three years was offered an apprenticeship to qualify as a level 4 heavy fabricator. The apprenticeship took four years to complete.

[24] Stuart Arrowsmith said he understood from comments made that his work was well regarded and he was viewed as being able to resolve problems quickly. He said that out of the 60 men in the workshop he was often asked by foremen Nathan Fish or Gavin Boyd to attend onsite jobs because he understood they had confidence in his ability to work well on different sites for the company.

Andrew Doocey

[25] Mr Doocey was first employed by Brightwater in 2003. During his first

2½ years of employment at Brightwater he undertook the majority of tasks in the workshop where he worked as a fabricator/fitter. He carried out site work as required. Occasionally he would assist the yardman at Brightwater.

[26] After 2½ years the yardman undertook studies in electrical tradesman and Mr Doocey was asked if he would be interested in taking on the sole charge yardman role. Mr Doocey accepted that role and worked alone for almost 2½ years until Cameron Fullerton was employed as yard and detailing supervisor. Mr Doocey attached copies of the various certificates he had achieved as a result of completing various training courses in operating cranes, forklifts and working in confined places.

Michael Colquhoun

[27] Mr Colquhoun qualified as a welder from 1993. He was initially employed by Brightwater between 1999-2006 as a certified welder and general trade assistant/journey man. At that time he did not have his full trade certificate but the company recognised he had previous extensive experience and he was paid a higher hourly amount than other equivalent trade assistants. During this time Mr Colquhoun was able to complete his heavy trade engineering qualification within a 2½ year timeframe rather than the 4 year requirement. He acquired 360 credits which was more than the required 280 credits to become qualified as a trades person. Mr Colquhoun also held his heavy truck licence and could perform heavy truck driving, forklift and crane operating, overhead gantry and confined spaces.

[28] In 2006 for personal family reasons which involved another worker

Mr Colquhoun resigned. He left on good terms with Brightwater.

[29] In 2008 Mr Colquhoun heard that the other worker had left Brightwater and he expressed an interest in working again for the company. He was advised by the project manager, Tim Martin, he might like to work toward a supervisory role as the main priority for the company was to complete the Stockton project. Mr Colquhoun performed heavy fabrication work and tradesmen's duties. He described amongst his duties organising labourers, undertaking certified welding work, arc welding, gantry operator work, refractory heat grouting, heavy lifting and marking in measuring work.

The process leading to the redundancy

[30] The following process applied to three of the applicants but not Mr Colquhoun. He was on sick leave on 11 February 2010 when the process commenced and then on four pre-arranged days of annual leave. I will deal with the process that applied to him separately.

11 February 2010

[31] Employees at Brightwater, including Brian and Stuart Arrowsmith and Mr Doocey were directed to attend a meeting in the mess room on 11 February. At the meeting they were addressed by Richard Herd who was at that time the Chief Executive Officer of Brightwater. Mr Herd distributed a memorandum dated

11 February to all staff at the meeting. The evidence was unclear at what point in the meeting that occurred however it is not particularly material. I shall summarise the main points in the memorandum. It was headed *Proposal in Respect of Potential Redundancies* and referred to work easing off as a large project, the Stockton project, is completed. Cost saving steps and steps to encourage new business taken in light of that were set out. These included stopping overtime, encouraging leave and letting contractors go when there was no pressing business case to keep them. Mr Herd asked for suggestions to avoid the proposed redundancies. There was a timeframe for that until 15 February 2010. There was also an opportunity in the meeting to make any oral suggestions.

[32] There was reference in the memorandum to a selection process. The selection process was described as follows; *In our decision-making process about who stays and who goes, we will be working hard to retain as many of the skills we need going forward as possible. The selection criteria we propose to use will be based on our estimation of individual skills. Apprentices will*

not be considered. The memorandum provided that the company undertook to communicate as quickly as possible with any individual who may be potentially affected by the proposal. Employees who wanted to take voluntary redundancy were asked to talk to Rosemary Lynn, the Human Resources Manager. Employees were reminded that the organisational counselling service was available or they could talk with their manager or human resources.

[33] At the end of the meeting the Arrowsmiths and Mr Doocey did not believe that their positions would be affected by the restructuring.

16 February 2010

[34] There was a further memorandum provided to staff on 16 February 2010 from Mr Herd. The evidence supports there was a brief meeting held to distribute this toward the start of the day. The memorandum thanked those who had given feedback at or following the earlier 11 February 2010 meeting. 31 suggestions had been

received and some of these were set out. The memorandum provided that whilst the feedback would assist, it did not give the level of savings required and did not remove the need to look further at the redundancy proposal. The memorandum provided there may be a need to cut between 10 and 12 positions from the workshop area and potentially affected individuals would be spoken to in the next couple of days. Again on reading the memorandum the Arrowsmiths and Mr Doocey did not expect to be one of the affected workers. They were confident that their experience and skills would keep them in the job. Mr Doocey said that as he was the only yardman, he did not consider that Brightwater would terminate his position.

[35] The Arrowsmiths and Mr Doocey were asked at separate times that day by the workshop manager, Marcus Foster to go with him to the Human Resources office. When they arrived at the office Ms Lynn was present and the evidence from all three was to the effect that they were advised their positions were disestablished. They were given a letter at the end of the meeting and advised that they were not required to carry on work that day.

[36] I accept that the Arrowsmiths and Mr Doocey considered that their positions had been disestablished as a result of the conversation at the meeting and this was strengthened in their minds when they were told by Mr Foster they did not need to return to work. The identical letter handed to each of them which was signed by Ms Lynn referred to a proposal only, to make each position redundant and provided that a final decision had not been made. It advised that suggestions to enable Brightwater to retain their positions were welcome. There was an invitation to a meeting on Thursday 18 February at 1.30pm and that they were welcome to bring a support person with them to present any alternative suggestions.

Process as it applied to Michael Colquhoun

[37] The evidence from Brightwater was that the memorandum distributed at the

11 February meeting was posted to all those who were not present that day. I am satisfied that Mr Colquhoun did not receive that earlier memorandum by way of mail and the first that he knew of the restructuring was when he attended at work on

16 February 2010 and was asked to attend the brief meeting I have earlier referred to that the Arrowsmiths and Mr Doocey attended at which they were given the second memorandum dated 16 February.

[38] Following that meeting Mr Colquhoun returned to work but said that he then received a tap on the shoulder from Mr Foster who indicated he should follow him to the Human Resources room. Ms Lynn was present at that meeting and Mr Colquhoun was advised that he had been selected for redundancy. Mr Colquhoun asked a number of questions and explained that he had not been at work when the initial meeting on

11 February had been held. Mr Colquhoun challenged his selection for redundancy. After he had left the meeting and he was also advised that he did not need to continue at work that day, he called Ms Lynn and asked for further information and a copy of his personnel file to be provided to him. This was provided under cover of letter dated 17 February 2010. In that letter it was acknowledged that Mr Colquhoun had been absent on 11 February and it provided that Brightwater was willing to take further feedback from him on the general proposal as well as the specific proposal regarding the possible disestablishment of his position. Although a time of 2.30pm was scheduled for this to take place Mr Colquhoun I find in all likelihood simply participated in the meeting with all the other applicants.

18 February meeting

[39] All four applicants obtained the services of Ms Sharma for the purposes of the meeting on 18 February. The meeting was recorded by Ms Lynn and whilst a transcript was made available to the Authority, the actual recording could not be located and the applicants were not satisfied that the Authority could fairly rely on the transcript. The transcript however was provided by the respondent and I have read it. It is I conclude the best evidence of what was said and discussed.

[40] Present at the meeting on 18 February were Ralph Webster, Mr Foster, Ms Lynn, Ms Sharma, Stuart and Brian Arrowsmith, Mr Colquhoun, Mr Doocey and another affected employee.

[41] At the meeting for the first time each of the applicants was provided with a skills matrix. 54 employees from the workshop area had been graded from 1-10 for the following skills; welding quality, welding speed, fabrication accuracy, fabrication speed, machining accuracy, machining speed, fitting speed, in and out goods and there was also a column for NZQA tickets but that was not completed for any employee. Ten was the highest score that an employee could achieve for any particular skill and one was the lowest. It was the ten lowest ranked employees, which included the four applicants, who had been approached about a proposal to make their positions

redundant. The scores, but not the names of the other employees, were included on the spreadsheet. The only name on the skills matrix handed to each applicant was his own. Although the applicants had been earlier advised that apprentices would not be considered, they were included and had been scored on the sheet.

[42] Mr Foster explained in his evidence at the Authority investigation meeting and at the meeting itself that the spreadsheet had been prepared some 4-6 months earlier and that its original purpose had been to see where the skills were in the workplace, what skills were utilised and what skills needed to be improved. He said the matrix could have been used for training purposes. On page 3 of the transcript Ms Lynn is recorded as saying that the matrix was also to assist with *budgeting for training and staff like that.* Mr Foster said that although he originally prepared the matrix form he had asked for input in terms of scoring from the relevant supervisors and the welding inspector. The applicants all had concerns about their placement at the bottom of the skills matrix. Of the fourteen apprentices identified on the matrix by the word *apprentice*, but not their name, all had scored higher than Mr Doocey and Brian Arrowsmith and only one apprentice scored lower than Mr Colquhoun and three lower than Stuart Arrowsmith.

[43] There was considerable disquiet by all the applicants about their selection and assessment of their skills and the conversation about that occupied much of the meeting which went for approximately two hours. There was some limited discussion about redeployment.

[44] Although there was disquiet expressed by all the applicants about the skills matrix and their placement on it, Mr Foster when he gave his evidence at the Authority investigation meeting said that he was *not about to change the document*.

[45] The concerns from the applicants about the skills matrix broadly were that they were not provided with detailed information about how they had been scored and no-one had interviewed them about their skills and what they could or could not do. They did not understand what skills the company was looking to retain. It was clear from the evidence that the applicants simply did not know why they had been scored the way they had.

[46] Mr Doocey said that he had not been scored at all for fabrication accuracy and speed although he had been in the workshop undertaking that work for two and a half

years of his time with Brightwater. *N/a* had simply been entered into those columns alongside his name. Mr Doocey also said that Mr Foster told him at the meeting on

18 February that *anyone could do* the yardman role. In his evidence Mr Foster did not disagree that was his view although his evidence did not go so far as those were the exact words used by him at the meeting. I conclude that something along those lines was said to Mr Doocey at the meeting and he found the comment hurtful. On page 30 of the transcript Mr Doocey asked Mr Foster who was doing the yard work at the moment. Mr Foster is recorded as saying that it was being shared *among the guys*. In fact I find it more likely that it had already been decided that the yard supervisor Cameron Fullerton would absorb the duties of the yardman in his work. I was not satisfied that Mr Doocey was advised about this and I find it likely that he wasn't clear about this until the evidence at the Authority investigation meeting.

[47] Brian Arrowsmith said that he used to undertake fabrication for the first five years of his employment with Brightwater and then he concentrated on welding. He had not been scored for fabrication accuracy and speed at all in the skills matrix and had only been scored for welding quality and speed and fitting speed. Brian Arrowsmith scored second to bottom out of the 54 employees. Brian Arrowsmith said that he should also have been scored for in and out goods. My understanding from both the transcript and the evidence was that Mr Foster concluded that all Brian Arrowsmith wanted to do was welding. That had not been put to him though before the matrix was completed and Mr Arrowsmith's answers at the meeting on

18 February would not support that he was not willing to do other work if it meant keeping his role with the company.

[48] Mr Colquhoun took issue with his scores and also felt he should have been scored for in and out goods. He said that he could not understand why he had scored so low when he had above the requirement for his trade certification qualification. He said that he could not understand why some of Brightwaters most experienced workers had been placed at the lower end of the skill set.

[49] Stuart Arrowsmith also took issue with the skills matrix as it related to him. He had not been scored for machining accuracy and speed and said that he should have been and also for in and out goods where he said helped out regularly. He thought that would add another 15 points to his score.

[50] The meeting concluded on the basis that Ms Sharma would be advised of the outcome for each of the applicants. Ms Sharma was provided later that same day with a letter for each of the applicants. The letter confirmed each applicant's redundancy after careful consideration of the points raised and provided that they did not have to work out their notice period and would be paid in lieu for that. Each of the applicants was invited to a support seminar on 19 February 2010 which was to be their last day and they were offered extended access to the organisational counselling programme to

31 March 2010.

Applicants' relationship with Marcus Foster

[51] The applicants expressed strong concern in their evidence about difficulties they had experienced in their relationship with Mr Foster when they were employees at Brightwater. They said that those difficulties with Mr Foster impacted on their selection for redundancy. Mr Foster did not accept that was the case and said that whilst he implemented the skills matrix, it was completed by the supervisors and welding instructor. I accept that each applicant had had interactions with Mr Foster that concerned and troubled them. Mr Foster had a different view of each interaction from a workshop manager's perspective.

[52] Objectively assessed there are some surprising features about the skills matrix. The applicants had skills in some areas but the skills matrix, as it applied to them, showed as *n/a* under that column. That impacted on the final score because scoring under each skill for each employee was totalled and the final score relied upon for placement on the matrix. Mr Foster said in his evidence that he asked the supervisors to score people on *how they performed* not on what they could do. That does not sit easily though with the description of the selection process in the memorandum dated 11 February 2010 as a selection criteria *based on our estimation of individual skills and a desire to retain as many skills as possible going forward*. It would not be a fair process if an employee had skills in a particular area but these skills were not taken account of in a selection process. Mr Foster when questioned by the Authority accepted that Brian Arrowsmith had fabrication skills for which he wasn't scored. Mr Foster said all Mr Arrowsmith wanted to do was welding but as I have set out earlier Mr Arrowsmith was not asked about that. Also somewhat surprising was the confirmation, from Mr Foster in answer to a question from the Authority, that the matrix included the supervisors who were undertaking the scoring

of others. The supervisors received the highest scoring. Several of them received scores of 10 which was the best score possible for the various skills. One of the supervisors received five 10's and one 9 for the skill scores. Mr Foster conceded in evidence that scores of that level would be unusual. It was not clear whether the supervisors scored themselves or not.

[53] The Authority has no direct evidence to support that Mr Foster deliberately interfered in scoring and I find the correct approach in those circumstances is to make an assessment of the fairness of the selection process and whether it complied with good faith obligations. The Authority did not hear evidence from any of the supervisors or the welding inspector who carried out the scoring.

[54] Another issue was raised when Mr Herd confirmed that as Chief Executive Officer of Brightwater Engineering it was his responsibility to approve any redundancies that took place. He made the decision to terminate the four applicants' employment by approving the redundancy of 17 positions from the organisation, 10 of those from the workshop. Mr Herd did not attend at the meeting on 18 January 2010 and there was a concern from the applicants that they were not heard by him.

Were the dismissals for reason of genuine redundancy?

[55] All four applicants challenged the genuineness of their redundancy. Brian Arrowsmith provided copies from various newsletters that painted a somewhat rosier picture than had been presented to the Authority by Mr Herd. The Authority had the benefit of evidence and documentation provided from Mr Herd that gave a fuller picture in my view than the various newsletters and other documentation.

[56] There was also evidence given by the applicants about advertisements that followed their redundancies for workers at Brightwater. The evidence supports that a project did come to fruition and require additional employees in or about May 2010 and September 2010. In short things picked up a little. The Authority was provided by Mr Herd with copies of various Board reports at or about the time of the redundancies and there was evidence about the status of various projects that the company was undertaking.

[57] The Stockton project that has been referred to earlier in this determination was the largest project Brightwater had ever taken on. It was winding down and it was recognised from November 2009 that this had a slowdown effect in the workshop and

engineering side of things. There was a concern that the Stockton project may not be replaced by other projects. Mr Herd gave evidence that two major projects did not come to fruition and he was instructed by the Board to reduce costs. From January

2010 a staff rationalisation project was carried out and cost cutting steps implemented including contractors being laid off

and reduction of overtime. The decision was then made to reduce the staff at the workshop by ten. There were 17 staff overall made redundant but seven of those came from elsewhere in the organisation. Mr Herd explained that between December 2009 and January/February 2010 the numbers in the workshop were in the mid 50s but after the redundancy there were 40 staff in the workshop. Mr Foster's evidence was that that number had further reduced to 22 as at August 2012.

[58] I am satisfied in this case that there was a genuine redundancy situation as a result of the winding down of the Stockton project and concern that there were no significant projects to replace it that would justify maintaining the staffing level in the workshop. The Authority is now to consider the process and particularly the selection of the applicants for redundancy.

[59] In *Jinkinson v Oceana Gold (NZ) Ltd* [2010] NZEmpC 102, the Employment Court was looking at a dismissal of Ms Jinkinson for redundancy. At para.[41] of the judgment, Judge Couch stated amongst other matters that:

...the decision to disestablish Ms Jinkinson's existing position as a grade controller and the decision not to appoint her to one of the mine technician positions were both essential aspects of the employer's actions leading to her dismissal. Had either decision been made differently, she would not have been dismissed. In carrying out the selection process Oceana Gold was undoubtedly proposing to make a decision that would, or was likely to, have an adverse effect on the continued employment of one or more of its employees. Those who were selected would have their employment continued. The employment of those not selected would be terminated.

[60] Judge Couch referred to section 4(1A)(c) applying therefore to the selection process and in para.[42] said:

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

[61] The applicants' in this case challenge their selection for redundancy and the

process followed by Brightwater.

Did Brightwater follow a fair and proper process before making the applicants redundant?

[62] The skills matrix that was relied on by Brightwater had been prepared some four to six months earlier than the announcement of the need for redundancies. It had not been discussed with the applicants at the time of its preparation and its existence was not disclosed at either the 11 or 16 February 2010 meet ings. It was a document that was relevant to the continuation of employment of the four applicants and they needed an opportunity to comment on it before a decision was made. The evidence supported that the supervisors were asked to score employees on how they performed and not on what they could do. Mr Foster said in evidence that he possibly had not conveyed that there was a requirement for an assessment of flexibility or at least could not recall a discussion about that.

[63] Mr Webster in his submissions relies on the disclosure of the skills matrix at the meeting on 18 February 2010 as sufficient to meet the requirements of s 4(1A)(c)of the Employment Relations Act 2000. The evidence did not satisfy me that the fundamental elements of consultation required by s 4 of the Employment Relations Act 2000 set out in *Simpsons Farms* at [62] were present at that meeting:

The consultation principles were stated by this Court in a redundancy case, Communication & Energy Workers Union Inc v Telecom NZ Ltd [1992] NZCA 577; [1993] 2 ERNZ 429, as having been extracted from the judgment of the Court of Appeal in Wellington International Airport Ltd v Air NZ Ltd [1992] NZCA 577; [1993] 1 NZLR 671 (CA). Fundamental elements of consultation that are now strengthened and required by s 4 in redundancy cases include (as summarised by Mr Menzies for SFL):

•

Consultation requires more than a mere prior notification and must be allowed sufficient time. It is to be a reality, not a charade. Consultation is never to be treated perfunctorily or as a mere formality.

•

If consultation must precede change, a proposal must not be acted on until after consultation. Employees must know what is proposed before they can be expected to give their view.

•

Sufficient precise information must be given to enable the employees to state a view, together with a reasonable opportunity to do so. This may include an opportunity to state views in writing or orally.

•

Genuine efforts must be made to accommodate the views of the employees. It follows from consultation that there should be a

tendency to at least seek consensus. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done.

•

The employer, while quite entitled to have a working plan already in

mind, must have an open mind and be ready to change and even start anew.

[64] There was no evidence to support an openness to revisit or make any corrections or changes to the matrix. There was limited information provided about the basis to the scoring including what skills Brightwater actually wanted to retain except that Mr Webster said on 18 February that it was as wide a skill base as possible. Mr Foster conceded in evidence that there had not been a discussion as he could recall it about flexibility being a requirement.

[65] When it was clear that the applicants had skills that they were not scored for the view from Mr Foster and Mr Webster was that even if they had been included it would not have made any difference. I could not be satisfied that would have been the case. An employer is entitled to assess employees on the basis of its view of their skills. The process though in doing so should be fair. The skills matrix did not satisfy me that its preparation had been sufficiently objective, open and transparent so as to meet the requirement of fairness and good faith.

[66] I do not find that disclosing the skills matrix at the meeting on 18 February

2010 satisfied the good faith requirements of s 4(1A)(c) of the Act because there was no meaningful consultation about it. I find that there was fundamental unfairness and a breach of the good faith requirements with the selection process used by Brightwater to select the four applicants for redundancy.

[67] There was also an element of predetermination because Brightwater simply relied on a skills matrix prepared some months earlier for the selection of employees for redundancy and were not genuinely I have found prepared to make any changes to that matrix. There was an element of performance assessment in the skills matrix which the applicants should have had an opportunity to comment about before the decision to make their position redundant was made as it was relevant to the continuation of their employment.

[68] After the 16 February 2010 meeting had been held Mr Foster I find in all likelihood advised another employee or employees along the lines that there would be no other meetings. This together with the lack of meaningful consultation after

16 February supported that there was pre-determination about the final outcome as to who would be made redundant notwithstanding the advice that no decision had been made.

[69] I referred the representatives to the Employment Court judgment in *Massey University v Wrigley* [2011] NZEmpC 37 after the first investigation meeting and before the second at which submissions would be delivered. There was some similarity between the situations of restructuring at Massey University and Brightwater in that it was proposed for both there would be a reduced number of positions. That required as with Brightwater a selection process to determine who would stay and who would go. The Full Court had to consider whether the University had complied with s 4(1A)(c) of the Employment Relations Act 2000 about access to relevant information and an opportunity to comment during the selection process.

[70] There was reference in *Massey* to the fact that more informed employee involvement will promote better decision making by employers and greater understanding by employees of decisions finally made and that would in turn avoid or reduce the sense of grievance and then in turn personal grievances – para [47]. The inequality of power in employment relationships when a business is restructured with the employer in most cases having almost total power over the outcome was also recognised – para [48].

[71] It was also recorded in *Massey* that information that is relevant for the purposes of s 4(1A) (c) may not only be information that is written but may be in the mind of a person. Mr Foster and/or other supervisors had formed a view about what work Brian Arrowsmith was prepared to do. He was not scored on fabrication. A question should have been put to Mr Arrowsmith about what he was prepared to do as it was plainly relevant. Although this was a more obvious example of an omission it seemed to me that there was other information that was in the minds of either supervisors or Mr Foster when the skills matrix was developed, completed and relied upon that needed to be disclosed in good faith with the other applicants and consulted about before a decision was made. I refer here to performance issues (Mr Colquhoun), attitude concerns (Stuart Arrowsmith) and skills (Mr Doocey).

[72] I find that it was virtually impossible for the applicants to sensibly comment on the skills matrix at the meeting on 18 February 2010 in a way that the good faith obligation required when there were no names apart from their own on the matrix and no interview or discussion had taken place previously with them about their skills and the basis they were being assessed on.

[73] There was criticism of the failure by Brightwater to consider re-deployment opportunities. There was some limited

discussion about that on 18 February and the applicants were represented at that time. I am not satisfied that there was procedural unfairness about that aspect of the process. The offer of counselling and job search was the action of a fair and reasonable employer.

[74] There was unfairness that Mr Herd was not at the final meeting with the applicants. He made the decision about the redundancies but the applicants had no opportunity to address him directly about the concerns with their selection. There was unfairness to Mr Doocey in that it was not explained to him what would happen to his position as yardman. Mr Colquhoun's process was inadequate but the fundamental unfairness to him was the process around his selection.

[75] In conclusion the actions of Brightwater were not what a fair and reasonable employer would have done for the reasons set out above and not in accordance with good faith obligations.

Was the decision to make each of the applicants redundant justifiable?

[76] I do not find that the decision to make each of the applicants redundant was justifiable. Each applicant has made out a personal grievance of unjustified dismissal and is entitled to consideration of remedies.

Remedies

[77] I do not find that the applicants contributed to their personal grievances.

Brian Arrowsmith

Lost Wages

[78] Mr Arrowsmith seeks lost income between the period 25 February 2010 and

5 February 2012 less money he received whilst working during that period. He was

paid in lieu of notice from 26 February 2010 so assessment of any lost income should run from Monday 1 March 2010. Mr Arrowsmith is also claiming loss of future earnings. He was able to secure alternative employment quickly within about a fortnight from 19 February 2010 and is in essence claiming a shortfall between what he was paid in his new employment compared with his hourly rate at Brightwater. There is no issue of mitigation. Mr Arrowsmith was in receipt of $28 per hour for a forty hour week at Brightwater and his annual income was $58240.

[79] I have considered whether, even if the process had been fair with proper consultation Mr Arrowsmith would have been dismissed in any event. In this case 10 employees were made redundant out of 54 employees in the workshop so a considerable percentage of employees remained even taking the apprentices into account. The selection process was quite flawed and I am simply unable to conclude that Mr Arrowsmith, had the selection process been in accordance with good faith, would still have been made redundant.

[80] As to the duration of any award for lost wages there was a pick up of work from May 2010 and an advertisement for trade and field staff in September 2010. After February 2012 the evidence does support a decrease in the number in the workshop again. If the process had not been flawed then Mr Arrowsmith could have continued working for at least another two years. There was though a further reduction of staff Mr Foster gave evidence about in the workshop in early 2012 so I am not satisfied that there should be an award of future earnings beyond that period.

[81] I find that Mr Arrowsmith is entitled to be reimbursed for lost income until

5 February 2012 but not beyond that period. Although he has claimed two full weeks lost wages his payslip from his new employer reflects payment from 7 March 2010 so he is only entitled to full lost wages for one week in the sum of $1120 gross. Between the period 8 March 2010 and 6 March 2011 he received the sum of $53,162 so there is a shortfall of $5078 gross. Between the period 7 March 2011 to 5 February 2012 he earned $41,733.91 gross so there was a shortfall during that period of $12,026.09 gross. The total loss therefore to Mr Arrowsmith is $18,224.09 gross.

[82] I find that Mr Arrowsmith is entitled to be reimbursed for lost wages in the sum of $18,224.09.

[83] I order Brightwater Engineers Limited to pay to Brian Arrowsmith the sum of

$18,224.09 under s 123(1)(b) of the Employment Relations Act 2000.

[84] Interest is also claimed on that amount. I find that there should be an award of interest on that sum from the date the statement of problem was lodged on 12 July

2011 with the Authority. Under clause 11 of the second schedule to the Employment Relations Act 2000 I award interest at 5% being the rate prescribed under s 87(3) of the Judicature Act 1908 on the sum of $18,224.09 from 12 July 2011 until the date of payment.

Reimbursement of holiday cancellation fee

[85] This is an unusual claim. Mr Arrowsmith and his wife had booked and paid for a holiday to Rarotonga on 21 August 2009. He had made an application for leave and had talked to various people including the welding inspector about the holiday destination. They were booked to leave on 15 March 2010 but after his dismissal Mr Arrowsmith felt he had to cancel the holiday. The total cost of the holiday was

$5220 but insurance only paid out $3700.35 so there was a balance unrecovered of

$1519.65 being the cancellation fee.

[86] By the date of the holiday Mr Arrowsmith had commenced at his new job.

[87] I find that Mr Arrowsmith suffered the loss of a benefit in that he had to cancel his pre-arranged holiday suffering loss in circumstances where he could reasonably have been expected not to have suffered such a loss if the personal grievance had not arisen. There is an expectation on an employee to mitigate their loss and Mr Arrowsmith did that by promptly obtaining a new job from 7 March 2010 but at the cost of not having the holiday he had planned for 15 March 2010.

[88] I order Brightwater Engineers Limited to pay to Brian Arrowsmith the sum of

$1519.65 together with interest from 12 July 2011 until the date of payment at the rate of 5% being the rate prescribed under the Judicature Act 1908 for the loss of a benefit under s 123(1)(c)(ii) of the Employment Relations Act 2000.

Loss of Kiwisaver benefit

[89] Mr Arrowsmith claims the loss of a benefit of the employers contribution o f

2% to Kiwisaver on his lost wages calculated above as $18,224.09 being the sum of

$364.48. I am only prepared to award that on wages for the period he was without employment of $1120 gross as after that he could have elected to carry on the scheme with his new employer.

[90] I order Brightwater Engineers Limited to pay to Brian Arrowsmith the sum of

$22.40 being the loss of a benefit under s 123 (1)(c)(ii) of the Employment Relations

Act 2000.

Compensation

[91] Mr Arrowsmith in his evidence about compensation said that he would never get over the upset of the loss of his job. He seeks $20,000. He felt that there had been no recognition of his skills and experience and that was particularly hurtful. He said that he started to wake in the night and mull over the unfairness of his termination and in mid 2011 went to see a doctor who diagnosed depression and for the first time in his life he was prescribed anti depressants and was referred to the counselling with a mental health co-ordinator. A medical certificate from a mental health co-ordinator provided that the only identifiable stressors at the time were the upcoming Authority hearing and the loss of the job at Brightwater.

[92] Mr Arrowsmith said that having to start again so late in his career in another job has left him with a sense of disillusionment.

[93] Mr Arrowsmith was clearly devastated by his dismissal. He was able to find alternative employment very quickly which he has retained. I balance that with his medical condition of depression that I accept in all likelihood is related to the manner in which he was dismissed and the feeling of unfairness that resulted from his dismissal. In all the circumstances I am of the view that an appropriate award for compensation would be $12,000.

[94] I order Brightwater Engineers Limited to pay to Brian Arrowsmith the sum of

$12,000 without deduction under s 123 (1)(c)(i) of the Employment Relations Act

2000 being compensation for humiliation, loss of dignity and injury to feelings.

Stuart Arrowsmith

Lost wages

[95] Mr Arrowsmith commenced new employment after his termination on

21 March 2010. He claims lost income of three weeks based on an hourly rate of

$22.50 for a forty hour week of $2,700. I am not satisfied that Mr Arrowsmith, even if the process of selection had been fair and there had been proper consultation would have lost his job. I accept the claim for lost wages is made out.

[96] I order Brightwater Engineers Limited to pay to Stuart Arrowsmith the sum of

$2,700 gross under s 123(1)(b) of the Employment Relations Act 2000 for lost wages.

[97] There is also a claim for interest on that amount. I find that there should be an award of interest on the sum of $2700 from the date the statement of problem was lodged on 12 July 2011 with the Authority. Under clause 11 of the second schedule to the Employment Relations Act 2000 I award interest at 5% being the rate prescribed under s 87(3) of the Judicature Act 1908 on the sum of $2700 from 12 July 2011 until the date of payment.

Compensation

[98] Mr Arrowsmith had considerable financial commitments at the time of his dismissal and that impacted heavily on his mind when he was unemployed. He had no opportunity with one weeks notice to plan forward around his personal situation and he made the decision to apply for a no asset procedure. The long hours he had to work in his new job impacted on the time he could spend with his young daughter and he felt generally disillusioned, sometimes he said it was too much to bear. He felt that a send off was in order for him after nine years at Brightwater and instead he was simply told to leave and that he has been left with a sense of mistrust about employers.

[99] Mr Arrowsmith also wanted $20,000. I accept that he was also devastated by his dismissal and it had serious financial consequences for him. Fortunately he was able to find a position within a few weeks although it was not his ideal type of work.

[100] In all the circumstances an award in the sum of $12,000 would be appropriate.

[101] I order Brightwater Engineers Limited to pay to Stuart Arrowsmith the su m of

$12,000 without deduction under s 123 (1)(c)(i) of the Employment Relations Act

2000 being compensation for humiliation, loss of dignity and injury to feelings.

Andrew Doocey

Lost Wages

[102] I am required to determine on the balance of probabilities whether procedural unfairness that I have found caused the loss of Mr Doocey's role. In other words would he still have lost his role if the process was fair. I consider Mr Doocey was in a different position to the other three applicants. The evidence support that his role as yardman was disestablished and absorbed into that of the yard supervisors role. I cannot be satisfied in those circumstances that his employment would have continued if the process had been fair and there had been proper consultation. In those circumstances I do not find that Mr Doocey has an entitlement to lost wages or to the loss of a tool allowance.

Compensation

[103] Mr Doocey seeks the sum of $20,000 under this head. Compensation is limited to the process that was unfair and not the loss of the job itself. I accept that the unfair process had a significant effect on Mr Doocey. He felt that there was a complete lack of good faith in how he was dismissed and that at the 18 February meeting felt he had been shafted. He said it was upsetting and demoralising to be refused information as to how the company had formed a view he had insufficient skill and experience to retain his job.

[104] I accept that there was a significant effect on Mr Doocey and an appropriate award would be the sum of $10,000.

[105] I order Brightwater Engineers Limited to pay to Andrew Doocey the sum of

$10,000 without deduction under s 123 (1)(c)(i) of the Employment Relations Act

2000 being compensation for humiliation, loss of dignity and injury to feelings.

Michael Colquhoun

Lost Wages

[106] Mr Colquhoun understood that there was a good possibility that he could obtain a supervisors position. There is evidence to support that the company agreed with this as a future prospect.

[107] The selection process was so flawed I am not satisfied I can conclude that Mr Colquhoun would have lost his role in any event even if it had been fair. He is therefore entitled to lost wages. Mr Colquhoun seeks lost wages from the end of the notice

period on 26 February to 21 November 2011 in the sum of $9793.69. He seeks wages on the basis of a weekly income of $1150 gross that on my assessment of his wages and time records is fair. The evidence also satisfies me that he mitigated his losses for that period. For the same reasons that are set out under Brian Arrowsmith's claim for lost wages I find that wages should be awarded for the whole period as there was evidence of a pick up in work at Brightwater.

[108] Mr Colquhoun seeks wages for the period 25 February to 2 March in the sum of $1150 gross. As he was paid notice to 26 February he is only entitled to lost wages from 1 March 2010 and the evidence supports that he started a temporary role on that date. For the period 2 March to 21 March the lost wages claim is $1765.84 gross. From 21 March to 11 July 2010 it is $3657.15 gross and then from 18 July 2010 to

21 November 2011 it is $3220.70 gross. After 21 November 2011 Mr Colquhoun received the same hourly rate as at Brightwater. The total claim for lost wages should therefore be the sum of $8643.69. I accept that claim.

[109] I order Brightwater Engineers Limited to pay to Michael Colquhoun the sum of $8643.69 gross under s 123(1)(b) of the Employment Relations Act 2000 for lost wages

[110] There is also a claim for interest on that amount. I find that there shou ld be an award of interest on the sum of $8643.69 from the date the statement of problem was lodged on 12 July 2011 with the Authority. Under clause 11 of the second schedule to the Employment Relations Act 2000 I award interest at 5% being the rate prescribed under s 87(3) of the Judicature Act 1908 on the sum of $8643.69 gross from 12 July

2011 until the date of payment.

[111] I do not however make an award for the loss of the Kiwisaver benefit as Mr Colquhoun could have continued that arrangement on in his new employment or, if not, there was no evidence about why this could not continue.

Tool allowance

[112] I do not make an award for the loss of the tool allowance Mr Colquhoun had at Brightwater as that was paid for using his tools at Brightwater and that use did not continue after termination.

Cost of truck licence

[113] Mr Colquhoun claims reimbursement for the cost of obtaining a heavy truck licence to get another role in the sum of $1600. I accept that this was a cost incurred to mitigate the loss of employment and that his new employer would not reimburse him for. Mr Colquhoun though has a duty to mitigate his loss and I do not find that the cost of that should be the responsibility of Brightwater. Although an expense it led Mr Colquhoun in a roundabout way to his current engineering role with the same company.

Compensation

[114] Mr Colquhoun described the considerable upset over the loss of his job, the inadequate consultation and the very limited notice he received. He struggled financially and the arrangement with his young daughter was no longer possible. He said that he felt embarrassed and humiliated that he was viewed as not having the requisite skills and experience to keep his job by his fellow workers. He explained that he had aspirations of working his way up in the company into a supervisory position and felt that after the dismissal he had to start again in proving his worth in a managerial role. I accept that his distress was very real over the loss of his job and the process leading to that. An award of $12,000 is appropriate.

[115] I order Brightwater Engineers Limited to pay to Michael Colquhoun the sum of $12,000 without deduction under s 123 (1)(c)(i) of the Employment Relations Act

2000 being compensation for humiliation, loss of dignity and injury to feelings.

Costs

[116] I reserve the issue of costs. Given Christmas is almost here if agreement as to costs cannot be reached then Ms Sharma has until 21 January 2013 to lodge and serve submissions as to costs and Mr Webster has until 18 February 2013 to lodge and serve submissions in reply.

Helen Doyle

Member of the Employment Relations Authority