

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 102/08
5097860

BETWEEN BARRY MANSON, GORDON
 BENNETT and
 CHRISTOPHER PROCTOR
 Applicants

AND SOLID ENERGY NEW
 ZEALAND LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Tony Wilton, Counsel for Applicants
 Andrew Shaw, Counsel for Respondent

Investigation Meeting: 27 and 28 May 2008 at Invercargill

Determination: 18 July 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicants (Mr Manson, Mr Bennett and Mr Proctor or the applicants), allege that they were unjustifiably dismissed by the respondent (Solid Energy) for reason of redundancy because the decision taken by Solid Energy was not a decision that a fair and reasonable employer would have reached in the particular circumstances of the case.

[2] Solid Energy resists that claim on the basis that none of the applicants has been unjustifiably dismissed and thus no personal grievances arise.

[3] Solid Energy is a State-owned enterprise which, amongst other things, operates an open cast mine near Ohai in Southland. The applicants are all coalminers and at the time the dispute between the parties arose, all were employed by Solid Energy at the Ohai mine.

[4] Each of the applicants and two other employees of Solid Energy at the Ohai mine were dismissed on the grounds of redundancy effective 31 July 2007 as a consequence of Solid Energy having lost a contract to supply Fonterra with coal at its Clandeboye facility in South Canterbury.

[5] The Fonterra contract was due to expire by the passage of time in August 2008 but once Solid Energy was notified that it would lose the Fonterra contract, it immediately started the downsizing operation in anticipation of the loss of the contract 12 months later.

[6] The thrust of the applicants' case is that Solid Energy has failed to comply with the terms of the relevant collective employment agreement in two particular respects, namely the obligation to consult with the applicants' union and the obligation to follow the agreed process for selection of workers to be made redundant.

[7] Solid Energy contends that it has not failed in either regard to meet its obligations pursuant to the collective employment agreement and that, in particular, if the obligation to consult is examined carefully, it will be seen that any failure on the consultation process was a failure by the union to engage with Solid Energy rather than the other way round.

[8] The applicants are all members of the New Zealand Amalgamated Engineering Printing and Manufacturing Union (the Union).

[9] The Union and Solid Energy are parties to the National Mining Industry Multi Employer Collective Agreement (the collective agreement).

[10] The collective agreement contains a number of relevant provisions pertaining to the employment relationship problem. In particular, the following provisions from the collective agreement are particularly pertinent:

16.1 Redundancy procedures

16.1.1 For the purposes of this agreement redundancy is a condition in which the employer has manpower surplus to his requirements because of the closing down or reorganisation of the whole or part of the employer's operation, due to changes in plant, methods, materials or products, reorganisation, economic circumstances, or like cause requiring a permanent reduction in the number of employees.

- 16.1.2 *All redundancies shall be administered in accordance with the terms below.*
- 16.1.3 *All employees to be declared redundant shall receive not less than one month's notice of the termination of their employment. In lieu of such notice an employee shall receive one month's notice.*
- ...
- 16.1.5 *The Union shall be notified before notice is given to the employee to allow for consultation between the parties.*
- ...
- 16.1.8 *If upon receiving notice of redundancy, an employee accepts an offer of employment with the employer, outside the Ohai mining area, the employer shall meet the actual and reasonable costs of relocation.*
- 16.2 *Criteria for the selection of redundant employees*
- 16.2.1 *It is recognised that the employer's need to maintain an efficient workforce and an efficient operation must be taken into consideration in the selection of employees to be made redundant. It is accepted that redundant employees may be selected on a departmental or sectional basis.*
- 16.2.2 *The employer will select the employees to be made redundant on the basis of their skill and ability to perform the work required by the employer. Where employees to be made redundant have equal skills and ability selection shall be made on the basis of "last on first off".*
- 16.2.3 *It is recognised that voluntary redundancy is preferable to compulsory redundancy and this preference shall be applied taking into consideration the matters listed above.*
- 16.3 *Future employment.*
It is agreed that employees covered by this agreement will, where practicable, receive prior consideration without discrimination (as defined in the Employment Relations Act 2000 and its amendments) for future employment with the employer, provided that they have been in the opinion of the employer, competent and satisfactory employees.

[11] On 20 March 2007, Trevor Hobbs who was the Union organiser responsible for the Union's members at the Ohai mine, was told in confidence by a Solid Energy manager that Solid Energy believed it had lost the Fonterra contract and this intelligence was confirmed in an announcement by Solid Energy to staff at the Ohai mine on 26 March 2007. In that latter announcement, Solid Energy confirmed that as a consequence of the loss of this very significant contract, the mine operation would be downsized with effect from August of 2007.

[12] That same day, Solid Energy notified the General Secretary of the Union by email of the same intelligence that had been conveyed to the workers and indicated that management hoped to meet with Mr Hobbs *later today*. In fact, that meeting did not transpire and there was in fact no face-to-face meeting at all between Solid Energy and the Union until 18 July 2007, less than two weeks before the termination of the applicants' employment.

[13] Solid Energy had sent to Mr Hobbs copies of each and every letter that was sent to the mine workers but it was Solid Energy's position that in the absence of any definitive feedback from Mr Hobbs, it continued to assume that the Union was satisfied with the procedure that was adopted and that, if there were issues of concern, then Mr Hobbs would raise them.

[14] It was not until 29 June 2007 that Mr Hobbs formally raised concerns about the process that Solid Energy was undertaking, by which time the restructuring process had been under way for fully three months. By email dated that day, Mr Hobbs complains about the Solid Energy process and raises a number of particular objections, but it was not until 18 July 2007 that Solid Energy and the Union actually engaged face-to-face on the issues that Mr Hobbs raised in that email.

[15] By then, of course, the process was to all intents and purposes complete and effective 31 July 2007, Solid Energy dismissed the three applicants for redundancy together with two other employees, one of whom was the occupant of a fixed term employment agreement which was simply not renewed.

[16] In practical terms, Solid Energy had disestablished the back or night shift and rejigged its reduced workforce as a consequence.

[17] The decision to dismiss the applicants rather than other employees is, in Solid Energy's view, a function of the applicants all being less desirable employees for the company *going forward*. Mr Stodart, the production manager, frankly told the Authority that the choices were made based on his *subjective view of who was best for the company* and that he did not consider the last-on/first-off principle.

[18] Of particular concern to the applicants was the failure to consider the last-on/first-off principle and the options to compulsory redundancy which, in terms of the collective agreement, were required to be considered. The applicants' position was that, because of the nature of the assessment process which Solid Energy used, and in

particular its failure to use a quantitative measuring system for ceasing workers, it was completely impossible to make a rational assessment about whether the selections for redundancy were fair or not and that in ignoring the last-on/first-off principle, Solid Energy had failed to fulfil its obligations under the collective agreement.

[19] Similarly, in failing to even consider voluntary redundancy as an option, Solid Energy had, in the applicants' view, failed to fulfil its obligations under the collective agreement.

Issues

[20] The first issue for determination is whether the consultation process which is mandated by the collective agreement has been appropriately completed.

[21] The second issue for determination is whether the process adopted by Solid Energy in determining which employees would be made redundant met Solid Energy's obligations in terms of the collective agreement.

Consultation

[22] Solid Energy's position is that by copying to the Union organiser, Mr Hobbs, each and every one of the items of correspondence directed to the affected workers, it complied with the basic obligation to consult with the Union.

[23] In Solid Energy's view, if there is any default in relation to the consultation obligation, it is a default of the Union and not of Solid Energy. Solid Energy correctly makes the observation that the obligation to consult in the collective agreement must be a bilateral obligation and I accept that observation as an accurate statement of the position. However, the question remains whether either party has been in default of its obligations in respect of the consultation process and it will be helpful first to look closely at the relevant provision in the collective agreement.

[24] That provision is clause 16.1.5 which is as follows: *The Union shall be notified before notice is given to the employee to allow for consultation between the parties.* That provision is clear enough on its face. It contemplates what amounts to a *heads up* by the employer to the Union so that a consultation process can be undertaken.

[25] What follows in the balance of the clause in the collective agreement pertaining to redundancy matters, is a series of broad principles which are to govern the determination of which employees are to be made redundant. I hold that the relevance of the notification obligation is to enable the parties to engage with each other such that there can be discussion about matters such as the need for job losses and the selection process which is, after all, fundamental to the end result.

[26] What happened in this case was that Solid Energy commenced the process once it became clear that there would be a superfluity of staff and the Union was copied in to each communication that went to staff members. The Union's evidence was that the fundamental need for the restructure was never in question; Mr Hobbs' evidence was that the Union accepted that there was a need for the workforce to be shortened down and so there was absolutely no need for any liaison between the Union and Solid Energy in relation to the need for the restructure.

[27] Consistent with that position, the factual matrix discloses that there was no significant engagement between the Union and Solid Energy in the early part of the process. Mr Hobbs said in his evidence that he expected to have an opportunity to engage with Solid Energy in respect of the process for selecting the employees to be made redundant. After all, if the necessity for restructuring and job loss is accepted as a given, then the only issue, in a practical sense is the issue of the selection of those employees to be made redundant.

[28] It was not until 29 June 2007 that Mr Hobbs sent an email to Solid Energy protesting about the employer's process and in particular seeking urgent advice about when the Union was to get *notification* in order that it could commence *consultation* with Solid Energy in respect of the upcoming redundancies.

[29] Solid Energy's response on 3 July simply confirms that it has copied all correspondence to the Union as it has been generated throughout the process.

[30] In effect, each of the contracting parties seeks to blame the other for the failure to consult, with Solid Energy maintaining that notification has been satisfied by forwarding copies of letters.

[31] In my opinion, if the only issue to decide was whether Solid Energy had notified the Union or not, then I would have inclined to the view that, by sending copies of correspondence relating to the redundancy to the Union, as those letters

were generated, Solid Energy did, in truth, notify the Union. The reason I might reach that conclusion is the plain meaning of the word *notify*. The dictionary definition of the word is *to inform or give notice to or to make known*. It is difficult to reach a conclusion other than that by providing to the Union copies of correspondence, the employer has in fact fulfilled its narrow obligation to notify, were that all its obligation constituted.

[32] However, I hold that Solid Energy must do more than simply notify. The relevant clause in the collective agreement requires notification for a particular purpose, that purpose being to *allow for consultation between the parties*. In my opinion, it is not enough for Solid Energy to simply provide copies of letters and expect that that will generate the appropriate response. The better view is that Solid Energy ought to have sent copies of the relevant correspondence but in conjunction with that, formally indicated that it was responding to its obligation in terms of clause 16.1.5 of the collective agreement and seeking to engage with the Union to progress the mutual obligation.

[33] This, after all, is not a situation where there is any particular dispute between the Union and Solid Energy. The Union accepted that redundancy was necessary and the only issue was the selection of the persons to become redundant. That surely is an issue where a collaborative approach using as the road map the broad principles in the collective agreement, will achieve a more desirable outcome than any alternative process.

[34] Furthermore, even if I am wrong to find against Solid Energy in relation to its initial failure to adequately notify in order that consultation can take place, it is plain that from the point at which Solid Energy received Mr Hobbs' email of 29 June it was on notice that there was a problem and it ought to have responded promptly by seeking to engage with the Union so that it could get the process back on track. In the result, its solitary reply to Mr Hobbs' email was to note that copies of correspondence had been forwarded to him, presumably leaving him to draw his own conclusions from that reply. Indeed, the failure of Solid Energy to engage with the Union once the Union indicated in that email that it was anxious about the position, must be fatal to Solid Energy's obligation in terms of the collective agreement requirement.

[35] Accordingly, I hold that Solid Energy has failed to fulfil its obligation in terms of clause 16.1.5 of the collective agreement in either failing to notify the Union in

order that *consultation between the parties* could take place, or, in the alternative, failing to amend the restructuring process after receipt of the Union's email of 29 June 2007 in order to allow of the consultation which receipt of that email ought to have alerted the employer was or had been deficient.

The selection process

[36] The applicants say that the selection process was flawed in part because it failed to comply with the broad principles about selection of redundant employees contained in the collective agreement, and in part because, by reason of the failure of the parties to consult with each other during the process, there was no ability for the applicants to influence Solid Energy to consider particular positions or points of view. That, after all, must be one of the prime purposes of the negotiating parties requiring consultation before redundancy is declared. In addition, the Authority must satisfy itself that the actual process used by the employer was both reasonable and fair.

[37] For instance, if there had been consultation then it would have been available for Mr Hobbs to explore on behalf of the applicants whether redeployment was a real issue (there were at the relevant time two potential vacancies at another mine, albeit some hours' drive away from Ohai), and to consider matters such as voluntary redundancy. Quite clearly, if the applicants (or indeed other workers similarly rated in terms of aptitude and ability) had accepted redeployment, then that would have obviated the need for some of the redundancies. Solid Energy's view was that that redeployment option was properly explored in its direct one-on-one discussions with the affected individuals and that may well be the position, but the absence of the proper and legitimate engagement with the Union meant that any particular benefits which the Union could bring to the table were lost to the process.

[38] In respect of the voluntary redundancy situation, Ms Mary Reynolds, Solid Energy's human resources manager, gave evidence that this option was raised with all staff but in her words *not assertively*. She also accepted that voluntary redundancy had been successfully used in this particular workplace in the past, albeit when that workplace was under different ownership. Again, one has to wonder whether, if the Union had been actively involved in the process, the result in respect of voluntary redundancy may have been different. Were that the position, the total number of workers to lose their jobs by reason of compulsory redundancy may have been fewer.

[39] Accordingly, I hold that even looked at exclusively from the point of view of the inadequacy of the consultation between Solid Energy and the Union, the deficiencies or potential deficiencies in the ultimate decision to dismiss for redundancy must cause doubt about the fairness of the process.

[40] However, when I turn to look at the actual selection process itself, again I find significant deficiencies in the process adopted.

[41] The key provision here is clause 16.2.2 and in this respect I accept Mr Wilton's submission that that provision requires:

- (a) A conclusion about what work is to be performed;
- (b) An objective assessment about the skills and ability of each of the workers to perform that work; and
- (c) An assessment process which can deal adequately with the circumstance where there is an *equality* of skills and ability.

[42] It is plain from the straightforward and honest evidence of Solid Energy employees that the process it adopted was not consistent with those requirements and the clear words of clause 16.2.2. In particular, Mr Stoddart's observation that the process used was his *subjective view of who was best for the company going forward* is quite clearly inconsistent with the need for an objective, measurable calculation which can deal with the situation where there is an equality of skills and ability between more than one employee.

[43] Further, Mr Stoddart also confirmed that the employer did not consider the last-on/first-off principle. Again, that does not comply with the collective agreement which specifically says that where there is that equality of skills and ability, then *selection shall be made on the basis of 'last on first off'*. In that circumstance, by its own admission, Solid Energy has absolutely failed to comply with the terms of the collective agreement.

[44] Further, it is manifest from the evidence for Solid Energy that although the process which Solid Energy designed appears to have a numerical base for assessing the skill set of employees against the work requirement of the employer, in fact the way in which the numerical foundation was used meant that the system was not

quantitative at all and thus, in my opinion, completely unable to meet the requirements of the collective agreement.

[45] A particular example of this is Solid Energy's process in evaluating the number of tasks that each employee must perform and giving a numerical weighting to the employee's ability in relation to those tasks. If the assumptions behind this system had been transparent, then there could be no criticism of this particular part of the process, but in my judgement, that was not the case, or perhaps more accurately, once the evidence came out at the investigation meeting, it became clear that it was not the case.

[46] The particular assumption that is most important in a system of this kind is the assumption, reasonably assumed in my view, that each job required by the employer was of equal value or weighting. In fact, it became absolutely plain at the investigation meeting that Mr Stoddart regarded some jobs as more important than others because he saw them as pivotal to the overall mine process. There is nothing wrong in principle with having some jobs more important than others in a process of this kind, but that needs to be declared so that the participants of the process understand that assumption. In the case of this particular process, it was certainly not clear to the applicants that some of the roles they were being assessed for were, in the employer's eyes, more important than other roles.

[47] In his oral evidence before the Authority, Mr Stoddart indicated that one of the key drivers of the mine was the washery and another was the stamler. He said that employees who were good at those tasks would be more valuable to the employer *going forward* than employees who were less able in those areas. However, the difficulty with this thesis is that that intelligence was not shared with the workforce and nobody knew apparently that Solid Energy regarded those two tasks as more important than certain others.

[48] A related criticism of the process adopted, again with the benefit of hearing the key personnel from Solid Energy talk about the process at the investigation meeting, was the fact that while Solid Energy maintained in all its public information that *multi skilling* was the key determinant of whether a person would survive in employment or be made redundant, in fact that was not the position at all and, as I have just made clear by my reference to Mr Stoddart's evidence, Solid Energy actually rated some tasks more highly than others.

[49] Even more baffling is confirmation from Solid Energy's evidence that the numerical assessment was not actually relied upon. Ms Reynolds refers in her evidence to *the selection criteria used by us was not based simply on numbers*, but in fact that does not really put the matter clearly enough at all. When one looks at a schedule of the ratings achieved by each of the employees affected, with the lowest score being the most desirable, one of the applicants had an assessment score closer to the best employee's score than the worst, and still was made redundant. To put the same point another way, that same applicant lost his job in the redundancy but actually scored better than three other employees, all of whom remained in employment. It follows that I must accept the submission of Mr Wilton that on that basis there was no objective reason for that particular applicant (Mr Proctor) being made redundant at all.

[50] Further, there could be no objective basis on which the process adopted by Solid Energy could be evaluated so as to assess the appropriate application of the broad principles contained in the collective agreement. The last-on/first-off principle is a good example. The relevant provision says that where employees have equal skills and ability, selection shall be made on the basis of last-on/first-off. Applying the numerical system which the employer devised and then seems to have resiled from, one finds that one of the applicants (Mr Manson) scored the same as one employee who was not dismissed. Given that the applicant dismissed had 20 years' experience, one might well imagine that the last-on/first-off principle could reasonably have been expected to be applied.

[51] In fact, the whole exercise was, as Mr Stoddart conceded to me in the investigation meeting, a subjective analysis by Mr Stoddart of who was best for the mine *going forward*.

[52] It seems to me beyond doubt that Solid Energy has absolutely failed to comply with the terms of the collective agreement in choosing a process which, by its very nature, was incapable of delivering the required outcomes from the collective agreement. Furthermore, I hold that the process which Solid Energy used, as well as not complying with the requirements of the collective agreement, was itself unreasonable and unfair in that it held itself out to be something that it was not, particularly in respect of the appearance of being an objective quantifiable process

(when it was not), and in appearing to rate all tasks similarly (when plainly that was not the intention at all).

Bad faith

[53] Mr Wilton argues for the applicants that it is a short step from a subjective decision to make some employees redundant and lapsing into the consideration of *irrelevant and unfair considerations* in the making of these decisions. It is suggested that the Authority ought to find that Solid Energy has acted in bad faith.

[54] I decline to make such a finding. I accept that my findings in this matter are that Solid Energy has got this matter badly wrong, but I do not accept that it has behaved in bad faith. I was impressed with the honesty and straightforwardness of the Solid Energy witnesses who openly and sincerely gave their evidence and who were prepared to make proper concessions when the difficulties with their argument were put to them. I think Solid Energy's view of this matter is mistaken but not malicious and I decline to make a finding in respect of bad faith.

Determination

[55] Each of the applicants has successfully demonstrated that they have a personal grievance by reason of having been unjustifiably dismissed for redundancy, the decision to dismiss, in each case, being not the decision that a fair and reasonable employer would have made in the particular circumstances of the case or cases. Having found the evidence supports personal grievances for each of the applicants, each applicant is entitled to remedies for those grievances.

[56] Section 124 of the Employment Relations Act 2000 requires me to turn my mind to the question of whether the applicants have contributed in any way, or any of them, to the personal grievance complained of. I do not think that the behaviour of any of the applicants has in any way contributed to that applicant's grievance. The applicants were subjected to a process which I have found was unfair and unreasonable. They participated in that process believing that it was something other than what it actually was, and there is no evidence whatever that was brought before me which would suggest that any applicant contributed by his behaviour to the circumstances of his personal grievance.

[57] The applicants seek compensation and lost wages. Initially, there was a claim for reinstatement but after discussion between the parties which I encouraged at the end of the investigation meeting, the remedy of reinstatement was withdrawn by the applicants.

[58] I am satisfied that a reasonable compensatory award ought to be made in the particular circumstances of this case. The applicants have, in my judgement, been badly treated by the employer and the evidence of their hurt, humiliation and injury to feelings is palpable. Aside entirely from the distress occasioned by losing their position on the grounds of redundancy in a small close-knit community, each of them was effectively subjected to the additional humiliation of having to face the judgement of their peers by reason of each of them having failed to retain their position in a competitive process. The humiliation will have been all the more significant because each of the applicants was a long serving employee who one would have thought in the normal course of events might have derived some benefit from the *last on first off* principle enshrined in the collective agreement.

[59] For those reasons then, I award each applicant the sum of \$10,000 as compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.

[60] The effect of the loss of the position for each of the applicants is that they have potentially lost a year's income which they would otherwise have enjoyed. Indeed, in a properly applied redundancy process, the applicants may not have lost their positions at all and might have survived any further downsizing 12 months hence.

[61] However, to some extent these calculations are hypothetical and I think the proper course of action is to direct that the parties' counsel are to confer with a view to fixing the amount due to each of the applicants by Solid Energy on the footing that each applicant is to be paid a contribution to his lost wages of the likely amount that that applicant would have earned for the 12 month period from the date of his redundancy, less the amounts that that applicant has earned from other sources inclusive of the wages component of any redundancy compensation each applicant received. Leave is reserved for the parties to revert to the Authority for orders or further directions.

Costs

[62] Costs are reserved.

James Crichton
Member of the Employment Relations Authority