

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 129
5323393

BETWEEN DAVID LEWIS and 14 others
 listed in Attachment A hereto
 Applicant

A N D SOUTH PACIFIC MEATS
 LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Karina Coulston, Counsel for Applicant
 Graeme Malone, Counsel for Respondent

Investigation meeting: 11, 12 and 13 July 2011 at Christchurch

Submissions Received 3 August and 18 October 2011 from Applicant
 5 September 2011 from Respondent

Date of Determination: 28 June 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] David Lewis and the 14 applicants listed in Attachment A to this determination were all employees of South Pacific Meats Limited (SPM) at the Malvern plant in Canterbury. The Malvern plant was acquired by SPM in October 2006. The applicants were also members of the New Zealand Meat Workers' Union (the Union). They say that they were unjustifiably dismissed from their employment for the purported reason of redundancy on 28 October 2010. They do not accept that the redundancies were genuine or undertaken in a procedurally fair manner and allege breaches of good faith on the part of SPM.

[2] SPM says that the applicants were dismissed justifiably for reason of redundancy when the Malvern plant was closed from 28 October 2010. SPM does not accept that the applicants are entitled to remedies.

[3] The applicants seek reinstatement to the same or no less advantageous position with SPM, varying compensatory amounts for humiliation and loss of dignity, reimbursement of any wages lost as a result of the unjustified dismissal, a penalty for each applicant for alleged breaches of good faith in the sum of \$10,000 and costs.

The issues

[4] The Authority needs to determine the following issues:

- Was the dismissal of the 15 applicants for reason of genuine redundancy;
- Was the dismissal of the 15 applicants procedurally fair and reasonable;
- If not, what remedies are available; is reinstatement practicable and are there issues of contribution and mitigation;
- Were there breaches of good faith and should there be an award of a penalties for breaches of good faith to each applicant?

[5] The dismissal of the applicants took place before 1 April 2011 and therefore the test for justification that will apply will be the test in s.103A that was inserted from 1 December 2004 by s.38 of the Employment Relations Amendment Act (No 2) 2004.

[6] As part of the objective assessment under s.103A, the Authority has to have regard to the statutory obligations of good faith dealing. In the Employment Court judgment in *Simpsons Farms Ltd v. Aberhart* [2006] ERNZ 825, Chief Judge Colgan stated the following with respect to good faith at para.[65]:

A fair and reasonable employer must, if challenged, be able to establish that he or she or it has complied with the statutory obligations of good faith dealing in s.4 including as to consultation because a fair and reasonable employer will comply with the law.

Was the dismissal of the 15 applicants for reasons of genuine redundancy?

[7] It is helpful to start with the role of the Authority in determining whether there was substantive justification for redundancy.

[8] The Court of Appeal in *GN Hale & Son Ltd v. Wellington Caretakers' IUOW* (1990) ERNZ Sel Cas 843; [1991] 1 NZLR 151 (CA) stated that an employer is entitled to make his/her business more effective including abandoning unprofitable activities, reorganisation or other cost-saving steps no matter whether or not *a business would otherwise go to the wall* and that the Court could not substitute its own opinion as to the wisdom or expediency of the employer's decision.

[9] These longstanding principles were revisited in *Simpsons Farms* where the Employment Court was considering the justification of a redundancy after the enactment of the test in s.103A of the Employment Relations Act 2000 (the Act). Chief Judge Colgan stated in para.[67]:

I do not consider that the recent statutory changes were intended to revisit longstanding principles about substantive justification for redundancy exemplified by judgments such as Hale ...

So long as an employer acts genuinely and not out of ulterior motives a business decision to make positions of employees redundant is for the employer to make and not for the Authority or even the Court, even under s.103A.

[10] With those longstanding principles in mind therefore, I objectively assess whether the decision to close the Malvern plant from 28 October 2010 resulting in the redundancy of all employees involved in meat processing, was what a fair and reasonable employer would have done in all the circumstances at the time the decision was made. The plant had not reopened at the time of the investigation meeting.

The lease arrangement

[11] By way of background to the plant closure, SPM and General Distributors Limited (GDL) had a lease arrangement at the Malvern plant until 1 November 2010 for the boning room. As part of the lease arrangement with GDL, there was a related agreement with Progressive Enterprises Limited (Progressive) that for the duration of the lease, SPM was the preferred supplier of slaughter services for bovine and ovine product required by Progressive for its South Island supermarkets and retail outlets.

The plant's main operation at that time comprised the slaughter of beef and sheep for Progressive for processing through the boning room.

[12] It was always the intention of SPM to upgrade the Malvern plant and increase freezing and storage capacity, modernise and increase production capacity and ultimately obtain the ability to operate as an export plant rather than for domestic supply only.

[13] Tony Miles is the Operations Manager for both AFFCO New Zealand Limited (AFFCO) and SPM. SPM is a subsidiary of AFFCO. Mr Miles said in his evidence that it was a preference of SPM to carry out the upgrade over time whilst continuing to process meat rather than to close the plant. The ability to continue to operate the plant and upgrade required a new agreement with Progressive following the end of GDL's lease on 1 November 2010. This was because the plant was an abattoir only and had no freezing capacity so SPM could only kill and supply fresh product to the domestic market, and without Progressive to take that supply, it was not feasible to continue to operate the plant. There was no dispute between the parties about that.

[14] It was the intention of SPM that if it entered into an agreement with Progressive it would move in time to take over and operate the boning room from Progressive. This would, in all likelihood, involve a transfer of the employment of the Progressive employees in the boning room to SPM. The period within which this may occur was known at the material time to be within about six months.

[15] An agreement with Progressive beyond 1 November 2010 was never entered into and it is the circumstances leading up to that the applicants have asked the Authority to consider because they say that their redundancy was not based on genuine reasons and there were ulterior or mixed motives in the redundancy as follows:

- SPM did not want to enter into a contract with Progressive to process its stock; and
- SPM wanted to de-unionise the plant if possible including any future workforce in the new plant.

[16] SPM says that it could not enter into a contract with Progressive following the end of the 1 November 2010 lease because it could not obtain the agreement to terms and conditions necessary to do so with the Union and its members.

[17] The bargaining forms part of the factual matrix in this case although the employment relationship problem is not one of bargaining but of 15 personal grievances and allegations of breaches of good faith. Although the factual background is largely the same for each of the applicants their claims do require separate consideration as do the claims for a penalty. The Union is not a party to the proceedings.

The collective agreement and commencement of bargaining

[18] At the material time, the applicants' work was covered by the SPM Malvern Employee's Agreement that came into force on 1 July 2009 and continued in force for 12 months expiring on 30 June 2010 (the collective agreement). I shall set out the clauses that are material to redundancy in that agreement. There was no definition of redundancy in the collective agreement. The first clause is clause 25:

25. REDUNDANCY

- (a) *Except in unforeseen circumstances, the employer shall give the union four weeks' prior notice in writing of impending redundancy. The above notice is to be prior to the issuing of termination notices to the affected employees.*
- (b) *The employer shall consult with the union before terminating an employee's employment due to the employees position becoming redundant, with object of identifying and considering alternatives to loss of employment.*
- (c) *Where the employment is terminated due to a lack of work, change in methodology, or reorganisation or other likely cause the parties agree to meet to discuss what redundancy compensation, if any, will be paid to effected employees.*

The balance of that clause refers to situations involving technical redundancy and transfer of undertaking and as they do not apply to this situation I shall not set those out. The other relevant clause that was referred to during the evidence was clause 26:

26. CHANGE TO PLANT AND METHODS

- (a) *In the event of the introduction of new or additional plant and equipment or the introduction of new or altered methods of processing, employees shall meet the employer's wishes in this respect.*
- (b) *Any adjustment to rates of pay and manning levels shall be discussed between the parties.*

Development

The parties have herein agreed and understand that the plant will be progressively upgraded commencing 30th January 2009 and completed over approximately 4 to 5 years to handle increased throughputs in lambs and Beef plus the capability to process Venison and Bobby Calves.

It is intended this upgrade will be progressive so as to allow continued processing without undue interruption.

It will include freezing and cold storage together with an upgraded boning room.

It is agreed an understanding exists between the parties that a new manning agreement will be discussed between the parties allowing for the additional throughput and a reduced unit rate. (If unit rates are in effect at the time.) for the increased manning and taking advantage to SPM of additional mechanisation but not so as to reduce the base rates/day that will form part of the new collective agreement.

[19] Bargaining was initiated in early May 2010 before the expiry of the collective agreement. Therefore, in accordance with s.53 of the Employment Relations Act 2000 (the Act) the collective agreement that would otherwise have expired on 30 June 2010 continued in force for a period not exceeding 12 months.

[20] Union claims were provided to the Malvern plant manager, Mark Kelly, in a letter from William Watt, the secretary of the Canterbury Branch of the Union dated 10 June 2010. The Union wanted the term of the agreement to be 18 months. It was expressed that because of uncertainty over the status and future operations of the boning room, it was desirable to have a six month and a 12 month term, there was a claim for a 5.5% increase over 18 months and for the redundancy agreement to be improved to industry-standard.

[21] One of the complaints was that no one from SPM would meet until 12 August 2010 when the first bargaining meeting was held. I accept that, with the benefit of hindsight, it was unfortunate that there was such a delay in the commencement of bargaining. The evidence from Mr Kelly and Mr Miles was to the effect that SPM did not intentionally delay the progression of the bargaining and there was criticism from them that the Union did nothing to progress the matter more quickly. Mr Kelly and Mr Miles referred in their evidence to periods of annual leave preventing bargaining at an earlier time and Mr Kelly said he wanted to prepare a proposed collective agreement. I find the delay was unfortunate but the evidence did not satisfy me it was a deliberate strategy on the part of SPM.

The negotiation teams and commencement of bargaining

[22] The negotiating team for the Union was Mr Watt, John Reid, President of the Canterbury Branch of the Union, and David Lewis who was the Union delegate on the Malvern site.

[23] The negotiating team for SPM was Mr Kelly, Mr Miles and the Human Resources Manager, Gregory Cox.

[24] Bargaining took place between the Union and SPM on 12, 13 and 17 August 2010. On 17 August, SPM proposed that, given the urgency of the matter, the parties attend mediation and that was set down for 26 August 2010. The bargaining time was emphasised by the Union because it was only about six hours. I shall address briefly the nature of the discussions as they took place on the days of bargaining.

[25] There were two mediations. One took place on 26 August and one on 3 September 2010. Somewhat unhelpfully whether they were confidential or not was a matter of dispute. I can however determine this matter without needing to resolve that issue and/or refer to matters that were discussed at mediation.

12 August 2010

[26] There was a bargaining process entered into for the renewal of the collective agreement on this date. SPM presented a collective agreement with the proposed changes it wanted set out in that agreement. Although the parties may have been able to move on some claims, SPM was firm on two matters. The first was a proposal to have a change to the rates of pay for employees employed after 30 August 2010 and

also a change to the overtime rate. What it proposed was a grandfathering of the overtime rates and hourly production rates for existing employees including the applicants. SPM also wanted a term of two years for any agreement with the Union.

[27] There was some dispute as to whether Mr Watt raised clause 26 of the collective agreement on this particular day of bargaining. Mr Watt said about clause 26 that it was not the correct time to negotiate reduced rates for new employees because they could not be negotiated until after the collective agreement had been agreed to. Mr Watt said in his written evidence that the Union was *philosophically uncomfortable with a provision that provided for inferior terms and conditions for two groups of members employed under the same CA*.

[28] SPM said it wanted rates for new workers that would give it a competitive advantage over other plants and certainty of terms if it subsequently entered into an agreement with Progressive including for the taking over of the boning room and the employees in that room.

13 August 2010

[29] At this next bargaining meeting, Mr Miles advised the Union negotiating team that SPM needed to reach agreement with the Union so that it could retain Progressive along the lines in its proposed collective agreement. I am satisfied that it was put that if agreement could not be reached then the plant could close.

[30] The Union's evidence at the Authority's investigation meeting was that whilst these statements were made, they were untrue. Mr Watt, for example, said in his written evidence "*why did the respondent require the Union to sign the proposed agreement for 300 prospective employees when it only required the present staff of approximately 30 workers to carry out the Progressive work?*" Because the number of workers whose pay and overtime rates would be grandfathered was presented differently at various times as 30, 39 and 40, I record here that 39 seemed to me to be the correct number.

[31] The question Mr Watt posed in his written evidence and talked about in his oral evidence at the Authority investigation meeting was indeed the sharp point of difference between the parties. Mr Watt, in his oral evidence, said he believed SPM never contemplated keeping Progressive onsite and that he felt the whole bargaining was "*a charade*" and that SPM "*needed a fall guy to blame*". His view, and the view

of the negotiating team for the Union, was that they were there to negotiate for current members and not for lesser terms for new employees. Mr Watt also said in evidence that he offered an agreement that made it possible for SPM to enter into a deal with Progressive based on a settlement for 39 employees and then negotiate after 18 months or earlier for those employees who came from Progressive to SPM in the boning room using the mechanism under clause 26 of the collective agreement.

[32] SPM's view was that it could not agree a fixed unit cost agreement with Progressive unless it reached agreement with the Union about the terms of its new employees and agreement to a two year term. It also wanted the ability to do 480 minute shifts and work day/night and weekend shifts. SPM offered additionally to the Union that all existing staff would be permanent. Mr Miles explained that that was a significant benefit to them as export plants are seasonal and there would therefore be some seasonal uncertainty for workers over the length of their employment each year. There was also an offer by SPM of a 1.8% increase per annum for the two year term for the 39 workers. The Union did not consider the offer of permanency for its employees, a particularly beneficial claim, and thought the percentage increase was too low. Mr Watt was also of the view that it could not negotiate a boning room agreement until it knew the manning and production/unit rates. This was not accepted by Mr Miles who said that this could have been negotiated on the basis of current production and manning levels in the boning room. Mr Watt said that SPM was consistently confused about the term of the agreement that the Union was offering. That may have been so although I was not persuaded in the overall circumstances that this would have made any material difference to the applicants.

[33] The Union remained sceptical throughout the bargaining that SPM needed lesser terms for new employees to enter into an agreement with Progressive. In good faith bargaining a request can be made by a union or an employer for information from the other party. There is also a mechanism within s.34 of the Employment Relations Act 2000 to deal with any response that the information may be confidential. There was nothing to suggest that information had either been requested or, if so, withheld.

17 August 2010

[34] On 17 August 2010, it became clear that the Union would not agree to some of the claims that SPM proposed and SPM suggested the parties attend mediation which was set for 26 August 2010.

[35] There were then two allegations by the Union of undermining of the bargaining. I heard a lot of evidence about these, but will try and set them out as briefly as possible so as to keep this determination to a reasonable length.

[36] The first matter concerned Mr Miles telephoning the National Secretary of the Union, David Eastlake. He said he did that because he was frustrated about “*not getting through to the Union about the Progressive situation*” and also because he thought Mr Lewis was saying things that were untrue to the members. When he found out about this call, Mr Watt was unhappy although he does not accept that he was abusive in a subsequent discussion with Mr Miles.

[37] The other alleged undermining of the Union that the Authority heard evidence about concerned a meeting Mr Kelly held onsite. During that meeting, he read from a letter dated 19 August 2010 telling the employees present SPM’s offer and the consequence if the terms were not agreed – *there is much at stake; failure to agree may result in the loss of key local customers and the ultimate closure of the plant for an extended period of time while export construction is finished*. The letter recommended employees obtain a copy of the draft Agreement and be aware of what the Company is offering and meet with the representatives prior to the mediation on 26 August 2010. Mr Watts was not, I find, advised of that meeting within a reasonable time and there was a dispute about whether he was advised in the usual manner. Mr Lewis was though present on 19 August and he challenged Mr Kelly at the time of the meeting. The meeting was able to be recalled by virtue of those heated discussions by several applicants. The Union and SPM were then diverted for a short time away from the issue of bargaining with some formal communication from the Union advising that legal action was being considered over the alleged bypass issue.

[38] On 25 August Mr Watt arranged a distribution of his own letter and the Union’s view of negotiations to members. This letter was distributed to members on site by Union organiser, Tony Matterson. Mr Watt’s letter contained the view of the Union that they were sceptical that SPM needed to set the terms for prospective

employees before entering into an agreement with Progressive and that it was his view that he believed the Union's proposal would enable an agreement to be entered into by Progressive.

[39] Mr Matterson had also been onsite on 24 August 2010 and he had spoken to some members at SPM and also to some Progressive members from the boning room. Mr Kelly I find was very concerned about the discussion that took place with the Progressive workers as he felt that it was potentially scaring them off working for SPM and preventing the reaching of a successful deal with Progressive. That this was the point of the meeting was denied by the Union. At or about this time objectively assessed the relationship between the Union and SPM deteriorated.

[40] Mr Watt tried to arrange Union access for a meeting on site before 26 August. Mr Kelly said the kill was too high and for a short period whether mediation would take place at all was in jeopardy. The Union did, however, agree in good faith to attend mediation but had not, as at the date it took place, had an opportunity for the negotiating team to talk to the members onsite. It would have been preferable for the Union to meet with its members. In reality I do not find that in all probability it would have made a difference to the outcome. There was focus at that time by the Union on the bypass issue. SPM's offer that was talked about by the Union with most of the applicants on 30 August 2010 was no different to that which would have been presented before 26 August 2010 and the outcome therefore that I shall shortly come to would likely have been the same.

[41] Mediation took place on 26 August 2010. Mr Kelly asked the Chief Executive of SPM, Hamish Simson, to attend this mediation in his words, *to demonstrate how serious things were with Progressive*.

Union meeting with members 30 August 2010

[42] Mr Watt, Mr Matterson and Mr Lewis attended a union meeting with the members. Most of the applicants were present at the meeting although not all could remember it clearly.

[43] Mr Watt said in evidence that the meeting was not a ratification meeting but a meeting for him to talk to members about SPM's offers and, as he put it in his evidence, *highlight the difficulties with the offer*. Mr Watt acknowledged in his evidence that he appreciated the time limits with the lease expiring on 1 November

2010. He accepted *things were getting close*. It is important to set out that SPM had to advise Progressive and other customers some time in advance of the end of the lease date if they were in a position or not to finalise an agreement. It was not something that could be left to the last minute because Progressive had to find an alternative supplier and give notice to its own employees. The Union I find understood this although whilst appreciating that time was getting close still expected bargaining to continue at mediation.

[44] The evidence from Mr Watt was that the meeting was not a ratification meeting. I conclude it must have been an indication from the members about SPM's offers because Mr Watt was satisfied, as he put it, that the Union was *on the right track* after the meeting. One of the applicants said in evidence there was a show of hands. The evidence did not satisfy me that the Union advised Mr Kelly of the outcome of the meeting. Mr Kelly recalled Mr Watt and Mr Matterson walking straight past him and not saying anything although he said that he recalled prior to the meeting the word ratification being used.

[45] Mr Kelly received a message from someone who was not a union official that the employees were not going to accept the company offer. He expanded on this to say that he had spoken to a supervisor who, although not present at the meeting, had in fact spoken to others who were present. For example, Mr Kelly said he had heard one female employee had supported accepting the offer but had been shouted down. Mr Watt denied that was the case. He said there had simply been a discussion with that member.

[46] Mr Kelly said that before that time and the understanding that he obtained from talking to a supervisor that the offer had been rejected on 30 August 2010, he did not *seriously think about closing the plant*.

30 August-3 September 2010

[47] Mr Miles said that between 30 August and 2 September 2010, it became clear in discussion with Mr Simson and Mr Kelly that SPM could not finalise a deal with Progressive. Before coming to this point though it is common ground that there was no discussion with the Union about what had happened at the union meeting on 30 August 2010. Whether SPM at this stage acted in accordance with good faith and fairness will be considered. It is important to set out though that I was not satisfied

from the evidence of the applicants that they would have accepted that offer made by SPM if there had been an opportunity for a ratification vote.

[48] Mr Simson sent a letter on 2 September 2010 (it was dated 3 September 2010) to the Union. The letter gave the Union notice under the provisions of clause 25 (a) of the collective agreement of impending redundancy of all employees at the SPM Malvern site. The reason provided was that SPM was no longer in a position to guarantee Progressive extended contractual terms with the existing uncertainty on future staffing and must allow them sufficient time to find suitable alternatives. The letter provided that SPM considered it essential to give early notice to employees to allow them the greatest possible opportunity to seek alternative employment, as any payment on termination would be likely to be restricted to payment of holiday entitlements. The letter provided that the company proposed to use a portion of the time set aside in the mediation to discuss the implications of the notice.

[49] Mr Watt said he was shocked to receive the letter as the negotiating teams were entering mediation the following day to continue negotiations. He said there had been a *unilateral decision* made to close the plant down and the Union had not had an opportunity to hold a ratification meeting to put the offer to the members. Mr Watt telephoned Mr Steve Mills who was the Meat Processing Manager at Progressive. As referred to earlier the Union also had members at Progressive in the boning room. He asked Mr Mills the effect on Progressive's employees with respect to SPM's decision to close the plant. Mr Watt said that Mr Mills told him that a deal was going forward with SPM and a memorandum of understanding and a heads of agreement had been drawn up and executed between the two companies.

[50] The mediation set for 3 September 2010 proceeded as previously arranged. Mr Watt sent a letter dated 3 September 2010 after the mediation advising, amongst other matters, that SPM was continuing to negotiate with Progressive and that Progressive was surprised to hear of the impending redundancies. Mr Watt noted that SPM would be failing in good faith if it continued to negotiate with Progressive while representing to the Union that was not happening. He also advised in his letter there was nothing to prevent SPM concluding a collective agreement with the Union in order to retain the contract with Progressive. He said, in his letter, it appeared that SPM had sabotaged negotiations with both the Union and Progressive and he

concluded his letter by referring to clause 26 of the collective agreement and said SPM was contractually bound to continue the members' employment.

[51] The day after the 3 September 2010 mediation, the first significant Christchurch earthquake occurred. There was a dispute in the evidence as to whether the Union could have met with its members after mediation and before the announcement was made to all employees by SPM on 6 September 2010. I accept the Union evidence about this that it is likely even if they had attended at the plant the employees would have left for the day. The result was that of the applicants only David Lewis knew about the impending redundancies when there was a message to all the applicants from SPM to attend at a meeting on 6 September 2010.

[52] On 6 September 2010, the employees were asked to attend at the Christchurch plant where they were addressed by Mr Miles and Mr Kelly. Mr Matterson attended as the union members' representative. Before Mr Miles addressed the workers, Mr Matterson explained in his evidence that he had had difficulty being allowed to meet the members on site before the meeting. Several of the applicants referred to that in their oral evidence at the Authority's investigation meeting. Mr Matterson said that he was told by Mr Kelly he had no right to have an all up meeting on site with members before the announcement was made. Mr Kelly suggested seeing the members one at a time. A heated exchange took place for which Mr Matterson later apologised. Mr Matterson then walked off site as requested and members followed him onto the road where they asked questions about the mediation and letter from Mr Simson. Mr Matterson was allowed to enter the site and attend at the meeting at which Mr Miles addressed workers at about 9.40am.

[53] The Union was critical at the lack of counselling available at that time to members. Mr Kelly did subsequently explore EAP options, however, felt that because the notice of termination had not been given it would have been premature to offer that at that stage.

[54] A letter was distributed by SPM at that meeting which provided that SPM was advising employees of the possibility of significant redundancies at Malvern in the near future. The reason expressed in the letter was the anticipated loss of the Progressive business on or before the expiry of the lease on 1 November 2010 and further that, as a result of the breakdown of negotiations with the Union and the failure to secure any long term certainty for existing and future staff with the Union, it

was no longer in a position to guarantee Progressive extended contractual terms, and in good faith must allow them sufficient time to find suitable alternatives.

[55] The earliest intended date for termination of employment was expressed to be 6 October 2011, although it was noted that this could be extended on a weekly basis depending on the requirements of Progressive.

[56] Mr Simson responded to Mr Watt's letter of 3 September in a letter dated 7 September. The Union, however, did not receive that letter before 14 September because its offices were closed as a result of the earthquake. In that letter to Mr Watt, Mr Simson advised that matters had moved past the point initially anticipated of resumed bargaining at mediation on 3 September 2010. He said in the letter that Progressive wished to know with certainty about the future contracting of processing operations past the expiry of its lease so that it could give their own staff four weeks' notice as required in the collective agreement and another four weeks to make alternative arrangements. Mr Simson said clause 26 related to a situation where it was anticipated the plant would be remaining open throughout the rebuild but this was no longer the case. He did not accept that SPM contracted to retain staff throughout the rebuild and said that the intended redundancy situation was genuine and real and arose not from the rebuild but from the termination of the Progressive contract. It is clear that Mr Simson considered the situation to be of the Union's making as he says in the penultimate paragraph:

The staff as you know were advised on Monday. I have advised Progressive that we are unable to carry forward contract negotiations, which personally I have spent more than a year working hard to conclude and will shortly have to give notice to smaller customers that the plant will close based on the Progressive situation again many of which I have been personally involved in bringing to the plant in order to maintain work for the staff at Malvern. The responsibility for this I place squarely at your door.

[57] An application for an interim injunction was lodged on or about that same day to prevent SPM from continuing with its process and making its employees redundant. The view of SPM was that the proceedings were premature and there had not been a consultation meeting under the collective agreement. Ms Coulston was not the solicitor on behalf of the Union in the telephone call with the Authority on the injunction proceedings. I record that these proceedings were subsequently withdrawn.

[58] Ms Coulston alleges that there was no communication from SPM about consultation between 3 September and 17 September. Mr Malone submits that after the interim application was lodged, the solicitor then acting for the Union said he would confirm whether or not the Union would agree to attend a meeting so there could be consultation.

[59] I want to deal at this point with the thrust of Ms Coulston's submission that SPM had essentially given actual notice of redundancy on 3 September 2010 and therefore she refers to the consultation meeting that did take place on 1 October 2010 as *farcical*. I do not accept those submissions. I find that SPM gave notice on 2 September under s 25(a) of the collective agreement in writing of impending redundancy to the Union. Ms Coulston submits that Mr Miles and Mr Kelly spoke to both the Union and employees about the inevitability of the plant closing at that early stage. Mr Miles and Mr Kelly said they spoke of the likelihood of that occurring. I accept that the Union and applicants may well have taken, and sensibly so, that it was almost inevitable the plant would close from the discussion on 3 September 2010 and announcement on 6 September 2010 and other written information. The process though under clause 25 required that notice of impending redundancy is given prior to the issue of termination notices. SPM did not give notice of termination to employees on 6 September under the terms of the collective agreement. They did not give notice of termination to employees until 6 October 2010. Prior to giving that notice SPM was required to consult with the Union with the objective of identifying and considering alternatives to loss of employment and to meet with the Union to discuss what redundancy compensation if any was to be paid. That occurred at the meeting on 1 October 2010.

[60] I prefer Mr Malone's submission that SPM had to consider some further matters. It still had to talk as at 3 September 2010 to Progressive and other suppliers so it could understand what their needs were. It was still required under the collective agreement to consult with the Union about alternatives to loss of employment and discuss if any redundancy payment would be made. I also accept that from SPM's perspective it was waiting to hear from the Union following the telephone conference with the Authority about the interim proceedings and that accounted for the delay between 6 September 2010, Ms Coulston's letter of 23 September and 1 October 2010 when the meeting for consultation took place. I am not satisfied that I can read into

that delay that there was no intention as at 6 September 2010 to comply with the contractual obligations about consultation.

[61] Ms Coulston wrote to Mr Malone by letter dated 23 September 2010 and requested a meeting to discuss the following matters:

- (a) The alleged redundancy situation;
- (b) Alternatives to the alleged redundancy situation;
- (c) SPM's failure to consult with respect to the alleged redundancy;
- (d) Redundancy compensation.

[62] It was duly agreed that there would be a meeting between the parties with the presence of a mediator on 1 October 2010. In between those dates, on 21 September 2010, Mr Mills wrote to Mr Simson and confirmed that Progressive no longer required SPM's processing services from 1 November 2010. In his letter, he referred to developments in early September and in particular SPM's inability to complete negotiations with Progressive within a timeframe. He set out that this was due to SPM's ongoing inability to finalise collective negotiations with the Union for the slaughter staff so as to give Progressive the necessary assurance of continuance and present cost structures.

[63] On 1 October, those in attendance at the consultation meeting were Ms Coulston, Mr Watt, Mr Matterson and Mr Lewis and for SPM Mr Malone, Mr Kelly, Mr Miles and Mr Cox. The Union commenced the discussion about the genuineness of redundancy, payment of compensation and re-employment and there was quite a lengthy discussion that took place between the parties. The meeting was recorded and I have a copy of the transcript as well as the recording. Counselling, support and assistance with CV preparation was offered at this time for employees. Ms Coulston submitted that issues of redundancy compensation and re-employment had already been predetermined and that the counselling, whilst offered, was too late. SPM was going to go away from the meeting to consider the discussion relating to redundancy compensation. It was accepted at that meeting that in light of the letter from Progressive there were no real alternatives to redundancy.

[64] On 6 October 2010, employees were advised that there was no alternative to a plant closure and that the plant would close on 29 October 2010. On that date they were given notice of termination. Employees who were interested in working as a casual before the re-start to put through trial meat quantities to gain export certification and to test run new plant and equipment were asked to register with Mr Kelly or their supervisors.

[65] Mr Miles also wrote to Mr Watt by letter dated 6 October 2010 and, amongst other matters, confirmed that it had considered the Union request and was not prepared to extend beyond the current redundancy provisions in the agreement, having given the earliest possible notice of redundancy. He set out, amongst other matters, the reason for this being that Malvern had been unprofitable for some time, however employees had still been employed until the company was in a position to develop the site and expand. Mr Miles also referred to what he considered to be the Union's part in the result that SPM could not conclude a commercial arrangement with Progressive. He referred to the cost to SPM being large with lost revenue making what was already a bad situation worse with no ability to cover fixed and other costs. He did say that significant compensation offered by the Union for SPM employees would be viewed favourably by the company and would entail a review of the current stance. However, SPM would remain with its position unless advised otherwise.

[66] The final day before the plant closed was 28 October 2010.

Conclusions as to genuineness of the redundancy

[67] The Authority can objectively assess the genuineness of a redundancy including, for example, whether an employer's evidence that a redundancy was for genuine commercial reasons was in fact a sham or an excuse for a dismissal for another reason. The Authority, though, cannot substitute its own view or second guess the commercial decision made by SPM not to enter into an agreement with Progressive and/or Progressive with SPM.

[68] All employees in meat processing at the Malvern plant lost their jobs when the plant closed from 28 October 2010. Progressive advised in writing on 21 September 2010 that it had found another supplier and no longer required the services of SPM.

[69] Ms Coulston referred to SPM having mixed motives or ulterior motives in making the applicants redundant. She referred the Authority to the Employment Court judgment in *Hill v. Cantec Services* [1993] 1 ERNZ 51. The Tribunal in that case concluded the loss of a contract and supplier work for employees was not the operative reason for the selection of them for redundancy but rather their refusal to accept new individual employment contracts. I find, in this case, that the most relevant or significant reason for the redundancies was that the plant closed. This was because SPM and Progressive did not enter into a supply agreement with Progressive to continue to use the company's services. I find the plant closure was the operative reason for the redundancies. *Hill* is distinguishable.

[70] Ms Coulston submits that SPM never intended to enter into an agreement with Progressive. Mr Miles and Mr Kelly gave evidence that that was their intention. There is some evidence that would support that intention. Mr Kelly's meeting with employees on 19 August 2010 objectively assessed is inconsistent with a desire not to enter into an agreement with Progressive. Mr Miles telephoning Mr Eastlake and suggesting he be involved in the bargaining also seems inconsistent. Then there is Mr Watt's discussion with Mr Mills on or about 2 September 2010. Mr Watt gave evidence that he was told by Mr Mills SPM and Progressive had already started to finalise an agreement with a heads of agreement and further that Mr Mills was surprised when Mr Watt advised him about the contents of the letter from Mr Simson. I am not satisfied from the evidence that SPM did not intend to enter into an agreement with Progressive and I am not satisfied that the bargaining was a *charade*.

[71] Ms Coulston submits the evidence supports the redundancies were an attempt to de-unionise the plant. Lower rates for prospective employees were unpalatable to the Union and indeed the evidence supports to the applicants. The Union may well have been of the view that it was an attempt to de-unionise the plant. There is no evidence though for me to be satisfied that was the reason for the redundancies.

[72] Ms Coulston submits that SPM used the negotiation with Progressive to put pressure on the employees to agree to terms in the proposed agreement for inferior terms of conditions of employment for prospective employees. She submits that SPM was not truthful in saying that those terms were required before it could enter into an agreement with Progressive. I am referred to the Employment Court judgment of *New Zealand Seafarers Union Inc v. Silver Fern Shipping Ltd* [1998] 3 ERNZ 768.

[73] *New Zealand Seafarers* was a successful application for an interim injunction that prevented the employer making certain employees redundant. The circumstances in that case were that Silver Fern was negotiating the terms of a new collective contract with its employees in a tender it had submitted to another company, Coastal Tankers Limited, for manning of a new ship was rejected and it was advised to resubmit a tender at a reduced rate. Silver Fern then advised its employees it would be necessary for them to accept a reduction in their terms and conditions of employment, the proposed Silver Fern contract was found to have been a loss for each employee of at least 20% of their annual income, otherwise it would have to implement redundancies. It was argued as part of the case for the employees that the two companies, Coastal and Silver Fern, were essentially one and the same and that communication between the two about the tender was effectively a farce.

[74] It was found arguable in *New Zealand Seafarers* that notification of redundancies and intended dismissal may be a pretext to compel the employees to agree to a substantial variation of the current collective agreement by way of a significant cut in their remuneration. It was arguable that employees were not surplus to requirements because if they agreed to substantial cuts in their remuneration they would be retained as crew members on Coastal tankers. Also, it was arguable that Coastal and Silver Fern acted together to contrive the need to reduce manning costs on the ships.

[75] SPM told the Union it could not enter into an agreement with Progressive unless certain terms were agreed particularly about prospective employees. The evidence supports that the terms would not have been acceptable to the Union or the members. These sorts of situations involving proposed changes to terms against the possibility of redundancy are always going to be viewed by employees with significant suspicion and reservation. Additionally, in this case, there was a deep level of distrust of SPM from the Union. As bargaining progressed, it is clear, objectively assessed, that the relations between SPM and the Union deteriorated significantly.

[76] I find the situation of SPM distinguishable from *New Zealand Seafarers*. The employees at *New Zealand Seafarers* could have, after notification of redundancies, agreed to a variation of the agreement and been retained as crew members so arguably were not surplus. SPM withdrew its offer to its employees before it gave notice to

Progressive from either 3 or at the latest 6 September 2010. That there would be redundancies then became a reality. It was not therefore on all fours with *New Zealand Seafarers* where employees could have accepted a variation of the agreement after notification of redundancies. There is no suggestion in this case that Progressive acted other than entirely independently to SPM and that its arrangement with SPM was a commercial one and that Progressive would negotiate on the basis of its needs and requirements.

[77] Ms Coulston also referred to another Employment Court case of *Davis v. Ports of Auckland Ltd* [1991] 3 ERNZ 475. It was alleged in this case that there was pressure on employees in the form of redundancy notices to sign individual employment contract on terms required by the Ports of Auckland. The application for interim orders preventing the Ports of Auckland from terminating employees' employment on the basis of redundancy was declined. In that case, Judge Travis found it was not for the Court or the Authority to review the business judgment of the employer but employees are entitled to be treated fairly and reasonably in circumstances where the termination of their employment may be in issue or contemplated.

[78] I accept Mr Malone's submission in terms of the genuineness of the redundancies that SPM did not have to enter into an agreement with Progressive. It could not be forced to do so. It is not for the Authority to substitute its opinion for SPM's decision not to enter into an agreement with Progressive or second guess the reason for that decision. Ms Coulston submits that there was no relationship between the lesser terms proposed for new employees and the Progressive contract. What is known is that the likely employment of employees from the boning room did fall within the proposed term of two years for a contract with Progressive. There is no question that terms would have to be negotiated for those employees with SPM and there is some basis for Mr Malone's submission and supported by the evidence that the rates for all work would have to be set with Progressive at the start of the two year period including for those employees. I was not satisfied that the work under the Progressive contract would only be undertaken by the 39 employees for the two year period. Objectively assessed if SPM entered into an agreement with Progressive on the basis of a cost model where it paid the employees from the boning room X amount and in six months time in negotiations with the Union there was no agreement to that then there would be an issue for SPM. I accept Ms Coulston's submission that the

employment of some employees under the lesser rates may have fallen outside of the two year agreement period with Progressive and therefore rates paid to those employees would have no bearing on that. That level of detail was never really explored in bargaining because the Union's position was always clear that it was there to bargain for its current members. For completeness, I do not find clause 26 prevented redundancies taking place. If there was no agreement with Progressive then it was not intended to keep the plant open.

[79] In conclusion I find that after it became clear that no agreement would be entered into with Progressive beyond 1 November 2010 and the plant would close, a fair and reasonable employer would have concluded the applicants' positions were surplus to the requirements of SPM. I find that the redundancies of the 15 applicants were genuine and dismissal of each of the applicants substantively justified.

Was the dismissal of the 15 applicants procedurally fair and reasonable?

[80] There is a challenge to nearly every aspect of the process in this case starting from the initiation of bargaining on 5 May 2010 to the giving of termination notice on 6 October and leading up to the final day. The claims for a penalty for a breach of good faith overlap in some respects with the issues of procedural fairness.

[81] The statutory obligation of good faith applies when an employer is making employees redundant – 4(4)(e) of the Act. Section 4(1A)(b) provides that the duty of good faith requires parties to be active and constructive in establishing and maintaining an employment relationship in which parties are amongst other things, responsive and communicative. Section 4(1A)(c) of the Act provides that an employer who is proposing to make a decision that is likely to have an adverse effect on the continuation of an employee's employment must give that employee access to relevant information and an opportunity to comment before the decision is made. This includes the mandatory obligation to consult with potentially affected employees before a decision is made.

[82] In *Cammish v Parliamentary Service* [1996] 1 ERNZ 440 the Employment Court stated with respect to consultation:

Consultation is to be a reality, not a charade. The party to be consulted must be told what is proposed and must be given sufficiently precise information to allow a reasonable opportunity to respond. A reasonable time in which to do so must be permitted.

The person doing the consulting must keep an open mind and listen to suggestions, consider them properly, and then (and only then) decide what is to be done. However, consultation is less than negotiation and the assent of the persons consulted is not necessary to the action taken following proper consultation.

[83] I turn firstly to whether there was a breach of the good faith statutory obligations by SPM in failing to clarify with the Union what had happened at its meeting on 30 August 2010. SPM had reached a point where they were proposing to make a decision that they not finalise an agreement with Progressive. I find that the decision not to finalise an agreement with Progressive was likely to result in the almost inevitable closure of the plant and that would have an adverse effect on the continuation of the applicants' employment. Most of the applicants' gave evidence that they were expecting bargaining to continue in good faith on 3 September 2010 at mediation following the 30 August 2010 meeting. This was one of those very rare situations where the redundancies could have been avoided by ratification of the collective agreement. SPM announcing notice of impending redundancies to the Union without first checking whether the offer was acceptable was unexpected. There were three working days between the Union meeting on 30 August 2010 and the mediation on Friday 3 September 2010 and that was more than sufficient time for SPM to confirm the outcome of the Union meeting and tell the Union about the urgency of the situation putting a time limit on giving notice if required to Progressive. There could have been a ratification meeting within those three days. If an approach had been made by SPM to the Union about the outcome of the 30 August 2010 meeting it would have reduced the shock for the applicants on 6 September 2010.

[84] Mr Malone's submission is that communication with the Union on that day would have made no difference. I do not accept that. The applicants could have considered the offer against the likelihood of redundancy if it was not accepted rather than considering it with a view that the parties were returning to bargain in three days time. The reality of a redundancy situation is that the employees have not done anything wrong and good faith behaviour addresses the inequality of power in employment relationships. I find that SPM breached its consultation and good faith obligations in this respect and its action were not those of a fair and reasonable employer particularly in the circumstances of this case. I have not found that there

was a real opportunity for the Union to talk to the applicants prior to 6 September 2010.

[85] Ms Coulston submits that there should have been counselling available for employees on 6 September 2010. The announcement that day that redundancies were very likely came after a significant earthquake. That was very unfortunate although of course not something SPM was responsible for. I accept that it was preferable for the applicants to know of the likelihood of redundancy as soon as possible. It would have been a good idea for a counsellor to have been present for the applicants to talk to if required but I am not satisfied that it was a breach for SPM not to have had a counsellor at that stage of the process. SPM provided assistance in the form of counselling and WINZ support in early October when notice of termination was given and that was what a fair and reasonable employer would do.

[86] It was unfair though I find that Mr Matterson was restricted in the manner of meeting with the applicants before the company made its announcement on 6 September 2010 and was required to move off site to talk to them. The applicants observed that SPM was not treating their representative with respect at a time when they needed support. Mr Kelly's evidence did not satisfy me there was a good reason not to allow whatever sort of meeting Mr Matterson wanted with his members.

[87] The Union say that there was pre-determination in respect of considering alternatives to redundancy, payment of redundancy and re-employment. I have already dealt with the 30 August 2010 issue. From that time there was a delay between 6 September and the meeting on 1 October 2010 that was unfortunate. Both parties agreed that following the letter from Progressive dated 21 September 2010 there was no real alternative to the plant closing. In reality there was little alternative to redundancy once there was to be no agreement with Progressive. There was though some consultation about alternatives and I find no breach in that regard.

[88] SPM had an early view on payment of redundancy that it was unlikely. They are entitled to have a view. Mr Miles did express a view at the 1 October 2010 meeting the employees had been compensated by keeping the employees in work over the years when the plant was not profitable. The relationship between SPM and the Union was one in which they spoke frankly with each other. The Union had an

opportunity to respond and did strongly to that comment. SPM went away to think about the claims made. It was not contractually obliged to pay redundancy. SPM gave reasons for not paying redundancy. Clearly the failure to pay redundancy was very disappointing for the applicants. There was discussion about re-employment but no commitment to that.

[89] I have had careful regard to the transcript of the meeting on 1 October 2010 and the evidence given about pre-determination. There was at that time a lengthy discussion about redundancy, re-employment, clause 26 and the redundancy itself. I am not satisfied that the outcome of the meeting on 1 October was predetermined or that the parties attended and discussed the issues in other than good faith. Both were legally represented.

[90] There were further criticisms about a breach of SPM in not allowing or making it difficult for Mr Matterson on site to talk to the applicants about job opportunities on 13, 14 and 15 October 2010. There was significant dispute between Mr Kelly and Mr Matterson about this matter. Mr Matterson did get access on 14 and 15 October 2010 and was able to talk to members about job opportunities. He was able to find work for at least one member. Both Mr Kelly and Mr Matterson have strong views about this access matter on the particular days. The statements of evidence from the applicants were quite strikingly similar about this union access issue. In oral evidence the applicants did not talk of any actual unfairness arising to them as a result of this matter. I was not satisfied for example that any of the members missed out on a role or that Mr Kelly would have intended that they would have. I do not find any procedural unfairness arising as a result of that issue to the applicants.

[91] On 6 October 2010 the employees were given notice of termination. Although the Union was not present that matter was not referred to by any of the applicants as causing them any particular concern. I do not find any procedural unfairness to them as a result.

[92] In conclusion I have found that parts of the process were unfair. The first was a breach by SPM of its consultation and good faith obligations following the 30 August Union meeting and before giving notice of impending redundancies. The

second was the restriction on Mr Matterson meeting with his members on 6 September 2010. I did advise Ms Coulston and Mr Malone that the Authority may view this matter as one of unjustified disadvantage rather than unjustified dismissal – *Simpsons Farms*. I find that is the nature of the grievance in front of the Authority.

[93] I find that the applicants each have a personal grievance that they were unjustifiably disadvantaged in their employment but not unjustifiably dismissed. They are entitled to remedies.

Remedies

[94] I have found that the redundancies were genuine as a result of the plant closing from 28 October 2010. I accept Mr Malone's submission that reinstatement therefore would not be practicable. There is no contractual obligation for preferential re-employment and many of the applicants did not want to return to SPM in any event. There is nothing stopping the applicants applying for roles at the upgraded plant.

[95] The remedies therefore in terms of the personal grievance are limited to compensation for hurt and humiliation. There is no issue of contribution in terms of the unjustified actions I have found.

David Lewis

[96] Mr Lewis had 14 years of service with SPM and its predecessor. He wanted \$13,000 compensation. Mr Lewis is not entitled to be compensated for the loss of his job because I have found the redundancy was genuine but is entitled to be compensated for the unjustified actions that I have found if the evidence supports he suffered hurt and humiliation because of that. Mr Lewis said that he was shocked at the 6 September 2010 meeting although because he had been involved as a delegate at the 3 September mediation did have some advance notice. He was expecting bargaining to continue on 3 September 2010. Mr Lewis also said in his evidence that Mr Kelly did not permit a meeting between the union members and Mr Matterson at a very stressful time. Mr Lewis did take some stress leave in September although some of that may have been for earthquake related matters. I was not satisfied that there

was any intentional withholding of his pay slip and if it was delayed then it seemed an administrative issue.

[97] I find that Mr Lewis was distressed by the events regarding the announcement of impending redundancies and the way Mr Matterson was treated on 6 September and that a fair award would be \$4000 compensation.

[98] I order South Pacific Meats Limited to pay to David Lewis the sum of \$4000 without deduction under s. 123 (1) (c)(i) of the Employment Relations Act 2000.

Garry Smith

[99] Mr Smith had 24 years of service with SPM and its predecessor. He wanted \$17,000 compensation. Mr Smith is not entitled to be compensated for the loss of his job and the financial impact of that. That is because I have found the redundancy was genuine. He is entitled to be compensated for the unjustified actions that I have found if the evidence supports he suffered hurt and humiliation because of them. Mr Smith is the longest serving of all the applicants. He said that he was quite shocked at the meeting on 6 September but in the back of his mind he knew it was going to happen and that none of the workers *would have signed the contract*. Mr Smith said that Mr Miles told him in a meeting in August that if the contract was not signed by October the plant would close and the workers would not get any redundancy. Mr Miles denied that he said that and said the only matter talked about in August was that if it could not get agreement with the Union then SPM could lose Progressive and the plant may shut. I was not satisfied from the evidence as to the context of the statement if one was made. I have therefore not placed weight on it. Mr Smith spoke of the *fighting* between SPM and the Union. Mr Smith was aware of the possibility of the plant closing but still experienced shock on 6 September 2010. In his written evidence he referred to the Union official not being allowed on site. I find that a fair award would be the sum of \$4000 compensation.

[100] I order South Pacific Meats Limited to pay to Garry Smith the sum of \$4000 without deduction under s. 123 (1) (c)(i) of the Employment Relations Act 2000.

Jim Seymour

[101] Mr Seymour had 17 years of service with SPM and its predecessor. He seeks \$15,000 compensation. Mr Seymour is not entitled to be compensated for the loss of his job and the financial impact of that. That is because I have found the redundancy was genuine. Mr Seymour said that he would have been at the 30 August meeting and he thought the terms offered were *pretty poor*. He said that he thought the Union would go away for negotiation. He described himself on 6 September 2010 as pretty angry and quite shocked and that he felt the treatment received was heartless and brutal.

[102] I accept that Mr Seymour was shocked with the announcement and had an expectation of continued bargaining taking place prior to the announcement. I find that a fair award would be \$4000 compensation.

[103] I order South Pacific Meats Limited to pay to Jim Seymour the sum of \$4000 without deduction under s. 123 (1) (c)(i) of the Employment Relations Act 2000.

Wayne Manson

[104] Mr Manson had 15 years of service with SPM and its predecessor and seeks the sum of \$14,000 compensation. Mr Manson is not entitled to be compensated for the loss of his job and the financial impact of that. That is because I have found the redundancy was genuine. Mr Manson was not at the 30 August 2010 Union meeting but had heard if the agreement wasn't signed the plant could close. Mr Manson said that he felt the workers were treated badly and without decency and he described the treatment as *rude*. He did describe himself as shocked at the 6 September 2010 meeting in his written evidence. He said that there was an issue with his payslip although Mr Kelly provided evidence to support pay verification was supplied to WINZ on the day it was requested.

[105] I accept that Mr Manson was shocked by the announcement on 6 September 2010 and that his distress went further than simply the loss of his job as submitted by Mr Malone. He did however know that there was a possibility of the plant closing although was not as well informed as others as to the state of the bargaining. If there had been consultation with the Union before the announcement of impending

redundancies then the Union could have advised Mr Manson before 6 September 2010 and reduced his shock. A fair award would be \$3000 compensation.

[106] I order South Pacific Meats Limited to pay to Wayne Manson the sum of \$3000 without deduction under s. 123 (1) (c)(i) of the Employment Relations Act 2000.

Don Davis

[107] Don Davis had six years service with SPM and its predecessor. He seeks the sum of \$9000 compensation. Mr Davis is not entitled to be compensated for the loss of his job and the financial impact of that. That is because I have found the redundancy was genuine. Mr Davis said that he was entitled to \$9000 compensation because he could not get another job. He did though seek a penalty because there was no ability to vote on the company offer and that arose in part because SPM did not confirm with the Union if there had been a vote and the outcome of the meeting. The shock for Mr Davis of the announcement on 6 September 2010 could have been lessened. Mr Davis is entitled to some limited compensation I find on that basis. A fair award would be \$2000 compensation.

[108] I order South Pacific Meats Limited to pay to Don Davis the sum of \$2000 without deduction under s. 123 (1) (c)(i) of the Employment Relations Act 2000.

Matthew Chant

[109] Matthew Chant had about five years service with SPM. He seeks the sum of \$7000 compensation. Mr Chant is not entitled to be compensated for the loss of his job and the financial impact of that. That is because I have found the redundancy was genuine. Mr Chant said in his evidence that when he arrived at site on 6 September 2010 Mr Matterson was not allowed in the gate. He understood that SPM wanted a grandfather clause but that they *couldn't really do that*. Mr Chant felt that in terms of the redundancy *it was a very rude way of doing it*. He said about the Union meeting on 30 August that it was unfair to have a lower rate for other employees.

[110] Mr Chant knew that there was a risk of the plant closing and had been made aware from the Union about the situation. He explained in answer to some questions from Mr Malone that he was confused about different stories from the company and Progressive about what was happening. I accept that Mr Chant did find the announcement of impending redundancies quite a shock. Had SPM contacted the Union to ascertain the outcome of the meeting on 30 August then the announcement would not have been such a shock. A fair award for Mr Chant would be \$2000 compensation.

[111] I order South Pacific Meats Limited to pay to Matthew Chant the sum of \$2000 without deduction under s. 123 (1) (c)(i) of the Employment Relations Act 2000.

Russell Lush

[112] Russell Lush had about four years service with SPM. He seeks compensation of \$7000. Mr Lush is not entitled to be compensated for the loss of his job and the financial impact of that. That is because I have found the redundancy was genuine. Mr Lush was on sick leave at the material time but was called into the site on 6 September 2010. He gave evidence that he thought a penalty should be awarded because he was required to sign a contract for people who were not there but did not think it would come to losing his job. He did recall mediation being talked about at the meeting on 30 August but not the dates it was to take place.

[113] I accept that Mr Lush found the announcement of impending redundancies a shock. If SPM had talked to the Union prior to the announcement then the information would have lessened the shock for Mr Lush. A fair award for Mr Lush would be \$2000.

[114] I order South Pacific Meats Limited to pay to Russell Lush the sum of \$2000 without deduction under s. 123 (1) (c)(i) of the Employment Relations Act 2000.

Paula Ballantyne

[115] Paula Ballantyne had three years service at SPM. She seeks \$6000 compensation. Ms Ballantyne is not entitled to be compensated for the loss of her job and the financial impact of that. That is because I have found the redundancy was genuine. Ms Ballantyne could not recall what occurred at the Union meeting on 30 August 2010 but in her written evidence described her reaction on 6 September as *quite gutted*. Ms Ballantyne in her written evidence referred to the Union not being able to come on site and support the union members.

[116] Ms Ballantyne gave evidence about the effect of losing her job on her financially. She relocated to Gore in early October and took up two part time roles. Ms Ballantyne I find though did suffer distress that could have been lessened had there been consultation in good faith with the Union after 30 August 2010. A fair award for Ms Ballantyne would be \$2500 compensation.

[117] I order South Pacific Meats Limited to pay to Paula Ballantyne the sum of \$2500 without deduction under s. 123 (1) (c)(i) of the Employment Relations Act 2000.

Colin McKinnel

[118] Colin McKinnel had three years service at SPM. He seeks \$6000 compensation. Mr McKinnel is not entitled to be compensated for the loss of his job and the financial impact of that. That is because I have found the redundancy was genuine. Mr McKinnel said that he thought at the meeting on 30 August 2010 that negotiations were continuing and that he was hoping it would be able to be sorted out. He was aware though that the Progressive contract was finishing at the end of October. Mr McKinnel said that he was shocked when the impending redundancies were announced and thought that he had been treated shoddily by the company. He said that it was unfair that the company did not carry on negotiations.

[119] Mr McKinnel thought that negotiations were continuing with SPM and the Union after 30 August 2010 and was therefore shocked when the announcement was made. I accept that causes him distress. A fair award would be \$4000.

[120] I order South Pacific Meats Limited to pay to Colin McKinnel the sum of \$4000 without deduction under s. 123 (1) (c)(i) of the Employment Relations Act 2000.

Hayden Clinton

[121] Hayden Clinton had three years service at SPM. He seeks \$6000 compensation. Mr Clinton is not entitled to be compensated for the loss of his job and the financial impact of that. That is because I have found the redundancy was genuine. Mr Clinton was on ACC. I accept from his evidence that he was aware of the possibility of the plant closing but his evidence about any distress was very limited. He did state that he felt picked on and harassed at SPM but that was for matters unrelated to those unjustified actions I have found around the time of the redundancy. Following the announcement on 6 September 2010 Mr Clinton described feeling *gutted and lost*.

[122] I cannot compensate Mr Clinton for the loss of the job and the financial matters that occurred as a result of that. I cannot compensate him for hurt feelings from matters unrelated to his personal grievance. I do find though the evidence supports a feeling of shock on 6 September 2010 but only a limited award is called for given the paucity of evidence. A fair award would be \$1000 compensation.

[123] I order South Pacific Meats Limited to pay to Hayden Clinton the sum of \$1000 without deduction under s. 123 (1) (c)(i) of the Employment Relations Act 2000.

Callum McKay

[124] Callum McKay has three years service at SPM. He seeks \$6000 compensation. Mr McKay is not entitled to be compensated for the loss of his job and the financial impact of that. That is because I have found the redundancy was genuine. Mr McKay was also on ACC at the time of the announcement on 6 September 2010 but was called in to attend a meeting. Mr McKay did obtain

another job as a result of the Union assistance and started the new role in October 2010.

[125] He said that he wanted \$6000 because of the stress of losing his job and he had a couple of weeks with nothing lined up. He was not required by SPM to work out his notice period. Mr McKay in his written statement said that he thought a penalty should be awarded because the Union was in negotiations about the employment agreement and then there was an announcement about closing the plant. Proper consultation after 30 August 2010 would have reduced the shock for Mr McKay on 6 September 2010 but I cannot compensate him for the loss of his job. Any award must reflect the limited evidence. A fair award would be \$1000 compensation.

[126] I order South Pacific Meats Limited to pay to Callum McKay the sum of \$1000 without deduction under s. 123 (1) (c)(i) of the Employment Relations Act 2000.

Justin Jordan

[127] Mr Jordan was employed by SPM for nearly three years. He seeks compensation of \$5000. Mr Jordan is not entitled to be compensated for the loss of his job and the financial impact of that. That is because I have found the redundancy was genuine.

[128] Mr Jordan said in his evidence that when he turned up on 6 September to the meeting Mr Matterson was at the gate and not allowed on the premises. Mr Jordan said that he had to talk to him at the gate initially. Mr Jordan did recall a show of hands at the meeting on 30 August 2010 and he said that he thought negotiations would continue. Mr Jordan felt it was wrong to sign off fellow workers and believed that the company would eventually agree to what the Union wanted.

[129] Mr Jordan told Mr Malone that he thought Mr Kelly was bluffing about the plant closing.

[130] I accept that there was some distress suffered by Mr Jordan and that proper consultation in good faith after the 30 August 2010 meeting would have assisted with

this. Mr Jordan clearly did not believe everything was over after the 30 August 2010 meeting. A fair award would be \$4000 compensation.

[131] I order South Pacific Meats Limited to pay to Justin Jordan the sum of \$4000 without deduction under s. 123 (1) (c)(i) of the Employment Relations Act 2000.

David Scadden

[132] There was an issue about Mr Scadden's length of service. In the written statement of evidence it referred to six years but Mr Kelly said that the commencement date was March 2008. I accept Mr Kelly's evidence about this. Mr Scadden seeks the sum of \$5000 compensation. Mr Scadden is not entitled to be compensated for the loss of his job and the financial impact of that. That is because I have found the redundancy was genuine.

[133] Mr Scadden said that when he arrived at work on 6 September 2010 the Union official was prevented from coming on site. He said that he was shocked to hear about the announcement and said that he thought the company and Union were still bargaining in good faith.

[134] Mr Scadden said he wanted compensation because the company had lied, had not bargained in good faith and denied the union official the right to represent members.

[135] I accept that Mr Scadden was distressed on 6 September 2010 because he had thought bargaining was continuing and there was restricted access to the union official on 6 September 2010 initially. A fair award would be \$4000.

[136] I order South Pacific Meats Limited to pay to David Scadden the sum of \$4000 without deduction under s. 123 (1) (c)(i) of the Employment Relations Act 2000.

Joseph Taueki

[137] Joseph Taueki had been employed by SPM for 2 years. Mr Taueki said that he was shocked to hear the announcement on 6 September 2010. Although much of the distress was about the loss of his job and difficulties finding another for which he cannot be compensated Mr Taueki did give evidence that he remembered Mr Matterson being ordered off the plant. I find that that did cause him some distress. A fair award would be \$3000 compensation.

[138] I order South Pacific Meats Limited to pay to Joseph Taueki the sum of \$3000 without deduction under s. 123 (1) (c)(i) of the Employment Relations Act 2000.

Ian Taylor

[139] Mr Taylor was in hospital at the date of the investigation meeting. I reserve leave for Ms Coulston to apply to the Authority within 14 days from the date of this determination for Mr Taylor to have his evidence heard unless the parties are able to resolve the matter short of that step.

Penalty

[140] A penalty will not be imposed for every failure to comply with the obligation of good faith in s 4(1). Section 4A of the Act describes the circumstances that must occur to make a party to an employment relationship liable to a penalty. The failure must be deliberate, serious and sustained; or intended to undermine bargaining for an individual or collective agreement; or an individual or collective agreement or an employment relationship.

[141] I have dealt with as I have worked through the factual matrix with the delay in commencing bargaining and found it was not an intentional strategy on the part of SPM. I also found actual notice of termination under clause 25 of the collective agreement was not given to the applicants on 6 September 2010 under the collective agreement but was given on 6 October 2010.

[142] There was a view that SPM bargained in bad faith with a take it or leave it offer. There was some limited movement though on its part. The Union did not agree

to lesser terms for new employees, the term of the agreement or the percentage increase. The reasoning behind the claims for lesser terms for new employees was I am satisfied explained at the bargaining meetings, the explanation was not accepted by the Union. Bargaining was limited in time but I am not satisfied that that would attract a penalty. There was some urgency about the matter. There may well have been a degree of overstatement on the part of SPM about rates needing to be set for all new employees for agreement with Progressive to proceed. It seemed likely though that SPM would need to know what rate it would pay those in the boning room rather than leave that to chance for negotiation later. The fact is the applicants were not happy with lesser terms for new employees. The Union relied in part on clause 26 which did afford an opportunity for negotiation at a later time but also that employees at Malvern should if they achieve similar productivity get the same remuneration as employees at other meat companies in the area – see Mr Watt’s letter to members of 25 August 2010. I am not satisfied that the behaviour at bargaining was in bad faith so as to justify a penalty as claimed by the applicants.

[143] There was an allegation about the bypass meeting with the members on 19 August 2010 that I have described in the factual background. That in all likelihood was a breach of the bargaining agreement. It is not a breach I would impose a penalty for. Having heard from Mr Kelly I find that although such a meeting was a serious matter and an unwise step it was not behaviour intended to undermine bargaining but rather it was an attempt to advise the employees of the risk of the plant closing. Mr Watt said in his written evidence that the Union was satisfied after 26 August 2010 that SPM would not communicate again directly with its members and therefore did not lodge pre-prepared legal proceedings. There was no repeat of that behaviour by SPM. The objective of the Act is to promote good faith behaviour, promote mediation as the primary problem-solving mechanism and reduce judicial intervention. Quite properly the Union and SPM dealt with the issue short of taking legal action in order to move on with the important matter of bargaining and there was no repeat of the behaviour. In all the circumstances I am not satisfied that this matter would justify a penalty.

[144] I have found a breach of good faith in terms of the failure to consult with the Union after the 30 August 2010 meeting before issuing notice of impending redundancy. I would have awarded a penalty but that is a matter I have directly taken

into account in terms of compensation and I do not intend to do so again. I am not satisfied that any of the other matters referred to should attract a penalty award.

Costs

[145] I reserve the issue of costs. Ms Coulston has until 27 July to lodge and serve submissions as to costs and Mr Malone has until 9 August to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority

ATTACHMENT A

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