IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 292
5294098

	BETWEEN	MALCOLM MORRICK Applicant
	A N D	JMV AGRI LIMITED Respondent

Member of Authority:	K J Anderson
Representatives:	W Lawson and C Dawson, Counsel for Applicant R Marsden, Advocate for Respondent
Investigation meeting:	14 February 2012 at Rotorua
Submissions Received	20 March 2012 and 17 April 2012 from Applicant 3 April 2012 from Respondent
Date of Determination:	28 August 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Malcolm Morrick, claims that he was unjustifiably dismissed effective from 27 November 2009. Mr Morrick also claims that he has a further personal grievance because his employment was affected to his disadvantage by an unjustified action by his employer, in that he was unfairly demoted from his position of workshop manager to the role of workshop mechanic. Mr Morrick also alleges that he was denied the right to transfer to a new employer when JMV Agri Limited was sold to another company. But this claim appears to be largely related to the primary claim of unjustifiable dismissal. Mr Morrick asks the Authority to find that he has a personal grievance (or grievances) and award him the remedy of reimbursement of lost wages and compensation pursuant to s.123 of the Employment Relations Act 2000 (the Act).

[2] The respondent, JMV Agri Limited (JMV), denies that Mr Morrick was unjustifiably dismissed. JMV says that all of the company's employees had their employment terminated as the result of the sale of the business at the material time. In regard to the unjustifiable disadvantage claim, JMV denies that Mr Morrick was demoted, but in any event, the issues about the role of Mr Morrick and the alleged demotion were remedied on or about 18 August 2009. Apart from denying that there was any unjustifiable disadvantage visited upon Mr Morrick, the respondent says that a personal grievance, relating to this matter, was not raised within the 90 days required by s.114 of the Act.

[3] The Authority has received evidence from Mr Morrick and Mrs Kim Morrick. For JMV, there is evidence from Mr Roy Marsden and Mr Andrew Belcher. A number of relevant documents and written closing submissions have also been provided. All of the material evidence has been closely considered by the Authority, albeit it may not be specifically referred to in this determination.

Background Facts and Evidence

[4] Mr Morrick is an experienced diesel mechanic. Along with his family, he emigrated from South Africa to Rotorua to take up the position of tractor workshop service manager with JMV; commencing his employment on 1 September 2008.

[5] Mr Morrick reported to Mr Peter Spry, the Branch Manager. At all material times, Mr Roy Marsden was a director of JMV and he was actively involved in various matters relating to Mr Morrick. The General Manager of the business was Mr Noel Rogers but there is little evidence about his role in events. Mr Andrew Belcher was employed as the Parts Manager.

[6] The evidence of Mr Morrick is that at the beginning of his employment, there were weekly meetings attended by Mr Spry, Mr Rogers and Mr Belcher. It appears that Mr Rogers ceased attending these meetings at some point (for unspecified reasons) and Mr Marsden became involved in his place.

The alleged demotion

[7] It appears that the employment relationship progressed reasonably well until 9 April 2009. The evidence of Mr Morrick is that on this day he attended a meeting with Mr Spry, Mr Marsden and Mr Belcher.

[8] The evidence of Mr Morrick is that Mr Marsden: *"…told me to stand down as workshop manager"* and that he was to take up the position of senior mechanic. Mr Morrick attests that he was told that if he were to accept this demotion, then this would enable the business to retain the employment of another employee (Bob) who worked in the spare parts department. Apparently, the rationale was that the business was experiencing some financial issues due to the prevailing economic climate and if Mr Morrick did some work as a mechanic, the work carried out by him could be charged out; hence contributing to the income of the business. Mr Morrick says that if he had not agreed to take up the role of mechanic, the business would have been forced to make Bob redundant so he felt "cornered" and had no option but to accept that position. Mr Morrick says that he was told that when the financial situation improved, he may be reinstated to the role of workshop manager. Mr Morrick acknowledges that there was no change to his remuneration but complains that his management and supervision duties were removed. And these duties were essential to him accepting employment with JMV.

[9] The further evidence of Mr Morrick is that Mr Belcher took over his duties in regard to the management of the tractor workshop and that this removed Mr Morrick from meetings and discussions that involved other JMV managers. Mr Morrick's evidence is that:

> *My demotion was sudden and unexpected. It occurred in an unfair manner. It was in breach of my employer's obligation of good faith and was dealt with in a procedurally incorrect way. I was in an impossible situation having moved my entire family to New Zealand on the basis of working in a senior position as workshop manager. In order to protect my ongoing employment with JMV Agri I had no option but to accept the change.*

[10] The evidence of Mr Belcher portrays a somewhat different version of events. Mr Belcher recalls that it was somewhere in May 2009 (not April)[1] that it became apparent that the business needed to reduce its costs. Also around this time, a mechanic resigned and Mr Spry suggested that with the workshop being one mechanic short, Mr Morrick could take on a more practical hands-on technician role; and Mr Belcher could take over the administration of the workshop.

[1] But on the weight of the evidence, I conclude that he is most probably mistaken about this.

[11] Mr Belcher says that it was proposed that Mr Morrick should have a "changed emphasis" as foreman of the workshop and that he and Mr Belcher would cooperate to run the workshop, thus enabling Mr Morrick to charge out some workshop jobs.

[12] The other employee, Bob, would continue to be employed in the parts department under the supervision of Mr Belcher who would then have three responsibilities: workshop administration, parts supervision and the walk-in sales function. The evidence of Mr Belcher is that this seemed to be a sensible arrangement to provide for the economic circumstances faced by the business and also to ensure that as many people as possible could retain their employment. Mr Belcher says that:

> *A round table discussion took place, including Malcolm Morrick and the discussion all seemed very amicable and agreed on without a great deal of formality.*

[13] Mr Belcher attests that whilst he and Mr Spry and Mr Marsden remained and continued with some discussion about how to implement the changes, a staff member came to them and advised that Mr Morrick was: *"…ranting and raving at the top of his voice to all the other staff about being supplemented as the workshop manager"*. Mr Spry was requested by the staff member to come and quieten Mr Morrick down. Mr Belcher says that this was his first experience of the "volatility" of Mr Morrick's personality. Mr Belcher attests that Mr Morrick went on to continually refer to his demotion, albeit his remuneration and conditions were not altered. In the eyes of Mr Belcher, Mr Morrick was not demoted. Rather, it is the view of Mr Belcher that there was simply a different emphasis on the work that Mr Morrick was doing. That is, that Mr Belcher and Mr Morrick were to share the workshop administration functions and Mr Morrick remained the manager of the service technicians.

[14] Sadly, due to his untimely demise, Mr Spry is not able to give evidence to the Authority. However, the evidence of Mr Marsden is that Mr Spry was aware of the claims of Mr Morrick and the forthcoming proceedings in the Authority before he died and he prepared a written summary of his recollection of events. This has been produced to the Authority by Mr Marsden. In regard to the issue of the alleged demotion, Mr Spry recorded that:

> Due to the economic downturn, we were forced to make redundancies in our parts department and one of our mechanics had resigned. Malcolm had struggled with the paperwork in the service department, I suggested that I (Peter Spry) relieve our parts manager, Mr Andy Belcher of some of his workload and he, in turn, would carry out the

> administration duties in the workshop. He [Mr Morrick] would still remain in charge as foreman/leading hand and Andy Belcher would book and allocate the work in conjunction with Mr Morrick. Before this was implemented, I consulted with Mr Morrick. He thought it was a great idea and accepted the proposal. A letter was given both to Malcolm and Andy explaining the new proposal, and for them to carefully read before making any commitment.[2] After they were both happy and agreeable with the changes, I then discussed the new proposal with the rest of the staff on 8 April 2009 and explained to them that it was not a demotion and for them to read through the letter which carefully explained everything.

[15] Mr Spry continues in his statement to say:

> Malcolm was completely uncooperative in this role and went to considerable lengths to undermine Andy who endeavoured to run the workshop as well as his other duties. Several meetings were held with him [Mr Morrick] to try to gain his cooperation.

[16] The evidence of Mr Marsden is that he observed that the change in roles led to "behavioural difficulties" emanating from Mr Morrick from time to time. Mr Marsden says that he formed the view that Mr Morrick had become disenchanted with his move to New Zealand generally, rather than any perceived wrongdoing by the company. Mr Marsden refers to having several meetings with Mr Morrick and Mrs Morrick at which he endeavoured to obtain an understanding as to what was causing the behavioural differences on the part of Mr Morrick. The evidence of Mr Marsden is that:

> *The initial meeting was within two weeks of his changing deployment and his general demeanour surprised me. He was quite emotional with what he thought and called a demotion. It wasn't a demotion of course. His terms and conditions of employment remained the same, including his remuneration. All that changed was a focus onto the workshop technician part of his role, which the respondent was in need of at that time because of the business environment existing. I did my best to seek his cooperation in coping with what was a very tight economic climate. The main response that I can recall receiving from the applicant was that he said if we would give him $30,000 he would return home. That, I think, perhaps sums up his disenchantment with New Zealand generally.*

[17] Mr Marsden also refers to Mr and Mrs Morrick coming to his office in Taupo on a particular Saturday morning. Mr Marsden relates to Mr Morrick being in an emotional state and he made, what Mr Marsden believed to be, *"disloyal comments and wild interpretations"* as to the perceived activities of Mr Spry and Mr Belcher.

---

[2] There is no evidence of the letter referred to.

[18] Mr Marsden also refers to having a meeting with Mrs Morrick in an attempt to get some "family background" and to see if she could assist in helping Mr Marsden to "settle down" Mr Morrick. Mr Marsden subsequently prepared a *Mechanic's Protocol* and a new job description for Mr Belcher. In a memorandum to Mr Morrick dated 8 June 2009, Mr Marsden conveyed his thoughts about how matters had developed. Among other things, Mr Marsden recorded that:

> You will not be required to understudy or fill in for the workshop manager as this is seen as unfair and leads to many demarcation issues. The company manager is primarily responsible for any coverage of the workshop manager duties.
>
> As senior mechanic you should use your status to encourage professional workmanship and conduct by the rest of the team.
>
> You will be given opportunities to increase and develop your technical knowledge and will be our primary representative at franchise meetings or courses where technical information is the prime item on the agenda.
>
> At the same time we wish to establish a protocol for what is expected of all mechanics. You will I trust encourage the mechanics to observe the company's mechanics' general working protocol. Attached is the job description for Andy and also the mechanics' working protocol.
>
> I know we have the potential to develop as the best workshop team in the district which will lead us to profits that we all can share.

[19] The evidence of Mr Belcher also refers to several meetings involving him, Mr Morrick and Mr Marsden for the purpose of defining Mr Morrick's role and explaining that the changes were a "sound way" for the business to continue. Mr Belcher relates to another mechanic leaving because of the tension created by Mr Morrick and his "continuing disloyalty to the company". According to Mr Belcher, there was also an issue about getting timesheets and job sheets completed correctly by Mr Morrick.

Disciplinary action

[20] It appears that the behaviour of Mr Morrick deteriorated to the point where disciplinary action was contemplated. The evidence of Mr Morrick is that on the afternoon of 9 July 2009, he was called to the office of Mr Spry where he was told by him that he did not think that Mr Morrick could continue to work for the company. Mr Morrick attests that his response was to inform Mr Spry that if the company wanted him to leave, it would need to reimburse him for the cost of his relocation

from South Africa to New Zealand; a sum of approximately $30,000. Mr Morrick attests that Mr Spry then said: *"I knew you would say something like that. I will simply give you a written warning and Andy Belcher will back me up."* According to Mr Morrick, Mr Belcher was present at the time but Mr Belcher makes no mention of this in his evidence.

[21] The evidence of Mr Morrick appears to be confirmed by the existence of a letter dated 10 July 2009, from Mr Spry:

> To: M Morrick
>
> Further to our disciplinary meeting held yesterday, 9th July 2009, I wish to confirm that you are receiving a first written warning as a result of your inappropriate behaviour and performance as outlined in the bullet points below.
>
> This warning will remain on your personnel file for a period of one year after which all reference to the warning will be removed provided your conduct improves and remains satisfactory. Any further instances will result in further disciplinary action.
>
> I would also like to point out that over the past few months we as your employer have made every effort to ensure that your work meets the standards required by taking all considerable steps to reorganise your workload to an agreed level. As you are aware we have had several Team Meetings (the last on 26th May 2009) to address the ongoing communication issues that we have experienced with both staff and customers alike, and to date there has been no improvement seen.
>
> We are also requesting that improvement is made in the following areas:
>
> - More accurate accountability on timesheets
> - Improved communication with the service manager
> - Unacceptable outbursts will not be tolerated and must cease immediately
> - Carrying out work instructions accurately as instructed
> - Improved support to fellow employees as needed (without condemnation)
>
> We will be monitoring these issues over the next two weeks and if these areas are not addressed further steps will be taken as per your Employment Contract.
>
> Peter Spry Malcolm Morrick
> Manager

[22] Mr Morrick says that on that day (10 July 2009), he was asked to come to Mr Spry's office to sign this letter.

[23] The evidence of Mr Morrick is that upon reading this letter, he enquired about the disciplinary meeting mentioned in the letter that had, purportedly, occurred the day before (9 July 2009). Mr Morrick says that he asked Mr Spry for the company disciplinary code and procedure but Mr Spry was unable to produce them.

[24] The further evidence of Mr Morrick is that later on the afternoon of 10 July 2009, he was given a second letter dated 9 July[3]. This letter purportedly (and, it seems, retrospectively) invites Mr Morrick to attend a disciplinary meeting (along with a support person) on 10 July 2009. The matters to be discussed are the same as the five bullet points set out above. In the absence of Mr Spry, Mr Marsden could not give any evidence about this remarkable set of events, but when asked by the Authority, Mr Marsden did not take issue with the evidence of Mr Morrick. Following receipt of the two letters mentioned, Mr Morrick sought legal advice and it seems that some discussions took place between Mr Spry and Mr Morrick's lawyer (Mr Lawson), the outcome being that the two letters in question appear to have been negated or withdrawn; although the evidence about this is unclear.

Disciplinary meeting

[25] While the matters pertaining to the letters dated 9 July 2009 and 10 July 2009 seem to have slipped into the background, upon the return of Mr Marsden from a trip overseas, a letter from him (dated 11 August 2009) was given to Mr Morrick:

> Dear Malcolm
>
> You are required to attend a disciplinary meeting on Tuesday 18th August 2009, in our Rotorua office. The purpose of this meeting is to provide you the opportunity to answer the allegations about the following aspects of your employment.
>
> Our concerns are:
>
> The accuracy and accountability on timesheets of your day's work.
> Communication and relations with the service manager.
> Outbursts of temper and general attitude in the workplace.
> Carrying out work accurately as per instructions given to you.
> Cooperation and support of your fellow employees as the senior mechanic.
>
> This meeting is to take place on Tuesday, 18th August at 10.30am in the manager's office.

[3] The year has been omitted from the copy produced to the Authority but can be assumed to be 2009.

> You have the right to bring a representative to this meeting. Attached are copies of relevant information and further detail covering the above concerns.

[26] A meeting duly took place on 18 August 2009. Mr Morrick was represented by Mr Lawson with Mr Marsden present. There is some uncertainty in the overall evidence about whether Mr Spry was in attendance. The amended statement of problem (at clause 2.26) informs that Mr Spry was present. But Mr Morrick's written evidence is that while Mr Spry had been present earlier, and a discussion had taken place between Mr Spry and Mr Lawson along with Mr Marsden, when Mr Morrick arrived, Mr Spry had departed from the office. Little rests on whether Mr Spry was or was not present at the meeting, except in relation to a matter which has been examined below, concerning whether or not a personal grievance was raised at the meeting.

[27] Pertinent to the claim of an unjustifiable disadvantage to Mr Morrick's employment, there is a conflict in the evidence about whether (or not) a personal grievance regarding that matter was raised on 18 August 2009. The evidence of Mr Morrick is that at the beginning of the meeting with Mr Marsden, Mr Lawson:

> *... showed Mr Marsden a draft personal grievance letter and* [Mr Lawson] *stated that if they* [the company] *were to carry on with my dismissal on the grounds alleged, the personal grievance would be lodged.*

[28] The letter referred to by Mr Morrick is dated 18 August 2009. It is comprehensive and there is an allegation (among others) that Mr Morrick was *"unfairly and unlawfully"* demoted from his position as workshop manager.

[29] But Mr Marsden denies that he was shown the draft letter raising a personal grievance as referred to by Mr Morrick (albeit he acknowledges Mr Lawson had a letter in his hand); nor was he given such a letter or ever sent a copy. I accept the evidence of Mr Marsden[4] and I conclude that a personal grievance was not raised on 18 August 2009 regarding the alleged demotion of Mr Morrick. I find that the first time a personal grievance was raised regarding the alleged demotion of Mr Morrick was via a letter dated 16 December 2009. Therefore, the raising of the personal grievance about the alleged demotion was well outside the 90 days required by s.114 of the Act.

[4] Albeit Mr Morrick may be correct when he says that Mr Lawson "showed" the letter to Mr Marsden – but from a distance, whereby it was impossible for Mr Marsden to see the content.

Outcome of the meeting held on 18 August 2009

[30] It is commonly accepted that the outcome of the meeting was that Mr Marsden agreed that the company would not pursue any further disciplinary action against Mr Morrick. The evidence of Mr Marsden is that the company wished to resolve matters with Mr Morrick and to have him *"working happily in a harmonious workplace"*. Mr Marsden says that it became apparent to him that the joint management of the workshop by Mr Morrick and Mr Belcher was not working as well as he had contemplated. Therefore, it was agreed that Mr Morrick would resume sole responsibility for the management of the workshop. Mr Marsden also proposed that the expectations of the company regarding Mr Morrick in his role as a service technician and as service (workshop) manager should be more clearly set out. Mr Marsden says that even if Mr Morrick had been demoted (which is denied), then this situation was remedied as an outcome of the meeting on 18 August 2009.

[31] The outcome of the meeting is recorded, to some extent, by Mr Morrick in an email to Mr Marsden dated 31 August 2009. The content of the email indicates that Mr Morrick wished to move forward in a cooperative and constructive manner and his sentiments were reciprocated via an email from Mr Marsden dated 2 September 2009. Attached to this email was a document setting out his thoughts regarding the expectations of the company in regard to Mr Morrick's role, including that the budget for chargeable hours from the workshop would include 20 hours of Mr Morrick's time. The requirement to achieve the budgeted chargeable hours was stressed as was the need to *"*strive urgently*"* to get sufficient extra work to enable another mechanic to be employed.

Further issues

[32] Mr Morrick referred to two other matters that arose on or about 12 October 2009, relating to some discussions between Mr Spry and Mr Morrick pertaining to two matters. The first of these was about the use of a field service vehicle by one of the mechanics (Oliver). The second matter related to the resignation of another mechanic and an inference by Mr Spry that it was the fault of Mr Morrick that the mechanic (Clark) resigned. Mr Morrick says that the manner in which these two matters were dealt with by Mr Spry was *"ongoing unfair treatment"*. But the evidence about these two issues is inconclusive and at best, reflects some possible

ongoing tension between Mr Morrick and Mr Spry. But sadly, Mr Spry's view of these matters is not available.

[33] There was also an issue about Mr Morrick being requested to take leave during a quiet period of trading. Mr Morrick took issue with this but there is no conclusive evidence of any unfair or unreasonable action on the part of the employer.

Redundancy

[34] The evidence of Mr Morrick is that on Friday, 30 October 2009, at approximately 10.15am, Mr Marsden came to the workplace. According to Mr Morrick, a meeting took place between Mr Marsden, Mr Spry and the administration/office staff, including Mr Belcher. There was a second meeting involving the other two workshop staff. Both of the meetings (apparently), involved Mr Marsden and Mr Spry. The purpose of the meetings was to announce that JMV had been sold to Parts & Services Ltd; the latter company is based at Taupo. The Authority understands that the new trading entity is called PSL Agri Rotorua and is a part of Parts & Services Ltd which also trades as PSL Agri Taupo.

[35] Mr Morrick attests (and his evidence is not disputed) that he met with Mr Marsden after the other two workshop staff. Mr Morrick says that he was given a letter by Mr Marsden. The letter is undated and is over the signature of Mr Marsden:

> Dear Staff Member
>
> **Sale of JMV Agri Limited**
>
> This letter is to confirm that JMV Agri Limited has been sold and as such your employment with it is terminated as of Wednesday, 25 November 2009. We will do what we can to help you to adjust to this situation.

[36] The original appears to have been altered at some point, probably before Mr Morrick received it, and the alteration is that the typed "*Wednesday 25 November"* is crossed out and inserted (by hand) in its place, is "*Friday, 27 November*."

[37] The evidence of Mr Morrick is that Mr Marsden informed him of the sale of JMV and that he [Mr Morrick] was: *"being paid off"*. Mr Morrick says that Mr Marsden said: *"Sorry I have to let you go. It's not personal, it's a financial issue."*

[38] Not surprisingly, Mr Morrick was taken aback but asked if he could take up a position as a mechanic, as just one week previously, Mr Spry had asked him to obtain another mechanic. Mr Morrick says that when he mentioned the possibility of being employed as a mechanic, Mr Marsden responded: "*No because there would be personal issues"*. Mr Morrick left the office and began to pack his tools as he had been told to leave that day and was paid in lieu of notice.

[39] The evidence of Mr Morrick is that Mr Spry phoned him on the evening of 30 October 2009 and told him that he had no forewarning of what was going to happen and that he felt bad about leaving things like this, as he did not get a chance to see Mr Morrick before he left. It was agreed that the two men would meet on Monday, 2 November 2009. When they met on that day, Mr Morrick says that Mr Spry *"went to great lengths"* to explain how his position also had been affected by the company's financial state, and he had to take a drop in pay. Mr Morrick attests that he found the attempt by Mr Spry to reason with him to be frustrating and the two men parted with some critical comments from Mr Morrick about the lack of management skills on the part of Mr Spry.

[40] Mr Morrick related to a discussion on 2 November 2009 with the other two workshop staff, whereby he was told that upon the departure of Mr Morrick, Mr Spry had called a meeting and announced that he had: *"...let me go/dismissed me"* because Mr Morrick had not obeyed Mr Spry's instructions. But this evidence has not been verified and unfortunately, as with much of Mr Morrick's evidence, as it pertains to Mr Spry, it is not possible to ascertain if there is another version of certain matters. Mr Morrick received his final pay slip on 3 November 2009.

Analysis and Conclusions

[41] Mr Morrick pursues two fundamental claims:

(a) That he was disadvantaged in his employment by an unjustified action (or actions) by his employer; in particular, he was demoted from his position as workshop manager to workshop mechanic; and

(b) The termination of his employment on the ground of redundancy was an unjustifiable dismissal because it was procedurally flawed and a breach of the employer's duty of good faith towards Mr Morrick. Further, it is submitted for Mr Morrick, that he was wrongly denied the

opportunity to be redeployed to the position of mechanic with Parts & Services Ltd, the purchaser of JMV.

The claim of unjustifiable disadvantage

[42] There is a primary question here that requires determination. This is: Was the personal grievance raised within 90 days as required by s.114(1) of the Act?

[43] It is submitted for JMV that Mr Morrick did not raise a personal grievance within 90 days of his alleged demotion from the position of workshop manager. According to the evidence of Mr Morrick, the alleged demotion was effective from 9 April 2009, therefore the personal grievance should have been raised by (or about) 8 July 2009. Alternatively, it is argued, that if it is found that Mr Morrick did raise the personal grievance within 90 days, any alleged disadvantage was rectified as an outcome of the meeting with him on 18 August 2009. Of course, it is also the position of JMV that the change in Mr Morrick's role was not a demotion in any event. Rather, there was an agreed re-allocation of duties between Mr Morrick and Mr Belcher, driven by financial imperatives.

[44] Taking first the issue of whether or not Mr Morrick was demoted, I conclude that it is more probable than not that he was. While the respondent has put something of a gloss on the change to Mr Morrick's duties, it is clear that Mr Belcher assumed many of the management responsibilities that previously belonged to Mr Morrick. And while it is true that Mr Morrick retained his remuneration, he clearly lost much of the management status and decision making ability that he previously had as the workshop manager.

[45] The evidence of Mr Belcher is that Mr Morrick agreed to the change in his role. But it is clear that he did not, as evidenced by his reaction after he left the meeting on 9 April 2009, and subsequently. And while the manner in which Mr Morrick expressed his displeasure was not acceptable, it is obvious that he believed that he had effectively been forced into accepting the change in his role, because if he did not, another employee (Bob), would have had his employment terminated. Given that Mr Morrick was new to his job and had recently relocated from South Africa, he says that he had no choice but to go along with the change in his role. But, then the attitude of Mr Morrick in regard to the change in his role led to disciplinary issues and complaints from clients. A separate matter altogether.

[46] Having reached a conclusion that it is more probable than not that Mr Morrick was demoted from his role as workshop manager, the next question that falls for determination is: Did Mr Morrick raise a personal grievance within 90 days of the action amounting to a personal grievance occurring or coming to his notice; namely, 9 April 2009?

[47] It is argued for Mr Morrick that he clearly expressed a grievance in regard to his demotion and that Mr Marsden and Mr Belcher were aware of Mr Morrick's dissatisfaction with the situation. It is also argued that Mr Morrick clearly protested the demotion on a number of occasions. It has been held that expressions of dissatisfaction and/or protestation are not sufficient to raise (or submit) a personal grievance unless it takes the form of a: *"forceful response or the protests are of sufficient strength and purpose to alert the employer."* [5]

[48] *Wilkinson* is a case decided under the Employment Contracts Act 1991 and the language used in regard to bringing a grievance to the notice of the employer is *"submitted"* rather than *"raised"* under s.114 of the current Act, but it has been held that this does not make a material difference[6].

[49] But following his findings in *Wilkinson*, Castle J. in *Start v. Foster (t/a The Hutt Pet Centre)* [1994] 2 ERNZ 200, 211, referred to an observation that he made in *Wilkinson*:

> I agree with the proposition advanced, provided the protests made by the employee at the time of his or her departure have been of sufficient strength and purpose to alert the employer to make a response as envisaged in, if not positively required by clause 5 of the First Schedule.

[50] Judge Castle then went on to effectively revoke that particular proposition and stated:

> On reflection I do not think that statement of mine went far enough. On what basis can an employer decide whether or not to prepare himself to resist a personal grievance attack before he has any notice or any step has been taken? There can be no practical answer or, if there is, I am unable to envisage it. With the greatest respect to Palmer J and the authors of *Horn* and only after further consideration, I now express my concluded view that not only is the proposition misleading but it is also wrong. In short, the employer must be given

[5] *Wilkinson v. ISL Computer Systems* [1993] 1 ERNZ 512, 524
[6] *Ruebe-Donaldson v. Sky Network Television Ltd (No 1)* [2004] 2 ERNZ 83

> some positive notice of the bringing of a claim of a personal grievance.

[51] The above is a reference to the finding in *Houston v. Barker (t/a Salon Gaynor)* [1992] 3 ERNZ 469, where Palmer J. held that he could see no reason why protests made by an employee at the time of dismissal, if couched in language clear enough to alert the employer to the fact that there was disagreement with his or her actions, could not constitute a submission of a grievance.

[52] More recent (and current) authority is provided by *Creedy v. Commissioner of Police* [2006] ERNZ 517. The circumstances of this case are that Mr Creedy forwarded a letter to his employer, the relevant content of the letter being:

> By this letter Sergeant Creedy serves notice that he commences a personal grievance with you pursuant to s.103 of the Employment Relations Act 2000.

[53] And further:

> It is claimed that one or more of Sergeant Creedy's conditions of employment is or are affected to his disadvantage by the unjustified way in which you, as his employer have applied the disciplinary process to him.

[54] It was held that this letter did not raise a personal grievance as required by the legislation. Chief Judge Colgan held that:

> It is the notion of the employee wanting the employer to address the grievance that means that it should be specified specifically to enable the employer to address it. So it is insufficient, and therefore not a raising of a grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment as Mr Barrowclough did on Mr Creedy's behalf in this case. As the Court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates. (My underlining.)

[55] While I accept that Mr Morrick had some discussions with Mr Marsden whereby he expressed his unhappiness about the changes in his position, and Mr Morrick reacted to the demotion in other ways, to the extent that disciplinary action was required, I do not accept that his words or actions were such that: *"the*

employer was made aware sufficiently of [a] *grievance to be able to respond"* as the Act requires.

[56] Finally, regarding the issue of the raising of a grievance, while it has not been alluded to in the submissions for Mr Morrick, for reasons of completeness, I reiterate my earlier finding that the so-called "draft" letter dated 18 August 2009, was not given to Mr Marsden at the meeting held on that day and further, Mr Marsden never viewed nor subsequently received this letter. I find this was, most probably, because the issues surrounding the demotion of Mr Morrick were largely resolved as an outcome of the meeting; as recorded by the subsequent exchange of emails between Mr Morrick and Mr Marsden. But in any event, even if this is not correct, the alleged grievance was required to have been raised by not later than 8 July 2009.

The claim of unjustifiable dismissal

[57] As with any dismissal, the test the Authority must apply is whether the decision to dismiss Mr Morrick on the ground of redundancy was what a fair and reasonable employer would have done in the circumstances.[7]

[58] And then, as was held by the Employment Court (Colgan CJ) in *Simpsons Farms Ltd v. Aberhart* [2006] ERNZ 825:

> So long as an employer acts 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 s.103A.

[59] The above statement from the Employment Court is consistent with the findings of the Court of Appeal in *GN Hale & Son Ltd v. Wellington etc Caretakers etc IUOW* [1990] 2 NZILR 1079, where the Court held that:

> An employer is entitled to make his business more efficient as for example by automation, abandonment of unprofitable activities, reorganisation or other cost saving steps, no matter whether or not the business would go to the wall. A worker does not have a right to continued employment if the business can be run more efficiently without him.

[60] And further:

[7] Section 103A as it was then.

> When a dismissal is based on redundancy it is the good faith of that basis and the fairness of the procedure followed that may fall to be examined on a complaint of unjustified dismissal.

[61] Then, in a discussion about the statutory concept of unjustified dismissal, Richardson J stated that:

> The statutory concept of unjustified dismissal is concerned with both the reason for the dismissal and the manner in which it was handled; with the substantive justification and with procedural fairness.

Application of the law to the circumstances of Mr Morrick

Was the redundancy of Mr Morrick's position genuine?

[62] It does not appear to be disputed by Mr Morrick that the sale of JMV to Parts & Services Ltd was for genuine financial reasons and it seems that it is accepted that the sale of the business effectively made Mr Morrick's position as workshop manager redundant along with all other JMV employees, at all levels.[8] But in the event I am wrong with these two assumptions, upon the financial evidence that has been produced to the Authority by JMV, I conclude that it is more probable than not that due to the deteriorating trading position of JMV and the cumulative losses incurred, the sale of the company to Parts & Services Ltd was genuinely required as a matter of fiscal urgency.

Was the termination of Mr Morrick's employment procedurally fair?

[63] The answer to the above question is arrived at quite easily as the common evidence starkly reveals that the termination of Mr Morrick's employment on the grounds of redundancy was not procedurally fair; for several reasons.

[64] First, as has been submitted for Mr Morrick, there is a statutory duty of good faith imposed upon an employer by s.4 of the Act. This duty applies to the employment relationship generally but in a redundancy setting, it is quite specific as set out below:

> [(1A) The duty of good faith in subsection (1) –
>
> (a) Is wider in scope than the employed mutual obligations of trust and confidence; and

[8] Albeit, it was a technical redundancy for all other employees, except Mr Morrick and another employee (Bob). It also seems that Mr Spry was required to accept a reduction in his salary.

> (b) 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; and
>
> **(c) Without limiting para.(b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected –**
>
> **(i) Access to information, relevant to the continuation of the employee's employment about the decision; and**
>
> **(ii) An opportunity to comment on the information to their employer before the decision is made.**

[65] And then further at s.4(4):

> The duty of good faith in subsection (1) applies to the following matters:
>
> (a) Bargaining for a collective employment agreement or for variation of a collective agreement, including matters relating to the initiation of the bargaining:
>
> (b) Any matter arising under or in relation to a collective agreement while the agreement is in force:
>
> (ba) Bargaining for an individual employment agreement or for a variation of an individual employment agreement:
>
> (bb) Any matter arising under or in relation to an individual employment agreement while the agreement is in force:
>
> **(c) Consultation (whether or not under a collective agreement) between an employee and its employees, including any union representing the employees, about the employees' collective employment interests, including the effect on employees of changes to the employer's business:**
>
> **(d) A proposal by an employer that might impact on the employer's employees, including a proposal to contract out work otherwise done by the employees or to sell or transfer all or part of the employer's business:**
>
> **(e) Making employees redundant:**[9]
>
> (f) …
>
> (g) …

[66] It is transparently clear that JMV did not act in good faith toward Mr Morrick in that it failed to consult with him about the transfer of the business to Parts & Services Ltd and the associated affect upon the continuation, or more precisely, the lack of continuation, of Mr Morrick's employment.

---

[9] My emphasis.

[67] A more obvious breach of the statutory obligations of the employer (intentional or otherwise) is unimaginable.

[68] In defence of its actions, JMV submits that, having made the decision to sell the business, any consultation with staff would have been "fruitless" as JMV no longer required any of its staff and as such, all employees were surplus to the requirements of the business and hence all redundant.

[69] But this argument completely ignores the legal requirements that are imposed by s.4 of the Act and common law precedent. For example, in *Aoraki Corp Ltd v. McGavin* [1998] 1 ERNZ 601, the Court of Appeal held that:

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

[70] And in *Coutts Cars v. Baguley* [2001] ERNZ 60, 672, the Court of Appeal stated:

> Plainly the obligations to act in good faith and to avoid misleading and deceiving together with the importance accorded the provision of information, will make consultation desirable, if not essential, in most cases. But as said in *Aoraki*, to impose an absolute requirement would lead to impracticabilities in some situations.

[71] But it was not impracticable for Mr Marsden to consult with Mr Morrick before giving him notice of the termination of his employment. This is particularly so given that, at the time, Mr Marsden was the sole director and shareholder of JMV and he was one of three directors of Parts & Services Ltd. Furthermore, via another company, Matrix Investments Limited, Mr and Mrs Marsden were, substantially, the majority shareholders in Parts & Services Ltd. This means that in practical terms, Mr Marsden was, effectively, the primary decision-maker in regard to the sale of JMV Agri Ltd to Parts & Services Ltd and hence he was clearly in a position to have full knowledge of the sale of JMV. Therefore, Mr Marsden could undoubtedly have consulted with Mr Morrick before the termination of his employment was confirmed.

[72] In summary, I find that the dismissal of Mr Morrick on the ground of redundancy was procedurally flawed and the defects in the process followed by the employer were not minor or inconsequential. It follows that the dismissal of Mr Morrick is found to be unjustifiable.

Redeployment

[73] It has been submitted for Mr Morrick that he should have been given the opportunity, as were other employees, except for one other (Bob), to transfer to the employment of Parts & Services Ltd. It is argued that there was a position available as a mechanic, as evidenced by the fact that Mr Morrick had been requested to employ another mechanic shortly prior to the sale of JMV and as further evidenced by an advertisement on Trade Me for a Foreman/Diesel Technician, listed on 10 November 2009.

[74] While there is clearly a common link between JMV Agri Ltd and Parts & Services Ltd, via the involvement of Mr Marsden, the fact remains that the companies are two separate and distinct legal entities and Mr Morrick was not a vulnerable employee covered by Part 6A of the Act. No doubt, Mr Marsden could have offered Mr Morrick employment with Parts & Services Ltd had he chosen to, but the fact remains, he was under no legal obligation to do so, given the separate legal status of Parts & Services Ltd, which did not have an employment relationship with Mr Morrick.

[75] But apart from the primary factor of there being two separate and distinct legal entities, the evidence relating to the actions and attitude of Mr Morrick, when he was demoted to the role of senior mechanic earlier, shows that he would not have adapted easily to working in a similar role again with Parts & Services Ltd (t/a PSL Agri Rotorua) and it is unlikely that he would have fitted into the new organisation without further disruption. There is also evidence of various complaints from dissatisfied customers who had indicated that they no longer wished to have any further dealings with Mr Morrick.

Summary

[76] In regard to Mr Morrick's claim of unjustified dismissal, I find that his position of workshop manager was genuinely redundant due to the sale of JMV for proven financial reasons. However, I find that the manner in which the dismissal of Mr Morrick occurred was a breach of the duty of good faith by the employer pursuant to the relevant provisions of s.4 of the Act, as set out above. The breach of the duty of good faith, along with the failure of JMV to acknowledge established common law requirements in a redundancy setting, were not what a fair and reasonable employer

would have done in all the circumstances and hence the dismissal of Mr Morrick was unjustifiable.

Remedies

[77] Having found that the dismissal of Mr Morrick was unjustifiable and hence he has a personal grievance, pursuant to s.123(1) of the Act:

> Where the Authority or the Court determines that an employee has a personal grievance, it may, in settling the grievance, provide for one or more of the following remedies ...

[78] Included in the remedies available is reimbursement of wages and compensation for humiliation, loss of dignity and injury to feelings.

Reimbursement of wages

[79] Mr Morrick seeks to be paid reimbursement of lost wages for four months; the time that elapsed before he obtained new employment. But as I have found that the redundancy was for genuine reasons and that there was no entitlement to redeployment; and Mr Morrick was paid the contractual period of notice, there is therefore, no loss of or entitlement to, reimbursement of wages.

Compensation

[80] The sum of $20,000 is sought by Mr Morrick but there is no reference in the statement of problem, or the submissions for Mr Morrick, regarding why such a relatively high sum should be awarded. I assumed that the evidence of Mr Morrick would give some indication as to the effect upon him of the dismissal but there is nothing in his written statement of evidence about the existence of "humiliation, loss of dignity or injury to feelings" as required by s.123(1)(c)(i) of the Act. Neither did Mr Morrick give any oral evidence to the Authority about any of these factors at the investigation meeting. Indeed, when asked by the Authority about his feelings in regard to whether he could have continued to work with the people who were involved with JMV (in the context of redeployment), Mr Morrick said he would still work for Mr Marsden: *"if he wanted me"*.

[81] I observed that Mr Morrick is a reasonably stoic man and hence I thought that perhaps Mrs Morrick would provide evidence that would satisfy the requirements of

s.123(1)(c)(i), but there is no evidence from her about the effect of the dismissal either.

[82] Therefore, I am left to rely upon my observations of Mr Morrick at the investigation meeting. It was apparent that his dismissal under the circumstances that were visited upon him, had affected him to some degree in regard to a loss of dignity and injury to feelings, albeit not to the extent that the sum he is seeking to be awarded is warranted.

[83] I conclude that on the evidence that was available to me in regard to making an award of compensation, the sum of $6,000 is appropriate.

Ability to pay

[84] The financial information provided for JMV Agri Limited, via an affidavit from Mr Marsden, shows that the company has net assets/equity of $100; hence there is no ability to meet any contingent liability pertaining to any remedies awarded to Mr Morrick. Indeed, I raised this with counsel for the applicant at the beginning of the investigation meeting but was informed that Mr Morrick wished to continue with the proceedings regardless.

[85] The Authority has received submissions from Mr Morrick urging that JMV Agri Limited and Parts & Services Limited are effectively one and the same, given the involvement of Mr Marsden as a director and a direct (and indirect) shareholder of both companies. The Authority has been urged to *"*lift the corporate veil*"* and has been referred to a judgment of the Employment Court, *Square One Service Group Ltd v. Butler* [1994] 1 ERNZ 667,[10] as authority for such action. This case was an appeal of an Employment Tribunal decision whereby the Authority declined to strike-out certain respondents that the applicant had cited in order to pursue remedies against them. But the grounds of that case are not similar to the circumstances of Mr Morrick and JMV. Nonetheless, it is relevant that Judge Colgan (as he was then) observed that:

> I acknowledge the generally cautious approach taken by Courts in interfering with the long established law of corporate separateness confirmed as long and as authoritatively ago by the Privy Council in *Salomon v. Salomon & Company Ltd* [1897] AC 22. The cautious approach of Courts even now is illustrated by judgments such as that of the Court of Appeal in *Re Securitibank Ltd No 2* [1978] 2 NZLR 136, 158 and 159 per Richmond E.

[10] At p.679,680.

[86] Judge Colgan then went on to state the following:

> Mr Lock for the respondent submitted, correctly I conclude, that the Court (or Tribunal) may lift the corporate veil but still ensure the *Salomon* principles are not abused or employed, to prevent the veiled company or other entity to avoid its lawful or proper obligations. This may be done, in this Court or the Tribunal [Authority], in equity and good conscience and where there are sufficient elements of artificiality or a sham is apparent.

[87] But apart from the very significant fact that the Authority has not been requested to join Parts & Services Ltd to the proceedings, I conclude that there is no apparent element of *"artificiality or a sham"* in regard to the sale of JMV to Parts & Services Ltd. The latter was already an existing entity and has been since 1991; the former was in financial trouble and urgent action was taken to rectify this. This action was not to avoid any possibility of a contingent liability involving Mr Morrick, as at that point, legal proceedings had not been initiated by him. It seems to me that the recovery of the remedy awarded to Mr Morrick is a matter that he and his counsel will have to contemplate further. It is not appropriate for the Authority to impose liability upon an entity that is not a party to the proceedings, but even if Parts & Services Ltd was a party, it is difficult to see how any liability involving the remedy awarded to Mr Morrick could be made the responsibility of that company, at least without further evidence and legal argument substantiating a contrary view.

Determination

[88] For the reasons set out above, the findings of the Authority are:

(a) Mr Morrick is unsuccessful with his claim that he was disadvantaged in his employment by an unjustified action by JMV. Apart from it being arguable as to whether a resolution was agreed to on (or shortly after) 18 August 2009, Mr Morrick did not raise a personal grievance about this matter within the 90 days required by s.114(1) of the Act;

(b) The dismissal of Mr Morrick on the grounds of redundancy was unjustifiable;

(c) JMV is ordered to pay to Mr Morrick the sum of $6,000 pursuant to s.123(1)(c)(i) of the Act.

Costs

[89] Costs are reserved. The parties are invited to resolve that matter if they can, taking into account the outcome and the usual daily approach adopted by the Authority. In the event a resolution cannot be reached, the applicant has 28 days from the date of this determination to file and serve submissions with the Authority. The respondent has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority