Determination Number: AA 59/01
File Number: AEA 135/01

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND OFFICE**

| | |
|---|---|
| **BETWEEN** | Calvin Ashworth (Applicant) |
| **AND** | Tokoroa Club Inc (Respondent) |
| **REPRESENTATIVES** | Anne-Marie Hendra for Applicant<br>John P Corbett for Respondent |
| **MEMBER OF AUTHORITY** | W R C Gardiner |
| **INVESTIGATION MEETING** | 21 May 2001 |
| **DATE OF DETERMINATION** | 28 May 2001 |

DETERMINATION OF THE AUTHORITY

## Length of this determination

The Employment Relations Act envisages that determinations of the Authority should desirably be brief and to the point. That object no doubt fuelled mostly by the understandable wish to facilitate provision of speedy justice. However, while brevity is desirable in itself, parties are not easily satisfied by a decision which tells them who is right and who is wrong but which fails satisfactorily to explain why. If this determination is longer than the Act envisages, then I make no apology, because the reality is that the parties have not been kept long in waiting before receiving it.

## Brief Background

Mr Ashworth's Statement of Problem was filed in the Authority on 16 March 2001 and was followed on 3 April by the Respondent's Statement in Reply. This matter has not been the subject of a mediation conference using the services of a Department of Labour Mediator. However, I know that discussions have taken place between experienced representatives and am satisfied that mediation will not contribute to resolving this particular matter, not at the front end of it anyway.

On 11 April I hosted a telephone conference of the representatives of the parties. Arrangements were made for prior exchange and filing of briefs of evidence and for supply of relevant documents and a date (21 May) and venue (Hamilton) were agreed for an investigation meeting.

## Mr Ashworth's Problem

The employment of Mr Ashworth (who commenced with the Club in March 1994) was terminated effective 8 March 2001. He was paid four weeks' pay in lieu of notice. Mr Ashworth disputes the basis of his termination. Mr Ashworth does not accept that as a consequence of a restructuring, the

position he held became redundant. It is Mr Ashworth's view that the "new" position created (and to which someone else has been appointed) in reality is still the position formally held by him. However, while the above outlines Mr Ashworth's primary concern, the reality is that he has correctly described his problem as being a personal grievance.

Mr Ashworth says that the Club unjustifiably dismissed him. The problem, which I am required to investigate and determine, is Mr Ashworth's claim that he has been unjustifiably dismissed. That requires an investigation of all the relevant circumstances. My investigation is not limited simply to the issue of whether or not a genuine restructuring occurred.

**The Respondent's Position**

The Respondent's position, predictably enough in cases of this nature, is that as a matter of law the Club was entitled to restructure its operation and did so, that as a consequence of the restructuring, two positions (including the position held by Mr Ashworth) were disestablished and two new positions created in their place. The Club says that Mr Ashworth's application for one of the new positions was considered on its merits but the appointment went to another Applicant.

The outcome for Mr Ashworth, says the Club, was a genuine redundancy brought about by a genuine restructuring.

**Remedies Sought by Mr Ashworth**

From his Statement of Problem, Mr Ashworth sought the following remedies:

> *"The Applicant wishes to have the problem resolved in the following way:*
>
> > *By effecting his reinstatement on the same terms and conditions and in the same position.*
> >
> > *By reimbursement of all lost wages and other monies including, in the event that reimbursement were declined, future losses.*
> >
> > *By payment of compensation for the humiliation, distress and injury to feelings the unjustifiable actions of the Respondent have caused including the effects of the unjustifiably dismissal.*
> >
> > *An order for costs."*

**Some Thoughts About Restructuring**

That an employer is entitled to structure or restructure the enterprise is well established and I do not need to quote case examples to demonstrate that that is so. In many instances, a restructuring genuinely results in the disappearance of a former position. That in turn frequently results in the displacement, by redundancy, of the former incumbent. At times a displaced employee from a disestablished position passes (as it were) in the doorway an incoming employee who is about to take up a different position created as a result of the restructuring. This is often called progress.

Sometimes, however, the displaced employee is not convinced that the old position has truly been disestablished. The displaced employee may acknowledge minor or cosmetic changes (some alteration of duties, some upgrading of responsibilities, maybe a change to reporting lines, almost invariably a change to job title) yet nevertheless claims that in substance, the job remains as it was.

If you are an All Black Selector and are blessed with a gifted fullback like Christian Cullen, you nevertheless still keep your eyes open for someone better. And should someone better come along, Cullen can simply be dropped from the team and replaced by a new incumbent.

Employment is not like that. Somewhere there will always be a better storeman, a better driver or a better accountant. But an employer cannot drop from the team the incumbent storeman/driver/accountant simply because the employer has spotted someone better.

In Wilkinson v Wairarapa Crown Health Enterprise Ltd [1999] 2 ERNZ 133, Goddard CJ held that:

> *"A genuine redundancy can justify a dismissal. Before there can be a genuine redundancy, there must be a redundancy. The general test asks whether the job content has gone. If the job content substantially remains but the employer wants to give the position to somebody else, then it cannot justifiably dismiss the incumbent but must either negotiate a consensual exit package or, if dismissing the employee against the employee's will, pay compensation as for an unjustifiable dismissal. This is because it is ordinarily unnecessary to displace the incumbent when all that is required is that she should upgrade her skills or accept a change in focus or emphasis."*

It is often helpful to look at matters from a reverse position. Down the years there have been many cases involving situations where an employer has introduced changes to a worker's job. The employer does not want the incumbent to leave the job. The employer says that in substance the job remains the same. The worker, however, (and it may be that there is an attractive redundancy pay provision in the employment agreement) argues that the job has been so significantly changed that the effect is that the employee says he/she has been made redundant. In other words, the exact reverse of Mr Ashworth's case. The worker wants to go, the employer says no, you're not redundant. In such a situation, see Carter Holt HarveyLtd v Wallis [1998] 3 ERNZ 984, the Court of Appeal adopted the following test:

> *"Would a reasonable person, taking into account the nature, terms and conditions of each position and the characteristics of the Respondent, consider that there was sufficient difference to break the essential continuity of the employment?"*

The Court also accepted that the above question must be determined objectively and that it is essentially a question of fact and degree.

In NZ Public Service Association v Land Corporation Ltd [1991] 1 ERNZ 741, Goddard CJ held that:

> *"…the respondent says that it was entitled to vary the grievants' duties, and to dismiss them if they failed to carry out those varied duties. An employer's right to vary an employee's duties has often been upheld. It is an important right and is not to be whittled away, as this Court made clear in NZ (with exceptions) Shipwrights etc Union v Honda NZ Ltd (re Morton) (unrep, 20/12/89, WLC 120/89), by the application of subtle technicalities. Managers in particular must be prepared to be flexible and versatile according to the changing needs of their organisation."*

The Chief Judge then went on to say that:

> *"There are, nevertheless, restrictions on that right. For example, it may not be competent for an employer to require a worker, by way of variation of duties, to*

*undertake work that is beyond the capacity of the worker, or that is more dangerous or more unpleasant or more arduous. There is also a further restriction which exists where the employer has bound itself not to vary an employee's duties at all or for a period of time. This example may take the form of an assurance to an employee on transfer to another town that he or she will not be called upon to transfer again before the expiry of a specified number of years. <u>But in the absence of something of that kind, an employer has a clear right to re-assign employees, at any rate to work of equal or equivalent status.</u>"* (my emphasis)

It must follow, that if an employer has the right to insist upon a worker accepting reasonable changes to duties, a worker, who sees reasonable changes being made to his existing job, has the right to insist that that job should remain his.

**<u>What My Investigation Revealed</u>**

(1) It is an agreed matter that Mr Ashworth commenced his employment with the Club in March 1994.

(2) It is common ground that the employment agreement applicable as at the date of Mr Ashworth's termination was the document headed "Individual Employment Contract, Bar Manager, Tokoroa Club Inc" and which was signed on 9 February 2000.

(3) It is common ground that Mr Ashworth's gross annual salary at termination was $34,676. Mr Ashworth was paid weekly. His gross weekly wage was $666.85.

(4) I find that during 1999 officials of the Club, following receipt of their auditor's report dated 28/5/99 and a report dated 5 July 1999 from John Corbett (Executive officer with New Zealand Chartered Clubs Inc.) formed the view that management systems at the Club were not all that they should be. This came at a time of declining population at Tokoroa and thus increased competition between the Tokoroa Club Inc and similar local service clubs for membership and membership patronage.

(5) Steps were taken in early 2000 to clarify the duties, responsibilities and reporting lines of the management employees and to issue to these employees for the first time written employment contracts and written job descriptions. As I have noted above, Mr Ashworth's contract was signed on 9 February 2000.

(6) The management team confirmed or established by that tidying up process was as follows:

| | |
|---|---|
| Club Manager | (Peter Everitt) |
| Bar Manager | (Calvin Ashworth) |
| Assistant Bar Manager | (Carole Middleton) |

All three positions were full-time salaried positions. I find that previously the position held by Mr Ashworth was called Assistant Manager. I find that there was no particular significance in the change of title, Mr Ashworth's duties continued essentially as before.

(7) I find that as regards competitive viability, the Club made other significant steps during the year 2000. To increase membership, the Club constitution was changed so as to allow for female membership. The Club also divested itself of its restaurant by turning it over to contractors.

(8) I find that during 2000 Club officials turned their minds to staffing levels. The President (George Harrison) told me that:

> *"In 1999 our Club Accountant/Auditor warned the Club Executive that its wage/turnover ratio was too high…"*
>
> and
>
> *"…during 2000 our Finance Committee carried out further analysis and it was ultimately recognised that we did not require the services of a management team comprising three full-time people … So it was decided to … retain the Club Manager, amalgamate the two deputy positions and create a part-time senior position."*

And, as Financial Convenor Russell Murphy explained to me, to similar effect:

> *"During the course of the year, it became apparent that there was overstaffing – 120 paid hours for approximately 98 hours worked."*

(9) The Club says that at quarterly meetings during 2000 indications were given to staff that staff structural arrangements were being considered. If this is so, it is not evident in such minutes as the Club made available. I do not accept that the final item (contract renewal) in the minutes of 30 October 2000 signal anything other than is said there. I do not accept that Mr Ashworth was given any alert during the year 2000 as to what would take place early in the New Year.

(10) On 12 January Mr Harrison wrote as follows to Mr Ashworth:

> *"As you are aware, your employment contract is due for review on February 14, 2001. This letter is to advise you that the Committee is not in a position to undertake the review at present. Therefore the contract will be rolled over on a month to month basis for the immediate future."*

(11) On 23 January the Management Committee met, considered staffing recommendations which had been formulated by the finance subcommittee, and decided to adopt those recommendations. Those recommended changes are at the heart of Mr Ashworth's personal grievance.

(12) On 30 January Mr Harrison and Vice President Vern Terry met Mr Ashworth and advised him that his position was being disestablished and a new full-time position and a new part-time position were being established. He was informed that these were two new positions and he was encouraged to apply for one or both of the positions. My finding is that this properly describes the information that was conveyed by the Club to Mr Ashworth that day. I also record here that the words I have used above are the Club's own statement at item 2(a) of their Statement in Reply.

(13) I find that the reality of this meeting is that Mr Ashworth, with no prior warning and no prior consultation, was being told unilaterally that there had been a restructuring, that his job was gone, effectively he was dismissed, if he wished to apply he might be re-engaged. It was all as sudden as that. Confirmation of the situation was given to Mr Ashworth by Mr Harrison in writing that same day.

(14) I find that job descriptions of the "new" positions had not in fact been finalised as at 30 January. Copies were not received by Mr Ashworth until late February.

(15) Mr Ashworth was not impressed by the situation. He did not accept that a genuine restructuring was taking place. To use his words, he believed he was being required to apply for his own job. For reasons which Ms Hendra, Mr Corbett and practitioners at large will appreciate, I can empathise with Mr Ashworth in the situation in which he found himself.

(16) Mr Ashworth sought the assistance of his union official (Richard Harpur, Engineers Union). There was an abortive attempt to achieve a meeting with Club officials on 25 February (no criticism of the Club in this matter). Mr Ashworth and Mr Harper did then meet Mr Harrison and Vice President Bill Machen on 27 February. They put their various points of view by way of comparing the old and the new job descriptions. The Club maintained their view, which was that the restructuring had produced a new position. Mr Ashworth and Mr Harpur maintained their view, which was that minor alterations and cosmetics aside, the old and the new were the same. In short, they agreed to disagree. The Club, however, continued down the road it had embarked on at 23 January.

(17) On 27 February Mr Ashworth "without prejudice" put in an application for the job of Assistant Manager.

(18) The job itself had meantime been advertised in newspapers. Points to note are that the "new" positions of Assistant to the Club Manager and of Bar Steward were advertised under the banner "Bar Manager" which, as it happened, was the job title for Mr Ashworth's "old" job. The reality of the newspaper advertisement was that these "new" jobs were open to competition from current office holders (Ashworth and Middleton) and "outsiders" who chose to apply.

(19) Mr Ashworth complains in his brief of evidence that:

> *"On Tuesday the 27th of February, George Harrison told me to come in on Wednesday the 28th for two hours only and then go home. I saw that my rostered days on following the 28th had been crossed off the roster."*

Clearly the suggestion in that complaint is that it was already a done deal, Mr Ashworth was already dead in the water.

At the investigation meeting, Mr Ashworth accepted as correct the Club's explanation for 28 February and 1 March. That explanation was that:

> *"Mr Ashworth was not on the roster for Wednesday the 28th of February to allow him time to prepare for the interview. He was not rostered on for Thursday 1st March as this was the day of the interviews. Both days were on full pay."*

As for the days subsequent to 1 March, I accept the explanation of Club Manager, Peter Everitt, who told me that:

> *"Neither Carole or Cal were put on the roster because nobody knew who was going to be there anymore."*

My finding is that there was no decision taken by the Club prior to 6 March that it was Mr Ashworth who was to draw the short straw in this matter.

(20) All applicants (including existing position holders, Calvin Ashworth and Carole Middleton) were interviewed on 1 March 2001. John Corbett was there as facilitator and conducted the interviews. Present to formulate a recommendation to the Club Committee were Messrs Harrison and Terry.

(21) On 6 March 2001 a special committee meeting was held. I use the Club's words from item 2(J) of the Statement in Reply:

> *"(The committee) accepted a recommendation to appoint person to new position of Assistant to the Manager. This meeting was advised that Mr Ashworth was unsuccessful and that he was to be released from his employment with one month's salary as per his contract."*

(22) The successful Applicant was the other existing office holder, Carole Middleton.

(23) On Thursday 8 March Mr Harrison and committee member Ian Johnson met with Mr Ashworth. They offered him the opportunity to have a support person present. This was declined by Mr Ashworth. Mr Ashworth was given the bad news. I accept that meetings like this are difficult for all parties concerned, but more especially of course for the person in Mr Ashworth's shoes. He was advised that he was to be released immediately with payment in lieu of notice. Mr Ashworth enquired whether they wanted him to work through to week's end. He was told, no.

I do not know whether Mr Ashworth had any personal preference as regards working out notice or being paid in lieu. It really doesn't matter because those options were not offered to him. The Club had made the decision unilaterally that he was to go on the spot. I will have more to say about that shortly.

(24) I recorded earlier that Mr Ashworth's gross annual salary at termination was $34,676. I was told at the investigation meeting that the salary being paid in the "new" position is $35,000. The per annum difference is therefore $324. That is not a salary differential which is reflective of significant change and enhanced responsibilities.

(25) While the master plan was to replace three full-time positions (Club Manager, Bar Manager, Assistant Bar Manager) with two full-time positions and a half-time position (Club Manager, Assistant to the Club Manager and a part-time Steward) that is not how things worked out.

Mr Everitt continues as Club Manager, Ms Middleton gained the appointment as Assistant to the Club Manager. The Club has found the envisaged part-time Steward position to be unnecessary. That envisaged position has never been filled.

(26) Club Manager Peter Everitt's gross annual salary at 1 January 2000 was $37,660. Effective 1 January 2001 it became $42,000. Mr Everitt told me he has gained new responsibilities. He told me that none of those responsibilities derived from responsibilities previously carried out by Mr Ashworth. Mr Everitt told me that he has not divested any duties to the "new" position of Assistant to the Club Manager.

**Failure to consult. Failure to act in good faith.**

I do not say that the Club acted in bad faith throughout this affair. The Club officials were genuine in their endeavours to do the right thing viz a viz viability of the Club itself and believed that they

acted properly toward Mr Ashworth. Regrettably (as regards Mr Ashworth) with all the best intentions, they nevertheless got it all badly wrong. The Club did not act in bad faith. But nor did they meet their obligation to act in good faith.

I have observed on previous occasions that the Employment Court has rarely given better advice regarding implementation of a redundancy than this:

> *"A useful guide … is for employers to ask themselves how they would reasonably like to be treated, as a matter of fairness, if they were the employee."*
>
> Northern Clerical Union v Beachlands Engineering Ltd [1991] 3 ERNZ 1023 per Travis J.

And as the Court of Appeal held in Aoraki Corporation Ltd v Colin Keith McGavin [1998] 1 ERNZ 601 CA:

> *"A just employer, subject to mutual obligations of confidence, trust and fair dealing, will implement the redundancy decisions in a fair and sensitive way."*

Since those Court decisions, we have all embarked on yet a new, new era as far as employer/employee relationships are concerned. I refer of course to the enactment of the Employment Relations Act 2000, which had effect throughout all of the events material to Mr Ashworth's dismissal. That Act, at section 4, obliges parties to employment relationships to deal with each other in good faith. At Section 4.4 the Act has specific provisions concerning the duty of good faith in matters such as:

> *"A proposal by an employer that might impact on the employer's employees;"*
>
> and
>
> *"Making employees redundant."*

There is an inescapable message in those provisions that existing employees are to be consulted concerning proposals by their employers which may lead to redundancy.

In Michael Baguley v Coutts Cars Ltd unreported decision of the full bench of the Employment Court AC 25/01 dated 3 April 2001, the Court held that:

> *"the jurisprudence developed under the Employment Contracts Act 1991 focused on the presence or absence of an obligation to consult as a term of the employment contract. Now that the spotlight is on the employment relationship, it is not necessary or permissible to speak in terms of consultation being mandatory in all cases or of never being required. Usually it will be. The Employment Relations Act 2000 strongly suggests so. It does so not only in the provisions already set out but in altered provisions governing the personal grievance remedy. So s.101, dealing with the object of Part 9 of the Act, highlights the importance of access to information and places it in a hierarchy different from and superior to adherence to rigid formal procedures."*

There can be no doubt whatsoever that Mr Ashworth (and Ms Middleton for that matter) were entitled as part of the employer's duty of good faith, to be consultated about the Club's plans to "restructure" their positions. At no stage did the Club ever consult with Mr Ashworth.

And for the avoidance of doubt in these matters, consultation (as was held in Baguley):

> *"Does not imply that the employer has to seek the employee's concurrence in the commercial decision."*

Demonstrably, the Club got this matter wrong at both the beginning and the end by failure to consult, by making all decisions unilaterally.

On 30 January 2001 Mr Ashworth was told that his job was disestablished. No matter how well Mr Harrison managed to word that message, the message by analysis was as blunt and final as that. I ask any employer (see Beachlands above) to ask themselves how they would feel if tomorrow their own "boss" asked them in to a meeting and told them "your job has been disestablished."

At the other end of the adventure, the Club acknowledges that the Club unilaterally made the decision that Mr Ashworth would finish up on the spot on 8 March.

I am not going to set out in full here the termination provision (see clause 8) of Mr Ashworth's contract. The clause sets out a sequence of dismissal circumstances. But the redundancy provision is a "stand alone" provision and earlier references to payment in lieu of notice do not apply to it. The redundancy termination provision is in clear terms:

> *"Where the employment is to be terminated because of redundancy, the employee shall receive not less than four weeks' notice of the termination of employment. No redundancy compensation shall be paid in the event of a termination of employment due to redundancy."*

Notice means advance notice of something which is to occur at some later time. In terms of the above provision, notice would mean that in four weeks' time the employees' job would cease. There is no provision in that subclause which allows an employer unilaterally to substitute notice with a payment in lieu of notice. Yes, that is a matter parties can agree on. For all I know that might have been Mr Ashworth's preference. The only way agreement could have been reached was by consultation. There was no such consultation.

The Employment Court addressed this situation in Atwill v Tanners Timberworld Ltd [1994] 1 ERNZ 321 where Colgan J held that:

> *"It may be appropriate that I should make a few general comments about what is in reality summary termination of employment by reason of redundancy. That is because in this case it appears that the respondent sought professional or semi-professional advice as to its obligations and elected to very suddenly terminate Mr Atwill's employment. Although it is not difficult to imagine some circumstances in which an employer may be justified in summarily terminating employment by reason of redundancy, this was not one of them. No case was advanced by the respondent for its need no longer to have Mr Atwill on the premises or otherwise involved in the company's business. There was no suggestion that he was other than an employee of good standing in whom the company had trust and confidence. There is no suggestion that he would have abused those attributes had he been asked to work out his notice. The Adjudicator elaborated on some of the reasons why it is generally preferable that employees to be made redundant should not have their employment summarily terminated but should be entitled to work out their notice and to seek to obtain employment from that same stable base.*

*Any consideration of human nature and the reality of employment relationships will result in an appreciation of the sorts of reasons why there should, if at all possible, be notice of termination of employment for redundancy and not of payment in lieu with a sudden departure in circumstances that can easily be misconstrued as sinister. It may be but I of course do not know - that there is some notion among people advising employers that one must be cruel to be kind and that once a decision to terminate employment by reason of redundancy is made, the sooner it is executed and completed the better it is for all concerned. This case is a good illustration of the falseness of that notion if it exists and of the financial consequences of adherence to it."*

Mr Ashworth's termination is rendered unjustified because of the Club's failure to meet its good faith obligations toward him. In particular, the failure to consult. But there is more to it than that. The "restructuring" concept itself was fatally flawed from the beginning.

**The "Restructuring"**

What happened here was not a restructuring which in turn resulted in a redundancy. What happened was this. The Club was overstaffed. There was a justifiable need to make one of the management team redundant. Why on earth the Club persuaded itself that the situation was any more complex than that is quite beyond me.

As Mr Murphy (Finance Convenor) said in evidence:

*"During the course of the year it became apparent that there was overstaffing – 120 hours for approximately 98 hours worked."*

The Club identified that they did not need the existing three full-time positions. Their calculation was that 2 ½ positions existed. There was evidence at that time to suggest that in fact two positions would suffice. Events have proven that to be the case.

The argument put by Mr Murphy to the 23 January special meeting of the management committee makes the actual situation absolutely clear to the extent that it is worth setting out here despite the general desirability for the Authority to restrict the length of its determinations.

*"Gentlemen / Team. As you know, we have been looking at management staffing levels during the past 2 to 3 months.*

*To recap – the first step following John Corbett's report was to define the job description for the Club Manager, Bar and Assistant Bar Managers. This at least gave us some idea of who was doing what and for how long.*

*It has shown – as outlined by John Corbett's report – that there is considerable downtime (or Administrative time as he described it) and you have no doubt seen for yourselves the considerable leisure time during shifts.*

*The finance sub-committee believes that the number of management required is probably 2.5 people.*

*It is our recommendation that:*

*a the Bar and Assistant Bar Managers position be dis-established.*

*b a new full time position be created which would include the present duties covered by the Bar and Asst. Bar managers plus taking on some of those allocated to the club manager*

*c to cover the short fall of hours, a "Steward" – license holder – be taken on for approx 20 hours per week – the Sat/Sun and Tues/Wed days off of the Club and Bar Managers.*

*A further part of the exercise has been to look at the position of Club Manager – hence the recommendation to include some of his present duties into the new position.*

*Basically, being employed by this club has become a "sweet little number". The subcommittee is of the opinion that much of the workload of the Social and Works committee should be part of the Club Manager's responsibility. The sub-committee should merely be the approving authority. We see the Club Manager drawing up or developing the maintenance programme for three to five years, submitting same to Works to approve on-going work. He would call for tenders, approach the appropriate Tradespeople, seek financial approval and oversee the work.*

*With regard to the Social aspect, he would arrange, organise and oversee approved events – not committee members.'*

*The sub-committee simply sets policy and monitors progress."*

An analysis of the above demonstrates that:

(i) The finance committee found that the existing management team of three full timers had time on its hands. 2 ½ people could do the job.

(ii) The finance sub-committee recommended "a new full-time position be created which would include the present duties covered by the Bar and Assist. Bar Managers," i.e. the positions held by Mr Ashworth and Ms Middleton. It emerged at the investigation meeting that the functions and duties of the positions Bar Manager and Assistant Bar Manager were indistinguishable, one from the other. See in particular paragraphs 3, 4, 5 at page 2 of the Club's opening submissions. Indeed, with the exception of one minor job (we referred to it during the hearing as the flower job), the job descriptions for both positions are exact duplicates. Therefore, when the recommendation speaks of creating "a new full-time position which would include the present duties covered by the Bar and Assist. Bar Managers," and given that the duties of those two positions were exact duplicates, the reality can only be that what is being said is that we really only need one such position.

(iii) It is true that the recommendation does go on to say "plus taking on some of those allocated to the Club Manager." But really, such add-ons as are there are not sufficient to put the Club in a position to sustainably say that a genuinely new position has been created.

(iv) There is certainly a basis by which to say that Mr Everitt's position as Club Manager has been "beefed up" and the salary increase granted probably reflects that. By comparison, I have noted earlier that the salary being paid in the so-called "new" position rates only $324 p.a. more than was paid to Mr Ashworth in his "old" position.

The Club went down the wrong path on this one. For some reason or other the Club became captured by the term restructuring, decided that the positions of Mr Ashworth and Ms Middleton

had both disappeared and that in place of those positions a new position had been created.

Effectively, the Club sacked both Ms Middleton and Mr Ashworth by telling them their positions were disestablished. The Club then invited Ms Middleton and Mr Ashworth to apply for the "new" job, along with anyone else who, on seeing the job advertisement, wanted to put their hat into the ring. In the event, Ms Middleton was successful and Mr Ashworth went down the road.

There was no restructuring resulting in the creation of a new position. There was simply a superfluity of staff which in the ordinary way of things would have lead either to a redundancy of one of the two positions or a proposal that one position become part-time.

Now some people might remark of all this, "restructuring, superfluity, what does it all matter, the same result was always going to occur, one job would be lost, either Ms Middleton or Mr Ashworth would have ended up redundant, that's what's happened anyway, so what's all the fuss about!"

And the answer to that is that Mr Ashworth, an employee since 1994, was not treated fairly by any of this. It is one thing to find yourself out of a job (as he effectively was on 30 January) and then applying for an (ostensibly) brand new job. That is no different then if he had gone down the road to XYZ Ltd and applied for an advertised job there. He was on the outside trying to come in.

The footing this matter should have been approached from was that the Club had one Bar Manager too many. As a consequence of that situation, either Mr Ashworth or Ms Middleton would have been selected for redundancy.

Matters that go into the pot when considering selection for redundancy are markedly different from matters which will be taken into consideration by a panel interviewing both existing employees and outside applicants for what is claimed to be a new job.

By wrongly going down the restructuring path, rather than accepting that they were simply overstaffed, the Club denied Mr Ashworth and Mr Ashworth's representative, Mr Harpur, the right to argue his case, not from the perspective of "please let me back in the door," but from the much stronger position of "these are the reasons why I should not be put out of the door in the first place."

## My Determination In This Matter

My determination and my reasons for it have already been made apparent. Mr Calvin Ashworth has a personal grievance. Mr Ashworth was unjustifiably dismissed by his employer, Tokoroa Club Inc. The dismissal was procedurally unfair. And while it emerges that the Club had a superfluity of staff, the Club's erroneous adoption of the disestablishment / restructuring / new position approach renders the dismissal substantively unjustified as well. It is not appropriate in this case to apply the Aoraki formulation, which is that where a genuine redundancy (albeit procedurally flawed) has occurred, available remedies cannot embrace lost remuneration or reinstatement.

## Remedies

### Contribution

The proper start point, as always, is to deal with the issue of contribution. Under section 124 of the Act, it is a mandatory requirement that the Authority consider the extent to which the actions of the employee contributed to the situation that gave rise to the personal grievance. The Authority is also obliged (in a remedies setting) to reduce the remedies that would otherwise have been awarded "if those actions so require."

The short answer in this case is that in no way can Mr Ashworth be said to have contributed to the situation that gave rise to his personal grievance. It follows from that finding that remedies will not be reduced for contribution.

Reinstatement

Mr Ashworth seeks to be reinstated. Section 125 of the Act provides as follows:

> ***"125 Reinstatement to be primary remedy***
> *(1) This section applies where –*
> *(a) the remedies sought by or on behalf of an employee in respect of a personal grievance include reinstatement (as described in section 123(a)); and*
> *(b) it is determined that the employee did have a personal grievance.*
> *(2) If this section applies the Authority must, whether or not it provides for any of the other remedies provided for in section 123, provide, wherever practicable, for reinstatement as described in section 123(a)."*

At the investigation meeting it was apparent that no personal ill feeling exists between these parties. Mr Ashworth saw no impediment to reinstatement by way of perceptions of discomfort or of being unable to work once more with Club officials concerned. Nor did the Club officials or the Club Manager advance any argument designed to demonstrate the potential for difficulties of that nature.

There is, of course, the problem that in effect there is only one position available, and that presently Ms Middleton is the incumbent in it. But in explaining why Mr Ashworth's dismissal was unjustified, I have explained why it is that I am in no position to prejudge which employee (meaning Mr Ashworth or Ms Middleton) would have become redundant had this matter been approached on a proper footing in the first instance, and had a proper redundancy selection process been applied.

Reinstatement in this particular case is not made impracticable because now there is only one pair of shoes at the Club with someone else's feet presently in them. And indeed, this was the potential situation, which the Club was effectively alerted to by Mr Harpur at an early stage in the process.

The order of the Authority is that Tokoroa Club Inc is to reinstate Mr Ashworth. I have no power to order the Club to create a position for Mr Ashworth. Nor can I order the Club to revert to the manning level which existed as at the beginning of the year 2001. On the face of it, reinstatement of Mr Ashworth puts the Club back in the situation of staff surplussage in which it originally found itself. The answer to that situation, if that is how the Club sees it, is for the Club to approach the matter on a proper footing and apply a proper redundancy selection process. I accept that in ordering reinstatement I may be embarking Mr Ashworth on a journey through a revolving door.

Section 126 of the Act provides that where the remedy of reinstatement is provided by the Authority, "the employee must be reinstated immediately or on such date as is specified by the Authority." The order of the Authority is that Mr Ashworth is to be reinstated no later than fourteen days from the date of this determination. That is to say, on or before 11 June 2001.

Lost Remuneration

Mr Ashworth was paid up to and including his last day at work. That is to say 8 March 2001. He was paid four weeks' in lieu of notice. That took him through to and including 5 April 2001. The period from then to his date of reinstatement is the period of lost remuneration which the Authority

orders Tokoroa Club Inc to make good to Mr Ashworth. Lost remuneration is to be calculated on the base of $666.85 gross per week. The sum payable to Mr Ashworth in respect to the period subsequent to 5 April is of course to be reduced by $2,106 gross. That is the sum earned by Mr Ashworth elsewhere during the time since his dismissal. If the parties have difficulties making the precise lost remuneration calculation, they can return to me for assistance. I should signal in advance that I shall be "grumpy" if they feel the need to do so.

Compensation

In reaching my determination that Mr Ashworth was unjustifiably dismissed, I recorded my finding that the Club had not acted in bad faith throughout this affair. I said that the Club officials were genuine in their endeavours to do the right thing viz a viz viability of the Club itself and that they believed that they acted properly toward Mr Ashworth.

I accept Russell Murphy's explanation as to why the newspaper advertisement appeared under the "Bar Manager" heading. Nevertheless, from Mr Ashworth's perspective, people in the community would not know the Club was claiming a restructuring; they would likely take the simplistic view that "Cal's job" was in the paper and would make of that what they chose.

At the investigation meeting submissions on Mr Ashworth's behalf said that:

> *"(Mr Ashworth) is entitled to be compensated for the humiliation, distress and injury to feelings caused him by the unjustifiable dismissal and looks to this Authority to make an order accordingly in the sum of $10,000."*

The origin of the $10,000 figures is not hard to pinpoint. But this is not the Baguley case, the circumstances are different and Mr Ashworth, unlike Mr Baguley, is being reinstated.

At times there appeared to exist a "tension" between the Court and the Employment Tribunal concerning appropriate levels for orders for compensation.

In Barbara Commerer v Red Eagle Corporation Ltd unreported decision of the Employment Court WC 29A/00 dated 27 June 2000, Goddard CJ, in determining appropriate compensation in the case, observed that:

> *"…voluntary settlements between parties tend to be higher than any awards made by the Court and much higher than awards made by the Employment Tribunal."*

It is important to note that in the case in question the Court had already dealt with the issue of lost remuneration so that the above observation was directed to compensation. I assume, but do not know, that the observation was based on anecdotal evidence because with few exceptions, voluntary settlements contain confidentiality clauses. And while the Employment Institutions Information Centre produced compensation tables of awards made by the Employment Tribunal in adjudication, no equivalent tables were compiled of mediated voluntary settlements.

To the extent that there may appear to be a difference between the levels of section 40(1)(c)(i) settlements and section 40(1)(c)(i) adjudicated awards, I would suggest that the difference is more apparent than real. That is because parties to voluntary settlements usually agreed on a single global settlement figure, which consisted in part of lost remuneration, in part compensation, and in part cost contribution and then attributed the entire sum to section 40(1)(c)(i) of the Employment Contracts Act 1991. No doubt that was done to simplify the drafting of settlement documents. It is possible there were other reasons as well.

By ordering reinstatement and by making good his lost remuneration, I have put Mr Ashworth back in his pre dismissal situation. What happens now, life being what it is, is of course a fresh sheet of paper. Looking at remedies overall as a balanced package and mindful of the requirement that remedies are to be fair, as between the parties, I find that the appropriate order for compensation is $4,000.

The order of the Authority is that Tokoroa Club Inc shall pay Mr Calvin Ashworth $4,000 without deduction. This order is made in terms of section 123(c)(i) of the Employment Relations Act 2000.

**Costs**

In the first instance I look to Ms Hendra and Mr Corbett to resolve this matter as between the parties. If they are unable to achieve this I shall be sad but will then resolve the matter for them. If that is what it comes to, Ms Hendra is to file cost submissions in the Authority and send a copy to Mr Corbett. On receipt of those submissions, Mr Corbett would be required to file response submissions within 14 days, sending a copy at that same time to Ms Hendra.

**W R C Gardiner**
**Adjudicator**
**The Employment Authority**