



[3] Farmers claims that without any authority the payroll department incorrectly processed a redundancy and other payments to Mr Malone, and that upon becoming aware of the error, it had engaged in discussions with Mr Malone with the objective of resolving the situation.

[4] The discussions between Mr Malone and Farmers did not resolve the situation and on 10 August 2011, Mr Malone filed a Statement of Problem with the Employment Relations Authority.

[5] Mr Malone claims that Farmers unjustifiably terminated his employment and breached the good faith requirements of the Employment Relations Act 2000 (“the Act”).

[6] Farmers denies that it terminated Mr Malone’s employment or that it breached the good faith requirements of the Act.

### **Issues**

[7] The issues for determination are:

- Whether Mr Malone’s employment was terminated by Farmers, or ended in some other way.
- If Mr Malone was dismissed, whether that dismissal was justifiable
- Whether Farmers breached the obligations it owed to Mr Malone during the course of the Reconfirmation Process

### **Background Facts**

[8] Farmers is a retail organisation with department stores throughout New Zealand. Products stocked include clothing, health and beauty, furniture, electrical and photographic, and electronic items.

[9] During 2009 Mr Malone had been employed as a ‘One on One’ Salesperson based at the Wairoa store. A ‘One on One’ Salesperson sells ‘big ticket’ items to customers, primarily home appliances, furniture and whitewear items, and is remunerated by way of a base salary and commission payments on items sold, which is not the case with General Salespersons who are remunerated by way of a salary only.

[10] The Wairoa store closed in late 2009 and during the closure process Mr Malone had been offered the option of redundancy or a transfer to another Farmers store. Mr Malone said that as he had been diagnosed with a chronic chest health problem in or around 2002, he had offered to obtain an updated medical report, which was subsequently provided to Farmers on or about 8 January 2010.

[11] The medical report cleared Mr Malone as fit to work provided he avoided heavy or repeated light lifting. Accordingly Farmers had transferred Mr Malone to the Albany Home Centre (“the Store”) where he had commenced work in the Furniture department, and had ensured that his work duties were within the recommended medical parameters.

[12] In early 2011 the Store was selected by Farmers to be redeveloped into a new Store Concept ‘Home By Farmers’. The new Store Concept would enable customers to select and take away ‘big ticket’ items on the same day, whereas previously the ‘big ticket’ items had been delivered to customers’ homes some time after purchase. Mr van Loggerenberg explained that the new concept would require employees to source the stock, and assist in lifting and carrying the item(s) purchased to the customers’ vehicles.

[13] Mr van Loggerenberg further explained that the transition to the new Concept Store necessitated a Reconfirmation Process being undertaken at the Store, which meant that a review of the existing employment contracts and staffing rosters would be undertaken to ensure that there was an appropriate labour to sales ratio.

[14] Mr van Loggerenberg said there had been a meeting on 9 May 2011 at the Store to present the Reconfirmation Process to the employees which had been attended by the Farmers Regional Manager, the Regional HR Manager, Ms Andrea Wagstaff, and himself.

[15] Mr van Loggerenberg said information provided at the meeting included the reasons for the change and an explanation that this would involve reviewing the labour scheduling within the Store. It had been explained there might be some changes to the way the roster was scheduled to ensure maximum sales coverage in the Store during the busiest times; and that a theoretical ideal roster (“the Ideal Roster”) would be worked out for the Store to which existing staff hours would try to be matched.

[16] The Ideal Roster would be devised by a Head Office specialist qualified and experienced in calculating the best labour to sales ratios. Once this had been made available to the Store, Mr van Loggerenberg said the Reconfirmation Process commenced to assess

how the working hours of existing employees could fit within the Ideal Roster. This was to be done by means of consultation with the individual employees, which Mr van Loggerenberg said would include discussion of their availability and preferences.

[17] Mr van Loggerenberg explained that at the conclusion of the meeting each employee had been provided with a letter detailing the information provided at the meeting, and a Team Member Availability Questionnaire which each employee was to complete and take to the first meeting with him. The letter also advised that the employee could have a representative present at each individual consultation meeting. Employees were also advised that if no agreement could be reached on the rostered hours following the consultation process, redundancy would eventuate.

*First Meeting on 14 May 2011*

[18] Mr van Loggerenberg said the first meeting with Mr Malone took place on 14 May 2011. Mr Malone said he had not had representation at this meeting as he had not thought it necessary.

[19] Mr Malone explained he had worked a roster which had been a 3 day week comprising Saturday, Sunday and Monday, 19.5 hours in total, and he had been unable to commence work before 10.00 a.m. due to his medical condition.

[20] Mr Malone said at the meeting he had presented his Team Member Availability Questionnaire and made it clear that he had not wanted any change to his hours on the basis that the days he worked suited his domestic arrangements. Mr Malone said he had thought if he emphasised what he really wanted, he would get it.

[21] Mr Malone said Mr van Loggerenberg had raised the issue of his health; however Mr van Loggerenberg disagreed saying that Mr Malone first raised the question of his health during the meeting and had explained that he could not commence work before 10.00 a.m. due to his medication.

[22] Mr van Loggerenberg added that the issue of functionality had been raised with all employees during the discussions due to the increased requirement for heavy lifting in respect of the sourcing and moving of heavy 'big ticket' items.

[23] Mr van Loggerenberg said he had taken notes during each meeting of what had been discussed, and that Mr Malone had read and been asked to agree their accuracy at the conclusion of each meeting. Mr Malone agreed that this was what had happened.

*Second Meeting on 21 May 2011*

[24] The next meeting took place on 21 May 2011. Mr Malone had again chosen not to be represented at this meeting. Mr van Loggerenberg said in accordance with the Ideal Roster, he had proposed a 33 hour week Tuesday to Saturday roster to Mr Malone as being the ideal for the position he held. During this meeting Mr Malone said that he had the Ideal Roster open on his computer screen.

[25] Mr Malone said he had reiterated that he preferred to retain his existing roster, explaining that working on a Monday was advantageous to him as the majority of public holidays fell on a Monday.

[26] Mr van Loggerenberg said he had explained that he would look at the days Mr Malone was available and where these could be accommodated within the Ideal Roster. Mr van Loggerenberg said he had assured Mr Malone that Farmers would endeavour to accommodate both his and its own requirements.

[27] Mr van Loggerenberg said that there had been further discussion about Mr Malone's ability to undertake the role which would require more heavy lifting, and he had also suggested possible alternative positions in the Electronics department or as a General Salesperson, in which positions he could retain his existing roster.

[28] Mr Malone stated that he had not considered either of these suggested positions as suitable given that, although he would be on a commission payment basis in the Electronics department, he did not like the nature of the selling involved; and as a General Salesperson he would not earn commission.

[29] Mr van Loggerenberg said the meeting had closed on the basis that there would be a further meeting when the other 'One on One' Salespeople had been dealt with, at which time he would know what hours were available for a 'One on One' Salesperson in the Furniture department in accordance with the Ideal Roster.

*Third Meeting 4 June 2011*

[30] At the third meeting on 4 June 2011 Mr Malone had again declined to have a representative present. Mr Malone said the matter of his health had been discussed again, and he had pointed out that his medical condition was not going to improve and he would obtain a medical report if necessary.

[31] Mr van Loggerenberg agreed that he had voiced his concern to Mr Malone in regard to his fitness to undertake the requirements of his existing role given the increased requirement for heavy lifting. Mr van Loggerenberg said in response Mr Malone had told him that his medical condition would not improve and if Farmers considered he was not able to do the job as required in the new store concept, the only option would be redundancy.

[32] Mr van Loggerenberg said he had told Mr Malone that there were options and alternatives and that redundancy was the last resort if nothing else could be accommodated. Mr van Loggerenberg said he had informed Mr Malone that he would need to set up an appointment with Ms Lauren Jalfon, Employment Relations Manager, to discuss his situation and that there would be a further meeting after he had spoken with her.

[33] On 11 July 2011 Mr van Loggerenberg said he had emailed Ms Jalfon and asked her to prepare indicative redundancy calculations for him to present to Mr Malone at their next meeting. Mr van Loggerenberg explained that a few days earlier he had made a similar request in respect of another employee, Mr Henry (Tom) Griffiths.

*Fourth Meeting on 11 July 2011*

[34] Mr van Loggerenberg said he and Mr Malone had met again on 11 July 2011 and at that meeting he had given Mr Malone a copy of the draft redundancy calculation which had been prepared by Ms Jalfon at his request. Mr van Loggerenberg said he had told Mr Malone that he would continue to look at options other than redundancy for him, which might include transferring to another Farmers store.

[35] Mr Malone said he did not recall Mr van Loggerenberg discussing other options with him, his recollection was that Mr van Loggerenberg had shown him the draft redundancy calculations and had asked if he wanted to work out his notice period, to which he had responded that he would prefer to be paid in lieu.

[36] Mr van Loggerenberg said he had informed Mr Malone he would have the redundancy calculation confirmed, and there would be a further meeting when he had these details. Mr van Loggerenberg said Mr Malone had been happy with the redundancy proposal.

[37] Mr Malone agreed that Mr van Loggerenberg had stated he would have the final redundancy calculation confirmed, but that he had just expected a single sheet of paper to be handed to him.

[38] Following this meeting Mr van Loggerenberg said he had emailed Ms Jalfon informing her of what had been discussed with Mr Malone, and requesting a final redundancy calculation and a letter. Following this, Mr van Loggerenberg said he had been away from the Store during next few days attending a Farmers Roadshow and Regional meeting.

#### *Redundancy Payment*

[39] On Wednesday 13 July 2011 Mr Malone said he had been involved in carrying out on-line banking when he realised that a payment had been made into his bank account by Farmers, which Mr Malone said he had concluded was his final payment.

[40] Mr Malone said he had telephoned the Farmers payroll department that day and had been advised through being provided with a copy of an unsigned letter that it was his final payment, consisting of a redundancy payment, a six week payment in lieu of notice effective 12 July 2011, and holiday and days in lieu payment.

[41] Mr Malone said he had also telephoned the Store and spoken to Mr Desmond Ferriman, a colleague, who had informed him that Mr van Loggerenberg was not in the Store, however Mr Malone said he had not left a message for Mr van Loggerenberg to contact him as he had decided that the correct course of action was to contact Mr Jason Greene, General Manager of Store Operations.

[42] Mr van Loggerenberg said that when he had returned to the Store approximately two days later, he had been informed by some of the employees that Mr Malone had been paid his redundancy payment and was very upset about this.

[43] Mr van Loggerenberg said he had immediately tried to contact Mr Malone to find out what had happened, and had called his home telephone line twice, the first time there had been no answer and the second time he had left a message with Mr Malone's wife requesting Mr Malone contact him.

[44] Having not heard back from Mr Malone, Mr van Loggerenberg said he had called a third time and had then spoken to Mr Malone, asking him to let him know what had happened. Mr van Loggerenberg said he could not understand how the situation had arisen since he had only just received the final draft redundancy figures.

[45] Mr van Loggerenberg explained when he had returned to the Store there had been an envelope on his desk which he had been expecting to receive from Ms Jalfon as previously requested, and which had contained a letter for Mr Malone outlining the final redundancy

calculations. The letter required his signature before being sent or given to Mr Malone. Mr van Loggerenberg said during their telephone conversation he had informed Mr Malone that there was a letter in his office for him, however Mr Malone had said that he did not want it posted to him.

[46] Mr van Loggerenberg said he had apologised to Mr Malone and said he would contact Ms Jalfon to ascertain what had happened.

[47] Mr Malone said he did not accept that the redundancy payment had been made in error and by letter dated 18 July 2011 he had advised Mr Greene of what had occurred and had asked for his view of the situation. Mr Malone said that his intention in adopting this course of action was to be reinstated to his position.

[48] Ms Jalfon said Mr Greene had received the letter on 21 July 2011 and consulted her about it. Ms Jalfon explained that shortly before the letter arrived she had become aware of what had happened when she had been contacted by Mr Griffiths, who had enquired why he had not received his redundancy payment as expected. When Ms Jalfon contacted the payroll department, she said she realised that the payroll department had in error actioned a redundancy payment to Mr Malone instead of actioning Mr Griffith's redundancy payment.

[49] Ms Jalfon said she had assisted Mr Greene in drafting a response to Mr Malone. In the resulting letter dated 21 July 2011 Mr Malone had been informed that there had been an error made and that the redundancy payment made to him had not resulted from an instruction given by Mr van Loggerenberg. In the letter Mr Greene had apologised for the distress the error had caused Mr Malone and had written:

*In order to rectify this matter, it is my suggestion that we resume discussions around the proposed exit from the business and that this happens as soon as possible. A meeting can be organised at your convenience in the next few days and we can resume discussions. If redundancy is now not the option you wish to pursue we can resume discussions around the reconfirmation process and the proposed change to your hours and days of work. Lauren Jalfon will be present at that meeting.*

*Kevin, we are anxious to rectify this matter as soon as possible and I am certain that once you have an opportunity to meet with Tinus and Lauren that the matter can be promptly resolved.*

[50] Ms Jalfon said on 25 July 2011 she had asked Mr Malone to meet with her and Mr van Loggerenberg, and Mr Malone had asked her to send him a copy of the Ideal Roster. Ms Jalfon said she had responded the same day, sending Mr Malone what she believed to be the

Ideal Roster, however Mr Malone had emailed her saying that the roster which she had sent him showed a total of 19 hours to be worked on the days he currently worked.

[51] Ms Jalfon said that she realised that she had sent the wrong roster and emailed Mr Malone stating that the best course of action would be for them to meet.

*Meeting 27 July 2011*

[52] Mr Ferriman attended the meeting with Mr van Loggerenberg and Ms Jalfon on 27 July 2011 in the capacity of an observer at Mr Malone's request. Mr van Loggerenberg said that both he and Ms Jalfon had apologised profusely to Mr Malone and that Ms Jalfon, who led the meeting, had told Mr Malone that the redundancy payment paid into his bank account had been made in error.

[53] Ms Jalfon said she offered Mr Malone the option of returning to work, or, if he preferred, of taking voluntary redundancy.

[54] Ms Jalfon said Mr Malone had been angry during the meeting because he thought, having been sent what he believed to be the Ideal Roster by Ms Jalfon, that the Reconfirmation Process had been designed to 'exit him out of Farmers'. Mr Malone agreed that he had been angry during the meeting, but attributed this to his having resumed smoking due to stress after having successfully given it up for the sake of his health.

[55] Ms Jalfon said she and Mr Malone had discussed two options: one being his returning to work and resuming the Reconfirmation Process, and the other being that Farmers would agree to Mr Malone taking voluntary redundancy and keeping the redundancy payment.

[56] Ms Jalfon said Mr Malone stated that he would consider returning to work but he wanted to keep the redundancy payment and waive the 90 day trial period. Ms Jalfon said her response had been that if Mr Malone did return to work he would need to refund the redundancy payment as it had been made in error and he had not been made redundant.

[57] Ms Jalfon said she had also explained that the 90 day trial period would not apply as Mr Malone would not be re-employed, but would be returning to his role while Reconfirmation Process discussions continued. Ms Jalfon said she had however informed Mr Malone that he would not have to repay the payment which he had received in lieu of notice, this being equivalent to six weeks salary.

[58] Mr Malone, who denied that he had refused to return the redundancy payment if he returned to work, said at the Investigation Meeting that the meeting had ended with him agreeing to consider the two options.

[59] On 2 August 2011 Mr Malone had sent a second letter to Mr Greene. In the letter Mr Malone had stated his view of the situation, rejecting the error explanations provided by Mr van Loggerenberg and Ms Jalfon, reconfirming that he was not prepared to return to work and stating his view that “*to return now would place me in a significantly vulnerable and insecure position*”. Mr Malone concluded the letter:

*...I suggest that the company consider making a compensatory payment to me which would fairly and reasonably cover the loss of income to me to August 2012 with an appropriate amount to compensate for the other aspects of this situation. Such an offer would, of course, take into consideration the redundancy payment already paid to me.*

[60] Ms Jalfon said that Mr Greene had discussed this letter with her and together they had drafted a response. In the response letter dated 8 August 2011 Mr Greene set out the two options as previously discussed, these being to return to work on his next rostered day, or to accept redundancy with an extension to the notice period to include further discussions. Mr Malone was requested to indicate which option he wished to accept on or before 5.00 pm on 10 August 2011.

[61] On 10 August 2011 Mr Malone had emailed Ms Jalfon asking if Farmers accepted the validity of his complaints and asking: “*Is the company prepared to present/negotiate a reasonable financial compensation proposal, as presented in the last paragraph of my letter to Jason on 2<sup>nd</sup> August 2011?*”

[62] Ms Jalfon said she had responded by email asking Mr Malone to clarify what he was seeking by way of compensation. Mr Malone replied the same day asking if Ms Jalfon wanted him to provide a specific dollar amount.

[63] Ms Jalfon said that the parties had attended mediation but this did not resolve the matter, and Mr Malone did not subsequently return to work. Ms Jalfon said that as a consequence Farmers accepted that Mr Malone had chosen to terminate his employment and the redundancy option had been actioned.

## **Determination**

### **Was Mr Malone's employment was terminated by Farmers or did it end in some other way?**

[64] Following a decision to redevelop the Albany Home Centre store Farmers had embarked on a Reconfirmation Process with the requirement to ensure that it had the correct labour to sales ratio in the new Concept store.

[65] As a direct result of that process Mr Malone, in conjunction with the other Store employees, had been involved in a process of consultation with Mr van Loggerenberg. Mr Malone did not want to alter his existing roster, a position he made clear at the first consultation meeting on 14 May 2011.

[66] In the second consultation meeting on 21 May 2011 Mr van Loggerenberg had informed Mr Malone that according to the Ideal Roster the roster available for his position was 33 hours Tuesday to Saturday, however I accept that this was not a *fait accompli* as indicated by Mr van Loggerenberg's advice that there would be further discussion after he had spoken to all the 'One on One' Salespeople.

[67] Mr van Loggerenberg had also indicated that Mr Malone might be able to retain his existing roster by moving to the Electronics department as a 'One on One' Salesperson, or by becoming a General Salesperson. I also accept that at this stage Mr van Loggerenberg had assured Mr Malone that Farmers would endeavour to accommodate both its own and his requirements indicating that the consultation process was still ongoing.

[68] Mr Malone said it had been Mr van Loggerenberg who initiated the conversation relating to the redundancy option at the meeting on 4 June 2011; however Mr van Loggerenberg's evidence that it was Mr Malone who raised the redundancy suggestion is supported by the notes he had made at the meeting which stated: (i) "*Other than that if Company feels can not do job as required, the only option is to be made redundant*" and (ii) '*You mentioned redundancy. Options role full capacity alternatives. GSP*'. I note that Mr Malone had read and agreed the notes

[69] At the fourth meeting on 11 July 2011 Mr van Loggerenberg's evidence that Mr Malone had been satisfied with the redundancy route and that he had offered to continue to look at other options to redundancy is again supported by the notes of that meeting which Mr Malone had read and agreed and which state: '*Have given Kevin draft of redundancy pay*

*package ...happy up to this stage. Next step is to look at full package payment. Again offered to look at options ie Glenfield.*

[70] I find that at the end of these consultation meetings, although there was a redundancy proposal for Mr Malone to consider, the process had not reached a conclusion: there were further steps to be undertaken regarding finalisation of the redundancy calculations and the exploration of alternative options.

[71] It is unfortunate that Mr van Loggerenberg was absent from the store for the next few days during which time Mr Malone had received a payment into his bank account on 12 July 2011, an error which had been compounded by the payroll department sending the unsigned standard draft letter to Mr Malone

[72] I accept that Mr Malone had been distressed by this situation but I consider that Mr van Loggerenberg acted as a reasonable employer by trying to contact Mr Malone and rectify the situation immediately upon becoming aware of what had occurred.

[73] Mr Malone's first letter to Mr Greene dated 18 July and which Mr Greene had received on 21 July 2011 had also been acted upon immediately.

[74] I find it had been made clear to Mr Malone both through the letter to him from Mr Greene dated 21 July 2011, and the subsequent meeting on 27 July 2011 between Mr Malone, Ms Jalfon and Mr van Loggerenberg, that a mistake had been made and that Mr Malone could retain the status quo by returning to work.

[75] I do not find that Farmers terminated Mr Malone's employment by reason of redundancy on 12 July 2011 despite the payment of a sum representing payment in lieu of notice and redundancy payment, and the sending to Mr Malone of an unsigned draft letter outlining the terms of redundancy, on the basis that:

- i. at the close of the meeting on 11 July 2011 it would have been apparent to Mr Malone that there was a further stage of the Reconfirmation Process to be completed; and
- ii. I accept Farmers explanation that the redundancy payment made and the letter sent to Mr Malone were as a result of an administrative error in their payroll department.

[76] Moreover as soon as Farmers became aware that the payment had been made in error, it had acted in a timely manner to reassure Mr Malone in the letter dated 8 August 2011 that his employment was not at an end, but rather that the options available to him were to return to work and resume the Reconfirmation Process, or he could accept redundancy.

[77] At the subsequent meeting on 27 July 2011 Ms Jalfon had reiterated that these options were open to Mr Malone. However despite him agreeing at the conclusion of the meeting to consider the two options his response had been to write to Mr Greene on 2 August 2011 reconfirming that he was not prepared to return to work and seeking a compensatory payment.

[78] In this situation I determine that Mr Malone's employment was not terminated by Farmers, nor was he forced to resign, rather his employment terminated of his own volition when he decided not to return to his employment with Farmers.

**If Mr Malone was dismissed, was that dismissal justifiable?**

[79] I have determined Mr Malone was not dismissed, but that he had decided not to return to his employment with Farmers of his own volition. In this situation Mr Malone had retained the final payments, including the redundancy payment. Consequently Mr Malone had effectively accepted voluntary redundancy.

[80] I have determined that the payment to Mr Malone of the redundancy payment on 12 July 2011 was an administrative error and did not represent a dismissal by way of redundancy at that stage.

[81] However had redundancy been the operative mode of terminating the employment relationship, which I do not accept, I find that this would have been a justifiable dismissal in the situation in which Farmers had a genuine reason for re-developing the Store, Mr Malone had discussed redundancy as an option, and had refused to consider alternative positions to redundancy or continue with the Reconfirmation Process.

**Did Farmers breach the obligations it owed to Mr Malone during the course of the Reconfirmation Process?**

[82] As stated by the Court of Appeal in *GN Hale & Son Ltd v Wellington Caretakers IUOW*<sup>1</sup>: "An employer is entitled to make his business more efficient"<sup>2</sup> However an

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<sup>1</sup> [1991] 1 NZLR 151

<sup>2</sup> Ibid at page 8

employer should conduct itself in good faith towards an employee. This is especially so during a restructuring or as in this case, the Reconfirmation Process.

[83] Section 4 (1A)(b) states that the duty of good faith:

*Requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.*

[84] There is no indication that Mr van Loggerenberg acted otherwise than in a respectful manner towards Mr Malone throughout the consultation process. I find there is evidence from the meeting notes as signed and agreed by Mr Malone, to support Mr van Loggerenberg's assertion that he considered redundancy to be the very last option and had advised Mr Malone of this. Further that it was his intention to explore what alternative options there were for Mr Malone to consider.

[85] I consider that Mr van Loggerenberg had been active and constructive in attempting to maintain a productive employment relationship with Mr Malone throughout the Reconfirmation Process, and had acted in good faith towards Mr Malone.

[86] I further find that although Mr Malone said Ms Jalfon's manner had been abrupt during the meeting on 27 July 2011, it was clear from the evidence that it was Mr Malone who was angry. Moreover Mr Ferriman, who was an observer at the meeting, agreed that Ms Jalfon's mood had been calm and kind during the meeting and that he had had the impression that she was trying to resolve the problem.

[87] I consider that Ms Jalfon was also active and constructive in attempting to resolve the situation produced by the administrative errors which had occurred and affected Mr Malone, she was responsive and communicative and I find that she acted in good faith in trying to resolve the situation.

#### *Mr Malone's Health*

[88] Mr Malone stated that he considered Farmers had wanted to terminate his employment based on his health circumstances. I consider that had Farmers wanted to terminate Mr Malone's employment purely on the basis of his medical condition, it had the opportunity to do so in late 2009 when the Wairoa store had closed; however it had chosen not to do so and had transferred him to the Albany Store

[89] I accept that there were perceived to be increased demands for heavy lifting in the furniture department as a result of the new Store Concept, but Mr van Loggerenberg's associated concern for the impact on Mr Malone's health was not evidence of pre-determination that his employment should end. Rather this was the concern to be expected of a fair and reasonable employer given these circumstances.

[90] It is also significant that the issue Mr Malone's health did not prevent the offer of continued employment within the furniture department at increased hours, or the technology department at the same hours, being made by Farmers, therefore the decision as regards continued employment was for Mr Malone to make after Farmers had made him aware of the likelihood of increased lifting expectations.

[91] I do not find that this concern for his health and well-being indicates an attempt to remove Mr Malone from the furniture department in the Store, or indeed to remove Mr Malone from Farmers employment.

*The proposed roster change*

[92] Mr Malone claimed that he had felt the 33 hour roster which had been proposed had been designed to cause his exit from his employment with Farmers. It is unfortunate that the roster sent by Ms Jalfon on 25 July 2011, which was another error, contributed to this perception on the part of Mr Malone.

[93] It is significant when considering this issue to note that the Ideal Roster was not of Mr van Loggerenberg's devising, it had been produced by a Farmers Head Office specialist experienced in the production of such labour: customer ratio rosters. Mr van Loggerenberg's role was to fit the existing staff rosters within the Ideal Roster.

[94] Looking at the consultation process as a whole, I find that Mr Malone had not been being forced to accept changes to his roster. It is apparent from the meeting notes, which Mr Malone had read and agreed, that Mr van Loggerenberg was not trying to force Mr Malone into accepting a 33 hour roster. Indeed Mr van Loggerenberg had made it clear that Mr Malone's roster preferences could be accommodated, albeit in another department or Farmers store.

[95] However I find that Mr Malone had made it clear from the outset of the consultation process that he wished to maintain the status quo as regards his existing roster, and as such he was not prepared to engage with Mr van Loggerenberg in reaching agreement

[96] I accept that had the discussions continued there may perhaps have been changes to the department or store in which Mr Malone was able to work his preferred hours. However such changes were open to negotiation and agreement via the consultation process which had still been in process at the time the erroneous redundancy payment had been made, and which Farmers had been willing to resume following the redundancy payment incident.

[97] I do not find that Farmers devised the 33 hour roster proposal with the pre-determined intention to terminate Mr Malone's employment.

[98] I also find that Farmers not only made timely acknowledgement of its administrative error, but had acted in good will by informing Mr Malone that he would be able to retain the six week payment in lieu should he elect to return to work.

[99] I determine that Farmers acted in good faith and did not breach the obligations it owed to Mr Malone during the course of the Reconfirmation Process.

#### **Costs**

[100] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**