IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 44/07
5029221

	BETWEEN	Frank Milligan, Maria Skates and Maureen Bolger Applicants
	AND	IAG New Zealand Ltd (Trading as State Insurance) Respondent

Member of Authority:	James Wilson
Representatives:	Frank Wall for the applicants Steve Kinch for the respondent
Investigation Meeting:	11 December 2006
Determination:	23 April 2007

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] The 3 applicants in this case, Frank Milligan, Maria Skates and Maureen Bolger, were all employed in its Christchurch office by IAG (NZ) Ltd, (trading as State Insurance – in the interests of brevity I will refer to the respondent as IAG). Mr Milligan was employed as one of seven Loss Adjusters and Ms Bolger and Ms Skates were employed as part of a team of five Property and Investigations Support Administrators. In July 2005 IAG commenced a consultation process which, in October 2005 resulted in a number of staff, including the 3 applicants, being advised that they were to be made redundant. As a result, all three ceased their employment with IAG on 9 December 2005.

[2] All three applicants say that their redundancies, and the way in which they were made redundant, were unjustified. They are seeking;

- Compensation for wages lost and the hurt and humiliation caused by the unjustified actions of their employer (in terms of s123 and 128 of the Employment Relations Act (the Act).
- Mr Milligan is also seeking compensation for the shortfall in his accrued GSF superannuation caused as a result of his being made redundant prior to age 65.
- That a penalty be imposed on IAG for an alleged breach of their employment agreements, in terms of s134 of the Act.
- That a penalty be imposed for an alleged breach of section 4 of the Act, and
- a penalty be imposed, in terms of s 85 of the Act, for an unlawful lockout under s82 and s8 of the Act.

The events leading to the redundancies

[3] Particularly because, somewhat unusually, there are three individual applicant parties in this case, I have heard a good deal of evidence which, while important in reaching my final conclusions it is not necessary to canvas in detail in this determination. Before a setting out a brief outline of the key events I wish to reassure all of the parties, in particular the applicants whose lives have been so drastically changed by these events, that I have considered all of the evidence. Each of the three applicants experienced slightly different events leading to the individual redundancies. However there are some key common events which applied to all three.

[4] On 20 July 2005 IAG held a series of simultaneous presentations in Auckland Wellington and Christchurch. The Christchurch presentation was attended by the company's South Island staff. This presentation outlined a proposal by IAG to restructure and set out the consultation process that the company intended to follow. At the end of the presentation employees were provided with an information pack. This set out the information which had been presented at the meetings and a question and answer sheet which included answers to questions regarding consultation, re-confirmation, redeployment and redundancy. During the period 21 July to 3 August 2005 a consultation period was provided for staff to provide feedback on the proposals via a confidential consultation mailbox. Apparently 110 submissions were made during this period although, the company points out, no individual submissions were made by the any of the three applicants.

[5] On 17 August 2005 a further presentation was made to inform employees of the outcome of the consultation process. This presentation advised employees of a number of changes to the

restructure proposals and a further three page question and answer sheet was distributed. The amended proposal included a reduction in the number of Loss Adjusters, i.e. the role carried out by Mr Milligan within the Christchurch office, from seven to four. The number of Support Administrators, the role carried out by Ms Bolger and Ms Skates, was to be reduced from five to three.

[6] All of the employees affected by these changes were advised that a selection process, to decide which employees would be "reconfirmed" in their position and who would be declared surplus, would be carried out in terms of the company's recruitment and selection policy. As a part of this selection process each of the three applicants were interviewed. These interviews were carried out by Mr Dean Munt, the Loss Adjusting Area Manager and Annette Purvis the Direct Claims Manager. The interviews were relatively short (less than 15 minutes). It appears that all interviewees were asked the same series of questions.

[7] On or about 10 October 2005 each of the applicants was invited, via e-mail, to attend a meeting with Mr Munt. This e-mail asked that the individuals keep the fact of the meeting confidential but did not advise what the meeting was to be about. The meetings were in fact with Mr Munt and a Human Resources consultant, Joh Edmonds. At their individual meetings the three applicants were advised that they had not been selected for reconfirmation and that, unless a suitable redeployment opportunity could be found they would, in due course, be given notice of redundancy. I note that the individuals concerned were not given an opportunity to be accompanied at these meetings by a representative or support person. There is some disagreement about what was conveyed to the three applicants during the course of these meetings - an issue I will return to later in this determination. However, according to the company's witnesses, the individuals were advised that efforts would be made to find them alternative redeployment opportunities and that they would also be able to apply for any suitable internal vacancies they saw advertised.

[8] Following the meetings in which they were advised they had not been successful in their applications for reconfirmation, each applicant had a slightly different experience leading to their eventual termination of their employment. However all three received a letter on or about 26 October 2005 giving them six weeks formal notice of redundancy. During this notice period no suitable redeployment opportunities were found and as a result all three applicants terminated their employment with IAG on Friday 9 December. At that point each received their contractual entitlement to redundancy and other outstanding payments.

Mr Milligan's experience

[9] Mr Milligan was, during the early part of the events set out above, on holiday overseas and returned to work on 23 August 2005. According to Mr Munt he telephoned Mr Milligan "numerous times" and forwarded him electronic copies of documentation in relation to the proposed changes. He says he advised Mr Milligan that he could make submissions in response. Mr Munt also says that he was in regular contact with Mr Milligan's son, who also worked at IAG and who was in turn in regular contact with Mr Milligan. However Mr Milligan's recollection of these communications is that he first heard of the proposed restructuring from his son and he had received only one phone call from Mr Munt who had advised him not to worry about making submissions. He also says that he never received electronic copies of the proposed changes.

[10] After he had been advised that he had not been successful in his application for reconfirmation Mr Milligan says that he felt a great deal of distress. In his evidence Mr Milligan described his feelings clearly and succinctly. He said:

> *Unless someone has suffered dismissal for reasons of redundancy, it is very hard to describe the mix of emotions one goes through. After a period of 20 years of loyal service one feels betrayed, "whiz kids" in Auckland called "Executives" out to make a name for themselves or otherwise justify their positions by constantly calling for restructuring without any real understanding of what the Claims Department in Christchurch is all about. That was the first instinctive emotion I felt. Whiz kids in Auckland whose identity and faces are always changing constantly moving the goalposts without any real regard to the employees.*
>
> *I was informed of my dismissal on the Tuesday afternoon. When I returned to my workplace my colleagues were understandably sympathetic, there but for the grace of God go I as it were. But over the next couple of days I felt all the loyalty I previously had for the Company had been completely drained from me. The mode of things if you like had been far too bureaucratic and impersonal, managers at Christchurch simply following like zombies their instructions from Auckland.*
>
> *Simply put, over the following few days I came to realise that I could not continue my normal duties. There I was at my workplace working alongside colleagues under a death sentence as it were, it is a terrible feeling, embarrassing to both me and my fellow colleagues, everyone waiting for 'D' day to pass as it were.*

[11] A few days after being advised that he was to be made redundant Mr Milligan sought his doctor's advice. His doctor's recommendation was that, to preserve his mental stability and given the stress he was feeling, he should not return to work. His doctor gave him a medical certificate to cover the period of his notice. Subsequently Mr Milligan returned to work on occasional evenings and weekends to complete the work he was engaged in and to ensure his workload would not cause inconvenience to his colleagues.

[12] During the period of notice, although not attending work during normal working hours, Mr Milligan was contacted on several occasions by Ms Edmonds *to see how he was coping and whether he needed assistance.*

Maureen Bolger's experience

[13] As with the other two applicants Ms Bolger was advised on 10 October 2005 that she had not been successful in her application and that unless an alternative position could be found she would be made redundant. However Ms Bolger says that at that meeting Mr Munt indicated that IAG might be able to offer her a two to three month fixed term contract to commence at the end of the notice period. Mr Munt apparently indicated that her redundancy compensation would be held over until the end of that fixed term contract. He also said, according to Ms Bolger, *who is to know what the situation will have in store as it unfolds.*

[14] On 19 October Ms Bolger had a further, impromptu, conversation with Mr Munt who asked if she would be interested in a job in the Call Centre - a position which Ms Bolger rejected. She says she rejected this offer because at that point she believed that the offer of a fixed term contract was still available and she believed this would lead to other possibilities. Apparently Mr Munt then indicated that he believed Ms Bolger had rejected the offer of a fixed term contract but then went on to say that the issue was still "alive". Ms Bolger says that Mr Munt also appeared to indicate that management had a discretion as to when she would be entitled to leave the Company and that if she left before they had given her notice she would forfeit her redundancy compensation.

[15] On Friday 21 October Ms Bolger, due to the stress she was under, received a doctor's certificate for a week's sick leave. The following Friday Mr Munt, accompanied by a union delegate, Michelle Smith, visited Ms Bolger at home. At this meeting Mr Munt formally handed Ms Bolger a letter of dismissal, by way of redundancy, with a final day at work being 9 December

2005. According to Ms Bolger, at this meeting Mr Munt said that the offer of fixed term employment had never been intended to be a firm offer, just a possibility. Ms Bolger's recollection is that Mr Munt indicated that he would have a better idea over the next three to four weeks and that he would keep her advised. Ms Bolger says that, in the light of the letter of dismissal she asked Mr Munt directly regarding offering her a fixed term contract. She says Mr Munt indicated that it was a possibility not a certainty. Ms Bolger says that it was not until 5 December 2005 that she was informed that a fixed term contract would not now be offered to her.

[16} Ms Bolger's recollection of the meeting at her home on 28 October is somewhat different than that of Mr Munt and the union delegate, Michelle Smith. The main point of difference being that Mr Munt and Ms Smith both say that Ms Bolger was clearly informed that there was no longer a possibility of a temporary contract.

Maria Skates experience

[17] Ms Skates experience is similar to that of the other two applicants in that she was advised that she had not been successful in her application for reconfirmation at a meeting on or about 10 October 2005. She says that following that date she had one perfunctory meeting with Mr Munt. She also says that she found out almost by accident, via a memorandum to staff posted on the intranet, that her procurement duties had been transferred to other employees. She received a formal letter of redundancy in late October and the last day on duty was Friday 9 December 2005.

IAG's version of events

[18] IAG does not dispute the timing of most of the events as recalled by the three applicants. However there are a number of points which the company has emphasised in defence of the process it followed. In particular Mr Munt says that the applicants were advised, along with all other employees, that appointments to the restructured positions were to be made on the basis of *the best person for the job*. The selection and policy guidelines were communicated to employees and were also available on the intranet site. He says that the selection interviews were undertaken by himself and another manager who was independent of that part of the business. Mr Munt says that at the meetings with the applicants at which they were told that they had not been successful, they were advised that efforts would be made to find them alternate redeployment opportunities. They were also told that they would be able to apply for any internal vacancies they saw advertised. Mr Munt says that after the selection process had been completed he made contact with all business unit managers in Christchurch seeking redeployment options for all of those staff who were surplus to

requirements. He also pointed out that a number of positions were advertised on the company intranet and that none of the applicants applied for any of these roles.

The respective employment agreements

[19] Mr Milligan was employed by IAG in teams of an individual employment agreement. This agreement provided, under the heading **redundancy**, that:

> *… where at any time the employee's position becomes surplus to the needs of the employer, the employer shall consult with the employee. Where the employee's position becomes surplus to the needs of the employer the following provisions shall apply:*
> *(a) In the first instance, every reasonable effort will be made by the employer to redeploy the employee. Where the redeployment of process has been completed and redundancy is unavoidable, redundancy payments shall be made on the following basis:*

The balance of this clause provides for a six weeks notice of termination and payment of 8 weeks salary for the first year of service and 2 weeks for each subsequent year with a maximum redundancy payment of 46 weeks salary.

[20] Ms Bolger and Ms Skates were employed in terms of the IAG Staff Association Collective Agreement. This agreement provided, also under the heading **redundancy**:

> *29.2.1 An employee who is covered by this agreement shall be entitled to the following provisions in respect of redeployment and, where necessary, redundancy. It is the intention of the parties that the search for alternative job options within the Company be conducted as speedily as possible in order to minimise the uncertainty of the employee's circumstances.*
>
> *29.2.2 Before an employee is made redundant the Company undertakes to examine all alternative job options and make every reasonable endeavour to identify and offer at least one job option.*

Subsequent clauses provide for six weeks notice and for 8 weeks and 2 weeks redundancy compensation with a maximum payment of 36 weeks.

Legal considerations

[21] Two sections of the Employment Relations Act 2000 (the Act) are relevant when determining whether the three applicants have personal grievances against their employer. Section 4 of the Act deals with good faith employment relations and says at section (1A)

> *The duty of good faith in subsection (1) ---*
> *(a) is wider in scope than the implied mutual obligations of trust and confidence; and*
> *(b) …..*
> *(c) without limiting paragraph (b), requires an employee who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of the employment of one or more of his or her employees to provide to the employees affected--*
>
> > *(i) access to information, relevant to the continuation of the employees' employment, about the decision; and*
> > *(ii) an opportunity to comment on the information to their employer before the decision is made.*

And at section 103A:

> ***103A Test of justification***
> *For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.*

[22] The Employment Court in *Simpson Farms v. Aberhart* (AC 52/06, Chief Judge Colgan, 14 September 2006) discussed these statutory provisions and reviewed previous case law in respect to redundancy. It is now well established that, when considering whether or not to make employees redundant, an employer should follow a series of discrete but interrelated procedural steps. Firstly the employer must carry out a genuine consultation with the employees likely to be effected by the proposed changes. (As envisaged by section 3(1A)(c) of the Act). Where it is necessary to select which employees will stay and which will be made redundant, the employee's should be made aware of the selection criteria to be used and these criteria must be applied fairly. Once a decision that an individual employee is surplus to requirements the employer must also consult with the

effected employee regarding such matters as how to mitigate the effects on the employee, whether alternatives to redundancy may be available etc.

[23] However as the Court also made it clear in *Aberhart* (at paragraph 67):

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

Discussion

[24] Any dismissal, even when that dismissal is as a result of genuine redundancy, causes distress and shock to the effected employee. Looking firstly at the consultation process leading to IAG's decision to declare a number of positions surplus, it is clear that the company followed a reasonable, open and genuine consultation process. The employees were advised of the proposals and the consultation process to be followed. They were given an opportunity to comment and, as evidenced by the changes made to the original proposals, at least some of those comments were taken into account. The Company could, perhaps, have taken further steps to ensure that Mr Milligan was more fully included in the consultation process. However Mr Milligan was aware of the process and it is unlikely that, had he been more actively involved this would have affected the final outcome of the company's restructuring process. Regrettably the outcome of this consultation process was a reduction in the number of employees. However, as the Chief Judge said in *Aberhart*, it is not for the Authority to overturn a business decision genuinely made in good faith by an employer. This was a decision which was open to the company to make. IAG, having followed a fair and reasonable process made a genuine business decision to make Mr Milligan, Ms Bolger and Ms Skates redundant.

[25] All three applicants expressed some concern regarding the selection process the company used in deciding which staff were to stay and who was surplus to the company's requirements. However all three were aware, both because they were advised verbally and because it was set out in the written materials provided to all staff, that the criteria to be used in selection was that set out in the company's "recruitment and selection policy". All three expressed dissatisfaction with the apparently perfunctory nature of the selection interview and questioned the relevance of the questions they were asked. However the same process was carried out for all of the potentially

surplus staff and there is no evidence that the selection process was in any way biased or unfair. The company came to the conclusion, having followed a proper process, that the three applicants were not the "best person for the job". While all three applicants were understandably unhappy about this decision it was a decision which was open to the company to make.

[26] Having decided that the three applicants' positions were to be disestablished the company then went about advising them of this decision, looking at redeployment options and, in due course, formally making them redundant. It is at this point that the company failed in its obligations. The management of the individual employee's reaction to the company's decision and during the period leading to the eventual termination, resulted in a great deal more stress and trauma for the applicants than was necessary. This unnecessary stress could have been dramatically reduced had the company taking the simple step of ensuring that the individuals were given a proper opportunity to be represented during the process. The HR manager involved, Joh Edmonds, told me that she had not suggested the applicants be accompanied by a representative (when they were invited to a meeting to be advised whether or not they had been successful in their applications to be reconfirmed) because *that was her job.* Unfortunately Ms Edmonds appears to misunderstand the respective roles of those involved in this type of process. Any employee when told that they are to be dismissed (and being made redundant is being dismissed) will almost inevitably and immediately suffer an emotional reaction and is likely to experience at least mild shock. They are unlikely to hear, let alone absorb and understand all of the information the employer is attempting to convey. The role of the representative/support person in these circumstances, in addition to providing personal and emotional support, is to listen, question and subsequently convey information to the employee. The HR adviser in these circumstances is inevitably seen both by the employee and by the employer as a representative of management. Even the most skilled and experienced HR practitioner cannot fulfil both the role of support person and adviser to management. In this instance I have no doubt that had the individual applicants been properly represented at that initial meeting what followed would, although still difficult and stressful, have been far less traumatic.

[27] A fair and reasonable employer under these circumstances, having made the decision that these individuals were surplus to its requirements would have:

- Advised the employees in writing that a meeting was to be held at which they were to be advised whether they were to be reconfirmed in their position or declared surplus.
- The employee would be encouraged to be accompanied to that meeting by a representative or support person of their choosing.

- At the meeting, having conveyed all of the appropriate information regarding the decision, the process to be followed regarding possible redeployment, etc the employee would be given a written summary of that information.
- The employer should ensure that proper, formerly constituted, follow-up meetings (as opposed to impromptu and/or informal "chats") were held with the employee and, as appropriate, their representative.

Had such a process been followed by IAG I have no doubt that, for example, the confusion regarding the offer of a temporary position to Ms Bolger would have been avoided. The individual employees would have been much clearer regarding the availability of alternative positions and their individual responsibilities to pursue any position in which they were interested. With more communication perhaps the individuals would have felt more able to take up the offers of outplacement support, preparation of CV's etc. The relationships with other employees could have been better managed and the applicants departures more dignified.

Penalties

[28] The applicants, as part of their claim, have requested that:

- a penalty be imposed on IAG for an alleged breach of their employment agreements, in terms of s.134 of the Act.
- a penalty be imposed on IAG for an alleged breach of section 4 of the Act, and
- a penalty be imposed on IAG in terms of s.85 of the Act, for an unlawful lockout under s.82 and s.8 of the Act.

I have heard no evidence that IAG breached the employment agreements of any of the applicants or acted in bad faith in breach of Section 4 of the Act. Despite Mr Walls attempts to persuade me that the applicants had been illegally locked out in terms of section 85 of the Act I do not accept his argument in this regard. The applicants' request that I impose penalties on IAG for these alleged breaches is declined.

Determination

[29] By way of summary of the findings set out above:

(i) IAG having followed a fair and reasonable process made a genuine business decision to make Mr Milligan, Ms Bolger and Ms Skates redundant. The applicants were dismissed for reasons of genuine redundancy and do not therefore have a personal grievance against IAG in this regard.

(ii) IAG came to the conclusion, having followed a proper selection process, that the three applicants were not the "best person for the job" and were therefore surplus to the company's requirements. This was a decision which was open to the company to make. The applicants do not have a personal grievance against IAG regarding this aspect of their dismissal.

(iii) IAG failed in its responsibility to properly manage the consequences of its decision to make the three applicants redundant. This failure amounts to an unjustifiable action by IAG to those three employees. All three applicants have a personal grievance against IAG as a result of this unjustifiable action.

(iv) IAG did not breach the applicants' employment agreements, did not breach section 4 of the Act and did not illegally lock out the applicants in terms of section 85 of the Act. The request that penalties be imposed on IAG for these alleged breaches is declined.

Remedies

Contribution

[30] In considering the nature and extent of the remedies to be awarded to the applicants I am required by section 124 of the Employment Relations Act to consider whether or not they *contributed towards the situation that gave rise to the personal grievance(s).* I have found that the applicants each have a personal grievance against IAG because of the way in which IAG managed the termination of their appointment. The applicants responded in what can only be described as a predictable and understandable way to what was for them a traumatic series of events. It was for the company to take the initiative in ensuring that the employee's stress was kept to a minimum and there was little that the employees themselves could have done to reduce that level of stress. Under

these circumstances none of the applicants can be said to have contributed towards the situation which gave rise to their personal grievance.

Recovery of lost earnings

[31] I have found that the three applicants were justifiably dismissed for reasons of genuine redundancy. At the time of the termination of their employment they were each paid redundancy compensation as required by their respective employment agreements. While I have found that they each have a personal grievance against IAG as a result of the way in which IAG managed the termination of their employment, this unjustified action by the company did not affect the basic fact that they were genuinely redundant. Under these circumstances it is not appropriate to compensate the applicants for any lost earnings.

Loss of potential superannuation

[32] As a result of his redundancy Mr Milligan will inevitably face a reduction in the amount of his accrued superannuation. However as with lost future earnings, had IAG acted entirely correctly Mr Milligan would still have suffered this loss of superannuation benefits. Loss of such benefits is, albeit inadequately, compensated by the redundancy compensation payments made in terms of his employment agreement. It is not appropriate to award additional compensation for this loss.

Compensation for hurt and humiliation

[33] Each of the three applicants suffered a level of stress and humiliation as a result of the unjustifiable actions of the employer. However the level of stress, and the consequent level of compensation, must be assessed in relation to the individual's circumstances.

(i) Mr Milligan had been employed by IAG/State Insurance for almost 20 years. At the time of his dismissal he felt betrayed, embarrassed and, on advice from his doctor went on sick leave because of the stress. Adding to his stress was the knowledge that, despite the level of redundancy compensation payable he would suffer an inevitable reduction in earnings and in particular his potential superannuation. In compensation for the additional and unnecessary stress caused by IAG's failure to properly manage the termination of Mr Milligan's employment, **IAG is to pay Mr Milligan $8,000 without deduction, in terms of section 123(1)(c)(i) of the Act.**

(ii) Ms Bolger had been employed by IAG for some 15 years. She too suffered a high degree of stress and found it necessary to take some sick leave, due to that distress, during the period of notice. Additional stress was added by the confusion regarding the possibility of temporary employment. **IAG is to pay Mrs Bolger $6,000 without deduction in terms of section 123(1)(c)(i) of the Act.**

(iii) Ms Skates, at the time of the termination of her employment had been employed by IAG for almost 4 years. Prior to joining IAG she had been unemployed for a period and faced the prospect of being unemployed again. During the period of noticed that she felt unsupported and concerned regarding her future **IAG is to pay Ms Skates $3000 without deduction in terms of section 123(1)(c)(i).**

Costs

[34] Costs are reserved and the parties are urged to attempt to settle this issue between themselves in the first instance. If they are unable to do so Mr Wall, on behalf of the applicants may file submissions in respect to costs within 28 days of the date of this determination. IAG will be given 14 days in which to file a response.

James Wilson
Member of the Employment Relations Authority