

A Portrait of Redundancy Law in
New Zealand

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by Sarah Joanne Hughes

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Abstract

This paper analyses the law of redundancy in New Zealand, from its historical background through to current developments which have impacted, or are likely to impact on its interpretation and application in the future. The paper specifically questions whether current substantive and procedural requirements for redundancy, as construed by the Courts, are in keeping with the intentions underpinning the Employment Relations Act 2000 (ERA), in particular, whether they fit with the principle of good faith and whether they provide an equal balance between the rights of the employer and the rights of the employees. It focuses on the common law that has developed around redundancy issues largely under the personal grievance regime.

In order to consider accurately these issues, the paper initially outlines the history of redundancy law, key legislative concepts and the New Zealand environment. Following this, discussion on both the procedural and substantive elements of redundancy law is outlined. It is through this analysis that symptomatic issues within each aspect of the current law are addressed and appropriately explored. Finally, new governmental and legislative developments are discussed prior to a broad conclusion being established. This addresses the key questions outlined above, as well as the supplementary issues identified within this paper. The conclusion advocates that redundancy law in New Zealand is in need of change and that the best method to achieve this is through legislation.

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Acknowledgments

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Abbreviations

General

ACC	Accident Compensation Corporation
ANZSIC	Australia New Zealand Standard Industrial Classification
ASE	Australian Stock Exchange
Authority	Employment Relations Authority
Convention 87	International Labour Organisation Convention 87 on Freedom of Association 1948
Convention 98	International Labour Organisation Convention 98 on the Right to Organise and Bargain Collectively 1949
Crest	Crest Commercial Cleaning Limited
ECA	Employment Contracts Act 1991
EPP	Employment Protection Provision
ERA	Employment Relations Act 2000
Evaluative Report	Evaluation of the Short Term Impacts of the Employment Relations Act 2000
HR	Human Resources
HRA	Human Rights Act 1993
HRM	Human Resource Management

Humiliation	Compensation for humiliation, loss of dignity and injury to feelings
IC&A	Industrial Conciliation and Arbitration Act 1894
IEA	Individual Employment Agreement
ILO	International Labour Organisation
IRA	Industrial Relations Act 1973
IRAA	Industrial Relations Amendment Act 1983
IRC	Industrial Relations Centre at the Victoria University of Wellington
IWTC	In Work Tax Credits
LRA	Labour Relations Act 1987
MECA	Multi-Employer Collective Agreement
Minimum Entitlements Bill	The Employment Relations (Minimum Redundancy Entitlements) Amendment Bill 2009
MP	Member of Parliament
MSD	Ministry of Social Development
NZPA	New Zealand Press Association
OECD	Organisation for Economic Co-operation and Development
PAYE	Pay As You Earn
SCS	Southern Cleaning Services Limited

SME	Small to Medium Enterprise
Advisory Group	Public Advisory Group on Restructuring and Redundancy 2008
The Association	Dunedin Kindergarten Association
The ReStart Programme	Re-Start Transitional Relief Programme
The Review	Employment Relations Act 2000 Review of Part 9: Personal Grievances
The Scheme	Working for Families Scheme
Tribunal	Employment Tribunal

Case Law

<i>ACC</i>	<i>Auckland City Council v The New Zealand Public Service Association</i> (Court of Appeal, CA112/03, 10 December 2003, Gault P, Blanchard, Tipping, McGrath, Glazebrook JJ) – Reported [2003] 2 ERNZ 386.
<i>Air New Zealand</i>	<i>Air New Zealand v V</i> (Employment Court, Auckland, AC15/09, 3 June 2009, Chief Judge Colgan and Judges Travis, Shaw and Couch) – Reported [2009] ERNZ 185.
<i>Aoraki</i>	<i>Aoraki Corporation Limited v McGavin</i> [1998] 1 ERNZ 601.
<i>Apiata</i>	<i>Apiata v Telecom New Zealand Limited</i> (Employment Court, Auckland, AEC124/97, 28 October 1997, Judge Finnigan) – Reported [1998] 2 ERNZ 130.
<i>Blowes</i>	<i>NCR (New Zealand) Corporation Limited v Blowes</i> (Court of Appeal, CA186/04, 24 August 2005, Robertson, Williams and Wild JJ) – Reported [2005] ERNZ 932.

<i>Building Trade</i>	<i>New Zealand Building Trades Union v Hawkes Bay Area Health Board</i> [1992] 2 ERNZ 897.
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<i>Charta</i>	<i>Charta Packaging v Howard and Ors</i> (Court of Appeal, CA125/01, 22 February 2002, Richardson P, Tipping and McGrath JJ) – Reported [2002] 1 ERNZ 10.
<i>Charter Trucks</i>	<i>Harris v Charter Trucks Limited</i> (Employment Court, Christchurch, CC16/07, 11 September 2007, Judge Couch).
<i>Coutts</i>	<i>Coutts Cars Limited v Baguley</i> [2001] ERNZ 660.
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<i>Dunn</i>	<i>Dunn v Methanex New Zealand Limited</i> (Employment Court, Wellington, WEC44/96, 22 July 1996, Chief Judge Goddard) – Reported [1996] 2 ERNZ 222.
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<i>Fletcher Challenge</i>	<i>Commerce Commission v Fletcher Challenge</i> [1989] 2 NZLR 554.
<i>Gibbs</i>	<i>Gibbs and Others v Crest Commercial Cleaning Limited</i> (Employment Court, Christchurch, CC10/05, 18 July 2005, Chief Judge Colgan and Judges Travis and Couch) – Reported [2005] ERNZ 399.
<i>Hale</i>	<i>G N Hale & Son Limited v Wellington, etc, Caretakers, etc IUW</i> [1991] 1 NZLR 151.

- Holmes* *Holmes v Ken Rintoul Cartage and General Contractors Limited* (Employment Court, Auckland, AC57/02, 4 September 2002, Judge Travis) – Reported [2002] 2 ERNZ 130.
- HP* *HP Industries (NZ) Limited v Davison* (Employment Court, Auckland, AC44/08, 7 November 2008, Judge Shaw) – Reported [2008] ERNZ 514.
- JetConnect* *New Zealand Air Line Pilot Association Incorporated and another v JetConnect Limited and Others* (Employment Court, Auckland, AC23/09, 27 May 2009, Chief Judge Colgan) – Reported (2009) 6 NZELR 632.
- Jinkinson* *Jinkinson v Oceana Gold New Zealand Limited* (Employment Court, Christchurch, CRC4/08, 4 August 2010, Judge Couch) – Reported [2010] NZEmpC 102.
- Lincoln* *Owens y de Novoa v Ross and Lincoln University* (Employment Court, Christchurch, CEC39/94, 7 October 1994, Judge Palmer).
- McKechnie* *McKechnie Pacific (NZ) Limited v Clemow* (Court of Appeal, CA233/97, 22 October 1998, Henry, Blanchard, McGechan JJ) – Reported [1998] 3 ERNZ 245.
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- Naughton* *Naughton v Vice Chancellor University of Auckland* (Employment Relations Authority, Auckland, AA124/05, 11 April 2005, Wilson (Member)).
- Nee Nee* *Nee Nee and Ors v TVNZ Auckland Ltd* (Employment Court, Auckland, AC13/06, 16 March 2006, Judge Travis) – Reported [2006] ERNZ 95.
- Norske* *Pulp and Paper Industry Council of Manufacturing and Construction Workers' Union v Norske Skog Tasman Limited* (Employment Court, Auckland, AC49/09, 9 December 2009, Chief Judge Colgan and Judge Travis and Couch) – Reported [2009] ERNZ 342.

<i>Nutter</i>	<i>Telecom New Zealand Ltd v Nutter</i> (Court of Appeal, CA127/03, 21 July 2004, Anderson P, Hammond and William Young JJ) – Reported [2004] 1 ERNZ 315.
<i>Oram</i>	<i>W & H Newspapers Ltd v Oram</i> [2000] 2 ERNZ 448.
<i>Priest</i>	<i>Priest and Ors v Fletcher Challenge Steel Ltd</i> (Employment Court, Auckland, AC81/99, 14 October 1999, Judge Colgan) – Reported [1999] 2 ERNZ 395.
<i>Rolls</i>	<i>Rolls v Wellington Gas Company</i> (Employment Court, Wellington, WC46/98, 9 July 1998, Chief Judge Goddard) – Reported [1998] 3 ERNZ 116.
<i>Samujh</i>	<i>Samujh v Gould</i> (Employment Court, Auckland, AEC12A/95, 11 April 2005, Judge Travis).
<i>Sanson</i>	<i>Auckland Regional Council v Sanson</i> (Court of Appeal, CA143/99, 16 December 1999, Thomas, Keith, Blanchard JJ) – Reported [1999] 2 ERNZ 597.
<i>Simpson Farms</i>	<i>Simpsons Farms Limited v Aberhart</i> [2006] ERNZ 825.
<i>Staykov</i>	<i>Staykov v Cap Gemini Ernst and Young New Zealand Limited</i> (Employment Court, Auckland, AC18/05, 20 April 2005, Judge Travis).
<i>Swinden</i>	<i>Swinden v Naylor Love Limited</i> (Employment Court, Christchurch, CC5/99, 23 February 1999, Judge Palmer).
<i>Telecom South</i>	<i>Telecom South v Post Office Union</i> [1992] 1 NZLR 275.
<i>Telecom</i>	<i>Communication and Energy Workers Union Incorporated v Telecom New Zealand Limited</i> [1993] 2 ERNZ 429.
<i>Thwaites</i>	<i>New Zealand Fasteners Stainless v Thwaites</i> [2000] 1 ERNZ 739.
<i>Vaughan</i>	<i>Canterbury Spinners Limited v Vaughan</i> [2002] 1 ERNZ 255.
<i>Wang</i>	<i>Wang v Hamilton Multicultural Services Trust</i> (Employment Court, Auckland, ARC9/10, 27 October 2010, Judge Perkins) – Reported [2010] NZEmpC 142.

Wrigley

Wrigley and Kelly v The Vice-Chancellor of Massey University
(Employment Relations Authority, Wellington, WA1/10, 6
January 2010, Asher (Member)).

Yukich

Charter Holt Harvey Limited v Yukich (Court of Appeal,
CA42/04, 4 May 2005, Glazebrook, Hammond and O'Regan
JJ) – Reported [2005] ERNZ 300.

Chapter One

A Portrait of Redundancy Law – An Introduction

“A man walks through life painting a picture, not of what he would have done, could have done, or should have done, but of what he did”.¹

As the quote suggests, painting a picture can take a lifetime with the intricacies of the subject matter being continually reviewed with idiosyncratic anatomization by not only the painter but also by all those that view it, and as a consequence, are personally affected by it. The concluded painting represents an individual’s internal subjective perception of the chosen subject matter. Such perceptions are very obviously influenced by an individual’s exposure to social, economic, and political circumstance. This is clearly demonstrated by the evolution of painting styles which have passed through periods such as renaissance and romanticism to contemporary modern day art.

In very general terms, painting by analogy is not dissimilar to the law. The law is affected by a myriad of interrelated external factors which, in New Zealand, culminate in the prescription of legislation and its interpretation in common law. The law of redundancy arguably provides a useful illustration of just how powerful those external factors are at influencing the overall direction of law. Furthermore, akin to eminent paintings, as this discussion unfolds, it is clear that redundancy is an area that has been subject to much scrutiny by those who come into contact with it. Consequently, this paper attempts to paint a picture which takes the reader through the life of redundancy law in New Zealand, from its historical background through to current developments which have impacted, or are likely to impact on its interpretation and application in the future. This paper focuses on the common law that has developed around redundancy issues largely under the personal grievance regime. Parliament and the common law are the artists of this picture, continuing to redesign and re-

¹ Anon, <<http://www.thinkexist.com/search/searchquotation.asp?search=portrait>>.

touch the canvas as the various shades of social, political and economic environmental circumstances surrounding redundancy law evolve with time.

Put simply, a redundancy situation is where an employee's "employment is terminated by the employer, the termination being attributable, wholly or mainly, to the fact that the position filled by that worker is, or will become, superfluous to the needs of the employer".² It is this simple articulation that provides the foundation for discussion and the basis of redundancy law.

Therefore, the picture's centerpiece is redundancy law in New Zealand and its importance cannot be understated. Redundancy is a special situation, where those affected have committed no wrong,³ yet the consequences of redundancy on the employment relationship are severe. This severity is not simply linked to overt economic implications but also the emotional personal burden which arguably leaves affected employees with the impression that they must have contributed to their selection for redundancy. As evidenced in this paper it can be hard for employees to accept that it is their position that is redundant rather than them personally.⁴ The increasing prevalence of redundancy situations is acute and their causes numerable.⁵ However, what is clear from empirical data is that this area of law will impact on a significant number of New Zealanders within their working career.⁶ Consequently, the final picture of redundancy law can either represent a masterpiece, or a work of art in need of restoration.

² See s 184 (5) (a) (1) of the Labour Relations Act 1987. A copy of this section is contained in appendix one. This definition of redundancy is discussed in greater detail in chapters two and three.

³ *Aoraki Corporation Limited v McGavin* [1998] 1 ERNZ 601, 618 as per Richardson P, Gault, Henry, Keith, Blanchard and Tipping JJ.

⁴ This point is discussed in chapters nine, ten and thirteen.

⁵ This point is discussed in chapter five, part A.

⁶ K Mackey, "Organisational Downsizing and Redundancies: The New Zealand Workers' Experience" (2004) 29(1) *New Zealand Journal of Employment Relations* 63, 81.

The picture in this paper replicates an analysis of redundancy law and specifically questions whether current substantive and procedural requirements for redundancy, as construed by the Courts, are in keeping with the intentions underpinning the Employment Relations Act 2000 (ERA), in particular, whether they fit with the principle of good faith and whether they provide an equal balance between the rights of the employer and the rights of the employees. In order to accurately consider these issues, the history of redundancy law, key legislative concepts and the New Zealand environment set the scene prior to discussion on both the procedural and substantive elements of redundancy law. It is through this analysis that symptomatic issues within each aspect of the current law become a part of the overall picture and are therefore appropriately explored. Finally, new governmental and legislative developments which have taken place in the latter part of this decade are discussed prior to the completion of the painting by reaching a broad conclusion which addresses the key questions outlined above, as well as the supplementary issues identified within this paper. The conclusion advocates that the picture of redundancy law in New Zealand is in need of restoration and that the best means to achieve this is through legislative change.

Although general recommendations are made, it is important to note that it is beyond the scope of this discussion to produce a detailed proposal to potentially resolve issues identified. This paper does not aim to address in detail the various ways in which a redundancy can arise, nor does it review the relative success or otherwise of these processes in accordance with their objectives,⁷ rather it looks at the application of redundancy law as such. Although part 6A of the ERA is noted within the discussion, this is for completeness only, as it is expressly excluded from substantive analysis. In examining the issues identified in this paper, predominantly only Court judgments are considered. However, where an issue of importance has not reached the Court but has been considered within the Employment Relations Authority (Authority), consideration is given to that determination within the

⁷ For discussion on this see: Mackey, above n 6, at 63-87; J Bryson, "Business Restructuring Practices in New Zealand's Top Organisations" (2002) 27(3) *New Zealand Journal of Industrial Relations* 299, 299-306.

discussion. Any further limitations associated with this paper are outlined in the relevant chapters.

Chapter Two

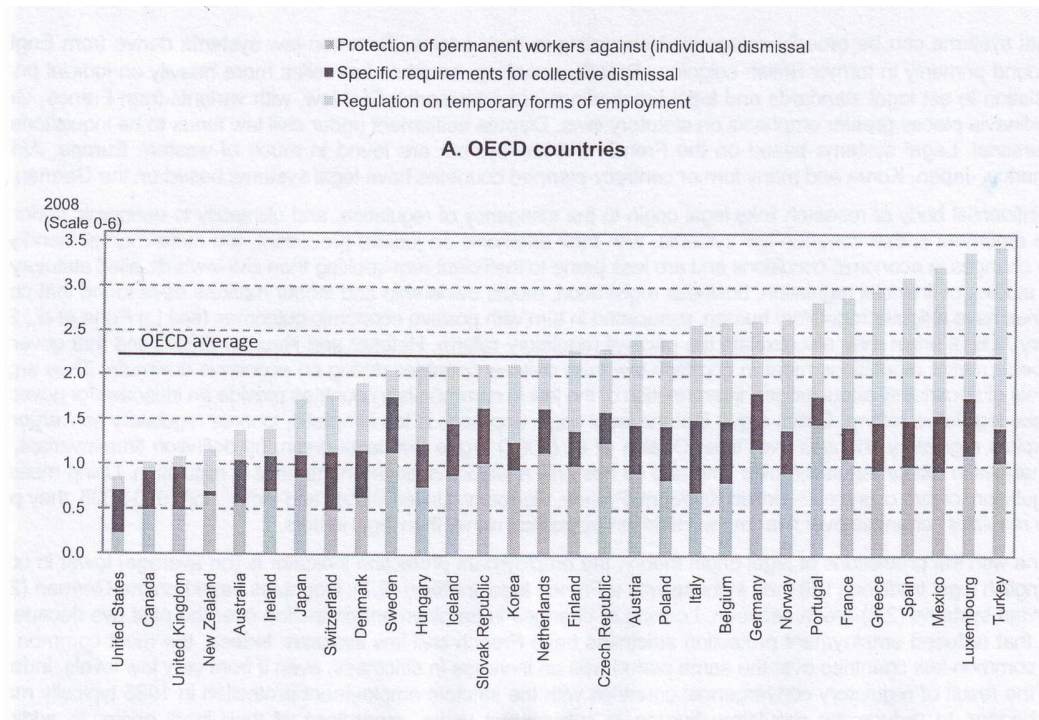
Setting the Scene - The History of Redundancy Law in New Zealand

Redundancy is an accepted occurrence within New Zealand's employment relations system, as it is in many countries. However, unlike the majority of overseas jurisdictions, successive governments in New Zealand have chosen not to codify the law relating to redundancy and provide definitive protection for employees who face a redundancy situation.¹ In fact, a recent report, providing a comparison with other OECD countries, highlighted New Zealand's minimal protection for employees in situations involving redundancy.² In particular, the report highlighted New Zealand's negligible cover in mass redundancy situations, defined below as collective dismissals. The following table clearly depicts the limited protection in correlation to the other OECD States.

¹ For comparative analysis of New Zealand's redundancy employment protection see: *Report of the Public Advisory Group on Restructuring and Redundancy* (Prepared for the Ministers of Labour, Social Development and Employment and Economic Development, 30 June 2008) Appendix J. A copy of this report can be obtained from: <<http://dol.govt.nz/PDFs/restructuring-and-redundancy.pdf>>.

² D Venn, *Legislation, Collective Bargaining and Enforcement: Updating the OECD Employment Protection Indicators* (OECD, Working Paper, 2009) <www.oecd.org/els/workingpapers>.

Figure One: Strictness of Employment Protection OECD Countries³



Notwithstanding New Zealand’s lack of express statutory guidance in respect of redundancy, there have been several key pieces of employment legislation that have provided the basic foundations for New Zealand’s redundancy law. Consequently, redundancy law in New Zealand has developed through common law processes within a broad legislative framework, such as the personal grievance regime.

This section briefly outlines the background to New Zealand’s redundancy law by considering some of the key legislative initiatives and environmental factors that have influenced its direction, therefore providing the foundation for further discussion. It is

³ Ibid, at 8.

beyond the scope of this thesis to outline in detail the historical evolution of redundancy law in New Zealand.⁴

A Industrial Conciliation and Arbitration 1894

New Zealand's employment relations history has, through the enactment and longevity of the Industrial Conciliation and Arbitration Act 1894 (IC&A), been founded historically on the ideals of compulsory unionism,⁵ national awards, and compulsory arbitration.⁶ Broadly, the underlying intention of the IC&A was to develop a tripartite system⁷ for the management and control of employment relations.⁸ Unions were accepted as both legitimate and an essential party in the employment relations structure, and disputes were to be resolved through conciliation and arbitration,⁹ therefore minimizing any form of social disorder.¹⁰ Importantly, in respect of redundancy, the system developed awards which prescribed minimum

⁴ For a detailed analysis of the history of redundancy law in New Zealand see: M Mulgan, "Redundancy Dismissals" in A Szakats and M Mulgan, *Dismissal and Redundancy Procedures* (2nd ed, Butterworths, Wellington, 1990) 193-268.

⁵ For a historical outline of New Zealand's history in respect of union membership provisions see: Anderson and others, *Mazengarb's Employment Law*, (online loose-leaf ed, LexisNexis) at [ERpt 8.3].

⁶ See Margaret Wilson's speech which refers to these three elements as the 'three legged stool'. M Wilson, "Ending Fear and Promoting Fairness in the Workplace" (Annual Local Government Human Resources Conference, Rydges Hotel, Rotorua, Tuesday 25 July 2000).

⁷ For a discussion on New Zealand's employment legislation in respect of Tripartism see: A Foukes, "The Culture of Tripartism: Can European Models be Adopted for New Zealand to Use?" (1993) 18(2) *New Zealand Journal of Industrial Relations* 185-193.

⁸ M Wilson, "The Employment Relations Act: A Framework For A Fairer Way" in E Rasmussen (ed), *Employment Relationships: New Zealand's Employment Relations Act* (Auckland University Press, Auckland, 2004) 9, 11.

⁹ See the IC&A title which states: "to encourage the formation of industrial unions and associations and to facilitate the settlement of industrial disputes by conciliation and arbitration". For general discussion on the IC&A see: J Deeks, J Parker and R Ryan, *Labour and Employment Relations in New Zealand* (2nd ed, Longman Paul, Auckland, 1994) 45-56; G Anderson, J Hughes, M Leggat, P Roth, *LexisNexis Employment Law Guide* (7th ed, LexisNexis, Wellington, 2005) at [Intro.7] ["*Employment Law Guide*"]; Anderson and others, above n 5, at [Intro 7].

¹⁰ J Deeks, J Parker and R Ryan, above n 9, at 46.

conditions of employment and ‘blanket coverage’¹¹ across defined industry and occupational groups.¹² This provided minimum conditions and protection for the majority¹³ of employees regardless of their employment status.¹⁴ So, although there was no express provision within the IC&A providing protection for employees in respect of a redundancy situation, it was perceived that protection was provided through awards¹⁵ or collective negotiation, culminating in either a provision within a collective agreement or a separate specific redundancy agreement.¹⁶ However, it was acknowledged that collective agreement negotiations were often a result of compromise to enable settlement. As a result, whether redundancy provisions were included, and if so, the precise content of those provisions,¹⁷ largely depended on the bargaining power of the respective parties involved in the negotiation.¹⁸

Although restructuring and subsequent redundancy situations have existed throughout New Zealand’s employment relations history, such actions were preponderantly perceived as a departure from standard organisational practice and generally only initiated as a last resort to prevent organisational closure.¹⁹ However, from the 1980s onwards, restructuring has been

¹¹ See G Anderson, J Hughes, M Leggat, P Roth, *Employment Law Guide*, above n 9, at 9; G Anderson, “Individualising the Employment Relationship in New Zealand: An Analysis of Legal Developments” in S Derry and R Mitchell (eds), *Employment Relations Individualisation and Union Exclusion an International Study* (The Federation Press, Sydney, 1999) 204, 206.

¹² See G Anderson, J Hughes, M Leggat, P Roth, *Employment Law Guide*, above n 9, at [Intro.7]; G Anderson, above n 11, at 206-207.

¹³ The awards system did not initially apply to State Sector employees until the passage of the State Sector Act 1988. Additionally employees in managerial or white collar positions generally were also outside the award system. This point is noted in the following resources: G Anderson, above n 11, at 207; G Anderson, J Hughes, M Leggat, P Roth, *Employment Law Guide*, above n 9, at [Intro.7].

¹⁴ G Anderson, J Hughes, M Leggat, P Roth, *Employment Law Guide*, above n 9, at [Intro.7].

¹⁵ M Mulgan, above n 4, at 258.

¹⁶ *Ibid.*, at 251.

¹⁷ For discussion on the content of redundancy clauses see: M Mulgan, above n 4, at 258- 268.

¹⁸ *Ibid.*, at 251.

¹⁹ K Cameron, S Freeman and A Mishra, “Downsizing and Redesigning Organisations” in G Huber and W Glick (eds), *Organisational Change and Redesign* (1993) 19-63 cited in K Macky, “Organisational Downsizing and

utilised more readily as a management strategy for achieving organisational improvement.²⁰ The heightening of the concept of negotiating protection for situations which were, or were likely to result in redundancy originated from the Waterfront Industry Redundancy Agreement of 1983.²¹ The waterfront industry had its own specific legislation at this time. Interestingly, prior to the Waterfront agreement, research showed that in 1980 less than eight percent of collective documents had full redundancy agreements.²² Specifically the research identified that out of the 851 collective documents, 509 (59.8 per cent) did not make any reference to redundancy, 271 (31.9 per cent) only required notice to be given and eight (0.9 per cent) required negotiation. The remaining 63 (7.4 per cent) provided full redundancy agreements.²³

Prior to the 1980s New Zealand experienced almost full employment.²⁴ Specifically, between 1966 and 1977 New Zealand's unemployment rate was around 0.2 per cent of the labour force.²⁵ Given this environment, those experiencing redundancy would easily find alternative work opportunities.²⁶ Therefore, despite some continued concern regarding the lack of express protection for employees in redundancy situations,²⁷ there was no immediate drive for change.²⁸

Redundancies: The New Zealand Experience" (2004) 29(1) New Zealand Journal of Employment Relations 63, 64.

²⁰ K Macky, "Organisational Downsizing and Redundancies: The New Zealand Experience" (2004) 29(1) New Zealand Journal of Employment Relations 63, 64.

²¹ M Mulgan, above n 4, at 226.

²² A Geare and F Edgar, "Stroking the Nettle: New Zealand Legislators and the Issues of Redundancy" (2006) 22(3) The International Journal of Comparative Labour Law and Industrial Relations 369, 374.

²³ Ibid.

²⁴ Ibid, at 370.

²⁵ J Deeks, J Parker and R Ryan, above n 9, at 396.

²⁶ A Geare and F Edgar, above n 22, at 370.

²⁷ An example of this was the Severance and Re-employment Bill cited in A Geare and F Edgar, above n 22, at 370.

²⁸ Ibid, at 396.

Additionally, as a common law jurisdiction New Zealand has tended to rely on judicial precedent rather than legislation to define standards.²⁹ Research has asserted that there is a link between the quantity and severity of regulation and economic performance.³⁰ The basic premise is that countries with more stringent statutory regulations are less able to adapt quickly to changing economic conditions making these countries less amenable to the needs of the market and therefore creating inefficiencies.³¹ Despite research to the contrary,³² there has been a perception in New Zealand that this exposition is correct.³³ As a consequence, given the changing employment relations environment since the 1980s,³⁴ people who held this view would be reluctant to advocate change to redundancy law and in some cases, actively opposed it. In simple terms, when economic times were good, there was no impetus for change. However, when New Zealand experienced harder economic times, arguably the belief that businesses³⁵ needed support and reduced compliance costs in order to survive and generate economic growth as alluded to above, would have most likely impeded any attempt to increase protection for employees in redundancy situations.

Historically it appears that redundancy was not perceived as a major issue for legislators probably for the abovementioned reasons, which possibly go some way to explain why successive New Zealand governments decided not to codify redundancy law. Generally, as outlined above in respect of the IC&A, it has been perceived that protection for employees

²⁹ D Venn, above n 2, at 9.

³⁰ See R La Porta, F Lopez-de-Silanes and A Shleifer, "The Economic Consequences of Legal Origins" (2008) 46(2) *Journal of Economic Literature* 285-332 cited in D Venn, above n 2, at 9.

³¹ D Venn, above n 2, at 9.

³² See C Hefeker and M Neugart, "Labour Market Regulation and the Legal System" (Working Paper No. 2041, CESifo, 2007) cited in D Venn, above n 2, at 9. See also: P Roth, "The OECD on Employment Protection Legislation and Labour Market Performance" [1999] 6 *Employment Law Bulletin* 104-105.

³³ P Roth, above n 32, at 104.

³⁴ The changing environment in New Zealand is discussed in detail in chapter five.

³⁵ New Zealand is predominantly made up of small to medium size enterprises. This is discussed in greater detail in chapter five.

affected by redundancy was obtained through collective negotiation³⁶ rather than legislative prescription. This belief has survived notwithstanding changes in the substantive legislation.³⁷ A good illustration of this can be seen in the Industrial Relations Amendment Act 1983 (IRAA) where the government of the time introduced voluntary union membership.³⁸ Interestingly, although the substantive IRA made no reference to redundancy, the amendments initiated by the IRAA prohibited preference in respect of union membership in relation to the formulation that would be used to assess compensation for redundancy,³⁹ highlighting that collectivism was associated with redundancy protection.

B Wage Adjustment

New Zealand's first express regulatory recognition of the concept of redundancy was through its definition found in the Wage Adjustment Regulations 1974 (now repealed).⁴⁰ This regulation confined the amount of compensation that could be paid to an employee dismissed on the grounds of redundancy.⁴¹ This original definition resembles the terminology utilised in the Labour Relations Act 1987 (LRA).⁴²

³⁶ It is noted that historically it was believed that basic terms and conditions were best set through collective involvement of workers and that such terms and conditions should be available to the whole workforce. See G Anderson, J Hughes, M Leggat, P Roth, *Employment Law Guide*, above n 9, at [Intro.9].

³⁷ A Geare and F Edgar, above n 22, at 370-371.

³⁸ For general discussion on this change see: Anderson and others, above n 5, at [ERpt 8.2]; J Hughes, *Labour Law In New Zealand* (Law Book Company, North Ryde, New South Wales, 1990), 3926; J Hughes, "The Restoration of Compulsory Unionism" (1986) 3(1) *Canterbury Law Review* 74.

³⁹ See s 100 of the IRAA 1983.

⁴⁰ See the Wage Adjustment Regulation 1974, Part IIIA reg 45A (1) for a definition of redundancy as contained in appendix one.

⁴¹ Despite this restriction, the judiciary at the time often awarded greater levels of compensation than that prescribed. For discussion in this point see: M Mulgan, above n 4, at 226-227.

⁴² The definition of redundancy under the LRA is discussed in greater detail in chapter three.

C The Labour Relations Act 1987

The LRA⁴³ was the first Act to officially give some form of express statutory acknowledgment of the burgeoning significance of redundancy law.⁴⁴ Not only did it provide a definition of redundancy,⁴⁵ it also authorized industrial action for disputes relating to procurement of a redundancy agreement⁴⁶ as well as extending the personal grievance regime⁴⁷ that was developed under the IRA 1973⁴⁸ to enable all employees who were union members to have access to it.⁴⁹ Importantly, the procedure provided a way to challenge unjustifiable dismissals or other unjustifiable actions, which could include redundancy situations.⁵⁰ Prior to this amendment, this form of protection was only accessible for employees covered by awards or other registered collective documents, and who were registered union members.⁵¹ As a result, for employees who did not meet these requirements, common law actions were the only available avenue to seek redress.⁵² Given the nature of

⁴³ For further information regarding the LRA see the following resources: Anderson and others, above n 5, at [Intro 8]; G Anderson, J Hughes, M Leggat, P Roth, *Employment Law Guide*, above n 9, at [Intro.8]. For general historical context see: J Deeks, J Parker and R Ryan, above n 9, at 66 -80.

⁴⁴ M Mulgan, above n 4, at 227.

⁴⁵ See LRA s 184 for the definition of redundancy as contained in appendix one.

⁴⁶ See LRA s 233 relating to industrial action as contained in appendix one. For discussion on this see: J Hughes, above n 38, at 6851-6853.

⁴⁷ For general discussion on the Personal Grievance regime under the LRA see: J Hughes, above n 38, at 1811-2483.

⁴⁸ The personal grievance regime closely resembles the current legislative provisions and is discussed in greater detail in chapter three.

⁴⁹ Anderson and others, above n 5, at [ERA P9.12]. For full discussion on the development of the personal grievance regime see: G Anderson, "Origins and Development of Personal Grievance Jurisdiction in New Zealand" (1988) 18(3) *New Zealand Journal of Industrial Relations* 257-275.

⁵⁰ For discussion on the initial redundancy cases under the personal grievance regime see: M Mulgan, above n 4, at 231-249.

⁵¹ See G Anderson, above n 11, at 206; Anderson and others, above n 5, at [ERA P9.12].

⁵² A Szakats and M Mulgan, *Dismissal and Redundancy Procedures* (2nd ed, Butterworths, Wellington, 1990) 9-13.

redundancy, as long as the contractual or reasonable notice was given, this avenue was largely meaningless.⁵³

Interestingly, just prior to the repeal of the LRA,⁵⁴ the legislation was amended to include a provision relating to the restriction of compensation for redundancy situations where there was a sale or transfer of an employer's business.⁵⁵ Again this highlights the growing significance of redundancy situations on employment relationships at this time and the continued belief that protection was, or could be negotiated if desired.⁵⁶

D Employment Contracts Act 1991

During the later part of the twentieth century there were a multitude of interrelated social, economic and political circumstances that precipitated the deregulation of the New Zealand labour market.⁵⁷ Although what some have described as the "regulatory avalanche"⁵⁸ commencing in the 1980s with the introduction of the State Owned Enterprises Act 1986; the LRA 1987 and the State Sector Act 1988,⁵⁹ the pinnacle of this movement was the

⁵³ Ibid, at 13. See also: Anderson and others, above n 5, at [ERA P9.10].

⁵⁴ The LRA was repealed as of 15 May 1991 by s 174 of the ECA 1991.

⁵⁵ See s 184A of the LRA. This provision was inserted from 31 August 1990 by s 20 of the Labour Relations Amendment Act 1990 (No 110).

⁵⁶ See s 184A (2) of the LRA.

⁵⁷ These factors are discussed in great detail in chapter five.

⁵⁸ This term has been used to describe the deregulation process. However certain authors assert that the process was in fact a misnomer as the period was also characterised by increasing regulation rather than a decrease in regulations. For discussion see: E Rasmussen and F Lamm, "From Collectivism to Individualism in New Zealand Employment Relations" (2005) *Academics of Australia and New Zealand* 479, 479-480. See also: H Colin, "Regulating the Employment Relation for Competitiveness" (2001) 30 *Industrial Law Journal* 17 cited in J Riley, *Employee Protection at Common Law* (2005) 3.

⁵⁹ For discussion on the major legislative changes of this period see: J Deeks, J Parker and R Ryan, above n 9, at 69 -72.

introduction of the Employment Contracts Act 1991 (ECA).⁶⁰ The ECA represented a monumental ideological shift in governance of New Zealand's employment relations.⁶¹ It removed the historic ideals of State regulation, compulsory unionism and national awards replacing them with a new era of individual employment relationships based on pure contract law with the intent of promoting an efficient labour market.⁶² Importantly for redundancy law, the ECA not only removed the substantive reference to redundancy within the Act, it also led to the effective collapse of collective bargaining⁶³ which was historically perceived as the way employees would gain protection in a redundancy situation. Redundancy conditions were however reinstated as a prohibited aspect of unlawful preference in terms of freedom of association under s 7 of the ECA.

Moreover, as the awards expired, or new terms and conditions were individually negotiated, employees lost the pre-existing minimum protections that they had once enjoyed.⁶⁴ However, the ECA did enable access for all employees to the personal grievance regime, and, as the new judicial authorities held exclusive jurisdiction in respect of employment disputes, it meant that employees who had previously been reliant on common law remedies were now able to access personal grievances in redundancy cases.⁶⁵

The ECA was instrumental in inducing enduring changes to New Zealand's employment relations environment.⁶⁶ It was perceived by many as an extreme piece of legislation that

⁶⁰ The ECA was developed and enacted by the National Party. It came into force on 15 May 1991.

⁶¹ For general information on this legislation see: J Deeks, J Parker and R Ryan, above n 9, at 81-101; G Anderson, J Hughes, M Leggat, P Roth, *Employment Law Guide*, above n 9, at [Intro.9]; Anderson and others, above n 5, at [Intro 9].

⁶² See the long title to the ECA 1991 contained in appendix one.

⁶³ This point is discussed in greater detail in chapter five.

⁶⁴ G Anderson, "The Individual and the Employment Relations Act" (2002) *New Zealand Journal of Industrial Relations* 26(1) 103, 103-104.

⁶⁵ A Szakats, *Supplement to Dismissal and Redundancy Procedures* (2nd ed, Butterworths, Wellington, 1991) 17.

⁶⁶ The changes to the employment relations environment exacerbated by the introduction of the ECA are discussed in greater detail in chapter five.

supported businesses at the expense of employees.⁶⁷ Politically it represented a neo-liberal ideology that made employment relations a strongly debated arena leading up to general elections during this decade.⁶⁸ Those parties at the opposite end of the political spectrum had a very straightforward employment relations policy stance prior to the 1999 general election: to remove the ECA and replace it with legislation that re-established and encouraged collective bargaining and legitimised unions⁶⁹ within the employment relations system.⁷⁰ This philosophy was encapsulated in the ERA.⁷¹ Interestingly despite the heightening instances of redundancy and the obvious severity of consequences for employees, this legislation did not expressly address redundancy situations.⁷²

E Employment Relations Act 2000 as first enacted

The introduction of the ERA marked yet another transformation in the governance of New Zealand's employment relations system. It was emphasised that this did not mean a return to

⁶⁷ R Wilson, "The Employment Relations Act: a CTU Perspective" in E Rasmussen (ed) *Employment Relationships New Zealand's Employment Relations Act* (Auckland University Press, Auckland, 2004)173, 174.

⁶⁸ E Rasmussen and C Ross, "The Employment Relations Act Through the Eyes of the Media" in E Rasmussen (ed) *Employment Relationships New Zealand's Employment Relations Act* (Auckland University Press, Auckland, 2004) 21, 23.

⁶⁹ It is important to note that the Labour Party was established in 1916 by labour organisations. Therefore the Labour Party has always recognised and supported unions within the employment relations system. For discussion on this see: J Deeks, J Parker and R Ryan, above n 9, at 49.

⁷⁰ M Wilson, above n 8, at 15. See also: H Clark, "Employment Relations – The New Direction Under Labour" (1993) 18(2) *New Zealand Journal of Industrial Relations* 153,153-162; M Wilson, above n 6; M Wilson, "The Whitlam Lecture 2000 New Zealand's Path Forward: A Plan for Working Together for Productivity and Fairness" (Trade Union Foundation, The Royal Theatre, Melbourne, 8 December 2000) ["Whitlam Lecture"].

⁷¹ The ERA was the product of a Labour/Alliance coalition government. It was enacted in August 2000 and came into force on 2 October 2000. For a general overview of this legislation see: G Anderson, J Hughes, M Leggat, P Roth, *Employment Law Guide*, above n 9, at [Intro.10]; Anderson and others, above n 5, at [Intro.10]; G Anderson, J Hughes, P Roth and M Leggat, *Employment Law: A Practical Guide* (LexisNexis New Zealand Limited, Wellington, 2010) at [1.1]-[2.8] ["A Practical Guide"]; P Bartlett, W Hodge, P Muir, C Toogood and R Wilson, *Brookers Employment Law* (online loose-leaf ed, Brookers) at [ERIntro.01]-[ERIntro.05] ["Brookers Employment Law"]. R Rudman, *The Employment Relations Act 2000: Supplement to Human Resource Management in New Zealand* (3rd ed, Longman, Auckland, 2000).

⁷² A Geare and F Edgar, above n 22, at 370-371.

the past,⁷³ recognising that the inflexibility associated with historic legislation would not prove beneficial.⁷⁴ However, arguably for redundancy law, the ERA did initially mark a return to the past. The ERA was advocated as: “a moderate, middle position between the extremes of the former New Zealand industrial relations system and the ECA”.⁷⁵ It was to be part of a wider economic strategy,⁷⁶ and its intention was to balance social and economic needs whilst ensuring New Zealand remained competitive in a constantly evolving and globalised environment.⁷⁷

The ERA promulgated the paradigm of partnership between all parties in an employment relationship.⁷⁸ It advocated returning the scales of power and accordingly equality and fairness to a more equally balanced position,⁷⁹ therefore ensuring that the employment relationship was treated as a human relationship rather than a mere contractual economic exchange.⁸⁰ In order to achieve these ideals the ERA set the following objectives:⁸¹

⁷³ See M Wilson, “Less Legal Involvement the Aim” (2000) 23 New Zealand Lawyer 9, 9; M Wilson, “New Zealand’s Path Forward” [2001] 1 Employment Law Bulletin 1, 1 [“Path Forward”]; M Wilson, above n 6; M Wilson, “The Whitlam Lecture”, above n 70.

⁷⁴ M Wilson, above n 8, at 17.

⁷⁵ M Wilson, “The Impact of the ERB” (BNZ Breakfast for Clients, Duxton Hotel, Wellington, 2 August 2000).

⁷⁶ M Wilson, above n 8, at 13; M Wilson, “Path Forward”, above n 73, at 1.

⁷⁷ M Wilson, “Path Forward”, above n 73, at 1. For general discussion on this point see also: N Haworth, “Beyond the Employment Relations Act: The Wider Agenda For Employment Relations and Social Equity in New Zealand” in E Rasmussen (ed), *Employment Relationships: New Zealand’s Employment Relations Act* (Auckland University Press, Auckland, 2004) 190, 190-205.

⁷⁸ M Wilson, “The Whitlam Lecture”, above n 70. Even in the development of the ERA a partnership approach of cooperation and inclusiveness was utilised throughout the consultation process. For discussion on this point see: L Skiffington, “Making the ER Act – A Recipe for Success” [2001] 3 Employment Law Bulletin 37.

⁷⁹ See the Employment Relations Bill 2000 No 8-1 Explanatory Note 1,1. See also: M Wilson, above n 8, at 19; M Wilson, “2nd Reading Speech Notes Employment Relations Bill” (Parliament, Wellington, 8 August 2000) [“2nd Reading”]; M Wilson, “Employment Relations Bill Third Reading Speech Notes” (Parliament, Wellington, 16 August 2000) [“3rd Reading”].

⁸⁰ See the Employment Relations Bill 2000 No 8-1 Explanatory Note 1,1. See also: M Wilson, above n 8, at 17; M Wilson, “2nd Reading”, above n 79; M Wilson, “3rd Reading”, above n 79; M Wilson, “The Whitlam Lecture” above n 70.

⁸¹ These objectives are the original objectives and do not include the 2004 amendments.

3 Object of this Act is -

- (a) to build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment and of the employment relationship -
 - (i) by recognising that employment relationships must be built on good faith behaviour; and
 - (ii) by acknowledging and addressing the inherent inequality of bargaining power in the employment relationships; and
 - (iii) by promoting collective bargaining; and
 - (iv) by protecting the integrity of individual choice; and
 - (v) by promoting mediation as the primary problem solving mechanism; and
 - (vi) by reducing the need for judicial intervention
- (b) to promote observance in New Zealand of the principles underlying International Labour Organisation Conventions 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively.

Central to these objectives was the concept of good faith, which was to be prevalent through all facets of the employment relationship.⁸² Although the concept was far from new,⁸³ primarily there was much discussion⁸⁴ about the precise meaning of this term, as the primary section of the ERA in relation to good faith merely specified that:

- 4 Parties to employment relationship to deal with each other in good faith
 - 1) The parties to an employment relationship specified in subsection (2)-
 - (a) must deal with each other in good faith; and
 - (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything –
 - (i) to mislead or deceive each other; or
 - (ii) that is likely to mislead or deceive each other.

⁸² See the Employment Relations Bill 2000 No 8-1 Explanatory Note, 1, 2. See also: M Wilson, above n 8, at 17.

⁸³ Hughes, J, “Good Faith Bargaining under the Employment Relations Act: The Original Scheme” in E Rasmussen (ed), *Employment Relationships: New Zealand’s Employment Relations Act* (Auckland University Press, Auckland, 2004) 77, 78.

⁸⁴ For discussion on what good faith was intended to mean see: Department of Labour, *Employment Relations Bill* (Report of the Department of Labour to the Employment and Accident Insurance Legislation Select Committee, June 2000); Erratum of 5th July 2000 to: *Report of the Department of Labour to the Employment and Accident Insurance Select Committee of June 2000*; Department of Labour, *Issues Relating to Good Faith* (Memorandum to the Minister of Labour, 12 January 2000); Department of Labour, *Good Faith ‘Infused’ Through the Employment Relationship* (Memorandum to the Minister of Labour, 21 February 2000). For general discussion that occurred at around the time the ERA was introduced see: P Churchman, “Good Faith” (2000) *New Zealand Law Journal* 343; M Timmins, “In Search of Good Faith” (2000) 9(1) *Auckland Law Review* 300.

This provision went on to outline what constitutes an employment relationship⁸⁵ and when this duty was to apply.⁸⁶ Although this particular clause was subsequently enhanced in 2004,⁸⁷ ss 3 and 4 provided the cardinal provisions in which the framework of good faith provisions were subsequently articulated.⁸⁸ Although it is beyond the scope of this paper to embark on full analysis of the good faith regime, it is important to note that it was fundamental to the new legislation and expressly applicable to redundancy law.⁸⁹

Notwithstanding the actual express clauses encapsulated in this legislation, it was very clear from the policy decisions emanating from its construction that collective bargaining was perceived as the best way to address inequality in bargaining power.⁹⁰ As a result of this, the government, whilst adhering to the rhetoric of freedom of choice, intentionally limited the application of good faith associated with individual employment agreements,⁹¹ restricting it to accord with the common law implied term of mutual trust and confidence as well as supplementing it with the unfair bargaining provisions.⁹² This action was meant to accentuate the benefits of collective bargaining and therefore encourage people to engage in collective rather than individual negotiations.⁹³ This is significant for redundancy law because, as the initial ERA made no express protection provisions for a redundancy situation, it was again, as

⁸⁵ See s 4 (2) of the ERA.

⁸⁶ See s 4 (4) of the ERA.

⁸⁷ See the Employment Relations Law Reform Bill which produced the Employment Relations Amendment Act (No.2) 2004. These amendments will be discussed in further detail in chapter three and four.

⁸⁸ J Hughes, above n 83, at 79-80.

⁸⁹ See s 4 (4) (e) of the ERA. The judicial application of good faith to situations involving redundancy is discussed in chapters six to fourteen.

⁹⁰ See the Employment Relations Bill 2000 No 8-1 Explanatory Note, 1,1.

⁹¹ See part 6, s 60 of the ERA.

⁹² See ss 68-69 of the ERA. See also: Employment Relations Bill 2000 No 8-1 Explanatory Note 1, 2; Department of Labour, *Issues Relating to Good Faith* (Memorandum to the Minister of Labour, 12 January 2000) at [50]-[52]; J Hughes, "Good Faith Bargaining and Individual Employment Agreements" [2004] 8 Employment Law Bulletin 95, 95.

⁹³ Department of Labour, *Issues Relating to Good Faith* (Memorandum to the Minister of Labour, 12 January 2000) at [50]-[52]; J Hughes, above n 92, at 95; J Hughes, above n 83, at 78.

in the past, assumed that negotiation would result in collectively negotiated redundancy clauses within employment agreements. Obviously this protection would only arise if collectivism reestablished itself under the new legislative regime. Whether collectivism has in fact been resurrected by the ERA is analysed in chapter five.

In addition to the above points, there are other initial elements of the ERA that require specific consideration in respect of redundancy law. In particular, although the ERA maintained the existing grievance procedure,⁹⁴ it did establish a new institutional framework for dealing with employment relations problems.⁹⁵ Within this framework, the ERA espoused where practicable, reinstatement as the primary remedy in personal grievance cases.⁹⁶ In reality, this remedy was never going to be appropriate in the majority of redundancy cases. If the redundancy was deemed genuine, the Courts have expressly stated that: “to reinstate the applicant to a position in which the sword of Damocles would hang above his head would not help to heal the grievance”.⁹⁷

Furthermore, the ERA was the first piece of New Zealand substantive employment legislation to articulate an express commitment to international conventions.⁹⁸ Despite the

⁹⁴ See the Employment Relations Bill 2000 No 8-1 Explanatory Note, 16-18.

⁹⁵ For discussion on the institutional framework for dealing with employment relations problems see: I McAndrew, J Moton and A Geare, “The Employment Institutions” in E Rasmussen (ed), *Employment Relationships: New Zealand’s Employment Relations Act* (Auckland University Press, Auckland, 2004). For discussion on the effectiveness of the institutional framework see: Department of Labour, *Review of the Employment Relationship Problem Resolution System* (Prepared for the Minister of Labour and the Cabinet Economic Development Committee, July 2008). A copy of this paper can be obtained from the following weblink: <<http://www.dol.govt.nz/publications/research/er-problems-cabinet/cabinet-paper-edc-241007.pdf>>. See also: B Woodhams, *Employment Relationship Problems: Costs, Benefits and Choices* (Prepared for the Department of Labour, August 2007). A copy of this report can be obtained from the following weblink: <<http://www.dol.govt.nz/PDFs/er-problems.pdf>>.

⁹⁶ See s 125 of the ERA. See also Employment Relations Bill 2000 No 8-1 Explanatory Note, 6.

⁹⁷ *Baguley v Coutts Cars Ltd* 2 ERNZ 409, 428 as per Judge Goddard. For discussion see also: J Hughes, P Roth and G Anderson, *Personal Grievances* (online loose-leaf ed, LexisNexis) at [11.4].

⁹⁸ See s 3 (b) which promotes observance to ILO Convention 87 on freedom of association and Convention 98 on collective bargaining (both conventions have been ratified by New Zealand). The 1998 Declaration on Fundamental Principles and Rights at Work, article 2, imposed an obligation on member states, regardless of ratification: “to respect, to promote and to realize, in good faith and in accordance with the Constitution, the

acknowledgement of the relevance and importance to the new framework⁹⁹ of International Labour Organisation (ILO) convention 98 and 87¹⁰⁰ other ILO conventions, such as the termination of employment convention 158¹⁰¹ and associated recommendation 166¹⁰² were not considered.¹⁰³ Obviously New Zealand is unable to ratify any convention that it could not comply with. However, interestingly New Zealand employment law complies with a number of the provisions contained within this convention¹⁰⁴ except where it comes to redundancy.¹⁰⁵ Given New Zealand's deliberate effort to meet ILO conventions¹⁰⁶ through the ERA, it is again interesting to consider why New Zealand never seized the opportunity at the Act's inception, to upgrade the protection for employees facing a redundancy situation as advocated by international organisations,¹⁰⁷ and as undertaken by other OECD States.

principles concerning the fundamental rights which are the subject of those conventions, namely: (a) freedom of association and the effective right of collective bargaining...". This point was identified in: P Roth, "International Labour Organisation Conventions 87 and 98 and the Employment Relations Act" (2001) 26(2) New Zealand Journal of Industrial Relations 145, 147-148.

⁹⁹ M Wilson, above n 8, at 17.

¹⁰⁰ For discussion on these Conventions in relation to the ERA see: P Roth, above n 93, at 145-169. For discussion on New Zealand's compliance in respect of these Conventions under the ECA see: R Wilson, "The Decade of Non-Compliance; the New Zealand Government record of non-compliance with international labour standards 1990-98" (2001) 25(1) New Zealand Journal of Industrial Relations 79-94.

¹⁰¹ See appendix two for a copy of this Convention.

¹⁰² See appendix two for a copy of this Recommendation.

¹⁰³ Unlike Conventions 87 and 98, according to the ILO Constitution New Zealand does not have an obligation to accord with the content of these principles. See ILO Constitution, Article 19 (5) (e) in 19 (6) (d) in respect of Recommendations contained in appendix two.

¹⁰⁴ For examples of this assertion see Article 7 and 8 of Convention 158 as well as the procedure prior to or at the time of terminations contained in Recommendation 166. Convention 158 and Recommendation 166 are contained in appendix two.

¹⁰⁵ For examples of this assertion see Article 12 and 14 of Convention 158 as well as the section on severance allowance and other income protection contained in Recommendation 166. Convention 158 and Recommendation 166 are contained in appendix two.

¹⁰⁶ N Haworth, "Beyond the Employment Relations Act: The Wider Agenda For Employment Relations and Social Equity in New Zealand" in E Rasmussen (ed), *Employment Relationships: New Zealand's Employment Relations Act* (Auckland University Press, Auckland, 2004) 190, 194-195. For a general discussion see: P Roth, above n 93, at 145-169.

¹⁰⁷ A Geare and F Edgar, above n 22, at 370-371.

I Employment Relations Act as amended

Notwithstanding this point, since its enactment the ERA has undergone some modifications which were intended to enable it to: “better meet its objectives of promoting a fair, productive and effective employment relationship between employees, employers and unions”.¹⁰⁸ These changes reflected areas of concern identified through the initial application of the ERA.¹⁰⁹ Importantly, some of the amendments held particular significance in respect of redundancy law. Specifically, the definition of good faith¹¹⁰ was strengthened to clarify that its ambit was not limited to the common law implied term of trust and confidence, and accentuating that the inequality of power extended beyond bargaining.¹¹¹ Initial judicial interpretation of good faith in respect of redundancy law had tended to restrict its application to the common law standard.¹¹² Additionally, part 6A was also enacted with the aim of providing protection for employees faced with a restructuring situation.¹¹³

II Contested effectiveness of the ERA

In spite of these amendments, legislation has yet to provide a full codification of protection for employees faced with redundancy. As outlined in this chapter, throughout New Zealand’s history, redundancy law has tended to arise on the periphery of legislation rather than being directly addressed. Arguably, this goes some way to explain why New Zealand’s protection levels in respect of redundancy law tend to be lower than those of many other OECD States.

¹⁰⁸ See Employment Relations Law Reform Bill 2003, Explanatory Note, 1.

¹⁰⁹ Ibid 1.

¹¹⁰ The application of these amendments are discussed within chapters six to fourteen.

¹¹¹ See Employment Relations Law Reform Bill 2003, Explanatory Note, 3.

¹¹² Note this assertion is discussed in greater detail in chapter three.

¹¹³ As noted in chapter one it is beyond the scope of this paper to engage in substantive discussion on part 6A of the ERA. However, part 6A of the ERA is discussed briefly for the sake of completeness in chapter four.

Redundancy is a no fault¹¹⁴ form of termination which has severe implications for those employees affected by it.¹¹⁵ International organisations which support the philosophy of the existence of inequality in bargaining power within the employment relationship assert that, when an employee exercises their right to terminate their employment, they represent a mere inconvenience for an employer. However, when an employer exercises their right to terminate, it can represent insecurity and poverty. This disparity of power has, with the increased prevalence of redundancy situations, led countries to increase their respective employee protection.¹¹⁶

Although the ERA asserts an ideological stance of recognising and subsequently addressing the inequality in power within the employment relationship for redundancy, this protection is predominantly meant to be achieved, as it was historically, through collective action. Therefore, whether this theory has in fact become a reality requires careful analysis. If collectivism has not been reestablished and is not providing the necessary internationally recognised level of protection, arguably, as the occurrence of redundancy situations rise, redundancy law can no longer remain on the periphery of New Zealand's substantive employment legislation.

F Report of the Public Advisory Group

This position was acknowledged in the Report of the Public Advisory Group on Restructuring and Redundancy¹¹⁷ (Advisory Group) which recommended a change in legislation incorporating both notice and compensation to be made payable to an employee

¹¹⁴ For discussion on this concept in relation to redundancy see: G Anderson, J Hughes, P Roth and M Leggat, "A Practical Guide", above n 71, at [18.64].

¹¹⁵ Richardson J made this very point in: *G N Hale & Son Limited v Wellington, etc, Caretakes, etc, IUW* [1991] 1 NZLR 151, at 157.

¹¹⁶ International Labour Organisations, "Protection Against Unjustified Dismissal" (1995), <http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document..>>.

¹¹⁷ *Report of the Public Advisory Group on Restructuring and Redundancy*, above n 1.

affected by redundancy.¹¹⁸ These recommendations were incorporated into the unsuccessful Employment Relations (Statutory Minimum Redundancy Entitlements) Amendment Bill 2009 (Minimum Entitlements Bill). Given the response to the Minimum Entitlements Bill, the recommendations encapsulated within the Advisory Group report are unlikely to be acted upon in the immediate future.¹¹⁹

G Recent Developments

In 2010 the government introduced legislative changes to the ERA. These changes do not expressly deal with redundancy law and are discussed in detail in chapter fifteen.

¹¹⁸ These recommendations are discussed in more detail in chapter fifteen. A copy of the recommendations can be found in appendix four.

¹¹⁹ The Minimum Entitlements Bill is discussed in greater detail in chapter fifteen. A copy of the Bill is contained in appendix five.

Chapter Three

Building the Picture - Definitions and Key Concepts

In order to provide the foundation for further discussion the key elements of redundancy law need to be outlined. Of fundamental importance is the personal grievance regime. In certain circumstances it can provide an employee with an avenue for redress against unjustifiable action or termination of employment through an alleged redundancy. Consequently, this chapter briefly discusses the personal grievance framework including key provisions and the categorisation of actions. Following on from this, attention is then focused on the common law definition of redundancy as well as a brief look at the legislative definition of restructuring in part 6A of the ERA.¹ Finally, this chapter concentrates on the concept of good faith and the test of justification.

A *Personal Grievance Regime*

The personal grievance regime provides employees with a level of statutory protection against unjustifiable conduct by their employer.² This form of protection encompasses dismissal and disadvantage actions as well as discrimination, harassment and duress cases. The general regime has been in existence in New Zealand for 36 years,³ with all employees being granted the same level of protection for the past 20 years.⁴

¹ Part 6A of the ERA is discussed in chapter four.

² G Anderson, "Reviewing Part 9: Personal Grievances: Is a Review Needed?" [2010] 3 Employment Law Bulletin 33, 33.

³ For historical discussion on the personal grievance regime see: A Szakats and M Mulgan, *Dismissal and Redundancy Procedures* (2nd ed, Butterworths, Wellington, 1990) 25; G Anderson, "The Origins and Development of the Personal grievance Jurisdiction in New Zealand" (1990) 13 New Zealand Journal of Industrial Relations, 257-275; P Churchman, C Toogood and M Foley, *Brookers Personal Grievances* (online loose-leaf ed, Brookers) at [1.1] ["*Brooker PG*"]; G Anderson, J Hughes, M Leggat, P Roth, *LexisNexis Employment Law Guide* (7th ed, LexisNexis, Wellington, 2005) at [ERpt9.11]-[ERpt9.13] ["*Employment Law Guide*"]; Anderson and others, *Mazengarb's Employment Law*, (online loose-leaf ed, LexisNexis) at

The framework for managing personal grievances⁵ is contained within the ERA,⁶ the Employment Relations Authority Regulations 2000,⁷ the Employment Court Regulations 2000⁸ as well as practice directions.⁹ However, the key provision encapsulating the essence of the personal grievance obligations is contained in part 9, s 103 of the ERA.¹⁰ Broadly, this provision states that an employee can take a personal grievance action against an employer or former employer because they have been unjustifiably dismissed from their employment.¹¹ Additionally, it goes on to state that a personal grievance can also be brought where the employee's employment or one or more terms of that employment is or are or was affected to the employee's disadvantage by some unjustifiable action by the employer.¹²

Therefore if an employee has their employment terminated by means of alleged redundancy and they feel that this action is unjustifiable they may challenge this action through the personal grievance regime under s 103 of the ERA.

[ERAP9.11] [*"Mazengarb"*]; G Anderson, J Hughes, P Roth and M Leggat, *Employment Law: A Practical Guide* (LexisNexis New Zealand Limited, Wellington, 2010) at [17.4] [*"A Practical Guide"*].

⁴ G Anderson, above n 2, at 33. See chapter two which outlines the development of the personal grievance regime under the various legislative enactments in New Zealand's employment law history.

⁵ For further general discussion on the personal grievance process see: G Anderson, J Hughes and P Roth, *Personal Grievances* (online loose-leaf ed, LexisNexis) at [2.2]-[2.5] [*"Personal Grievances"*]; Anderson and others, *Mazengarb*, above n 3, at [ERA.13]-[ERA.14]; P Churchman, C Toogood and M Foley, *Brookers PG*, above n 3, at [1.2]; G Anderson, J Hughes, P Roth and M Leggat, *A Practical Guide*, above n 3, at [17.4]-[17.5]; G Anderson, J Hughes, M Leggat, P Roth, *Employment Law Guide*, above n 3, at ERpt9.14]-[ERpt9.21].

⁶ See part 9 of the ERA as well as sch 2 and 3 of the ERA.

⁷ See Employment Relations Authority Regulations 2000 (SR2000/186). A copy of this regulation can be viewed at the following weblink:
<http://www.legislation.govt.nz/regulation/public/2000/0186/latest/DLM7977.html?search=ts_regulation_employment+regulations_resel&p=1&sr=1>.

⁸ See Employment Court Regulations 2000 (SR2000/250). A copy of this regulation can be viewed at the following weblink:
<http://www.legislation.govt.nz/regulation/public/2000/0250/latest/DLM2034701.html?search=ts_regulation_employment+regulations_resel&p=1&sr=1>.

⁹ For discussion see: G Anderson, J Hughes and P Roth, *Personal Grievances*, above n 5, at [2.1].

¹⁰ For the purposes of this discussion s 103 (c) to (f) are not considered in this paper.

¹¹ See s 103 (a) of the ERA.

¹² See s 103 (b) of the ERA.

I Categorising the Type of Personal Grievance

Although the judiciary retains the power to reclassify any grievance that is brought,¹³ in an alleged redundancy situation the issue of classification can present some issues.¹⁴ The importance of classification links largely to the remedies that are made available to an affected employee in a redundancy situation.¹⁵

It appears quite clear that in a case where an employee is alleging that their dismissal was not made for genuine business reasons, but rather the employer had some form of ulterior motive, the classification of the personal grievance in this scenario would be unjustifiable dismissal.¹⁶

However, where the affected employee is alleging that the process by which the dismissal for redundancy was conducted was unfair, but accepts redundancy as a genuine reason, then the most appropriate classification of the grievance would be a claim for unjustifiable disadvantage. The basis of this assertion rests on the fact that if the decision to terminate was based on substantively justified grounds, and if the lack of procedural fairness would not have altered the decision to dismiss the affected employee, then what the employee has suffered is a form of disadvantage in their employment. They have been unfairly treated as a result of a flaw in the process leading up to a termination that is in itself justified.¹⁷

A useful illustration of this can be seen in the case of *Simpsons Farms Limited v Aberhart*¹⁸ (*Simpson Farms*) where the initial grievance was framed as an unjustifiable dismissal case.

¹³ Section 122 of the ERA.

¹⁴ Anderson and others, *Mazengarb*, above n 3, at [ERA103.55].

¹⁵ Remedies are discussed in chapter fourteen of this paper.

¹⁶ Anderson and others, *Mazengarb*, above n 3, at [ERA103.55].

¹⁷ *Ibid.*

¹⁸ [2006] ERNZ 825.

However, the Employment Court decided to change this classification to a claim for unjustifiable action¹⁹ giving its reasons as follows:²⁰

‘SFL’s reason for dismissal [redundancy] was the genuine reason as opposed to any form of pretence by which other grounds for dismissal were dressed up as redundancy. With the disestablishment of his position, Mr. Aberhart became superfluous to SFL’s business needs. In that sense, his dismissal was substantively justified. It is rather the means by which SFL went about making that decision to dismiss that are the subject of serious challenge by Mr. Aberhart’.

B Definitions

I Definition of Redundancy²¹

As already noted in chapter two, the term ‘redundancy’ was first defined in the Wage Adjustment Regulations 1974. This definition resembled the terminology used in the LRA 1987, which defined redundancy as:²²

‘A worker’s employment is terminated by the employer, the termination being attributable, wholly or mainly, to the fact that the position filled by that worker is, or will become, superfluous to the needs of the employer’.

Although the LRA has been repealed and this definition has not been expressly incorporated into later employment legislation, it has been widely accepted as both accurate and in keeping

¹⁹ *Simpsons Farms v Aberhart*, above n 18, at [73].

²⁰ *Ibid*, at [72] as per Chief Judge Colgan.

²¹ For general discussion on the definition of redundancy see: P Bartlett, W Hodge, P Muir, C Toogood, R Wilson, *Brookers Employment Law* (online loose-leaf ed, Brookers) [ER103.16] [“*Brookers Employment Law*”]; P Churchman, C Toogood and M Foley, *Brookers PG*, above n 3, at [6.3]; J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 5, at [5.25]; Anderson and others, *Mazengarb*, above n 3, at [1201]; G Anderson, J Hughes, M Leggat, P Roth, *Employment Law Guide*, above n 3, at [ERpt9.31]; G Anderson, J Hughes, P Roth and M Leggat, *A Practical Guide*, above n 3, at [18.64].

²² See s 184 (5) of the LRA. A copy of this provision is contained in appendix one.

with the ordinary²³ meaning of the word.²⁴ As a consequence of this, it has been acknowledged as such in numerous judicial determinations.²⁵

As noted by Judge Colgan, in *The New Zealand Nurses Union v Air New Zealand*²⁶ case by definition a redundancy situation is a subjective assessment as it turns on the “needs of the employer”.²⁷ Therefore, whether a redundancy situation has actually occurred requires evidence of a termination of the employee’s employment by the employer.²⁸ The emphasis articulates the employer’s right²⁹ to determine if a redundancy situation, as defined above, exists and therefore an employee has no right to choose to be made redundant as “redundancy is a misfortune not a privilege”.³⁰

In accordance with the no fault³¹ notion of redundancy, importantly the definition clearly contemplates that it is the need for the position that is disappearing rather than the need for the employee in person.³² This is a very important characteristic of redundancy.³³

²³ *G N Hale & Son Limited v Wellington, etc, Caretaker, etcs IUW* [1991] 1 NZLR 151, at 155 as per Cooke P.

²⁴ *Ibid*, at 155 as per Cooke P; at 157 as per Richardson J; at 158 as per Somers J.

²⁵ The leading example is: *G N Hale & Son Limited v Wellington, etc, Caretaker, etcs IUW*, above n 23, at 155 as per Cooke P.

²⁶ [1992] 3 ERNZ 548.

²⁷ *New Zealand Nurses Union v Air New Zealand*, above n 26, at 567 as per Judge Colgan.

²⁸ For discussion on this point see the Court of Appeal decision in *Wood v Christchurch Golf Club Incorporated* (Court of Appeal, CA254/99, 23 May 2000, Henry, Tipping and Doogue JJ).

²⁹ The notion of the managerial prerogative is discussed in more detail in chapters five and thirteen.

³⁰ *NZPSA v Land Corporation* [1991] 1 ERNZ 741, at 759 as per Chief Judge Goddard.

³¹ For discussion on this concept in relation to redundancy see: G Anderson, J Hughes, P Roth and M Leggat, *A Practical Guide*, above n 3, at [18.64].

³² M Mulgan, “Redundancy Dismissals” in A Szakats and M Mulgan, *Dismissal and Redundancy Procedures* (2nd ed, Butterworths, Wellington, 1990) 193, 212.

³³ This characteristic is discussed in greater detail in chapters ten and thirteen.

Despite this definition, it is possible for parties to an employment relationship to develop their own definition of the term. It is only where no express definition is in existence that the judiciary will use the definition above as a default position.³⁴

Although there is no legislative definition of redundancy currently in use in New Zealand, the ERA does contain a definition of restructuring.

II Legislative Definition of a Restructure

As already articulated, redundancy is not uncommon in New Zealand's employment relations environment. It is synonymous with terminology such as restructuring, organisational reviews, downsizing, delaying, right-sizing, re-engineering, retrenchment and redesigning.³⁵ These terms describe the process that an organisation is instigating in order to achieve an objective. Objectives which culminate in the application of these processes tend to be driven by either market imperatives, such as a decline in production, or alternatively by managerial decisions, such as the implantation of new technology.³⁶

With this in mind, it is however important to draw a distinction between a restructuring situation and any other process that culminates in one or more redundancies. The current legislative framework prescribes a specific process to be followed in the case of a restructure.³⁷ The legislative framework has two distinct processes which provide differing

³⁴ R Nelson, "The Implied Term of Trust and Confidence: The Change in Approach of the Court of Appeal to the Requirement to Pay Redundancy Compensation" (2000) 31 Victoria University of Wellington Law Review 599, 602-603.

³⁵ See K Mackey, "Organisational Downsizing and Redundancies: The New Zealand Workers' Experience" (2004) 29(1) New Zealand Journal of Employment Relations 63-87, 63; J Bryson, "Business Restructuring Practices in New Zealand's Top Organisations" (2002) 27(3) New Zealand Journal of Industrial Relations 299-306, 299; J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 5, at [ERA103.16].

³⁶ M Mulgan, above n 32, at 193.

³⁷ Note this section is currently under review. See chapters four and fifteen for further discussion.

levels of protection. The first process is contained in part 6A, subpart 1 which governs “specified categories of employees” as outlined in schedule 1A of the ERA. The original legislation deemed these specified groups of employees as especially vulnerable in a restructuring situation and therefore greater protection was provided in the legislation.³⁸ The second process is contained in part 6A, subpart 3 and applies to all “other employees” who do not fit into the specific work types captured in subpart 1.³⁹

C The Concept of Good Faith

I Mutual Obligation of Trust & Confidence

Historically, the judiciary in New Zealand has applied the mutual obligation of trust and confidence⁴⁰ into all employment contracts.⁴¹ This denotes the distinctive nature of employment contracts: “It is a special relationship under which workers and employers have mutual obligations of confidence, trust and fair dealing”.⁴² This broad term of trust and confidence is not specifically defined, rather its application has depended on the extent to which the judiciary is prepared to apply the term to the specific scenario.⁴³ As will be discussed in chapter twelve the application of the implied term has contributed to the differing approaches to redundancy compensation.⁴⁴ Although there is no precise definition, a generally accepted statement encapsulating its basic premises is that the parties to an

³⁸ Anderson and others, *Mazengarb*, above n 3, at [1202].

³⁹ These processes are discussed in greater detail in chapter four of this paper.

⁴⁰ For further discussion on this implied term see: R Nelson, above n 35, 601-602. See also: J Hodder, “Employment Contracts, Implied Terms and Judicial Law-Making” (2002) 33 *Victoria University of Wellington Law Review* 895.

⁴¹ *Unkovich v Air New Zealand Ltd* [1993] 1 ERNZ 526, at 589 as per Colgan J.

⁴² *Telecom South Limited v Post Office Union* [1992] 1 ERNZ 711, at 722 as per Richardson J.

⁴³ R Nelson, above n 35, at 601.

⁴⁴ *Ibid.*

employment relationship will refrain from behaving in such a way as to “destroy or seriously damage the relationship of trust and confidence between employer and employee”.⁴⁵

II Good Faith⁴⁶

a) Good Faith Prior to the Introduction of the ERA 2000

Like the mutual obligation of trust and confidence, the concept of good faith is “incapable of precise definition”,⁴⁷ although the amendments of the ERA have provided some legislative guidance. In *EDS v Shaddox*,⁴⁸ Chief Justice Goddard cited with approval for its instructive value the following dicta from the Canadian Judgment in *Wallace v United Grower Ltd* in relation to the meaning of good faith:⁴⁹

‘...I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example untruthful, misleading or unduly insensitive’.

Arguably, this description fits nicely with the legislative notion of good faith as, in addition to the basic concept of good faith,⁵⁰ the obligation extends to refraining from doing anything

⁴⁵ This general statement originated in the case of *Woods v W M Car Services (Peterborough) Limited* [1981] ICR 666. This statement was accepted in *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372.

⁴⁶ For a general discussion on good faith see: Anderson and others, *Mazengarb*, above n 3, at [ERA 4.1]-[ERA4.24]; P Bartlett, W Hodge, P Muir, C Toogood, R Wilson, *Brookers Employment Law*, above n 21, at [ER4.01]-[ER4.11]; G Anderson, J Hughes, P Roth and M Leggat, *A Practical Guide*, above n 3, at [3.1]-[3.38]; G Anderson, J Hughes, M Leggat, P Roth, *Employment Law Guide*, above n 3, at [4.1]-[4.24].

⁴⁷ Chief Judge Goddard citing the Supreme Court of Canada case of *Wallace v United Grain Growers Limited* [1997] 3 SCR 701, 743 in *EDS Limited v Shaddox* (Employment Court, Wellington, WC9/04, 24 June 2004, Chief Judge Goddard) at [25]. This point is also discussed in: R Nelson, above 34, at 602.

⁴⁸ (Employment Court, Wellington, WC9/04, 24 June 2004, Chief Judge Goddard).

⁴⁹ *Wallace v United Grain Growers Limited*, above n 47, at 747 cited in *EDS Limited v Shaddox*, above n 47, at [25].

⁵⁰ See s 4 (1) (a) of the ERA.

that is, or is likely to, mislead or deceive the other party to the employment relationship⁵¹ as well as ensuring that the dismissal is carried out in a sensitive manner.⁵² It appears to be well accepted that, although the terms mislead or deceive are not defined in statute, in respect of good faith the conduct need not intend to mislead,⁵³ involve culpability⁵⁴ or even amount to a misrepresentation⁵⁵ in order to be classified as misleading.⁵⁶ Whether something is in fact misleading will be determined on an objective basis.⁵⁷

The case of *NZ Fasteners Stainless Limited v Thwaites*⁵⁸ (*Thwaites*) was the first decision to align the notion of good faith with the implied term of trust and confidence.⁵⁹ Specifically, it was noted: “In the course of the employer’s consideration of the position and in carrying out the dismissal the obligation of good faith and fair treatment applies”.⁶⁰

⁵¹ See s 4 (1) (b) of the ERA. The words mislead and deceive are taken from the Fair Trading Act 1986. These terms are not defined in the Fair Trading Act 1986.

⁵² Richardson P stated in *Aoraki Corporation Limited v McGavin* [1998] 1 ERNZ 601, 618 that: “A just employer, subject to the mutual obligation of confidence, trust and fair dealing, will implement the redundancy decision in a fair and sensitive way”.

⁵³ *Bonz Group (Pty) v Cooke* [1994] 3 NZLR 216.

⁵⁴ *Wineworths Group Limited v Comite Interprofessionnel du Vin de Champagne* [1992] 2 NZLR 327.

⁵⁵ *Prudential Building & Investment Society of Canterbury v Prudential Assurance Co of New Zealand Limited* [1988] 2 NZLR 653.

⁵⁶ For further discussion on s 4 (1) (b) of the ERA see: G Anderson, J Hughes, M Leggat, P Roth, *Employment Law Guide*, above n 3, at [ER4.6]–[ER4.11A]; G Anderson, J Hughes, P Roth and M Leggat, *A Practical Guide*, above n 3, at [3.8]–[3.14]; Anderson and others, *Mazengarb*, above n 3, at [ERA4.6]–[ERA4.11A]; P Bartlett, W Hodge, P Muir, C Toogood, R Wilson, *Brookers Employment Law*, above n 21, at [ER4.04].

⁵⁷ *Fletcher Construction NZ and South Pacific Limited v Cable Street Properties Limited* [1999] BCL 1121.

⁵⁸ [2000] 1 ERNZ 739.

⁵⁹ J Hodder, above n 40, at 914.

⁶⁰ *New Zealand Fasteners Stainless Limited v Thwaites*, above n 58, at [22] as per Gault J.

b) Good Faith under the ERA 2000

*Coutts Cars v Baguley*⁶¹ (*Coutts Cars*) was the first Court of Appeal decision to consider the statutory concept of good faith. Importantly, it was the perceived pre-existing application of the implied term of trust and confidence that led the majority to conclude:⁶²

‘We do not see that the new statutory obligation on employers and employees to deal with each other in good faith introduces any significantly different obligation to that which the Courts have placed upon the parties to employment contracts over recent years’.

Therefore earlier ECA decisions such as *Aoraki Corporation Limited v McGavin*⁶³ (*Aoraki*) and *Thwaites* were expressly recognised as continuing to provide assistance on the relevant principles of redundancy law.⁶⁴ The majority did go on to suggest that given the obligation of good faith, the duty to consult⁶⁵ will be “desirable, if not essential, in most cases”,⁶⁶ which accorded with the *Aoraki* decision.⁶⁷ However, in dissent McGrath J asserted that the ERA with its good faith obligations imposed a “higher standard of conduct”,⁶⁸ which “would require consultation with affected employees in a situation of redundancy wherever reasonably practicable”.⁶⁹

⁶¹ *Coutts Cars v Baguley* [2001] ERNZ 660.

⁶² *Ibid.*, at [42] as per Richardson P, Gault and Blanchard JJ.

⁶³ [1998] 1 ERNZ 601.

⁶⁴ *Coutts Cars v Baguley*, above n 61, at [42].

⁶⁵ The issue of consultation is discussed in greater detail in chapter eight.

⁶⁶ *Coutts Cars v Baguley*, above n 61, at [43] as per Richardson P, Gault and Blanchard JJ.

⁶⁷ *Aoraki Corporation Limited v McGavin*, above n 63, at 618 as per Richardson P, Gault, Henry, Keith, Blanchard and Tipping JJ.

⁶⁸ *Coutts Cars v Baguley*, above n 61, at [83] as per McGrath J.

⁶⁹ *Ibid.*

The judiciary's approach to the concept of good faith, by treating it interchangeably with the implied term of trust and confidence, was not what the legislature had initially intended when it enacted s 4 of the ERA.⁷⁰ This prompted its amendment in 2004.

c) Good Faith in the ERA as amended in 2004

The 2004 amendment was intended to provide more specific direction as to what the duty is and when it is to be applied. Importantly, in relation to the judiciary's current interpretation, Parliament was explicit in stating that the duty of good faith was wider than the implied mutual obligation of trust and confidence and in providing mandatory steps to be taken where continuation of employment was proposed to be affected. Specifically, s 4 (1A) was enacted:

- 1A) The duty of good faith in subsection (1) -
 - (a) is wider in scope than the implied mutual obligation of trust and confidence; and
 - (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 paragraph (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 employees' employment, about the decision; and
 - (ii) an opportunity to comment on the information to their employer before the decision is made.

As a rule, s 4 of the ERA confers a statutory obligation on all parties to an employment relationship to deal with each other in good faith, for example, legislation articulates a formal requirement to be both active and constructive in maintaining a productive employment

⁷⁰ For discussion see: Hughes, J, "Good Faith Bargaining under the Employment Relations Act: The Original Scheme" in E Rasmussen (ed), *Employment Relationships: New Zealand's Employment Relations Act* (Auckland University Press, Auckland, 2004) 77, 77.

relationship.⁷¹ However, some obligations as noted by Chief Judge Colgan in *Simpsons Farms* are solely applicable to the employer:⁷²

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

It appears from the case law that the good faith amendments had little impact on the substantive elements of justification.⁷³ However, as demonstrated by the quote above, and judicial decisions,⁷⁴ the amendment did impact on the requirements associated with procedural fairness, in particular in relation to consultation and the disclosure of information. This new approach arguably reflects the dissenting view of McGrath in *Coutts*.

The focus on procedure is also evidenced by case law. Specifically, most of the cases involving a breach of s 4 after the 2004 amendments relate to procedural defects causing a lack of good faith behaviour. A number of decisions have established clear breaches of s 4 in the context of redundancy.⁷⁵ Notwithstanding this, it is important to note that there has not yet been a case which has directly argued that good faith allows the curbing of the managerial prerogative.⁷⁶

⁷¹ *HP Industries (NZ) Limited v Davison* (Employment Court, Auckland, AC44/08, 7 November 2008, Judge Shaw) at [9].

⁷² *Simpsons Farms v Aberhart*, above n 19, at [65] as per Chief Judge Colgan. Judge Shaw cited Chief Judge Colgan in *HP Industries (NZ) Limited v Davison*, above n 71, at [9].

⁷³ *Simpsons Farms v Aberhart*, above n 19, at [67].

⁷⁴ See for example, *HP Industries (NZ) Limited v Davison*, above n 71; *McGuire v Rubber Flooring (NZ) Limited* (Employment Court, Auckland, AC9/06, 2 March 2009, Judge Travis).

⁷⁵ See for example: *HP Industries (NZ) Limited v Davison*, above n 71; *EDS Limited v Shaddox*, above n 47; *Harris v Charter Trucks Limited* (Employment Court, Christchurch, CC16/07, 11 September 2007, Judge Couch); *Staykov v Cap Gemini Ernst & Young New Zealand Limited* (Employment Court, Auckland, AC18/05, 20 April 2005, Judge Travis).

⁷⁶ T Cleary and D Mackinnon, “Restructuring, Redundancy, Selling or Shrinking” (Paper presented at New Zealand Law Society Employment Law Conference, 30 & 31 October 2008) 331, 338.

Contemporaneously, the other significant change brought about by the 2004 amendments was a codified test for justification.

D Test for Justification

I The Test of Justification Prior to the 2004 Amendments

As noted in section A of this chapter, the right of an employee to pursue a personal grievance is well established in New Zealand employment legislation.

Part 9, s 103 of the ERA defines a personal grievance. In relation to redundancy law subsection (1) (a) and (b) as outlined below have particular importance.

Section 103 Personal Grievance

- (1) For the purpose of this Act, personal grievance means any grievance that an employee may have against the employee's employer or former employer because of a claim –
- a. That the employee has been unjustifiably dismissed; or
 - b. That the employee's employment, or 1 or more conditions of the employee's employment (including any conditions that survives termination of employment), is or are or was (during the employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer; or.....

Interestingly, despite this historical statutory right, the legislation, until 2004, as noted below, did not define what was meant by the term 'unjustifiable'. Therefore, clarification of the term's precise meaning was left to the judiciary⁷⁷ which had "deliberately avoided the

⁷⁷ For general discussion on justification prior to the 2004 amendment to the ERA see: J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 5, at [3.33A]; G Anderson, J Hughes, M Leggat, P Roth, *Employment Law Guide*, above n 3, at [ER103A.3]-[ER103A.6]; G Anderson, J Hughes, P Roth and M Leggat, *A Practical Guide*, above n 3, at [18.103]-[18.106]; Anderson and others, *Mazengarb*, above n 3, at [ERA103A.1]-[ERA103A.6]; P Bartlett, W Hodge, P Muir, C Toogood, R Wilson, *Brookers Employment Law*, above n 21, at [ER103.06]; P Churchman, C Toogood and M Foley, *Brookers PG*, above n 3, at [4.7.01].

temptation to formulate detailed principles and rules by which justifiability or unjustifiability of dismissals is to be determined”.⁷⁸

Consequently, this somewhat aptly described “elusive”⁷⁹ term became characterised by the need of the employer to demonstrate fair treatment of the employee within the specified circumstances.⁸⁰ In respect of redundancy law,⁸¹ the Courts had, in reviewing this notion of fairness, looked at substantive grounds which the employer utilised in making their decision to assess whether the decision was in fact a reasonable one. This is often referred to as the ‘genuineness’ of the redundancy.⁸² Coupled with this, the Courts had assessed the procedure which the employer followed to implement such decisions.⁸³

II The 2004 Amendments to the ERA

The 2004 amendment to the ERA inserted a statutory test for justification with a new s 103A of the ERA.⁸⁴ This section was largely intended to override the decision in *W & H Newspapers Limited v Oram*⁸⁵ (*Oram*) and therefore redress the perceived lack of balance between the respective rights of employers and employees. By way of background, *Oram* was a case where the Court of Appeal held in respect of justification in dismissal for cause situations that the decision to dismiss had to be one “which a reasonable and fair employer

⁷⁸ *G N Hale & Son Limited v Wellington, etc, Caretakers, etc, IUW* [1991] 1 NZLR 151, at 157 as per Richardson J.

⁷⁹ *Ibid.*

⁸⁰ J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 5, at [3.33].

⁸¹ For full judicial analysis of the concept of justification in relation to redundancy see *Simpsons Farms v Aberhart*, above n 19, at [37]-[57]. For a general review of the concept of justification see *Air New Zealand v Hudson* (Employment Court, Auckland, AC30/06, 30 May 2006, Judge Shaw) at [92] - [107].

⁸² The genuineness of a redundancy is discussed in chapter thirteen.

⁸³ G Anderson, J Hughes and P Roth, *Personal Grievances*, above n 5, at [3.33].

⁸⁴ Section 103A was inserted on 1 December 2004 by s 38 of the Employment Relations Amendment Act (No 2) 2004 (No 86).

⁸⁵ [2000] 2 ERNZ 448.

could have taken”⁸⁶ and therefore there may be more than one approach to a situation that a reasonable and fair employer may apply.⁸⁷ Critics of this decision felt that the test applied gave too much power to the employer.⁸⁸

The Employment Relations Law Reform Bill 2003, of which the test for justification was part, was aimed at further enabling the ERA to meet its original objectives of “promoting a fair, productive and effective employment relationship”.⁸⁹ A fair and productive employment relationship was seen as an “essential ingredient in developing a more innovative economy while protecting the more vulnerable in society”.⁹⁰ Therefore, how justification was subsequently interpreted by the Courts was fundamental to meeting the ERA’s objective of realigning power to achieve a fairer balance.

The new statutory test⁹¹ attempted to clarify to the Courts how Parliament wanted justification to be interpreted. Specifically Parliament enacted the following:

Section 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,

⁸⁶ *W&H Newspapers Ltd v Oram*, above n 85, at [31] as per Gault J.

⁸⁷ *Ibid.*

⁸⁸ The *Oram* case is discussed in more detail in chapter fifteen.

⁸⁹ Employment Relations Law Reform Bill, Explanatory Note, General Policy Statement, 1,1.

⁹⁰ *Ibid.*

⁹¹ For discussion on this test see: T Cleary and D Mackinnon, above n 76, at 331-351; P Chemis and P Swarbrick, “Justification Section 103A: Has Anything Really Changed?” (Paper presented at New Zealand Law Society Employment Law Conference, 30 & 31 October 2008) 3-24; T Cleary, “What Would a Fair and Reasonable Employer Have Done?” [2006] 5 Employment Law Bulletin 85; G Rossiter, “The Standard for Justification for Dismissal” (September 2005) *The New Zealand Law Journal* 319; M Richards and N Belton, “Section 103A, Redundancy and *Simpson’s Farms*” [2007] 5 Employment Law Bulletin 80; G Anderson, “*Simpsons Farms v Aberhart*” [2006] 7 Employment Law Bulletin 150; G Anderson, J Hughes and P Roth, *Personal Grievances*, above n 5, at [3.34A]–[3.38]; Anderson and others, *Mazengarb*, above n 3, at [103A.8]; P Churchman, C Toogood and M Foley, *Brookers PG*, above n 3, at [4.7.04A]; P Bartlett, W Hodge, P Muir, C Toogood, R Wilson, *Brookers Employment Law*, above n 21, at [ER103A.04]–[ERA103A.08]; G Anderson, J Hughes, P Roth and M Leggat, *A Practical Guide*, above n 3, at [18.108]–[18.100]; G Anderson, J Hughes, M Leggat, P Roth, *Employment Law Guide*, above n 3, at [ER103A.8]–[ER103A.10].

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.

Interestingly in *Simpsons Farms*, which was the first redundancy case⁹² to consider the application of the new test, Chief Judge Colgan queried whether Parliament had actually intended the new test to change the judge made law of justification in respect of redundancy dismissals and disadvantages.⁹³ This speculation arose because the relevant background documents did not refer to redundancy or its associated case law. Rather the extrinsic documentation supported the notion that the change was directed at remedying the approach of the Court of Appeal in the much talked about judgment of *Oram* concerning dismissal for cause rather than redundancy per say.⁹⁴

Despite this, Chief Judge Colgan went on to articulate that as Parliament's words were so "broad and clear"⁹⁵ they must therefore be taken to circumscribe not only disadvantages or dismissal for cause but also situations involving redundancy.⁹⁶ It was therefore clear that this test was to apply to any case where unjustifiable dismissal or disadvantages were asserted.⁹⁷ Although the changes did not go as far as originally proposed,⁹⁸ it was not perceived that these changes were to be a "radical revamp of the dismissal law".⁹⁹ Rather the change was to emanate from existing case law.¹⁰⁰

⁹² The first case to consider s 103A was *Air New Zealand v Hudson* (Employment Court, Auckland, AC30/06, 30 May 2006, Judge Shaw). For discussion on this case see: Robson, "Air New Zealand v Hudson" [2006] 5 Employment Law Bulletin 99.

⁹³ *Simpsons Farms v Aberhart*, above n 19, at [56]-[57].

⁹⁴ *Ibid.*, at [56].

⁹⁵ *Ibid.*, at [57] as per Chief Judge Colgan.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ For discussion on this point see: G Anderson, J Hughes and P Roth, *Personal Grievances*, above n 5, at [3.34].

⁹⁹ Margaret Wilson's first reading speech was cited by Chief Judge Colgan in *Simpsons Farms v Aberhart*, above n 19, at [57].

¹⁰⁰ *Ibid.*

Intrinsically, the new test endeavoured to ensure an objective rather than subjective evaluation of the employer's actions. Specifically, the judiciary must give consideration to both the employer's actions, being the "substantive dismissal or justification for it",¹⁰¹ and how the employer acted, being "the process leading to those outcomes".¹⁰² These two elements of substance and procedure must be evaluated by applying the standard of "a notional employer to the conduct of the actual employer"¹⁰³ at the time of the dismissal.

III Statutory Test of Justification & Good Faith

The Employment Court in *Simpson's Farms* held that the requirements encapsulated in s 4 represented minimum obligations where redundancy may ensue and were thus elements of the new s 103A test of justification. Specifically the Court noted:¹⁰⁴

'Following the new s103A, the Authority or the Court must consider, on an objective basis, whether the decisions made by the employer, and the employer's manner of making those decisions, were what a fair and reasonable employer would have done in all the circumstances at the relevant time. The statutory obligations of good faith dealing and, in particular, those under s4 (1A)(c) inform the decision under s103A about how the employer acted. A fair and reasonable employer must, if challenged, be able to establish that he or she or it has complied with the statutory obligation of good faith dealing in s4 including as to consultation because a fair and reasonable employer will comply with the law'.

Therefore, the good faith obligations in s 4 are to be taken into account in respect of applying the objective test for justification. However, as the above dicta highlights, the good faith obligations relate to a consideration of 'how the employer acted', therefore leaving the test for substantive justification unchanged and as outlined in pre ERA case law. The decision reiterated the pre-existing situation that the two elements of justification, being substantive

¹⁰¹ *X v Auckland District Health Board* (Employment Court, Auckland, AC10/07, 23 February 2007, Chief Judge Colgan) at [97].

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Simpsons Farms v Aberhart*, above n 19, at [65].

justification and procedural fairness remain separate but interrelated elements as far as determining justifiability of the dismissal through the application of s 103A.¹⁰⁵

However, the case affirmed the approach which had historically been applied in respect of substantive justification.¹⁰⁶

IV Recent Judicial Interpretation of the Test of Justification

In *Air New Zealand v V*¹⁰⁷ (*Air New Zealand*) the Employment Court was asked to determine how s 103A should be interpreted and applied in respect of personal grievances.¹⁰⁸ The case did not concern dismissal for redundancy, rather it related to the interpretation and application of s 103A to a dismissal on the grounds of misconduct.

The Court reviewed the historic case law surrounding justification, extrinsic material, as well as express provisions within the ERA in order to make its determination. The Court concluded that: “In cases of dismissal, it requires the Authority or the Court to objectively review all the actions of an employer up to and including the decision to dismiss”.¹⁰⁹ This interpretation was consistent with both the purpose of the Act¹¹⁰ and the extrinsic materials that surrounded the ERA’s introduction.¹¹¹ The Employment Court noted:¹¹²

¹⁰⁵ For further discussion on this point see chapter thirteen.

¹⁰⁶ *Simpsons Farms v Aberhart*, above n 19, at [67].

¹⁰⁷ (Employment Court, Auckland, AC15.09, 3 June 2009, Chief Judge Colgan and Judges Travis, Shaw and Couch).

¹⁰⁸ *Air New Zealand v V*, above n 107, at [1].

¹⁰⁹ *Ibid*, at [37].

¹¹⁰ *Ibid*, at [50].

¹¹¹ *Ibid*, at [59].

¹¹² *Ibid*, at [60].

‘Insofar as a legislative intention can be drawn from those materials, it is not to promote the two step approach discussed in the second *BP Oil* case and in *Oram*, but rather, to subject all of the employer’s relevant actions to objective assessment against the standard of what a fair and reasonable employer would have done in all the circumstances’.

Therefore, put simply, the Employment Court seemed to be stating that s 103A is in fact a completely new test of justification which examines all the employer’s actions.¹¹³

¹¹³ Further discussion on this case and recent legislative changes are discussed in chapter fifteen.

Chapter Four

Filling Gaps in the Picture - Part 6A of the ERA

As noted in chapter one, it is beyond the scope of this paper to engage in a full analysis of part 6A of the ERA.¹ This paper focuses on the common law that has developed around redundancy issues, predominantly under the personal grievance regime. Part 6A outlines a process that must be followed in a restructuring situation. As will be discussed, the precise process to be followed will depend on the type of work that the employee is engaged to perform. However, when implementing redundancies the employer must not only follow the legislative and or contractual process within the affected employee's employment agreement, but they must also interpret the process in light of the general rules established through the common law² and as outlined in chapters six to thirteen of this paper. As a result of this, part 6A is only covered briefly for the sake of completeness.

Part 6A of the ERA is focused on specific circumstances which can result in a redundancy situation. Specifically, part 6A deals with the situation where an employer decides to dispose of their business or a specific part of their business by means of removing their ownership to another employer.³ Part 6A defines this situation specifically as "restructuring".⁴ As

¹ For further general information on part 6A of ERA see: G Anderson, J Hughes, P Roth and M Leggat, *Employment Law: A Practical Guide* (LexisNexis New Zealand Limited, Wellington, 2010) at [10.1]-[10.4] ["*A Practical Guide*"]; Anderson and others, *Mazengarb's Employment Law*, (online loose-leaf ed, LexisNexis) at [ERA P6A.1] and [ERA 69A.1] – [ERA 690.4] and [1202]-[1203] ["*Mazengarb*"]; P Bartlett, W Hodge, P Muir, C Toogood, R Wilson, *Brookers Employment Law* (online loose-leaf ed, Brookers) at [ER69A.01]-[ER69OL.02] ["*Brookers Employment Law*"]; T Cleary and D Mackinnon, "Restructuring, Redundancy, Selling or Shrinking" (Paper presented at New Zealand Law Society Employment Law Conference, 30 & 31 October 2008) 331-351; C Chauvel and K Elkin, "Employee Protection in Restructuring Situation" [2004] 8 Employment Law Bulletin 104; A Drake, "Buying and Selling a Business 2008: Don't Forget the Workers" [2008] 8 Employment Law Bulletin 111.

² P Keily, *Termination of Employment: A Best Practice Guide* (CCH, Auckland, 2008) 170-171.

³ Note that this is different to the situation where an employer company sells their shares. The company is the employer, rather than just the owner of the shares. This point is discussed in: Anderson and others, *Mazengarb*, above n 1, at [1202].

⁴ See s 69B for a definition of restructuring in relation to subpart 1 of part 6A of the ERA. See s 69L for a definition of restructuring in relation to subpart 3 of part 6A of the ERA.

employment agreements are non-transferable between one employer and another, when this situation arises, an employee's position technically becomes redundant, irrespective of whether the new employer is willing to re-employ the affected employees in the same or similar position.⁵ This situation is often termed a "technical redundancy".⁶ The enactment of part 6A of the ERA significantly changed the pre-existing law relating to this type of situation.⁷

A Overview

The introduction of part 6A stemmed from a report by an Advisory Group on Contracting Out, which was established by the then Minister of Labour in 2001. As a result of this report, part 6A was enacted in 2004.⁸

As already noted, the process that an employer must follow in a restructuring situation depends on the nature of the affected employee's work. The intention behind part 6A, subpart 1 was to provide continuity of employment and protection to employees in respect of their terms and conditions of employment in industries which were perceived by the government at the time of the legislative enactment as being particularly vulnerable.⁹ Therefore it ensured that employees covered by subpart 1 had specific protections in restructuring situations irrespective of their terms and conditions of employment.

⁵ Anderson and others, *Mazengarb*, above n 1, at [1202].

⁶ *Ibid.*

⁷ For a review of the law prior to the enactment of part 6A see: Anderson and others, *Mazengarb*, above n 1, at [1202].

⁸ For discussion on the origins of part 6A see: Anderson and others, *Mazengarb*, above n 1, at [ERA P6A.1]; P Roth, "Enterprise Transfer Regulations: Overseas Reality – New Zealand Possibility" [2001] 3 *Employment Law Bulletin* 42.

⁹ P Bartlett, W Hodge, P Muir, C Toogood, R Wilson, *Brookers Employment Law*, above n 1, at [ER69A.01].

Conversely, all other employees who do not fit into the specified work groups are governed by part 6A, subpart 3 of the ERA.¹⁰ Part 6A provides protection to these employees by stating that every employment agreement must contain provisions for managing a restructuring situation. These provisions are to be negotiated and agreed between the parties to the employment relationship.¹¹

B Specified Categories of Employees

Part 6A, subpart 1¹² of the ERA defines restructuring for vulnerable employees through s 69B to mean as follows:

- Restructuring, in relation to an employer's business, -
- (a) means -
 - (i) contracting out; or
 - (ii) contracting in; or
 - (iii) subsequent contracting; or
 - (iv) selling or transferring an employer's business (or part of it) to another person; but
 - (b) to avoid doubt, does not include, -
 - (i) in the case of an employer that is a company, the sale or transfer of any or all of the share in the company; or
 - (ii) any contract, agreement, sale or transfer entered into, made, or concluded while the employer is adjudicated bankrupt or in receivership or liquidation.

Schedule 1A of the ERA 2000 outlines the specific groups of employees who work within named sectors as vulnerable.¹³ Specifically, employees who work within the laundry service or caretaking within the education sector; orderly and laundry services within the health or age-related residential care sectors, and finally employees working within the cleaning and

¹⁰ It is also important to note that state sector employees are also subject to different provisions that concern the transfer of employees who work in government departments. These provisions are contained in the State Sector Act 1988. For further discussion on these provisions see: Anderson and others, *Mazengarb*, above n 1, at [1203].

¹¹ P Bartlett, W Hodge, P Muir, C Toogood, R Wilson, *Brookers Employment Law*, above n 1, at [ER69OH.01].

¹² See s 69A which outlines the objectives associated with subpart 1.

¹³ Note that s 237A (1) of the ERA allows the Governor General to, "by Order in Council, amend Schedule 1A to add to, omit from, or vary the categories of employees". This point is discussed in: P Bartlett, W Hodge, P Muir, C Toogood, R Wilson, *Brookers Employment Law*, above n 1, at [ER69A.01].

food catering services irrespective of the sector are deemed vulnerable employees for the purposes of this provision.¹⁴

If the abovementioned definition in s 69B is applicable, and the work of the affected employee(s) comes within schedule 1A of the ERA, then the legislation imposes specific obligations on both the former and new parties to the employment relationship.¹⁵ In particular, the provisions enable a current employee to elect to transfer to the new employer on the same terms and conditions of employment.¹⁶ Additionally, subject to the content of their employment agreement, affected employees have the right to bargain with the new employer for redundancy entitlements, which can include compensation¹⁷ if the new employer makes the employee redundant for reasons relating to the initial restructure.¹⁸ Importantly, if the parties cannot agree on the entitlements, then the Authority has the power to make a determination.¹⁹

¹⁴ Importantly, the legislation applies to employees only. In respect of determining the extent to which part 6A of the ERA applies to owner/operators, see the Authority judgment of *Hughes v Upper Hutt Cosmopolitan Club* (Employment Relations Authority, Wellington, WA120/08, 17 September 2008, Wood (Member)). In that case, the Authority held that although the work covered by owner/operators may be within the categories of work as outlined in part 6A those owner/operators must meet the usual tests as to whether they are actually employees under the ERA. A useful discussion of this case is found in M Quigg, “Who is a ‘Vulnerable’ Employee” (31 October 2008) One Stop Employment Law Update <http://www.conferenz.co.nz/index2.php?option=com_content&task=view&id=551&p>.

¹⁵ See ss 69G to 69N of the ERA.

¹⁶ See ss 69I to 69K of the ERA.

¹⁷ See s 69B of the ERA which defines the term ‘redundancy entitlements’.

¹⁸ See s 69N of the ERA.

¹⁹ See s 69O of the ERA. The Department of Labour has produced a factsheet to assist employers and employees with understanding part 6A, subpart 1. See: Department of Labour, “Fact Sheet: Protection in Special Circumstances – Special Groups of Employees”. A copy of this factsheet can be obtained from: <http://ers.govt.nz/factsheets/restructuring_protection_specified.html>.

I Judicial Decisions - Part 6A, subpart 1

There is limited case law on part 6A of the ERA, however when this part was originally enacted in 2004, there was some uncertainty regarding whether restructuring situations governed by subpart 1 included subsequent contracting situations, often described as “second generation contracting” or “successor contracting”.²⁰ The case of *Gibbs and Others v Crest Commercial Cleaning Limited*²¹ (*Gibbs*) confirmed that subsequent contracting was not governed by subpart 1.²²

To briefly outline the facts, *Gibbs* and five other employees were employed by Southern Cleaning Services Limited (SCS) in Dunedin. SCS had a contract with the Dunedin Kindergarten Association (the Association) to clean kindergartens which were members of the Association. However, the Association was not satisfied with the service being provided by SCS and as a result of this decided not to renew their contract when it expired in 2005. Instead, the Association sought tenders from other cleaning providers. Crest Commercial Cleaning Limited (Crest) was successful with their tender and took over the work formally performed by SCS. As a result of this the applicants were no longer required by SCS and their respective employment came to an end. The applicants claimed that part 6A, subpart 1 of the ERA required Crest to employ them to undertake the cleaning work that they had previously carried out at the kindergartens when employed by SCS. They asserted that they should be employed on no lesser favourable terms and condition of employment than they had previously enjoyed with SCS. Crest disputed this interpretation of part 6A.²³ The case

²⁰ See P Bartlett, W Hodge, P Muir, C Toogood, R Wilson, *Brookers Employment Law*, above n 1, at [ER69F.02]; Anderson and others, *Mazengarb*, above n 1, at [1202].

²¹ (Employment Court, Christchurch, CC10/05, 18 July 2005, Chief Judge Colgan and Judges Travis and Couch).

²² *Gibbs and Others v Crest Commercial Cleaning Limited*, above n 21, at [152]. This decision is discussed in: P Bartlett, W Hodge, P Muir, C Toogood, R Wilson, *Brookers Employment Law*, above n 1, at [ER69F.02]. See also: Anderson and others, *Mazengarb*, above n 1, at [1202]; K Spackman and E Warden, “*Gibbs v Crest Commercial Cleaning Limited*” [2005] 7 Employment Law Bulletin 143.

²³ *Gibbs and Others v Crest Commercial Cleaning Limited*, above n 21, at [2].

focused on the interpretation of part 6A and in particular whether it applied to subsequent contracting situations.²⁴

In summary the Employment Court held that part 6A, subpart 1 could not be interpreted in favour of the applicants and therefore did not cover subsequent contracting. The Employment Court based its reasoning on the then definition of restructuring contained in s 69B of the ERA. Specifically, the Employment Court relied on the fact that s 69B (i) and (iii) both demanded the existence of an agreement or contract which confirmed the “employer’s business” was undertaken “for the employer by another person”.²⁵ It was held that Crest was not taking over any aspect of SCSs business (SCS was the only possible employer as far as the legislative definition of “employer” was concerned) and therefore part 6A could not apply to this situation.²⁶

As a result of this decision the government amended part 6A in 2006 and expanded its scope so as to incorporate subsequent contracting within subpart 1.²⁷ As noted in the definition of restructuring, subpart 1 now expressly covers subsequent contracting.²⁸

The 2010 decision in *Service and Food Workers Union Nga Ringa Tota Incorporated v OCS Limited*²⁹ concerned very similar facts to the *Gibbs* case,³⁰ however the decision related to the interpretation and application of provisions in part 6A subpart 1 concerning the entitlements

²⁴ Ibid, at [3].

²⁵ *Gibbs and Others v Crest Commercial Cleaning Limited*, above n 21, at [153]. See also: Anderson and others, *Mazengarb*, above n 1, at [1202].

²⁶ Anderson and others, *Mazengarb*, above n 1, at [1202].

²⁷ Ibid. See also: P Bartlett, W Hodge, P Muir, C Toogood, R Wilson, *Brookers Employment Law*, above n 1, at [ER69F.02].

²⁸ Section 69B (a) (iii) of the ERA.

²⁹ [2010] NZEmpC 113.

³⁰ For a detailed description of the facts of this case see: S Robson, “*Service and Food Workers Union Nga Ringa Tota Incorporated v OCS Limited*” [2010] 7 Employment Law Bulletin 92. Also see the discussion in: P Bartlett, W Hodge, P Muir, C Toogood, R Wilson, *Brookers Employment Law*, above n 1, at [ER69F.02].

available to employees who were transferred to the new employer being OCS, but were subsequently being proposed to be made redundant.³¹ In this case, both OCS and the former employer were party to a MECA with the Service and Food Workers Union. The MECA expressly stated that in clause 25.2:³²

“The parties to this employment agreement agree that no claims for redundancy payments will be made as a result of loss of employment due to downsizing of client contract or loss of client contract”.

The Employment Court has the task of interpreting this express provision in light of the statutory right to pursue redundancy entitlements in s 69N and in the objects section of part 6A subpart 1 being s 69A (b) of the ERA.³³ The Employment Court held that this right was subject to any express provisions contained within an employee’s employment agreement, in this case clause 25.2 of the MECA. Therefore, the Employment Court held that clause 25 prevented the employees from claiming any form of redundancy payment from OCS.³⁴ However, in making this interpretation the Employment Court noted that the term ‘redundancy entitlement’ contained in section 69A(b) only excluded the payment of redundancy compensation,³⁵ it did not exclude the employees perusing non-monetary redundancy entitlements such as “redeployment and the provision of financial advice”.³⁶

³¹ *Service and Food Workers Union Nga Ringa Tota Incorporated v OCS Limited*, above n 29, at [1].

³² *Ibid*, at [11].

³³ *Ibid*, at [12]-[14].

³⁴ *Ibid*, at [54]-[57].

³⁵ *Ibid*, at [56].

³⁶ *Ibid*, at [59] as per Chief Judge Colgan. For discussion see also: P Bartlett, W Hodge, P Muir, C Toogood, R Wilson, *Brookers Employment Law*, above n 1, at [69F.01].

C Other Employees

For all other employees for which part 6A subpart 1 does not apply, part 6A, subpart 3 of the ERA³⁷ outlines the applicable process. These employees are not seen as being vulnerable employees and as a result of this the level of statutory protection is reduced. For the purposes of subpart 3, restructuring is defined in s 69OI to mean as follows:

- Restructuring, in relation to an employer's business, -
- (a) means –
 - (i) contracting out; or
 - (ii) selling or transferring the employer's business (or part of it) to another person; but
 - (b) to avoid doubt, does not include –
 - (i) contracting in; or
 - (ii) subsequent contracting; or
 - (iii) in the case of an employer that is a company, the sale or transfer of any or all of the shares in the company; or
 - (iv) any contract, agreement, sale or transfer entered into, made or concluded while the employer is adjudicated bankrupt or in receivership or liquidation.

In this scenario protection for employees is provided through an employee protection provision (EPP)³⁸ which must be contained in every worker's individual or collective employment agreement.³⁹ All employment protection provisions must describe the procedure that the employer must follow and the matters the employer must negotiate with the new employer regarding affected employee's employment, such as whether they are able to transfer to the new employer on their same terms and conditions of employment. Additionally the provision needs to outline the process to be followed in respect of determining what entitlements, if any, will be available for employees who do not transfer to the new employer.⁴⁰

As outlined by the definition of restructuring for subpart 3 it is more limited in scope in comparison with the definition of restructuring for subpart 1.

³⁷ See s 69OH of the ERA which outlines the objectives associated with subpart 3.

³⁸ The term employee protection provision is defined in s 69OI of the ERA.

³⁹ This obligation is contained in s 69OJ of the ERA.

⁴⁰ The duties are outlined in s69OI of the ERA.

I Judicial Decisions - Part 6A, subpart 3

As with part 6A subpart 1 there has been limited cases concerning these provisions. However the case of *Pulp and Paper Industry Council of Manufacturing and Construction Workers' Union v Norske Skog Tasman Limited*⁴¹ (*Norske*) is a key decision as it illustrates the power of the provisions contained in subpart 3 as well as the judiciary's ability to remedy any lack of compliance with these provisions.

In *Norske* the Employment Court considered an appeal from the Authority decision relating to the ability of the employer to carry out a restructure where no EPP had been agreed between the parties.⁴² The Authority determined that the employer "could not proceed unless and until the employment agreements of the affected employees contained EPPs".⁴³ Given this, the Authority issued a compliance order in respect of s 69OJ. The compliance order contained two elements; firstly that the parties needed to comply with s 69OJ and negotiate and agree on an EPP and secondly that the employer was restricted from undertaking any restructuring until an EPP clause had been negotiated.⁴⁴ The Employment Court overruled this decision holding that Parliament had not provided the judiciary with any authority to remedy a failure to comply with s 69OJ.⁴⁵ In *Eastern Bay Independent Industrial Workers Union Incorporated v Carter Holt Harvey Limited*⁴⁶ (*Eastern Bays*) the Employment Court

⁴¹ (Employment Court, Auckland, AC49/09, 9 December 2009, Chief Judge Colgan and Judge Travis and Couch).

⁴² *Pulp and Paper Industry Council of Manufacturing and Construction Workers' Union v Norske Skog Tasman Limited*, above n 41, at [1].

⁴³ *Ibid*, at [2].

⁴⁴ *Ibid*. This decision is discussed in: P Bartlett, W Hodge, P Muir, C Toogood, R Wilson, *Brookers Employment Law*, above n 1, at [ER69OJ.02].

⁴⁵ It is important to note that the employer had given a significant undertaking regarding the process that would be followed in the restructure and the Employment Court felt that this undertaking would have been more than adequate if it had been translated into an EPP. See the discussion in *Pulp and Paper Industry Council of Manufacturing and Construction Workers' Union v Norske Skog Tasman Limited*, above n 41, at [109]. This decision is discussed in: P Bartlett, W Hodge, P Muir, C Toogood, R Wilson, *Brookers Employment Law*, above n 1, at [ER69OJ.02].

⁴⁶ [2009] ERNZ 334.

applied the reasoning in *Norske* by holding that the absence of an EPP did not restrict an employer from undertaking restructuring.⁴⁷

D Effect of Part 6A of the ERA

Although these amendments represent a significant recognition of the impact of redundancy situations, and is the greatest form of express legislative protection that has been prescribed to employees to date, safeguarding employees' rights in a sale of business situation has been commonplace in other jurisdictions around the world for many years.⁴⁸ The provisions merely represent another incremental step towards more protection⁴⁹ without an express commitment to more comprehensive all encompassing redundancy protection provisions.

Realistically, the enactment of the provisions for non-vulnerable employees go no further than to ensure that procedures, to be determined by the parties themselves, are actually in place.⁵⁰ They do not define standards of protection or authorise the Authority to assist. The practical result of the enactment is that non-vulnerable employees are afforded no substantial protection other than what is already provided through good faith and common law obligations regarding termination of employment.⁵¹ A useful illustration of this point can be found in the abovementioned cases of *Norske* and *Eastern Bays*.

⁴⁷ *Eastern Bay Independent Industrial Workers Union Incorporated v Carter Holt Harvey Limited*, above n 46, at [21]. This case is discussed in: P Bartlett, W Hodge, P Muir, C Toogood, R Wilson, *Brookers Employment Law*, above n 1, at [ER 69OH.01].

⁴⁸ T Cleary and D Mackinnon, above n 1, at 339. For further discussion see also: P Roth, above n 8.

⁴⁹ In the original Employment Relations Bill the then Labour government tried to introduce this protection through clause 66. There was substantial criticism of the clause and it was eventually removed from the final draft of the ERA. For further discussion on this see: T Cleary and D Mackinnon, above n 1, at 339-340; C Chauvel and K Elkin, above n 1, at 104.

⁵⁰ T Cleary and D Mackinnon, above n 1, at 345.

⁵¹ *Ibid.*

In respect of the effectiveness of part 6A of the ERA, it has been suggested by some commentators that, although larger organisations appear to be complying with these legislative requirements, there are a substantial number of SMEs that are regularly overlooking the obligations associated with this part of the ERA.⁵² Furthermore, there have been legitimate questions raised as to whether the employees termed vulnerable are in fact the only ones that require or need protection.⁵³ As will be discussed in chapter five there are numerous employees who, by the non-standard nature of their employment relationship in contrast to their work function, are in need of greater protection. Given the minimal effect of part 6A, subpart 3, arguably the power within the employment relationship leaves some employees vulnerable in respect of restructures. Although it is beyond the scope of this paper to provide a full analysis of the impact of part 6A of the ERA, these points may however highlight inequality within the employment relationship, which was something the ERA was hoping to rectify.

As noted in the introductory section of this chapter, where a redundancy is not a result of a restructure, the employer's obligations in respect of making an employee redundant will be governed by any specific terms and conditions outlined in the affected employee's employment agreement and the common law. The all encompassing legislative concept of good faith is applicable, irrespective of the precise source of the obligation.⁵⁴

⁵² Ibid, at 347.

⁵³ Ibid.

⁵⁴ See M Wilson, "The Employment Relations Act: A Framework For A Fairer Way" in E Rasmussen (ed), *Employment Relationships: New Zealand's Employment Relations Act* (Auckland University Press, Auckland, 2004) 9, 17.

E Review of Part 6A of the ERA

In December 2009, the government initiated a review of part 6A of the ERA.⁵⁵ The review comprised of two parts.⁵⁶ The first part of the review was required by law as a result of subpart 4 of part 6A.⁵⁷ Specifically, the Minister of Labour was to conduct a review as soon as possible after September 2009 in order to ascertain whether the operation of part 6A has met its objectives, and if not, whether any amendments to part 6A were necessary to ensure the objectives were achieved.⁵⁸ In relation to the operation of part 6A, the discussion document focused on seven issues that the Department of Labour had been made aware of. These included matters such as the level of awareness of the provision,⁵⁹ transference of accrued entitlements⁶⁰ as well as the issue of transferring employees in what is perceived as a poorly performing service.⁶¹

The second part of the review was aimed at considering both the relevance and desirability of the policy which provides special protections for a prescribed set of employees.⁶² In considering both the relevance and desirability of this policy the discussion document asked a number of questions⁶³ relating to whether the current specified group actually faces any form

⁵⁵ Kate Wilkinson, "Review of the Continuity of Employment Provisions" (1 December 2009) Beehive <<http://www.beehive.govt.nz/release/review-continuity-employment-provisions>>. See also Department of Labour, "Review of Part 6A of the Employment Relations Act 2000" [2009] 8 Employment Law Bulletin 119.

⁵⁶ See the Department of Labour, *Review of Part 6A Continuity of Employment: A Discussion Document* (Prepared for the Minister of Labour, October 2009) 5 ["*Part 6A Discussion Document*"]. A copy of this document can be obtained from: <<http://www.dol.govt.nz/consultation/tor-review-part6a/discussion/part-6a-review-discussion-document.pdf>>.

⁵⁷ See s 69OL of the ERA.

⁵⁸ See the Department of Labour, *Terms of Reference for the Review of Part 6A: The Employment Relations Act 2000* (2009) ["*Terms of Reference*"]. A copy of these can be obtained from: <<http://www.dol.govt.nz/consultation/tor-review-part6a/discussion/part-6a-review-terms-of-reference.pdf>>. See also Department of Labour, *Part 6A Discussion Document*, above n 56, at 5.

⁵⁹ Department of Labour, *Part 6A Discussion Document*, above n 56, at 7.

⁶⁰ *Ibid*, at 7-8.

⁶¹ *Ibid*, at 10.

⁶² *Ibid*, at 5.

⁶³ *Ibid*, at 14-15.

of disadvantage in restructuring situations and whether there are other groups that should have more protection in restructuring situations. Attention was also placed on whether the current policy has detrimental effects for employers, employees, communities and the economy as a whole.⁶⁴

The two parts of this review are reflected in the overall objectives of the review.⁶⁵ Consultation was sought from stakeholders who are directly affected by part 6A as well as those parties that had an interest in its application.⁶⁶ Although the discussion document was seeking submissions until March 2010, as yet there have not been any further announcements regarding the outcome of this review.

⁶⁴ Ibid, at 14.

⁶⁵ See the Department of Labour, *Terms of Reference*, above n 58.

⁶⁶ Ibid.

Chapter Five

The Surroundings

Individualisation of the Employment Relationship

As outlined in the previous chapters, New Zealand has no prescriptive legislative code governing the management of all redundancy situations.¹ Consequently, employees faced with redundancy are often reliant on the terms and conditions prescribed in their employment agreement to provide protection.

It was envisaged that the introduction of the ERA would provide a catalyst for the rejuvenation of collectivism and consequently collective bargaining. Ideologically, although the ERA promotes freedom of choice,² it also intended to encourage collective action as a way of addressing perceived inequality of power within the employment relationship by making it more attractive for employees to pursue employment agreement negotiations through collective means.³ Collective negotiation was believed to be a way of balancing the power within an employment relationship more evenly between employers and employees. Those drafting the ERA believed that the ECA had tipped the scales of power too far in favour of the employer and realignment was necessary. Theoretically through a collective approach to employment relations employees would have a mechanism to obtain greater protection in a redundancy situation through negotiated terms and conditions in collective agreements, such as the provision of redundancy compensation. To achieve this objective, the ERA specifically restricts good faith provisions for individual employment agreements

¹ As discussed in chapter three and four, within the ERA there are provisions that govern dismissal for reason of redundancy such as s 103A and the good faith obligations contained in s 4. Furthermore, there are specific provisions contained within part 6A which provides protection in situations involving restructuring.

² See s 3 (a) (iv) and part 3 of the ERA.

³ Department of Labour, *Issues Relating to Good Faith* (Memorandum to the Minister of Labour, 12 January 2000) at [50]-[52]; J Hughes, "Good Faith Bargaining Under The Employment Relations Act: The Original Scheme" in E Rasmussen (ed), *Employment Relationships: New Zealand's Employment Relations Act* (Auckland University Press, Auckland, 2004) 77, 78.

(IEA), in order to promote collective action,⁴ with the unions as an instrumental party in achieving this objective.⁵ This intention was, in theory, very clear and has been successfully articulated and applied in respect of IEAs. Whether the approach was ideal is certainly debatable. However, in respect of addressing inequality through collective bargaining the ERA has in practice arguably been less successful.

Evidence would suggest that there is, and has been for some time, an ongoing movement in New Zealand away from the historical collective approach of employment relations to a more individualist approach⁶ notwithstanding the introduction and intentions of the ERA. The apparent growth in individualism is a phenomenon not purely limited to the New Zealand employment relations environment.⁷ In fact over the past few years the trend has been progressing particularly in common law jurisdictions.⁸ There appears to be an increasing preference for negotiating employment agreements at an enterprise level between an individual and management rather than through arguably more impersonal means.⁹ The corollary of the growth of individualism is obviously the subsequent decline in collectivism and union participation, which the ERA intended to rekindle.

The following discussion within this chapter outlines the factors that have given rise to individualism and how these factors also impact on redundancy law in New Zealand.

⁴ Ibid. For general discussion on the impact of the ERA on individuals see: G Anderson, "The Individual and the Employment Relations Act" (2002) 26(1) *New Zealand Journal of Industrial Relations* 103, 103-118.

⁵ M Wilson, "The Employment Relations Act: A Framework For A Fairer Way" in E Rasmussen (ed), *Employment Relationships: New Zealand's Employment Relations Act* (Auckland University Press, Auckland, 2004) 9, 15.

⁶ J Stevenson, "Collectivisation to Individualisation: Factors Contributing to the Recent Change in Employment Relations" 2006 4 *Otago Management Graduate Review* 103, 103.

⁷ G Anderson, "Individualising the Employment Relationship in New Zealand: An Analysis of Legal Developments" in S Derry and R Mitchell (eds), *Employment Relations Individualisation and Union Exclusion an International Study* (1999) 204, 204. See also: S Derry and R Mitchell, "The Emergence of Individualisation and Union Exclusion as an Employment Relations Strategy" in S Derry and R Mitchell (eds), *Employment Relations Individualisation and Union Exclusion an International Study* (1999) 1, 1-3.

⁸ G Anderson, above n 7, at 204.

⁹ J Stevenson, above n 6, at 103.

A *Environmental Factors Influencing Individualism*

There can be no one single element identified as the cause of this phenomenon. However, during the last three decades of the twentieth century there were several important interrelated developments, both nationally and internationally, which encouraged this advance.

During this period, economic globalization intensified, encouraging the operation of companies at an international level, rather than a solely domestic level. This resulted in intensified competition¹⁰ and the need for organisations to develop a competitive advantage in order not only to survive, but also prosper from new product markets and financial opportunities that this environment provided.¹¹ Minimizing costs and maximizing efficiencies through decisive action were deemed essential and were the driving force behind most change strategies. As labour is an essential yet major cost to any organisation, these strategies would often impact directly on the employment relationship.¹² The recognition of effective management of the employment relationships emerged and led to the increased prevalence of the Human Resource Management (HRM) function.¹³

Coupled with this, the ongoing advance of new technology continued to emerge leading to the decline in traditional product markets and subsequent growth in “service-based” and

¹⁰ A Butcher, “A Review of the Literature on Non-Standard Work and the New Economy” (Working Paper No 9, Labour Market Dynamics Research Programme, Massey University, 2002) 3.

¹¹ Ibid. See also: R Osborne and J Warren, “Multiple Job Holding – A Working Option For Young People” (Labour, Employment and Work in New Zealand, Centre for Research, Evaluation and Social Assessment, 2006) 3; J Riley, *Employee Protection at Common Law* (The Federation Press, New South Wales, 2005) ch 1.

¹² For discussion see: R Rudman, *Human Resource Management in New Zealand* (4th ed, Pearson Education New Zealand, Auckland, 2002) 19.

¹³ For discussion on the evolving nature of HRM see: R Rudman, above n 12, at 3-35; K Macky and G Johnson, *Managing Human Resources in New Zealand* (2nd ed, McGraw Hill, New South Wales, 2003) 4-24; S.R de Silva, “Human Resource Management, Industrial Relations and Achieving Management Objectives” (1996), International Labour Organisation, Bureau for Employers’ Activities
<<http://www.ilo.org/public/english/dialogue/actemp/downloads/publications/srshrm.pdf>>.

“information-based” roles.¹⁴ Technology has changed, and continues to change the way businesses operate and the roles within them.¹⁵ This particular development has led to the need for the labour force to be more highly skilled, which has led to labour shortages as well as arguably creating a more vulnerable environment for those workers within the labour market with fewer skills.¹⁶ New forms of employment relationships have been created in the search for flexibility through non-standard work relationships,¹⁷ outsourcing of services and certainly, for the purposes of this discussion, probably the biggest impact on an individual worker through what are perceived as not infrequent organisational restructures.¹⁸ Research has suggested that over two-thirds of employees within New Zealand’s labour market will have had some form of direct exposure to redundancy.¹⁹

In order to assist and facilitate much of what was evolving within the environment at this time, like many other countries New Zealand embarked on a period of deregulation in respect of its labour market.²⁰ As discussed already, the cornerstone of this was the ECA, which removed government controls and diminished union power, therefore providing organisations with more discretion and flexibility in respect of how the employment relationship was to be controlled.²¹

¹⁴ M Turner, “Non-Standard Work and Insecurity in New Zealand/Aotearoa” in *Student Essays: Work in the Twenty First Century* (Working Paper No 20, Labour Market Dynamics Research Programme, Massey University, 2007) 37.

¹⁵ See: A Butcher, above n 10, at 12; R Osborne and J Warren, above n 11, at 2; J Riley, above n 11, at 3; R, Cremer, A de Bruin, A Dupuis, P Firkin, E McLaren, J Overton, H Perera and P Spoonley, “Non-Standard Work: Alternative Working Arrangements Amongst Knowledge Workers” (Labour Market Dynamics Research Program, Massey University, 2002) 3, 14; M Turner, above n 14, at 37.

¹⁶ R Osborne and J Warren, above n 11, at 2.

¹⁷ These topics are discussed in greater detail in part B, V of this chapter.

¹⁸ For a summary of restructuring and redundancy events in New Zealand until mid 2008 see: *Report of the Public Advisory Group on Restructuring and Redundancy* (Prepared for the Ministers of Labour, Social Development and Employment and Economic Development, 30 June 2008) appendix F.

¹⁹ K Macky, “Organisational Downsizing and Redundancies: The New Zealand Workers’ Experience” (2004) 29 *New Zealand Journal Employment Relations* 63, 81.

²⁰ S Derry and R Mitchell, above n 7, at 2-3. See also: J Riley, above n 11, at ch 1.

²¹ For discussion on the effects of the ECA on collectivism see: G Anderson, above n 7, at 204-226; G Anderson, “Employment Rights in an Era of Individualised Employment” (2007) 38 *Victoria University of*

Although these environmental factors are not all-inclusive, in totality they paint a picture of developments that have encouraged change, fostering a more individualistic approach to employment relationships. This change from a traditional pluralist collective approach to a more unitary individualistic environment in employment relationships²² arguably impacts on peoples' rights in respect of redundancy situations.

It is highly likely, although there is little empirical data on IEAs, that there are gaps in protection for employees who do not have the ability to negotiate express provisions into their individual employment agreements. These gaps in protection, especially in respect of redundancy situations, are not a new phenomenon; rather they have been identified by leading academics over the years.²³

It has been asserted that IEA negotiations tend to be less about negotiation and more about meeting the organisation's policy requirements.²⁴ This assertion is supported by s 63A of the ERA, which only requires consultation by the employer with the employee concerned in order to legally establish an individual employment agreement. There is no express requirement to actually negotiate. The Department of Labour Evaluation of the Short Term Impacts of the Employment Relations Act²⁵ (Evaluative Report) clearly identified that most employees who were offered IEAs simply accepted the terms and conditions offered without any form of negotiation.²⁶ It was also noted that employees with greater power within the labour market were more confident in their ability to bargain with their employers and that

Wellington Law Review 417, 422; S Oxenbridge, "The Individualisation of Employment Relations in New Zealand: Trends and Outcomes" in S Derry and R Mitchell (eds), *Employment Relations Individualisation and Union Exclusion an International Study* (The Federation Press, Sydney, 1999) 227, 227-250.

²² For discussion on pluralistic and unitary approaches to Employment Relation see: J Deeks, J Parker and R Ryan, *Labour Relations In New Zealand* (2nd ed, Longman Paul, Auckland, 1994) 27.

²³ G Anderson, above n 4, at 115.

²⁴ J Stevenson, above n 6, at 104.

²⁵ T Waldegrave, D Anderson and K Wong, *Evaluation of the Short Term Impacts of the Employment Relations Act 2000* (Department of Labour, November 2003).

²⁶ *Ibid*, at 29.

employees who had less experience in the workforce were more likely to just accept terms offered.²⁷ This finding clearly generates concern for less skilled, low paid and vulnerable employees whose bargaining power in respect of negotiating terms and conditions are arguably weak.²⁸ Moreover the Evaluative Report also suggested that if discussions did in fact take place between employers and employees, such discussions tended to be associated with “salary, starting date, leave and tasks”.²⁹ This therefore adds weight to the assertion that it is highly unlikely that for the majority of employees the topic of protection in a redundancy situation would ever be discussed in individual employment agreement negotiations. As noted in the Evaluative Report, rather more foreseeable and immediate matters such as wages and the employment commencement date would most likely be both the start and end point of negotiations, if any actually take place at all.

As noted above, the desired way of addressing issues surrounding inequality of power resulting in reduced employee protections through the ERA was to promote and encourage collective action, in particular collective bargaining with unions facilitating such action. As evidenced by the proceeding discussion such desire has not become a reality with the growth in individualism arguably accelerating.

B Decline in Collectivism

The Evaluative Report identified many trends in respect of the operation of the ERA which although at an early stage have continued to resonate nearly a decade after its inception. Specifically, it was noted that the ERA produced little change in collective coverage.³⁰

²⁷ Ibid.

²⁸ M Turner, above n 14, at 40.

²⁹ T Waldegrave, D Anderson and K Wong, above n 25, at 29.

³⁰ Ibid, at 44.

Increases tended to be in the public sector or where unions had historically been strong.³¹ The Evaluative Report also highlighted the lack of growth in both union membership³² and resources.³³

Since the Evaluative Report, the Department of Labour has initiated a specific evaluation of the effects of the Employment Relations Act 2000 on Collective Bargaining.³⁴ This shows that although union membership has generally increased since the introduction of the ERA (currently standing at 373,327 members³⁵ of 168 registered unions³⁶ in 2008) overall union density³⁷ has remained largely unchanged at 17 percent.³⁸ The reason for this is that the number of people employed since 2000 has increased in alignment with union membership.³⁹ Obviously membership is fundamental to union resources, power and the corollary being collective action.⁴⁰

According to the statistics, like union density, collective bargaining has arguably fared no better, with the number of people covered by collective employment agreements declining or remaining at the same level since 2001.⁴¹ Therefore in 2009 collective coverage only applied

³¹ Ibid, at 45.

³² Ibid, at 80.

³³ Ibid, at 38. An example of a key factor cited in the prevention of union growth and therefore resources was the ability of employers to pass on the terms and conditions of the collective employment agreement to individuals, often termed 'free-riding'. This arguably did not assist unions to re-establish themselves as employees could see no obvious benefit in joining a union if they received the same terms and conditions of employment without paying membership fees. The 2004 amendment to the ERA has gone some way to rectify this very contentious issue (See ss 59A-59C of the ERA).

³⁴ Department of Labour, *The Effect of the Employment Relations Act 2000 on Collective Bargaining* (July 2009).

³⁵ Ibid, at 11.

³⁶ Ibid, at 10.

³⁷ Density refers to the proportion of union members in the total employed labour force.

³⁸ Department of Labour, above n 34, at 5.

³⁹ Ibid, at 10.

⁴⁰ J Stevenson, above n 6, at 106.

⁴¹ Department of Labour, above n 34, at 5.

to approximately 15 percent of the total employed labour force,⁴² which equated to 342,480 employees.⁴³ This implies that 85 percent of New Zealand's employed labour force (1,940,720 employees),⁴⁴ were covered by an IEA. This represents much more than a significant majority.

Additionally, data indicates disparity in coverage between the private and public sectors. There is substantially more coverage in the public sector as compared with private sector organisations.⁴⁵ This disparity between private and public sector coverage is increasing.⁴⁶ Moreover membership seems to be concentrated in specific industries that tend not to be associated with what could be described as the growth service sectors.⁴⁷ Furthermore, there is little evidence that the content of collective agreements has changed as a result of the ERA.⁴⁸

Paradoxically, notwithstanding the overarching principles and ideology behind the ERA, during its governance as the key piece of New Zealand's employment relations legislation, individualisation of employment relationships has continued to prosper and collectivism has declined. Why is this the case?

⁴² Ibid.

⁴³ Statistics New Zealand, Labour Force Statistics by Sex by Age Group (Annual-December) <<http://www.stats.govt.nz/infoshare/print.aspx?pxID=ff4c8026-7ed4-4c32-90d5-b8b07>>.

⁴⁴ Ibid.

⁴⁵ In 2008 data showed public sector collective bargaining density to be around 59 per cent as opposed to private sector density which sits around 10 per cent. See: Department of Labour, above n 34, at 19.

⁴⁶ The public to private sector coverage has increased from a ratio of 3.3:1 in 2000 to 5.7:1 in 2008. The public sector has for a long time had greater collective coverage than in the private sector. See: Department of Labour, above n 34, at 5-6.

⁴⁷ Union membership is particularly dense in industries such as manufacturing (23 per cent as at 2008), transport, storage and communication (30 per cent as at 2008) and public and community services (38 per cent as at 2008). See: Department of Labour, above n 34, at 12.

⁴⁸ Department of Labour, above n 34, at 7.

At its inception the ERA was described by some of its supporters as, “a modest law”⁴⁹ which “was too mild to deliver improvements in collective bargaining”.⁵⁰ It was felt that the scale and severity of changes that occurred in the 1990s⁵¹ were almost impossible to reverse.⁵² These sentiments were being articulated notwithstanding the ERAs express attempt to promote collective bargaining as a means of building productive employment relationships.⁵³

Even though the ERA legitimised and encouraged union membership, many unions adversely affected by the ECA⁵⁴ arguably did not have the resources that were required to organise effectively⁵⁵ and therefore take advantage of the new legislative environment. Additionally, after a decade during which people have seen unions being marginalized and their relevance diminished, it has made it hard for them to reestablish themselves, particularly with the younger generation who have had none or very little experience of unions during this era.⁵⁶

Notwithstanding these assertions, there are arguably five key elements requiring specific discussion which have assisted in the prolific growth of individualism and subsequent decline in collectivism in New Zealand. These factors are also significant in respect of redundancy

⁴⁹ R Wilson, “The Employment Relations Act: a CTU Perspective” in E Rasmussen (ed), *Employment Relationships: New Zealand’s Employment Relations Act* (Auckland University Press, Auckland, 2004) 173, 173.

⁵⁰ Ibid. See also: P Churchman, “Good Faith” (September 2000) *New Zealand Law Journal* 343, 343.

⁵¹ The impact of the ECA on unions is discussed in: J Stevenson, above n 6, at 104.

⁵² R Wilson, above n 49, at 183.

⁵³ Section 3 of the ERA. See also Department of Labour, above n 34, at 9.

⁵⁴ For general discussion of the impact of the ECA on unions see the following resources: R Brown, “Union Membership in New Zealand/Aotearoa” in *Student Essays: Work in the Twenty First Century* (Working Paper No 20, Labour Market Dynamics Research Programme, Massey University, 2007) 9, 11. J Stevenson, above n 6, at 104.

⁵⁵ Department of Labour, above n 34, at 13.

⁵⁶ See R May, “Trade Unions and the Employment Relations Act” in E Rasmussen (ed), *Employment Relationships: New Zealand’s Employment Relations Act* (Auckland University Press, Auckland, 2004) 159, 170. See also: R Brown, above n 54, at 12-13; B Banks, “Editorial: The Pendulum Swings Part Way Back – The New Employment Law” [2000] 1 *Employment Law Bulletin* 173, 174.

law as they help to illustrate key features of the New Zealand political, legislative, economic and social environment.

I New Zealand Business Environment

New Zealand's business environment is characterized by the proliferation of small to medium sized enterprises (SME).⁵⁷ Their importance can be seen in table one which highlights that 97 per cent of New Zealand's businesses are deemed SMEs, with the largest portion of enterprises being the self employed, currently situated around 69 percent.⁵⁸ The data also highlights that since the introduction of the ERA, although there is the obvious positive and negative fluctuation, enterprise size has generally remained constant. Consequently, SMEs are often described as, "the backbone of this economy".⁵⁹

⁵⁷ SME's are defined as businesses employing 19 or fewer employees. This definition is taken directly from the Ministry of Economic Development, "SMEs in New Zealand: Structure and Dynamics 2010" (July 2010) 9. A copy of this report can be viewed at <http://www.med.govt.nz/upload/74417/SMEs%20in%20New%20Zealand%20Structure%20and%20Dynamics%202010.pdf> >

⁵⁸ This data is taken from the 2010 year.

⁵⁹ Maurice Williamson, "Small Businesses Remain A Vital Part of New Zealand Economy" (1 September 2009) Beehive <<http://www.beehive.govt.nz/release/small+businesses+remain+vital+part+new+zealand>>.

Table One: New Zealand Enterprise by Number of Employees⁶⁰

Year	Zero Employees	1 to 5 Employees	6 to 9 Employees	10 to 19 Employees	20 to 49 Employees	50 to 99 Employees	100+ Employees	Total
2000	250,241 (66.48%)	84,351 (22.41%)	17,038 (4.53%)	13,441 (3.57%)	7,526 (2.00%)	2,129 (0.57%)	1,690 (0.45%)	376,416
2001	245,455 (65.75%)	85,425 (22.88%)	17,333 (4.64%)	13,597 (3.64%)	7,625 (2.04%)	2,155 (0.58%)	1,724 (0.46%)	373,314
2002	245,637 (65.00%)	87,881 (23.25%)	18,272 (4.83%)	14,133 (3.74%)	8,051 (2.13%)	2,216 (0.59%)	1,771 (0.47%)	377,961
2003	254,642 (65.03%)	90,726 (23.17%)	19,007 (4.85%)	14,873 (3.80%)	8,276 (2.11%)	2,268 (0.58%)	1,813 (0.46%)	391,605
2004	278,268 (66.31%)	93,475 (22.27%)	19,555 (4.66%)	15,423 (3.67%)	8,687 (2.07%)	2,400 (0.57%)	1,866 (0.44%)	419,674
2005	293,237 (66.79%)	96,588 (22.00%)	19,873 (4.53%)	16,148 (3.68%)	8,712 (1.98%)	2,487 (0.57%)	1,972 (0.45%)	439,017
2006	307,114 (67.45%)	98,463 (21.63%)	20,070 (4.41%)	16,341 (3.59%)	8,824 (1.94%)	2,439 (0.54%)	2,060 (0.45%)	455,311
2007	316,007 (67.84%)	99,328 (21.32%)	20,423 (4.38%)	16,492 (3.54%)	8,916 (1.91%)	2,514 (0.54%)	2,126 (0.46%)	465,806
2008	323,602 (68.01%)	100,973 (21.22%)	20,559 (4.32%)	16,803 (3.53%)	9,106 (1.91%)	2,585 (0.54%)	2,200 (0.46%)	475,828
2009	329,040 (68.75%)	100,169 (20.93%)	20,071 (4.19%)	16,015 (3.35%)	8,642 (1.81%)	2,498 (0.52%)	2,134 (0.45%)	478,569
2010	323,935 (68.87%)	97,888 (20.81%)	19,571 (4.16%)	15,980 (3.40%)	8,420 (1.79%)	2,489 (0.53%)	2,063 (0.44%)	470,346

A recent report by the Ministry of Economic Development⁶¹ has shown that SMEs account for 30.6 per cent of all employees⁶² and the self employed account for 10.4 per cent of the total labour force.⁶³

⁶⁰ Adapted from Statistics New Zealand data. See Statistics New Zealand, "Table reference: BUD004AA, Employment Size Groups for Enterprises" (ANZSIC 96), <http://wdmzpub01.stats.govt.nz/wds/TableViewer/tableView.aspx>. Statistics New Zealand define an enterprise as a business or service entity operating in New Zealand. It can be a partnership, trust, estate, incorporated society, producer board, local or central government organisation, voluntary organisation or self employed individual. The numbers in brackets represent the percentage of the total number of enterprises.

⁶¹ Ministry of Economic Development, above n 57.

⁶² Ibid, at 14. Note this figure is at February 2009.

⁶³ Ibid, at 18. Note that this figure is as at December 2009.

Given this analysis of New Zealand's business structure which consists predominantly of small organisations, it is no wonder that unions have struggled to increase their memberships in these enterprises. Traditionally, smaller workplaces were covered by multi-employer awards which faltered under the ECA regime. Moreover, multi-employer collectives (MECAs) have not grown as expected under the ERA (in 2008, MECA's cover approximately only 26 per cent of collectivised workers and are almost exclusively in the public sector).⁶⁴ These enterprises create a serious logistical and resource problem for unions as negotiating at an enterprise level with small employers is arguably unsustainable.⁶⁵

Consequently, this fact probably goes some way to explain why unions have focused their attention on their traditional strongholds and areas where they could build a "critical mass"⁶⁶ of members, such as, the public sector and large scale manufacturing.⁶⁷ However, these areas are not likely to produce ongoing growth in membership as generally the labour force in these areas are either static or in decline.⁶⁸

Given this analysis, arguably the intention to facilitate collective action in this environment was never likely to be achieved without more explicit regulation.

⁶⁴ Department of Labour, above n 34, at 24.

⁶⁵ R May, above n 56, at 170. See also: J Stevenson, above n 6, at 112; R Brown, above n 54, at 11-12.

⁶⁶ Department of Labour, above n 34, at 13.

⁶⁷ R Brown, above n 54, at 10.

⁶⁸ R May, above n 56, at 168. See also: R Brown, above n 54, at 10.

II Enactment of Employment Related Legislation

Coinciding with the major changes in New Zealand's substantive legislation there was also the establishment of further statutory protection encapsulated in specific pieces of employment legislation, which extended individual rights.⁶⁹

In particular, during the ECA era, two pieces of legislation were enacted which accentuate and protect individual rights. Firstly, the Human Rights Act 1993⁷⁰ consolidated⁷¹ and expanded the law surrounding human rights, specifically prohibiting certain forms of discrimination.⁷²

Secondly, the Privacy Act 1993 was established to “promote and protect individual privacy”.⁷³ It epitomises an individualistic ideology expressing the notion that individuals are entitled to know what information is being collected and stored about them, as well as how this information is being used, and who is allowed to access it.⁷⁴

Arguably the ERA itself has contributed to maintaining the use of individual employment relationships. Specifically, it has continued with a largely unchanged version of the pre-

⁶⁹ E Rasmussen and F Lamm, “From Collectivism to Individualism in New Zealand Employment Relations” (2005) Association of Industrial Relations Academics of Australia and New Zealand 479, 479. For discussion on this see also: R Brown, above n 54, at 13-14.

⁷⁰ This Act came into force on 1st February 1994.

⁷¹ The Human Rights Act 1993 consolidated and amended the Race Relations Act 1971 and the Human Rights Commission Act 1977. Additionally, it provided better alignment with the United Nations Covenants or Convention on Human Rights. See *Brookers Employment Law Handbook* (Brookers Limited, Wellington, 2009) 479.

⁷² See part 2, s 21 of the Human Rights Act 1993, which outlines the prohibited grounds of discrimination. See also part 2, s 22 of the Human Rights Act 1993, which expressly discusses discrimination in employment matters.

⁷³ Additionally, the Act was to accord with the Recommendations of the Council of the Organisation for Economic Cooperation and Development Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data. See *Brookers Employment Law Handbook* (Brookers Limited, Wellington, 2009) 1052.

⁷⁴ E Rasmussen and F Lamm, above n 69, at 482.

existing personal grievance procedures⁷⁵ as originally enacted in the 1970s⁷⁶ and subsequently modified to cover all employees in the ECA.⁷⁷ Modifications to the grievance procedures have incorporated further individualist rights through aligning and supplementing rights within the Human Rights Act 1993. In particular, a personal grievance can be brought by an individual on the grounds of discrimination⁷⁸ or harassment.⁷⁹ Therefore, as these provisions apply to all parties to an employment relationship, they impact on how that relationship needs to be managed to ensure ongoing compliance.⁸⁰

Notwithstanding the employment legislative changes already mentioned, during the Labour led coalition governments of the early to mid 2000s legislation continued to be enacted that promoted more beneficial minimum terms and conditions of employment that apply to all employees who work in New Zealand, such as increasing minimum holidays,⁸¹ parental leave⁸² and wage entitlements.⁸³ Previously these types of terms and conditions might have been negotiated through collective employment agreements.⁸⁴ Rasmussen and Lamm assert that these enactments emphasize individualism and therefore reduce the support for collectivism, and to some extent, undermine unions.⁸⁵

⁷⁵ Ibid.

⁷⁶ G Anderson, above n 4, at 113.

⁷⁷ J Deeks, J Parker and R Ryan, above n 22, at 94. See also: G Anderson, above n 4, at 113.

⁷⁸ See s 103 (1) (c) of the ERA.

⁷⁹ See s 103 (1) (d) of the ERA in respect of sexual harassment and s 103 (1) (e) of the ERA in respect of racial harassment.

⁸⁰ E Rasmussen and F Lamm, above n 69, at 481.

⁸¹ From 1 April 2007, s 42 of the Holidays Act 2003 was inserted. This section enabled subpart 1 of part 2 of the Act to be amended in accordance with sch 1, which increased all employees' minimum annual leave entitlement from three to four weeks per annum.

⁸² The Parental Leave and Employment Protection Act 1987 has had numerous amendments increasing minimum entitlements. A good example of the increases in parental leave entitlements is the increase in duration of the maternity leave to the current level of 14 weeks. This took effect on 1 December 2005.

⁸³ E Rasmussen and F Lamm, above n 69, at 482.

⁸⁴ Department of Labour, above n 34, at 14.

⁸⁵ E Rasmussen and F Lamm, above n 69, at 482.

Given the increase in minimum legislative protections, it is arguably hard to rationalize why there has been no codification of redundancy protections particularly given that “redundancy is a special situation”⁸⁶ where “employees affected have done no wrong”,⁸⁷ yet the severity of the outcome, being the loss of employment, is grave. Additionally, as noted already, the need for some form of intervention has been clearly raised.⁸⁸

III Managerial Prerogative

With a backdrop of these interrelated factors, managerial rights have arguably been affirmed, a trend which was synonymous in industrialized countries during the 1980’s and 1990’s. Managers had more discretion and flexibility to manage employee relationships with reduced external involvement. This liberal concept⁸⁹ has enhanced individualism,⁹⁰ particularly with the demise of union power, often, but not solely, associated with the ECA.⁹¹

If it is accepted, “that employment relationships are characterized by a systematic imbalance of power between employers and employees”⁹² and that this imbalance generally favours employers,⁹³ then it is going to be in the employers’ best interest to have employees contracted on individual employment agreements.⁹⁴ Individualism has been described as an

⁸⁶ *Aoraki Corporation Limited v McGavin* [1998] 1 ERNZ 601, at 618 as per Richardson P, Gault, Henry, Keith, Blanchard and Tipping JJ.

⁸⁷ *Ibid.*

⁸⁸ See G Anderson, above n 4, at 113-115.

⁸⁹ For further discussion on this concept see: G Fryer and Y Oldfield, *New Zealand Employment Relations* (Longman Paul, Auckland, 1994) 96.

⁹⁰ S Derry and R Mitchell, above n 7, at 2-3.

⁹¹ J Stevenson, above n 6, at 104.

⁹² G Hogbin, *Power in Employment Relationships: Is There An Imbalance?* (New Zealand Business Roundtable, Wellington, 2006) vii.

⁹³ The ERA is premised on this notion that employers have greater power in comparison to employees in the employment relationship.

⁹⁴ J Stevenson, above n 6, at 107-108.

“ideological cloak for managerial control”⁹⁵ as it gives organisations more power to negotiate terms that are favourable to them as well as making it easier to implement desired initiatives.⁹⁶ This is particularly true where less skilled employees are concerned, as their bargaining power is arguably reduced. Therefore, redundancy provisions in individual employment agreements rely largely on the organisation’s good will and the individual’s ability and power to negotiate.

Evidence suggests that the New Zealand judiciary has always been supportive of the notion of managerial prerogative, particularly in redundancy cases.⁹⁷ When considering whether a redundancy is genuine, and if so, affirming the dismissal as being substantially justified, the Court has accentuated this managerial right and predominantly declined to question an organisation’s decision. Notably Richardson J once asserted that:⁹⁸

‘... the right of the employer to manage its business, which is specifically recognised in many awards and agreements is not made subject, and should not be construed as being subject to the further fetter that it is exercisable only in those redundancy situations where the business has to close its doors, or its economic survival compels it to dismiss those workers. If for genuine commercial reasons the employer concludes that a worker is surplus to its needs, it is not for the Courts or the unions or workers to substitute their business judgment for the employers’.

The sentiment encapsulated in the above statement has been prevalent in all redundancy cases that have followed accentuating, the “employer’s prima facie right to organise and run its business operation as it sees fit”.⁹⁹ The reorganisation of businesses is arguably becoming more frequent and the reasons associated with such reorganisation becoming more diverse

⁹⁵ R Welch and P Leighton, “Individualizing Employee Relations: The Myth of the Personal Contract” (1998) 27(1) Personnel Review 40-56 cited in J Stevenson, above n 6, at 108.

⁹⁶ J Stevenson, above n 6, at 108.

⁹⁷ This is clearly evidenced in the case of *G N Hale & Son Limited v Wellington, etc, Caretakers, etc*, IUW [1991] 1 NZLR 151.

⁹⁸ *Ibid*, at 157.

⁹⁹ *Aoraki Corporation Limited v McGavin*, above n 86, at 618 as per Richardson P, Gault, Henry, Keith, Blanchard, Tipping JJ.

and not simply associated with what was sometimes perceived as financial necessity.¹⁰⁰ Although data in this area is light, a study of New Zealand businesses conducted between the years of 1993 and 1995 highlighted that of the organizations surveyed 34 per cent had restructured three or more times whilst 63 per cent had restructured at least twice.¹⁰¹

Although this concept is discussed in greater detail in chapter thirteen, it is essential to press the fact that the judiciary's interpretation has not changed despite the substantial changes in employment legislation which have occurred. This is particularly important in respect of the ERA which specifically attempted to realign the balance of power in employment relationships to a more equal footing, therefore theoretically diminishing the notion of the managerial prerogative. Additionally, given the intention to restrict good faith provisions for individual employment agreements;¹⁰² as collectivism has failed to be revitalised and individualism continues to rise, this leaves some employees vulnerable.

IV Human Resource Management (HRM)

Contemporaneously, the advance of HRM as an organisational management function has been steadily growing since the middle of the 20th Century.¹⁰³ However, its prominence has been expedited as a result of the changing environment over the past three decades.¹⁰⁴

¹⁰⁰ K Macky, above n 19, at 65.

¹⁰¹ C R Littler, R Dunford, T Bramble and A Hede, "The Dynamics of Downsizing in Australia and New Zealand" (1997) 35 (1) *Asia Pacific Journal of Human Resources* 65-79 cited in K Macky, above n 19, at 65.

¹⁰² Employment Relations Bill 2000 No 8-1 Explanatory Note 1, 2; Department of Labour, above n 3, at [50]-[52]; J Hughes, "Good Faith Bargaining and Individual Employment Agreements" [2004] 8 *Employment Law Bulletin* 95, 95; J Hughes, above n 3, at 78.

¹⁰³ K Macky and G Johnson, above n 13, at 4.

¹⁰⁴ *Ibid*, 5.

Put simply, HRM can be defined as: “the concepts, strategies, policies and practices which organisations use to manage and develop the people who work for them”.¹⁰⁵ Consequently, if an organisation utilises HRM and incorporates it into its overall organisational strategy,¹⁰⁶ it can provide an effective method of supporting an organisation to achieve its objectives and gain competitive advantage through effectively managing the employment relationship.¹⁰⁷

Central to this assertion is the notion that management should develop closer relationships built on “high trust”¹⁰⁸ with their employees rather than having indirect dealings through a third party.¹⁰⁹ Theoretically, by encouraging “genuine employee involvement”¹¹⁰ it increases organisational commitment,¹¹¹ highlights work performance¹¹² and increases synergetic productivity, therefore assisting to build organisational competitive advantage.¹¹³

New Zealand HRM has tended to follow the “performance focused individualistic and managerialist HRM values of the United States”¹¹⁴ and consequently practices have had much less focus on collective activities.¹¹⁵ As a result of this, HRM practices such as,

¹⁰⁵ R Rudman, above n 12, at 3.

¹⁰⁶ This is often termed Strategic Human Resource Management. See R Rudman, above n 12, at 11.

¹⁰⁷ Ibid.

¹⁰⁸ J Stevenson, above n 6, at 16.

¹⁰⁹ S Derry and R Mitchell, above n 7, at 3.

¹¹⁰ S Oxenbridge, above n 21, at 242.

¹¹¹ J Stevenson, above n 6, at 109-110.

¹¹² S Derry and R Mitchell, above n 7, at 3.

¹¹³ See the discussion in: A Canning’s 1996 Honour Dissertation research in S Oxenbridge, above n 21 at 242. For discussion on ideological orientation of New Zealand managers in respect of HRM see: A Geare, F Edgar and I McAndrew, “Employment Relations: Ideology and HRM Practice” (2006) 17(7) *International Journal of Human Resource Management* 1190. This article is also discussed in: M Wilson, “A Struggle Between Competing Ideologies” in E Rasmussen (ed), *Employment Relationships: Workers, Unions and Employers in New Zealand* (2nd ed, Auckland University Press, Auckland, 2010) 9, 11.

¹¹⁴ T Kochan and L Dyer, “HRM: An American View” in John Storey (ed) *Human Resource Management: A Critical Text* (1995) 332-351 cited in K Macky and G Johnson, above n 13, at 5.

¹¹⁵ K Macky and G Johnson, above n 13, at 5.

employee participation programmes,¹¹⁶ individual performance reviews, performance based pay,¹¹⁷ and work-life-balance schemes¹¹⁸ are all common initiatives which organisations promote. These initiatives attempt to encourage involvement and gain individual ownership and responsibility for actions that assist further with promulgating the individualistic rhetoric within employment relations.¹¹⁹

Although much of HRM appears to be directed at managing individual employment relationships, some authors have asserted that there is an inherent tension within HRM between individualism and collectivism. This is because HRM does not focus solely on the individual. It also attempts to encourage a strong team culture within organisations, with employees working together with management for the overall benefit of the organisation. Some authors assert that this surpresses collective action through a third party, such as a union.¹²⁰ As a consequence of this, arguably the development and increased use of HRM has contributed to the decline in both union membership and collective action.¹²¹

Whilst HRM itself has grown as a profession,¹²² so too have specific elements of this occupation. Although there appears to be few studies on the role of Human Resource (HR) practitioners,¹²³ in 2000 a study was conducted which identified factors that would impact on

¹¹⁶ S Oxenbridge, above n 21, at 242. See also: J Stevenson, above n 6, at 111.

¹¹⁷ S Derry and R Mitchell, above n 7, at 3. For discussion on this see also: J Stevenson, above n 6, at 110-111.

¹¹⁸ For discussion see: Department of Labour, "Work-Life Balance: Making it Work for Your Business" (June 2007) <<http://www.dol.govt.nz/worklife/resources/guide/index.asp>>.

¹¹⁹ J Stevenson, above n 6, at 111.

¹²⁰ For further discussion on this issue see: S.R de Silva, "Human Resource Management, Industrial Relations and Achieving Management Objectives" (1996), International Labour Organisation, Bureau for Employers' Activities <<http://www.ilo.org/public/english/dialogue/actemp/downloads/publications/srshrm.pdf>>.

¹²¹ J Stevenson, above n 6, at 108. But see: R Brown, above n 54, at 14.

¹²² In 2000 the Human Resources Institute of New Zealand had 1509 members. In August 2009 the institute had 3733 members. This shows that over a period of nine years the professional institute for New Zealand HR practitioners has grow by 147 percent. Data source: Email from Kim Thomas (HRINZ) to Sarah Hughes, Data on HRINZ Membership (25 September 2009).

¹²³ E Johnson and S Mouley, "The Human Resources Function in New Zealand" (2002) 2 New Zealand Journal of Human Resource Management 1, 3.

the role of HR in the future.¹²⁴ One of the areas identified was restructuring.¹²⁵ Arguably this assertion was correct, with change management becoming a key aspect of the role of most HR professionals as well as a career option in its own right.¹²⁶ As organisations have found the need to restructure, specialist knowledge is always required to advise how best to implement change management initiatives legally and with the least disruption to business.¹²⁷ Obviously this development is applicable to this discussion, as it accentuates the growing acknowledgement that restructuring, which often results in redundancy, is a real threat to how both employers and employees perceive¹²⁸ and structure employment relationships. Although there is no empirical data on this idea, a good example of the change is found in the increased use of non-standard work arrangements as a way to structure employment relationships.

V *Non-Standard Work Arrangements*

New Zealand's labour legislation is still predominantly based on the premise of our labour force being employed on a permanent basis with a presumed bond between the employer and the employee.¹²⁹ Yet, evidence suggests New Zealand employment relationships are

¹²⁴ Cleland, Pajo and Toulson, "Move It or Lose It: An Examination of the Evolving Role of the Human Resources Profession in New Zealand" 2000 11(1) *International Journal of Human Resources* 143-160 cited in E Johnson and S Mouley, above n 123, at 3.

¹²⁵ *Ibid.*

¹²⁶ As at 25th September 2009 there were 451 jobs specialising or containing aspects of change management being advertised on New Zealand's leading recruitment website, www.seek.co.nz. See: Seek Job Search, 'Change Management' <<http://www.seek.co.nz/jobsearch/index.aspx?DataRange=31&catlocation=1017&stateelected=true&keyword=s=change%20management&searchform=quickupper&searchtype=again>>.

¹²⁷ For a summary of recent restructuring and redundancy events in New Zealand see: *Report of the Public Advisory Group on Restructuring and Redundancy* (Prepared for the Ministers of Labour, Social Development and Employment and Economic Development, 30 June 2008) appendix F.

¹²⁸ For discussion see: K Macky, above n 19, at 63-87.

¹²⁹ P Spoonley, "Is Non-Standard Work Becoming Standard? Trends and Issues" 2004 29(3) *New Zealand Journal of Employment Relations* 3, 4.

transforming and becoming more diverse. Consequently, this may raise questions about the ideology underpinning New Zealand's current employment legislation and the level of protection which it provides employees.

Although it is accepted that these employment relationships may be described using varying terminology, for the purposes of this discussion they will be described as non-standard work arrangements.¹³⁰ While this concept is not new,¹³¹ its use in governing employment relationships has grown substantially since the later part of the twentieth century.¹³² The significant proliferation of these arrangements has left many questioning what type of employment relationship is actually deemed standard.¹³³ It is beyond the scope of this discussion to engage in the academic debate surrounding the precise definition of standard and non-standard work arrangements.¹³⁴

Notwithstanding this debate, traditionally standard employment relationships have typically been characterized by individuals undertaking full-time work for salaries or wages for an indefinite period of time with a single employer at their premises.¹³⁵ Conversely, non-standard employment relationships tend to vary one or more of these characteristics, such as tenure, hours of work, location and the actual employer employee relationship.¹³⁶ Although there is an array of work arrangements that can be viewed as non-standard, there is limited

¹³⁰ For discussion on the terminology used to describe this form of employment relationship, see: R Cremer, A de Bruin, A Dupuis, P Firkin, E McLaren, J Overton, H Perera and P Spoonley, above n 15, at 5.

¹³¹ *Ibid.*, at 3.

¹³² *Ibid.* See also: G Rossiter and F McMorran, "The Law and Alternative Working Arrangements" (Working Paper No 10, Labour Market Dynamics Research Program, Massey University, 2003) 1, 7.

¹³³ P Spoonley, above n 129, at 3.

¹³⁴ For further discussion see: R Cremer, A de Bruin, A Dupuis, P Firkin, E McLaren, J Overton, H Perera and P Spoonley, above n 15, at 3-8.

¹³⁵ M McCatin and G Schellenberg, "The Future of Work: Non-Standard Employment in the Public Service of Canada" (1999) cited in R, Cremer, A de Bruin, A Dupuis, P Firkin, E McLaren, J Overton, H Perera and P Spoonley, above n 15, at 4.

¹³⁶ R, Cremer, A de Bruin, A Dupuis, P Firkin, E McLaren, J Overton, H Perera and P Spoonley, above n 15, at 6.

statistical data available¹³⁷ on many of the types of employment relationships which are utilised in New Zealand.¹³⁸

Nevertheless, Statistics New Zealand does capture data on some forms of employment relationships. Table two shows a comparison of full-time to part-time positions in relation to the total number of New Zealanders employed since 1990. By providing data for a reasonable duration, arguably patterns can be more easily identified, hence data being evaluated from 1990 to 2010.

¹³⁷ Statistics New Zealand only holds information on part-time employees, multiple job holders and independent contractors.

¹³⁸ This point has been raised by a number of authors including: P Spoonley, above n 129, at 8, 14; R Cremer, A de Bruin, A Dupuis, P Firkin, E McLaren, J Overton, H Perera and P Spoonley, above n 15, at 3.

Table Two: New Zealand Employees by Full-Time & Part-Time Status¹³⁹

Year	Full-Time	Full-Time as a Percentage of Total Employed	Part-Time	Part-Time as a Percentage of Total Employed	Total Employed
1990	820,500	69.21	255,100	21.52	1,185,600
1991	824,500	68.78	265,000	22.11	1,198,700
1992	785,700	67.42	268,800	23.07	1,165,300
1993	783,600	66.57	280,200	23.80	1,177,100
1994	806,400	65.13	303,500	24.51	1,238,100
1995	841,600	65.43	317,500	24.68	1,286,300
1996	866,400	65.12	334,600	25.15	1,330,400
1997	867,300	65.11	337,900	25.37	1,332,100
1998	877,300	64.23	361,700	26.48	1,365,900
1999	879,300	62.40	397,800	28.23	1,409,100
2000	887,500	63.17	410,100	29.19	1,404,900
2001	901,800	62.50	435,200	30.16	1,442,800
2002	940,400	63.27	431,400	29.02	1,486,400
2003	971,400	63.54	441,000	28.85	1,528,700
2004	997,500	64.19	437,200	28.14	1,553,900
2005	1,034,000	63.99	451,700	27.95	1,616,000
2006	1,067,200	64.78	454,300	27.58	1,647,300
2007	1,084,600	65.39	450,100	27.14	1,658,600
2008	1,123,200	66.42	447,300	26.45	1,691,100
2009	1,098,600	65.93	438,200	26.30	1,666,300
2010	1,085,000	65.02	452,100	27.09	1,668,700

The key trend that can easily be identified from this table is that although the number of people employed has increased steadily over time, the increase has not been reflected in full-

¹³⁹ Adapted from Statistics New Zealand data. See Statistics New Zealand, “Table Builder: Filled Jobs by ANZSIC Group, Sex and Employment (000’s)” (Annual March) <<http://wdmzpub01.stats.govt.nz/wds/TableViewer/tableView.aspx>>. The magnitude for employees is 1,000 and part-time employees are defined as working fewer than 30 hours per week.

time employment. Albeit that both full-time and part-time employee numbers have fluctuated as a percentage of total employment numbers for this period, since 1990 full-time employment figures have effectively reduced whilst part-time figures have increased by 5.57 per cent.

As noted already this change is not limited to New Zealand. However, as table three shows, the speed of the change in New Zealand is faster than the average of OECD countries which have faced a 4.35 per cent shift from full-time to part-time work since 2000.

Table Three: OECD Countries Average Employees by Full-Time & Part-Time Status¹⁴⁰

Year	Full-Time	Full-Time as a Percentage of Total Employed	Part-Time	Part-Time as a Percentage of Total Employed	Total Employed
2000	420,199	88.13	56,575	11.87	476,774
2001	430,520	87.97	58,862	12.03	489,382
2002	416,847	85.56	70,339	14.44	487,186
2003	420,422	85.40	71,898	14.60	492,320
2004	420,249	84.98	74,261	15.02	494,510
2005	425,700	84.90	75,706	15.10	501,406
2006	432,737	84.91	76,928	15.09	509,665
2007	438,391	84.76	78,798	15.24	517,189
2008	440,828	84.55	80,530	15.45	521,358
2009	428,765	83.78	83,004	16.22	511,769

Coupled with this, as at March 2009, there were 70,995 people in New Zealand that held multiple jobs. Industries such as manufacturing (6,180 people), retail (7,716 people), health (11,871 people) and accommodation and food services (6,741 people) seem to be industries

¹⁴⁰ Adapted from OECD. StatExtracts database. See OECD.StatExtracts: FTPT Employment Based on a Common Definition <http://stats.oecd.org/Index.aspx?DataSetCode=AFA_CALC_IN3>. The OECD average is a weighted average and does not include Israel or Slovenia.

which have employed high numbers of multiple job holders in comparison with other industries.¹⁴¹

Furthermore, as identified earlier, self employed people are prevalent in New Zealand representing approximately 69 per cent of businesses and accounting for 10.4 per cent of the total labour force.¹⁴² This category represents another type of non-standard work arrangement. However, unlike part-time or multiple job holders, people who are deemed to be independent contractors are not generally covered or protected by employment legislation.¹⁴³ Therefore the general principles of contract law are applicable.¹⁴⁴ A significant concern with this type of arrangement is that employers could utilise this form of relationship to reduce compliance costs¹⁴⁵ and transfer business risks.¹⁴⁶

Given the data presented so far, there are significant numbers of New Zealand's labour force engaged in non-standard work arrangements. Notwithstanding this, the data presented only represents a part of the much larger picture of New Zealand's employment relationship landscape. Currently, data is not collected on other temporary forms of work, such as fixed term and casual employment or the use of temporary staff through employment agencies.¹⁴⁷ However, it is common knowledge that these forms of relationship both exist and are in frequent use in New Zealand. According to some research these temporary employment

¹⁴¹ See Statistics New Zealand, "Table 4.2: Workers with Multiple Jobs by Industry (ANZSIC06)" <<http://wdmzpub01.stats.govt.nz/wds/TableViewer/tableView.aspx>>.

¹⁴² For discussion on this point see section B, I of this chapter.

¹⁴³ G Rossiter and F McMorran, above n 132, at 6, 16. It is important to note that some legislation does provide protection for independent contractors, for example, the Parental Leave and Employment Protection Act 1987.

¹⁴⁴ Ibid.

¹⁴⁵ P Spoonley, above n 129, at 10; A Butcher, above n 10, at 5.

¹⁴⁶ R Cremer, A de Bruin, A Dupuis, P Firkin, E McLaren, J Overton, H Perera and P Spoonley, above n 15, at 3.

¹⁴⁷ For discussion on the use of employment agencies see: J Burgess, E Rasmussen and J Connell, "Temporary Agency Work in Australia and New Zealand: Out of Sight and Outside the Regulatory Net", (2004) 29 (3) New Zealand Journal of Employment Relation 25. See also: P Spoonley, above n 129, at 13-14.

relationships are the fastest growing type of non-standard working arrangement.¹⁴⁸ In the arguably comparable Australia labour market¹⁴⁹ casual employment agreements represented 25 percent of the labour force in 2007.¹⁵⁰

Interestingly, employees working under a fixed term and casual employment agreement can be working up to full-time;¹⁵¹ however their entitlements from their employer predominantly tend to be minimal as organisational benefits are usually limited to permanent employees.¹⁵² The absence of entitlements is further exacerbated for casual employees as, although entitled to the same legislative protection as any other employee, due to the very nature of the relationship, few casual employees accrue the necessary service requirements to obtain the minimum statutory entitlements, such as leave.¹⁵³ Also casuals are unlikely to pursue personal grievance actions when wronged, as the costs of such action would often be more than the benefits a casual employee would receive.¹⁵⁴

Nevertheless, non-standard work offers the obvious benefit of flexibility for both employers and employees. Arguably however, the benefits for employees are distributed more in alignment with the skills of the individual.¹⁵⁵ The higher the skill level or specialist nature of the skills, the greater the opportunity and power to negotiate higher rates of pay and benefits to supplement flexibility. Alternatively, non-standard work for lower skilled more vulnerable

¹⁴⁸ G Lowe, "Employment Relationships as the Centrepiece of a New Labour Policy Paradigm", (2002) 28(1) Canadian Public Policy 93-104 cited in P Spoonley, above n 129, at 4.

¹⁴⁹ J Mangan, *Workers Without Traditional Employment* (2000) cited in P Spoonley, above n 129, at 9.

¹⁵⁰ Australian Bureau of Statistics, "Job Flexibility of Casual Employees: Measures from the 2007 Survey of Employment Arrangements, Retirement and Superannuation"
<<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/6105.0Feature>>.

¹⁵¹ R Cremer, A de Bruin, A Dupuis, P Firkin, E McLaren, J Overton, H Perera and P Spoonley, above n 15, at 9.

¹⁵² P Spoonley, above n 129, at 9.

¹⁵³ G Rossiter and F McMorran, above n 132, at 9-10.

¹⁵⁴ *Ibid*, at 10.

¹⁵⁵ P Spoonley, above n 129, at 6.

workers is often associated with lower pay,¹⁵⁶ less security,¹⁵⁷ undesirable working hours,¹⁵⁸ reduced employer/employee conditions¹⁵⁹ as well as limited access to legislative benefits.¹⁶⁰

Given the intent of the legislation to address inequality through collective action, non-standard work arrangements would be an area where collectivism arguably needs to be prevalent. However, non-standard work arrangements are yet another area of New Zealand's employment relations environment demonstrating the individualisation of the employment relationship whilst conversely reducing collectivism. Independent contractors fall outside of the unions' usual ambit; however, other non-standard work arrangements are definitely areas where union membership could be enhanced.

Notwithstanding this assertion, employees working under a non-standard working arrangement, particularly temporary employees, by their very nature, tend not to have a long term view of their employment relationship and therefore are inclined to regard union membership as irrelevant.¹⁶¹ Moreover, due to the frequently fragmented characteristics of temporary and part-time work, union representatives would struggle to effectively promote their services and encourage membership growth. Furthermore, these forms of employment relationships are often associated in areas, such as food service,¹⁶² where unions are not traditionally strong. As already noted, since the ERA's inception, unions have focused their growth strategies in areas where union membership has historically been present.¹⁶³

¹⁵⁶ See R Osborne and J Warren, above n 11, at 7; A Butcher, above n 10, at 4.

¹⁵⁷ Ibid, at 7; M Turner, above n 14, at 37-40; A Butcher, above n 10, at 4.

¹⁵⁸ See R Osborne and J Warren, above n 11, at 7; P Spoonley, above n 129, at 8.

¹⁵⁹ See R Osborne and J Warren, above n 11, at 2; P Spoonley, above n 129, at 15, 17, 18; A Butcher, above n 10, at 4.

¹⁶⁰ See R Osborne and J Warren, above n 11, at 2; P Spoonley, above n 129, at 12-13.

¹⁶¹ Department of Labour, above n 34, at 15.

¹⁶² J Stevenson, above n 6, at 112.

¹⁶³ Department of Labour, above n 34, at 13.

Despite legislative acknowledgement of the need for greater flexibility in employment relationships, in some circumstances,¹⁶⁴ concern with the increasing prevalence of non-standard working arrangements is that employers can potentially utilise these working arrangements to avoid or minimize legislative compliance costs and subsequently restrict employee benefits and rights.¹⁶⁵ This is particularly so when considering redundancy law.

As already noted the managerial prerogative in respect of redundancy law in New Zealand is judicially recognised as fundamental to the New Zealand business environment and therefore its ongoing validity and protection is perceived by some as of paramount importance. However, as acknowledged by the ERA, this right needs to be balanced with the right of employees to have protection within the employment relationship. The replacement of what has traditionally been seen as a standard employment relationship with that of certain non-standard employment relationships, in particular, independent or dependent contractors, arguably creates a conflict between what is the generally accepted definition of a redundancy situation and a decision to contract out positions. The notion that redundancy is termination which is attributable, “wholly or mainly, to the fact that the position filled by the worker is, or will become, superfluous to the needs to the employer”¹⁶⁶ arguably does not sit well with a restructure resulting in the contracting out of duties which still need to be performed. By pure application of the facts, it is hard to argue that the duties, which make up the position, are in fact superfluous. It is hard to assert that a position is truly redundant when the functions of the role will continue to be carried out, although the person engaged to perform such duties will be given the title of independent contractor rather than employee. In many cases these contractors are completely dependent on the company to which they provide services. They take all the risks and have no form of legislative employment protection. This

¹⁶⁴ See for example: The Employment Relations (Flexible Working Arrangements) Amendment Act 2007 which enables employees to request more flexible working arrangements from their employers.

¹⁶⁵ See the discussion on this point in part B, V of this chapter.

¹⁶⁶ This definition is taken from s 184 (5) of the LRA. A copy of this provision is contained in appendix one. See chapter three for further discussion on the definition of redundancy.

argument is not new and is often raised with little success by allegedly redundant employees who question the reality of their redundancy.¹⁶⁷

The utilization of non-standard employment relationships further exacerbates arguments for greater legislative protection provisions for redundancy situations. As noted in chapter two, those behind the drafting of the ERA recognized the need to balance the power within the employment relationship and felt that this would be achieved through the express legislative promotion of collectivism. However, as this discussion has illustrated collectivism is not strong within New Zealand's employment relations environment for the reasons discussed. As there is greater individualism, there becomes a greater reliance on peoples' negotiating power in respect of redundancy protection. Evidence highlights that such power is uneven in a lot of case with little to no negotiation actually taking place.

¹⁶⁷ A full discussion on substantive justification in relation to redundancy law is contained in chapter thirteen.

Chapter Six

Sketching the Picture

Introduction to Procedural Fairness

Following the preceding discussion, this chapter outlines the concept of procedural fairness in redundancy cases.

Aside from any contractual or policy obligations, procedural fairness imposes an obligation on employers to comply with the principles of natural justice.¹ Broadly speaking in disciplinary cases, these principles incorporate an obligation to provide an employee with notice of any allegation and its potential consequences should it be established, an opportunity to be heard and an unbiased consideration of information provided prior to any decision to dismiss being made.² By and large these principles are aimed at ensuring that an employer possesses all facts before making any decision that may involve termination. However, the broad principles of natural justice cannot easily be applied to all situations. In a redundancy situation the employer generally has all the information in order to make a decision and the context is not disciplinary.³

Therefore, although redundancy is just one form of termination, from a procedural perspective it is in fact quite different to other forms of dismissal. In termination cases for cause such as where an employee has allegedly committed some form of misconduct, any decision to actually dismiss that employee should be made after a fair and transparent process has been completed. Conversely, in a redundancy situation the proposal to potentially

¹ J Hughes, P Roth and G Anderson, *Personal Grievances* (online loose-leaf ed, LexisNexis) at [4.4].

² For the minimum natural justice requirements in cases of termination see: *NZ Food Processing Union v Unilever New Zealand Limited* [1990] 1 NZILR 35, 45-46. For discussion see also: G Anderson, J Hughes and P Roth, above n 1, at [4.3].

terminate the position of one or more employees through redundancy is made prior to the commencement of any process. The process in a redundancy situation is used to consider that proposal through consultation with affected parties so as to definitively determine the precise outcome to be implemented. As a result, this paper considers the elements of procedural fairness prior to the discussion on substantive justification. Due to the extensive nature of procedural fairness it will be covered in the following seven chapters.

A *Importance of Procedural Fairness*

For a dismissal on the grounds of redundancy to be justifiable the employer must be able to demonstrate that they had genuine reasons for the termination and that the dismissal was carried out in a procedurally fair manner.

It has sometimes been asserted that a decision to dismiss an employee based on genuine substantive grounds should not be termed unjustifiable based on procedural deficiencies.⁴ However, the rationale and importance of procedural fairness in relation to dismissal cannot be understated.⁵ There is arguably no better articulation of the importance of procedural fairness as the words of Megarry J in *John v Rees*⁶ being:⁷

‘It may be that there are some who would decry the importance which the Courts attach to the observance of the rules of natural justice. ‘When something is obvious,’ they may say, ‘why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start.’ Those who take this view do not, I think, do themselves justice. As everybody who has had anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable

³ G Anderson, J Hughes and P Roth, above n 1, at [4.3].

⁴ See discussion in: G Anderson, J Hughes, M Leggat, P Roth, *LexisNexis Employment Law Guide* (7th ed, LexisNexis, Wellington, 2005) at [ER103.56].

⁵ For general discussion on the concept of procedural fairness see: J Hughes, P Roth and G Anderson, above n 1, at [4.1]–[4.5].

⁶ [1970] Ch 345.

⁷ *John v Rees*, above n 6, at 402.

charges which in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events’.

B Procedural Fairness Viewed In Totality

In determining whether the procedural elements of any redundancy process have been fair the judiciary has historically quite consistently stated that the process is to be viewed “in the round”⁸ in other words “not every imperfection renders a dismissal unjustifiable”.⁹ The judiciary must take a balanced approach by viewing both the positive and negative aspects of any termination process to determine whether, on an overall basis, the procedure of a dismissal has been conducted in an unjustifiable or justifiable manner.¹⁰ The actions of the employer are not to be viewed with “pedantic scrutiny”.¹¹ As Chief Judge Goddard in *New Zealand Food Processing Union v Unilever New Zealand*¹² stated:¹³

‘Slight or immaterial deviations from the ideal are not to be viewed with consequences for the employer wholly out of proportion to the gravity, viewed in real terms, of the departure from procedural perfection. What is looked at is the substantial fairness and substantial reasonableness according to the standards of a fair-minded but not over-indulgent person’.

⁸ *Mastertrade Limited v Te Koro* (Employment Court, Christchurch, CC43/98, 17 November 1998, Judge Palmer) 15.

⁹ *Ibid.*

¹⁰ *Ibid.*, at 18.

¹¹ *NZ Food Processing Union v Unilever New Zealand*, above n 2, at 46. Interestingly, the recently legislative amendments to the test of justification expressly state in s 103 A (5) that: “the Authority or the Court must not determine a dismissal or an action to be unjustifiable under this section solely because of defeats in process followed by the employer”. This is only the case where the defects are deemed “minor; and did not result in the employee being treated unfairly”. The 2010 amendments are discussed in more detail in chapter fifteen.

¹² [1990] 1 NZILR 35.

¹³ *Ibid.*, at 46. This dicta has been cited in subsequent case law with approval. See for example: *Swinden v Naylor Love* (Employment Court, Christchurch, CC5/99, 23 February 1999, Judge Palmer) 15.

This approach to procedural issues has regularly been reaffirmed.¹⁴ Consequently, this has meant that the judiciary has in certain circumstances held that even where there has been elements of a termination process that are not procedurally fair the dismissal is still justifiable as other procedural elements when viewed in totality make the dismissal justifiable.¹⁵ Having said this, these principles have developed largely through disciplinary cases.

I Key Redundancy Cases

The key redundancy cases have established that termination for reasons of redundancy must be carried out by a fair process.¹⁶ The decision in *G N Hale & Son Limited v Wellington, etc, Caretakers, etc, IUW*¹⁷ (*Hale*) is predominantly cited as authority for defining the wide ambit of managerial prerogative in situations involving redundancy. However, the decision also provided the platform for subsequent discussion on what procedural elements would constitute a fair process in redundancy situations. The Court of Appeal in *Hale* had declined to “rule on the content of procedural fairness in redundancy situations”¹⁸ rather stating that although aspects such as consultation, selection, redeployment and even compensation¹⁹ might be considered as elements of a fair process the real answer lay in the facts of each individual case.²⁰ According to the Court of Appeal it is these facts that determine precisely what elements dictate a fair process.²¹

¹⁴ *Lewis v Howick College Board of Trustees* [2010] NZEMPC 4. See also *Chief Executive of Unitec Institute of Technology v Henderson* (2007) 8 NZELC 98,749; *Craig v Carter Holt Harvey Ltd* (Employment Court, Auckland AC 30/08, 3 September 2008, Chief Judge Colgan); *Butcher v OCS Ltd* (Employment Court, Christchurch CC 8/08, 16 July 2008, Judge Travis).

¹⁵ An example of this in a redundancy situation is *Mastertrade Limited v Te Koro*, above n 8.

¹⁶ *G N Hale & Son Limited v Wellington, etc, caretakers, etc, IUW* [1991] 1 NZLR 151, at 156 as per Cooke P

¹⁷ [1991] 1 NZLR 151.

¹⁸ *Ibid*, at 158 as per Richardson J.

¹⁹ *Ibid*, at 156 as per Cooke P.

²⁰ *Ibid*.

²¹ *Ibid*.

Subsequently, under the ECA the controversial decision in *Brighouse Limited v Bilderbeck*²² (*Brighouse*) was determined. The majority of the Court of Appeal had seized on the obiter statements in *Hale* and held that although there was no general obligation to pay redundancy compensation in all cases, in some circumstances, despite there being no express agreement concerning redundancy compensation, the employer might be required to pay compensation in order to justify a decision to dismiss.²³ The reasoning for this rested on the employer's implied obligation of fair treatment.²⁴ This decision provided the foundation for significant debate and discussion about whether the payment of redundancy compensation was in fact a required element of a fair process in situations involving termination by means of redundancy.²⁵ In *Aoraki*,²⁶ the Court of Appeal overruled its own decision in *Brighouse* holding that redundancy compensation was only payable where express agreement requiring such a payment.²⁷

In keeping with the dictum in *Hale*, the Court of Appeal in *Aoraki* continued to shape procedural elements in accordance with the facts of individual cases. Although the majority decision ruled that there was no mandatory requirement to consult in all situations,²⁸ it was held that in some circumstances a failure to consult or consider elements such as redeployment may cast doubt on the genuineness of the employer's decision to dismiss.²⁹ Furthermore, the judgment in *Aoraki* set the standard of what, in the absence of any contractual obligations, would be a reasonable period of prior notice in redundancy

²² [1994] 2 ERNZ 243.

²³ *Brighouse Limited v Bilderbeck* [1994] 2 ERNZ 243, at 244 as per Cooke P, Casey J and Sir Gordon Bisson.

²⁴ *Ibid.*

²⁵ See chapter twelve for a full discussion on this judgement.

²⁶ *Aoraki Corporation Limited v McGavin* [1998] 1 ERNZ 601.

²⁷ *Ibid.*

²⁸ *Ibid.*, at 618.

²⁹ *Ibid.*

situations.³⁰ The approach taken by the Court of Appeal in *Aoraki* was very obviously based on the ECA and the ideal of contractual supremacy.³¹ Such an approach was accepted in the subsequent Court of Appeal decision of *Thwaites*³² concerning redeployment. In *Thwaites* it was held that where a position is genuinely redundant, such a finding cannot be overridden due to the employer failing to offer the affected employee an alternative position.³³

Despite the introduction of the ERA, the approach to procedural fairness by the Court of Appeal remained largely unchanged. In *Coutts*³⁴ the majority³⁵ of the Court of Appeal reiterated that the employment relationship still remained one of contract³⁶ and that the legislative duty of good faith did not introduce any significant obligations over and above what the Courts had traditionally placed on the parties to an employment relationship through the mutual implied duty of trust and confidence.³⁷ However, despite the Court of Appeal acknowledging the continued applicability of the principles contained in the decisions of *Aoraki* and *Thwaites*,³⁸ it was also noted that the requirement to consult had been strengthened, taking the obligation from “not mandatory”³⁹ to “desirable if not essential in

³⁰ See chapter seven for a full discussion on notice.

³¹ *Aoraki Corporation Limited v McGavin*, above n 26, at 620.

³² *New Zealand Fasteners Stainless Limited v Thwaites* [2000] 1 ERNZ 739.

³³ *Ibid.*, at [25].

³⁴ *Coutts Cars Limited v Baguley* [2001] ERNZ 660.

³⁵ It is important to note that there was a strong dissent by McGrath J. This is discussed in detail in chapter three.

³⁶ *Coutts Cars Limited v Baguley*, above n 34, at [39].

³⁷ *Ibid.*, at [42].

³⁸ *Ibid.*

³⁹ *Aoraki Corporation Limited v McGavin*, above n 26, at 618 as per Richardson P and Gault, Henry, Keith, Blanchard, and Tipping JJ.

most cases”.⁴⁰ The focus on the consultation requirements in *Coutts* related in particular to disclosure obligations associated with selection criteria.⁴¹

The evolution of the procedural elements continued with the enactment of the 2004 amendments to the ERA, which specifically expanded the duty of good faith.⁴² The Employment Court interpreted these amendments in relation to redundancy situations in the *Simpson Farms*⁴³ decision. In this case the Employment Court held that the amendments to the ERA had strengthened the procedural obligations in redundancy situations. Specifically, the amendments set a minimum standard in respect of procedural fairness and this included the mandatory obligation to consult in redundancy cases.⁴⁴

The abovementioned decisions are only briefly introduced in this chapter. They are regarded as key authorities in respect of redundancy law and, as a consequence of this, are discussed in greater detail and with reference to more recent judgments within the relevant chapters on procedural fairness.

II Key Legislative Obligations

The ERA also incorporates express statutory procedures to be followed in any redundancy process as outlined in s 4 (1A). The obligations imposed on employers require certain aspects of the process to be expressly complied with, such as consultation and the provision

⁴⁰ *Coutts Cars Limited v Baguley*, above n 34, at [43]. This point is discussed in: A Russell, “The ‘Emperor’s New Clothes’: the Judicial Fabric of Redundancy under the Employment Relations Act 2000” (2003) 9 New Zealand Business Law Quarterly 125, 128-131.

⁴¹ Consultation requirements in respect of selection processes are discussed in chapter nine.

⁴² These amendments are discussed in more detail in chapter fifteen.

⁴³ *Simpson Farms Limited v Aberhart* [2006] ERNZ 825.

⁴⁴ *Ibid*, at [60].

of relevant information.⁴⁵ If these aspects are not complied with, yet other non-statutory processes are followed, any decision to dismiss, irrespective of the fairness or sensitivity given by other procedural elements, must arguably make such a termination unjustifiable as it does not meet the express statutory requirement.

This assertion appears to be supported by the decisions under the ERA to date. In *T&L Harvey Limited v Duncan*⁴⁶ (*Duncan*), Ms Duncan was dismissed from her employment for reasons of alleged redundancy. Although Ms Duncan was well aware of changes that were taking place within her working environment, her employer had provided assurances that no employee's employment was at risk although the content of some employee's roles would require review.⁴⁷ It was during this review process that Ms Duncan was presented with a proposal in respect of what her job would entail. Ms Duncan did not agree with the proposal but was not given the opportunity for real and meaningful consultation regarding it. This was the first time Ms Duncan was told that her employment was actually at risk. Counsel for the employer argued that the process followed by T&L Harvey Limited was "less than satisfactory"⁴⁸ the departures merely incorporated "minor irregularities".⁴⁹ The Employment Court held, however, that viewed in totality the "actions were not what a fair and reasonable employer would do in all the circumstances"⁵⁰ and that the lack of true consultation "was a fundamental breach of the plaintiff's obligations under s 4 (1A) (c) of the Act".⁵¹ Therefore, this case highlights that although procedural elements may be viewed in totality some procedural breaches will render a dismissal unjustifiable as they do not meet statutory requirements.

⁴⁵ Each procedural element and the obligations associated with them are discussed in detail in chapters seven to twelve.

⁴⁶ (Employment Court, Christchurch, CC19/09, 20 November 2009, Judge Couch).

⁴⁷ *T&L Harvey Limited v Duncan*, above n 46, at [6].

⁴⁸ *Ibid*, at [39].

⁴⁹ *Ibid*.

⁵⁰ *Ibid*.

⁵¹ *Ibid*, at [38].

Recent legislative changes to the test of justification in 2010 affirm the pre-existing law in the sense that minor procedural defects will not render a dismissal unjustifiable. However, the new s 103A expressly sets out specific procedural elements that the Court and Authority must take into account when applying the test of justification. As will be discussed in chapter fifteen these express procedural requirements arguably do not lend themselves to redundancy situations.

C Requirements of Procedural Fairness in Redundancy

Although it is accepted that any redundancy process must be carried out in a procedurally fair manner, the precise procedural requirements may vary depending on the specific circumstances of the case.⁵² In some situations, such as where an organisation is facing insolvency, the procedural requirements are likely to be minimal due to the inevitability of an employee(s) dismissal.⁵³ Conversely, in other circumstances such as where only a small number of employees are potentially affected, the procedural requirements might be increased.⁵⁴

In general procedural fairness encompasses a wide ambit of potential obligations including but not limited to providing notice⁵⁵ and engaging in real and meaningful consultation.⁵⁶ The duty to consult incorporates elements such as selection,⁵⁷ redeployment⁵⁸ and outplacement

⁵² This point was made in *Aoraki Corporation v McGavin*, above n 26, at 618-619.

⁵³ G Anderson, J Hughes, M Leggat, P Roth, above n 4, at [ER103.51]; G Anderson, J Hughes, P Roth and M Leggat, *Employment Law: A Practical Guide* (LexisNexis New Zealand Limited, Wellington, 2010) at [18.72].

⁵⁴ *Ibid.*

⁵⁵ See chapter seven for discussion.

⁵⁶ See chapter eight for discussion.

⁵⁷ See chapter nine for discussion.

⁵⁸ See chapter ten for discussion.

support.⁵⁹ All potential elements of procedural fairness are discussed in detail in following chapters. Importantly, the precise procedural requirements might be dictated by the affected employee(s) terms and conditions of employment. Where a set procedure is prescribed, compliance with these contractual obligations is mandatory.⁶⁰

⁵⁹ See chapter eleven for discussion.

⁶⁰ See Anderson and others, *Mazengarb's Employment Law*, (online loose-leaf ed, LexisNexis) at [ERA103.52C].

Chapter Seven

Putting on the Paint - Procedural Fairness and Notice

The first procedural requirement considered in this paper is that of notice, as it marks the initiation of all the procedural fairness requirements. Notice can very simply be interpreted as communication by the employer to the employee of the advent of potential or actual redundancies.

Notice can therefore be divided into two aspects; firstly, prior notice of any potential redundancies, so as to provide scope for a fair process,¹ and secondly actual notice given to an employee that their employment is to be terminated following a procedurally fair decision that the employee's position is redundant.

The following analysis relates to the giving of prior notice of potential redundancies and is discussed in accordance with the applicable legislative era.²

A Contractual Notice

I Express Notice

Where there is an express prior notice of redundancy period specified in an employee's employment contract the employer must comply with it.³ Failure to do so would render the

¹ See s 4 (1A), which states that prior notice must be given when a "proposal" is formulated.

² For general discussion on the notice requirements for redundancy terminations see: Anderson and others, *Mazengarb's Employment Law*, (online loose-leaf ed, LexisNexis) at [ERA103.51] ["*Mazengarb*"]; J Hughes, P Roth and G Anderson, *Personal Grievances* (online loose-leaf ed, LexisNexis) at [4.30] ["*Personal Grievances*"]; P Churchman, C Toogood and M Foley, *Brookers Personal Grievances* (online loose-leaf ed, Brookers) at [6.8] ["*Brooker PG*"]; P Bartlett, W Hodge, P Muir, C Toogood, R Wilson, *Brookers Employment Law* (online loose-leaf ed, Brookers) at [ER103.20] ["*Brookers Employment Law*"]; G Anderson, J Hughes, P Roth and M Leggat, *Employment Law: A Practical Guide* (LexisNexis New Zealand Limited, Wellington, 2010) at [18.71] ["*A Practical Guide*"].

employer in breach of contract⁴ and the dismissal is highly likely to be construed as procedurally unfair.⁵

Having said this, non compliance with express contractual notice provisions can occur as a result of exceptional circumstances such as frustration of contract or business failure. In the case of frustration of contract, the agreement simply comes to an end and all obligations under it cease to exist.⁶ Conversely in the case of business failure, although the employee has a technical right to prior notice of redundancy or payment in lieu of notice, this right may be of little value as it is likely that the employer may not be in a position to meet its contractual obligations.⁷

II Common Law Implied Reasonable Notice

Where an employment contract does not contain an express contractual period of notice, the common law requirement of reasonable notice is implied.⁸ This is a term implied in law which is highly discretionary and therefore heavily fact dependent.⁹

³ *Unkovich v Air New Zealand Limited* [1993] 1 ERNZ 526. For discussion on this point see: Anderson and others, *Mazengarb*, above n 2, at [ERA 103.52C].

⁴ For examples of breach of contract relating to redundancy see: *Scott v Wellington College of Education* (Employment Court, Wellington, WEC1/98, 13 February 1998, Chief Judge Goddard); *Stevenson v Chief Executive of Auckland Institute of Technology* (Employment Court, Auckland, AC68/01, 17 October 2001, Judge Shaw); *Smith v Sovereign Limited* [2005] 1 ERNZ 832. These cases are cited and discussed in more detail in: Anderson and others, *Mazengarb*, above n 2, at [ERA 103.52C].

⁵ *Unkovich v Air New Zealand Limited* [1993] 1 ERNZ 526. For discussion on this point see: Anderson and others, *Mazengarb*, above n 2, at [ERA 103.52C].

⁶ For discussion on frustration see: G Anderson, J Hughes, P Roth and M Leggat, *A Practical Guide*, above n 2, at [18.19]; P Kiely, *Termination of Employment: A Best Practice Guide* (CCH, New Zealand, 2008) 225-226.

⁷ For further discussion on this point see: A Drake, "Unchartered Territory – Obligation of Good Faith During Voluntary Administration" [2009] (2) Employment Law Bulletin 33.

⁸ See: J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 2, at [4.30]; Anderson and others, *Mazengarb*, above n 2, at [ERA 103.51]. See also: P Kiely, above n 6, at 19-21.

⁹ See discussion on common law implied reasonable notice in: G Anderson, J Hughes, P Roth and M Leggat, *A Practical Guide*, above n 2, at [18.71].

Notwithstanding this assertion, as we will see, the Court of Appeal in the case of *Charta Packaging v Howard and Ors*¹⁰ (*Charta*) provided significant assistance in clarifying what reasonable notice in redundancy cases actually means. In delivering the joint judgment Judge McGrath stated:¹¹

‘In determining what is reasonable notice at common law, in the present circumstances, the starting point is that there is no evidence to indicate that common practice in employment agreements in relation to required notice of redundancy is other than that identified in *Aoraki Corporation*, where the Court said that practice provided no support for a reasonable notice period much in excess of one month’.

B *Labour Relations Act 1987*¹²

The judgement in *Hale*¹³ represents the leading authority advocating the power of the managerial prerogative as far as substantive justification of termination for redundancy is concerned.¹⁴ If there is a genuine reason for redundancy it is not the judiciary’s role to “substitute their business judgment for the employer’s”.¹⁵ Although the decision of the Court of Appeal was predominantly directed at the issue of substantive justification it was noted that a redundancy dismissal must be carried out by a fair procedure. What is fair depends largely on the circumstances of the case.¹⁶ The Court of Appeal expressed this ideal as follows:¹⁷

¹⁰ (Court of Appeal, CA125/01, 22 February 2002, Richardson P, Tipping and McGrath JJ).

¹¹ *Charta Packaging v Howard and Ors*, above n 10, at [31].

¹² For full discussion on the redundancy case law under the LRA see: M Mulgan, “Redundancy Dismissals” in A Szakats and M Mulgan, *Dismissal and Redundancy Procedures* (2nd ed, Butterworths, Wellington, 1990) 193-268.

¹³ *G N Hale & Son Limited v Wellington, etc, Caretakers, etc IUW* [1991] 1 NZLR 151.

¹⁴ See the discussion on substantive justification in chapter thirteen.

¹⁵ *G N Hale & Son Limited v Wellington, etc, Caretakers, etc IUW*, above n 13, at 158 as per Richardson J.

¹⁶ *Ibid*, at 156.

¹⁷ *Ibid*, at 156 as per Cooke P.

‘A reasonable employer cannot be expected to surrender the right to organise his own business. Fairness, however, may well require the employer to consult with the union and any workers whose dismissal is contemplated before taking a final decision on how a planned cost-saving is to be implemented.....This is a field where probably hard and fast rules cannot be evolved’.

This quote highlights that the statutory concept of unjustifiable dismissal under the LRA was concerned with both the reason for the dismissal (substantive justification) as well as the manner in which the decision was implemented (procedural fairness). However, the Court’s inclination to review the procedural irregularities was far greater than any inclination to review the former and generally the two considerations of unjustifiable dismissal were considered independently of each other. As consultation was a factor that may be relevant to procedural fairness, prior notice as the precursor to any procedural elements was essential under the LRA.

C Employment Contracts Act 1991

I Unjustifiable Dismissal/Action¹⁸

The ECA did not alter established principles under the LRA that an employer is entitled to determine for genuine commercial reasons that potential redundancies might be necessary. Once an employer had made such a determination however, at common law the employer had an obligation to ensure, that in carrying out any redundancy process, it was done in a procedurally fair manner. If an employer failed to comply with this obligation the employee might have been entitled to bring a personal grievance action.¹⁹

As already noted, prior notice of proposed redundancy was the cardinal feature of procedural fairness, as without it there was inadequate scope for key features of procedural fairness such

¹⁸ There is some debate regarding the precise terminology to describe procedural unfairness in implementing a decision. This is discussed at length in the *Aoraki* judgment, specifically at: *Aoraki Corporation Limited v McGavin* 1 ERNZ 601, 617– 620.

¹⁹ See s 27 of the ECA.

as consultation. Consultation regarding redundancy incorporated any selection processes which might have been required to determine which employees' positions would have been made redundant, redeployment options and other support mechanisms such as counselling and outplacement services.²⁰ Consequently, prior notice of proposed redundancy was the starting point of the procedural process in respect of redundancy.

Additionally, it gave affected employees notice of the employer's intention to embark on a course of action that might have impacted on their employment and therefore it facilitated their involvement in the decision making process through the abovementioned procedural requirements. Employees had a right to know that their employment was at risk and why it was at risk.²¹

Under the ECA the decisions of *Aoraki*²² and *Charta* considered what, in the absence of any express contractual provision, would be an appropriate duration of time to facilitate a procedurally fair redundancy process.

*a) Aoraki*²³

The case of *Aoraki* concerned an appeal from the Employment Court against a decision that the respondent (Mr McGavin) was genuinely redundant but was dismissed in a procedurally unfair manner. Although much of the decision centered on the issue of whether employees

²⁰ Each of these elements of consultation are discussed individually within this paper.

²¹ *Kitchen Pak Distribution Limited v Stoks* (Employment Court, Christchurch, CEC40/93, 12 August 1993, Judge Palmer) 4.

²² *Aoraki Corporation Limited v McGavin*, above n 18.

²³ For discussion on the *Aoraki* judgement in respect of notice see: G Rossiter, "Fair Treatment in Redundancy Dismissals" (May 1999) *New Zealand Law Journal* 163, 165-166; A Russell, "The 'Emperor's New Clothes': The Judicial Fabric of Redundancy under the Employment Relations Act 2000" (2003) 9 *New Zealand Business Law Quarterly* 125, 134-135; B Manning, "Dismissal on Notice after *Aoraki*" [1998] *New Zealand Law Journal* 370, 370-372.

were entitled to redundancy compensation where the employment contract was silent,²⁴ the case also discussed consultation and notice requirements. In relation to consultation, the Court of Appeal noted that there was no mandatory requirement to consult with employees potentially affected by redundancy.²⁵ However, the Court of Appeal went on to note that, in certain circumstances, a lack of consultation where it could be reasonably expected may raise questions about the genuineness of the alleged redundancy.²⁶ In respect of notice, the Court of Appeal discussed what, in the absence of an express contractual provision, would be a reasonable duration of prior notice in a redundancy situation.

In *Aoraki* the Court of Appeal highlighted that “dismissal cases will be affected by the reason for the purported termination of employment”.²⁷ Specifically, the Court of Appeal outlined that:²⁸

‘Broadly speaking employment may be terminated in three situations: (i) for cause, that is, and again broadly speaking, for misconduct or incompetence or incapacity; (ii) for redundancy, that is where the job has disappeared, ordinarily because of insolvency, closure or restructuring; or (iii) on notice, either as specified in the contract or on reasonable notice at common law’.

Further the Court of Appeal noted that under the ECA there were terminations which can be described as “justifiable and unjustifiable”.²⁹ Where a termination was deemed unjustifiable remedies as outlined in the personal grievance regime were available to remedy the loss associated with the particular breach or failure.³⁰ In respect of procedural requirements in a genuine redundancy situation, the Court of Appeal expressed the view:³¹

²⁴ This issue is discussed in greater detail in chapter twelve.

²⁵ See *Aoraki Corporation Limited v McGavin*, above n 18, at 618. For discussion on consultation requirements see chapter eight.

²⁶ *Ibid.*

²⁷ *Ibid.*, as per Richardson P, Gault, Henry, Keith, Blanchard and Tipping JJ.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*, at 620 as per Richardson P, Gault, Henry, Keith, Blanchard and Tipping JJ.

³¹ *Ibid.*, at 618-619 as per Richardson P, Gault, Henry, Keith, Blanchard and Tipping JJ.

‘A just employer, subject to the mutual obligations of confidence, trust and fair dealing, will implement redundancy decisions in a fair and sensitive way. The procedural fairness standard will determine the period of notice or payment in lieu which recognises that commercial circumstances may dictate that redundancies take immediate effect. It is a matter of how long would a just employer provide for in treating the employee fairly’.

Realistically, this meant that in determining the acceptable duration of prior notice of redundancy the real question was what was required to ensure that the termination was conducted in a procedurally fair manner.³² Therefore, although an employee may have had an express term in their employment agreement defining an explicit notice period, or alternatively have had the common law requirement of ‘reasonable notice’,³³ both these notice options may have been expressed in terms of a few days or weeks.³⁴ However, the demands of procedural fairness may have required a longer period of notice given the circumstances of the particular case.³⁵ The Court of Appeal went on to state:³⁶

‘Where the contract is silent as to the redundancy notice period and payment in lieu, the contractual period for termination on notice and in the absence of any contractual provision the common law requirement of reasonable notice in the circumstances, may help in striking a reasonable balance between employee and employer, but modified to recognise that the employment is being terminated in a redundancy situation and the inevitable impact on the employees of the manner in which it is done and the time involved’.

The Court of Appeal in its judgment seemed to be noting that there were different ways a termination could occur and that redundancy was a “special situation”,³⁷ which therefore required its own unique considerations in determining what would be an acceptable period of prior notice in order to facilitate a procedurally fair process. Consequently, judgments which were concerned with terminations for any other reason other than redundancy, such as for

³² J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 2, at [4.30].

³³ This point was discussed in greater detail in section A, I of this chapter.

³⁴ J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 2, at [4.30].

³⁵ *Ibid.*

³⁶ *Aoraki Corporation Limited v McGavin*, above n 18, at 619 as per Richardson P, Gault, Henry, Keith, Blanchard and Tipping JJ.

³⁷ *Ibid.*, at 618 as per Richardson P, Gault, Henry, Keith, Blanchard and Tipping JJ.

cause or on notice, were of little help in determining what would be a reasonable notice period in a redundancy situation.³⁸

In *Aoraki*, the Court of Appeal reviewed statistical data³⁹ associated with collective contracts and found that practice evidenced that one month's notice was clearly the most common.⁴⁰ Therefore, the Court held that:⁴¹

'general practice as to the period of notice is so clear as to provide no support for fixing the period of notice, in the absence of a contractual stipulation, at much in excess of one month'.

b) *Charta*⁴²

If there were any uncertainty regarding the decision and dicta associated with *Aoraki*, the case of *Charta* clearly articulated the principles of law that emerged through case law under the ECA.

Charta Packaging was a company which was experiencing significant business difficulties. As a result of this there was a genuine need to reduce staffing levels and make some staff redundant. One of the issues before the Court of Appeal related to the duration of prior notice of redundancy which the affected employees should have received given that their individual employment contracts were silent on this issue.

In respect of notice of potential redundancy, the Employment Court had held that, as there was no express provision specifying a period of notice in the applicable employment

³⁸ This point was made in *Charta Packaging v Howard and Ors*, above n 10, at [30].

³⁹ See *Aoraki Corporation Limited v McGavin*, above n 18, at 621-622 for details of the statistical data used by the Court.

⁴⁰ *Ibid*, at 622.

⁴¹ *Ibid*, at 622 as per Richardson P, Gault, Henry, Keith, Blanchard and Tipping JJ.

⁴² *Charta Packaging v Howard and Ors*, above n 10.

contracts, the employees were entitled to receive a period of reasonable notice. In determining what was reasonable the Employment Court gave consideration to the case of *Telecom South v Post Office Union*⁴³ (*Telecom South*) which, the judge in *Charta* believed, indicated that awards of up to 12 months notice for a senior manager were within the ambit of reasonable notice and sanctioned by the Court of Appeal.

On appeal, the Court of Appeal held that the Employment Court had erred in using common law principles to determine the appropriate length of notice of potential redundancy. Specifically, in reaffirming the *Aoraki* decision, the Court of Appeal asserted that the Employment Court, by considering the *Telecom South* decision, had “applied the wrong principle”⁴⁴ in its attempt to determine precisely what reasonable notice meant. The *Telecom South* case discussed reasonable notice in reference to an alleged unjustifiable dismissal on different grounds. The Court of Appeal, in applying *Aoraki*, accentuated that redundancy is a “special situation”⁴⁵ that required an examination of “different principles than those applicable to alleged unjustifiable dismissal cases involving termination for cause, or on notice in situations where the position itself has not disappeared”.⁴⁶

The Court of Appeal in *Charta* confirmed that in determining what would be a reasonable notice period in a redundancy situation where there was no express contractual provision, the starting point is whether there is any evidence to suggest that “common practice in employment agreements in relation to required notice of redundancy”⁴⁷ is any different to the one month notice requirement identified in *Aoraki*.⁴⁸ If there was no common practice

⁴³ [1992] 1 NZLR 275.

⁴⁴ *Charta Packaging Limited v Howard and Ors*, above n 10, at [30].

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*, at [31].

⁴⁸ *Ibid.*

indicating a different approach, based on *Aoraki* and *Charta*, one month was deemed a reasonable period of notice of proposed redundancy.

There is one significant exception to this. This is where an employer has given an employee an expectation that their employment would continue for a specific period of time. In *Charta* one of the respondents had held discussions with the appellant that her job was to be scaled down over a six month period in anticipation of retirement. The Court of Appeal held that this expectation of employment warranted a period of notice that was longer than the practice outlined in *Aoraki*. Specifically the respondent received three months notice as opposed to the other respondents who only received two months.⁴⁹

The Court of Appeal decision in *Charta* suggested that a longer period of notice might be required where the circumstances necessitated that consideration be given to factors such as retraining, re-employment or even self-employment of the affected employee(s). Very importantly however, the Court qualified this by stating: “All these factors however, must be weighted against the financial circumstances of the company. This is an important point of distinction with reasonable notice in other employment contexts”.⁵⁰

This case appears to suggest that what is deemed fair can be influenced by the employer’s resources⁵¹ and the specific commercial circumstance which the employer is facing, in particular its financial position. This implies that the procedural requirements for one organisation may differ to another based on the organisation’s financial situation. An organisation which is in a more precarious financial position might not need to give as long a period of notice or provide other support mechanisms as that required of an organisation

⁴⁹ Ibid, at [32].

⁵⁰ Ibid.

⁵¹ The 2010 amendments to the ERA expressly state that a company’s resources are a factor that the Court and Authority must take into account when applying the test of justification in s 103A of the ERA. See chapter fifteen for discussion on the new s 103A of the ERA.

which is in a healthier financial position and possesses greater resources. Although there is arguably some logic in this ideal, in the sense that an organisation can not give what it does not have, the employee who is, as acknowledged by the judiciary, a completely innocent and vulnerable party in a redundancy situation, is faced with both the loss of their job as well as judicially legitimatised reduction in entitlement to what would otherwise be reasonable notice and support mechanisms due to the organisations individual financial position.⁵² Arguably, by authorizing the reduction in the length of notice, it inhibits the ability to achieve the purposes associated with providing such notice.⁵³

D Employment Relations Act 2000

I Intentions of the ERA

The reasoning encapsulated in *Aoraki* and the subsequent decision in *Charta* was significantly founded on the auspices of the ECA and the notion of contractual supremacy.⁵⁴

This was particularly evident in *Aoraki* where significant parts of the judgment were dedicated to considering the intentions of the ECA as well as specific provisions encapsulated within it.⁵⁵ In analysing its title and objectives the Court noted: “employment issues are a

⁵² See G Anderson, “Personal Grievance – Redundancy – Reasonable Notice – Compensation” [2002] 3 Employment Law Bulletin 48, 50. This point is also discussed in: Anderson and others, *Mazengarb*, above n 2, at [ERA 103.51].

⁵³ The purpose of prior notice is discussed in the introductory section of this chapter.

⁵⁴ This is evidenced by the reasoning contained in the judgements. For example see: *Aoraki Corporation Limited v McGavin*, above n 18, at 620 where in the majority decision of Richardson P and Gault, Henry, Keith, Blanchard, and Tipping JJ held that: “The contract rules and that there is no basis conformable with the settled principles governing the implication of terms in other contracts to read in any implied obligation of that kind or to extend the mutual obligation of trust and fair dealing in that way. To do so would alter the substantive rights and obligations on which the parties agreed; it would change the economic value of their overall agreement; it would erode the statutory emphasis on the free negotiation of employment contracts”.

⁵⁵ *Aoraki Corporation Limited v McGavin*, above n 18, at 610-612.

matter of contract where the types of contract and the content are essentially for the parties to freely negotiate”.⁵⁶

The Court of Appeal’s decision in *Aoraki* overruled its previous judgment in *Brighouse*⁵⁷ regarding the provision of redundancy compensation where the applicable employment contract was silent on such a consideration.⁵⁸ The majority decision in *Brighouse*⁵⁹ had stated that although there was no general requirement to pay redundancy compensation in all cases, in some situations, even where there was no express agreement concerning its payment, in order to justify a dismissal by means of redundancy, the employer’s implied duty of fair treatment required compensation to be paid.⁶⁰ In overruling the *Brighouse* decision, *Aoraki* emphasized the supremacy of the contract. The Court of Appeal’s view of the role of the contract in employment relations is unreservedly outlined in the following key statement:⁶¹

‘The contract rules and there is no basis comfortable with the settled principles governing the implication of terms in other contracts to read in any implied obligation of that kind or to extend the mutual obligation of trust and fair dealing in that way. To do so would alter the substantive rights and obligations on which the parties agreed; it would change the economic value of their overall agreement; and it would erode the statutory emphasis on the free negotiation of employment contracts’

The intention and objectives underpinning the ERA marked a significantly different ideological stance to those of the ECA. This is illustrated in the abovementioned decisions of *Aoraki* and *Charta*. The ERA advocated partnership, equality and the fundamental ideal that

⁵⁶ *Ibid*, at 609 as per Richardson P, Gault, Henry, Keith, Blanchard and Tipping JJ.

⁵⁷ *Brighouse Limited v Bilderbeck* [1994] 2 ERNZ 243.

⁵⁸ Discussion on the *Brighouse* and *Aoraki* decisions including the possible reasons for the Court of Appeal’s change in approach are discussed in detail in chapter twelve.

⁵⁹ This decision is discussed in greater detail in chapter twelve.

⁶⁰ *Brighouse Limited v Bilderbeck*, above n 57, at 244.

⁶¹ *Aoraki Corporation Limited v McGavin*, above n 18, at 609 as per Richardson P, Gault, Henry, Keith, Blanchard and Tipping JJ.

the employment relationship was treated as a human relationship rather than a mere contractual economic exchange.⁶²

Given this legislative ideological departure from the pure contractual employment relationship that ensued under the ECA, the first significant decision under the ERA concerning redundancy *prima facie* appeared to advocate a similar approach to procedural fairness in respect of redundancy cases as those governed by the ECA.

The somewhat controversial majority decision in *Coutts*⁶³ made some general observations regarding the ERA:⁶⁴

‘Although employment relationships to which the Act applies are defined broadly (s 4(2)), the relationship between employer and employee still rest on agreement (contract). It is in negotiating for and operating under that contract the obligations of good faith apply. The obligation to deal with each other in good faith is not so much a stand-alone obligation as a qualifier of the manner in which those dealings are to be conducted, and specifically (though not exhaustively) those dealings identified in s 4(4)’.

The majority of the Court of Appeal went on to hold that the obligations of good faith did not introduce any significantly different obligation to that which the Courts had placed on the parties to an employment relationship over recent years through the implied mutual obligation of trust and confidence.⁶⁵ Therefore the principles developed in *Aoraki* were to still provide guidance in relation to procedural fairness.⁶⁶ However, as already noted in

⁶² See the Employment Relations Bill 2000 No 8-1 Explanatory Note 1,1. See also: M Wilson, “The Employment Relations Act: A Framework For A Fairer Way” in E Rasmussen (ed), *Employment Relationships: New Zealand’s Employment Relations Act* (Auckland University Press, Auckland, 2004) 9, 17. M Wilson, “2nd Reading Speech Notes Employment Relations Bill” (Parliament, Wellington, 8 August 2000); M Wilson, “Employment Relations Bill Third Reading Speech Notes” (Parliament, Wellington, 16 August 2000); M Wilson, “The Whitlam Lecture 2000 New Zealand’s Path Forward: A Plan for Working Together for Productivity and Fairness” (Trade Union Foundation, The Royal Theatre, Melbourne, 8 December 2000).

⁶³ *Coutts Cars Limited v Baguley* [2001] ERNZ 660. For general discussion on this case see: A Russell, above n 23, at 125-149; P Churchman, C Toogood and M Foley, *Brookers PG*, above n 2, at [ER103.22A]; Anderson and others, *Mazengarb*, above n 2, at [ERA4.5A].

⁶⁴ *Coutts Cars Limited v Baguley*, above n 63, at [39] as per Gault J.

⁶⁵ *Ibid*, at [42].

⁶⁶ *Ibid*.

relation to good faith in chapter three, the Court of Appeal were not unanimous in their thinking with McGrath J dissenting. Specifically, McGrath J reflected that given the legislative change, the employer's obligation to consult over potential redundancies should not necessarily continue to be interpreted in such a limited manner, as advocated in *Aoraki*,⁶⁷ that being that there was no mandatory requirement to consult with employees who were potentially affected by redundancy.⁶⁸ Notwithstanding this reflection, the result of *Coutts* was that the status quo had been endorsed.

Therefore the ideological shift in legislation with the introduction of the ERA and the statutory duty of good faith had achieved little, if any, impact on the judiciary's approach to dismissals on the ground of redundancy, and in turn, prior notice of redundancy.

II Amendments to the ERA

In response to the majority decision in *Coutts*, Parliament enacted s 4 (1A) which expanded the duty of good faith to ensure that the obligation was interpreted capaciously, being more than the implied term of trust and confidence.⁶⁹ Additionally, s 4 (1A) encompassed specific procedural requirements which, coupled with the introduction of s 103A⁷⁰ concerning the test of justification, had significance in respect of the giving of prior notice of redundancy.

Section 4 (1A) (c) expressly 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 one or more of his or her employees, to provide to the employees affected access to information and the

⁶⁷ *Ibid*, at [72].

⁶⁸ *Ibid*, at [80].

⁶⁹ See s 4 (1A) (a) where it expressly states that the duty of good faith "is wider than the implied mutual obligations of trust and confidence".

⁷⁰ This provision is discussed in more detail in chapter three.

opportunity to comment on that information before any decision is made. Therefore the formation of the proposal becomes the determining point as to when prior notice is to be given.

*Simpson's Farms*⁷¹ was the first case to consider the application of these new provisions in relation to redundancy law. Although the Employment Court held that the amendments did not change the “long-standing principles about substantive justification for redundancy exemplified by judgments such as *Hale*”,⁷² it stated that Parliament had “legislated expressly for minimum requirements of procedural fairness in employment relationships including, in particular, the circumstances of or leading to redundancies”.⁷³

Specifically, the Employment Court held that the integral elements of consultation were strengthened by the requirements encapsulated in s 4 (1A) making them mandatory in all cases.⁷⁴ In particular, it was noted that “consultation required more than simply a prior notification”⁷⁵ and that sufficient time was to be allowed for the elements of consultation to be met.⁷⁶ The Court reiterated the express words of the legislation and stressed the need for sufficient and precise information to be given to employees along with adequate time in order to develop and express an opinion on the information provided.⁷⁷ Furthermore, it was articulated that this opportunity to engage in consultation could be expressed orally or in writing and there must be a genuine effort on the part of the employer to accommodate the views of their employees.⁷⁸ Although an employer is quite entitled to have formulated a

⁷¹ *Simpson Farms Limited v Aberhart* [2006] ERNZ 825.

⁷² *Ibid*, at [67] as per Chief Judge Colgan.

⁷³ *Ibid*, at [58].

⁷⁴ *Ibid*, at [60].

⁷⁵ *Ibid*, at [62].

⁷⁶ *Ibid*.

⁷⁷ *Ibid*.

⁷⁸ *Ibid*.

working plan regarding any proposed changes, good faith requires the employer to have an “open mind and be ready to change or even start anew”⁷⁹ given the consultation process. Any proposal can not be acted upon until real consultation is completed.⁸⁰

However, the Employment Court did not go further to discuss what would be deemed to be a reasonable period of prior notice given these explicit procedural requirements. The principles surrounding prior notice encapsulated in *Aoraki* and subsequently approved under *Charta* were not expressly considered or overruled.

III Adequacy of One Month’s Prior Notice

According to data held by the Centre for Industrial Relations at Victoria University of Wellington (IRC),⁸¹ most collective agreements within the data sample contain a provision which incorporates specific requirements in respect of giving notice to employees who are to be made redundant.⁸² This is clearly illustrated in table four, which outlines that 90 per cent of collective agreements as at June 2009⁸³ include a specific clause about pay⁸⁴ and notice requirements in a redundancy situation.⁸⁵

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ There are some limitations associated with this data. These limitations are outlined in appendix three.

⁸² See appendix three, part A for a full copy of the data relating to notice provisions in collective agreements.

⁸³ S Blumenfeld, S Ryall and P Kiely, *Employment Agreements: Bargaining Trends & Employment Law Update 2008/2009* (Industrial Relations Centre, Victoria University of Wellington, 2009) 62.

⁸⁴ Note the term pay is taken directly from the IRC data and relates specifically to the payment of compensation. See: S Blumenfeld, S Ryall and P Kiely, above n 83, at 62.

⁸⁵ Redundancy compensation is discussed in greater detail in chapter twelve.

Table Four: Redundancy Provisions in Collective Agreements⁸⁶

Redundancy Provisions							
	No Provision	Notice Only Provision	Pay Only Provision	Pay & Notice Provision	Provision But No Details	Stand Alone Agreement	Coverage (000s)
Jun-99	10%	10%	9%	66%	2%	3%	421.4
Jun-00	9%	10%	10%	66%	2%	3%	420.6
Jun-01	7%	8%	14%	68%	1%	2%	391.4
Jun-02	7%	7%	13%	70%	1%	2%	399.1
Jun-03	6%	3%	13%	72%	3%	3%	329.3
Jun-04	4%	2%	17%	72%	3%	2%	297.8
Jun-05	4%	2%	17%	72%	3%	2%	300.7
Jun-06	4%	3%	16%	74%	2%	2%	321.9
Jun-07	3%	2%	12%	78%	2%	2%	309.9
Jun-08	3%	2%	12%	80%	1%	2%	331.8
Jun-09	3%	2%	3%	90%	1%	1%	284.7

As outlined in chapter six, compliance with contractual provisions is mandatory. Notwithstanding this point, in some cases, even where an employer complies with an express contractual notice provision, it does not necessarily mean that the notice or payment in lieu of notice will be deemed adequate.⁸⁷ Procedural fairness, based on the circumstances of the particular case, may require a longer duration.⁸⁸

In the main, the Courts have held that given the circumstances surrounding the individual's redundancy, a longer period of prior notice of redundancy would be warranted rather than that provided for in the employee's employment agreement.⁸⁹ A useful example of this is found in *Harris v Charter Trucks Limited (Charter Trucks)*⁹⁰ where the applicable

⁸⁶ This data is taken directly from annual Employment Agreements: Bargaining Trends and Employment Law Update from the Industrial Relations Centre of Victoria University in Wellington. The specific annual publications are listed in appendix three with the limitations association with this data.

⁸⁷ J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 2, at [4.30].

⁸⁸ See the earlier discussion on this point in chapter six.

⁸⁹ *Ibid.*

⁹⁰ *Harris v Charter Trucks Limited* (Employment Court, Christchurch, CC16/07, 11 September 2007, Judge Couch).

employment agreement provided for “at least two weeks notice of termination”⁹¹ on the grounds of redundancy. However, the Court held that given the employee had been a truck driver for most of his working life and had been employed by the same business for more than 25 years despite ownership changes, it was obvious that he would find it hard to obtain alternative employment and that the whole experience would be “traumatic and difficult”.⁹² Therefore the Court held that a fair and reasonable employer would have recognised these factors and therefore given greater notice of redundancy than the minimum duration which was contained in his employment agreement.⁹³ Arguably, given the explicit procedural requirements as encapsulated in s 4 (1A), this approach by the judiciary to the duration of prior notice of redundancy could be seen as an overt attempt to ensure the procedural elements contained within legislation are complied with. In other words there can be no contracting out of the legislation.

Under the ECA, the Court of Appeal in *Aoraki* determined that common practice indicated that one month was the most common period of prior notice of redundancy in contracts which contained redundancy clauses.⁹⁴ Figure two clearly shows that the Court’s analysis of common practice in respect of notice periods under the ECA in *Aoraki* remains unchanged today under the ERA.⁹⁵ However, it is also important to note that, although four weeks or one month represents a clear majority, there is still a high percentage of other durations of prior notice periods in existence as evidenced in tables AA7 to AA34 contained in appendix three, part A.⁹⁶

⁹¹ Ibid, at [92].

⁹² Ibid.

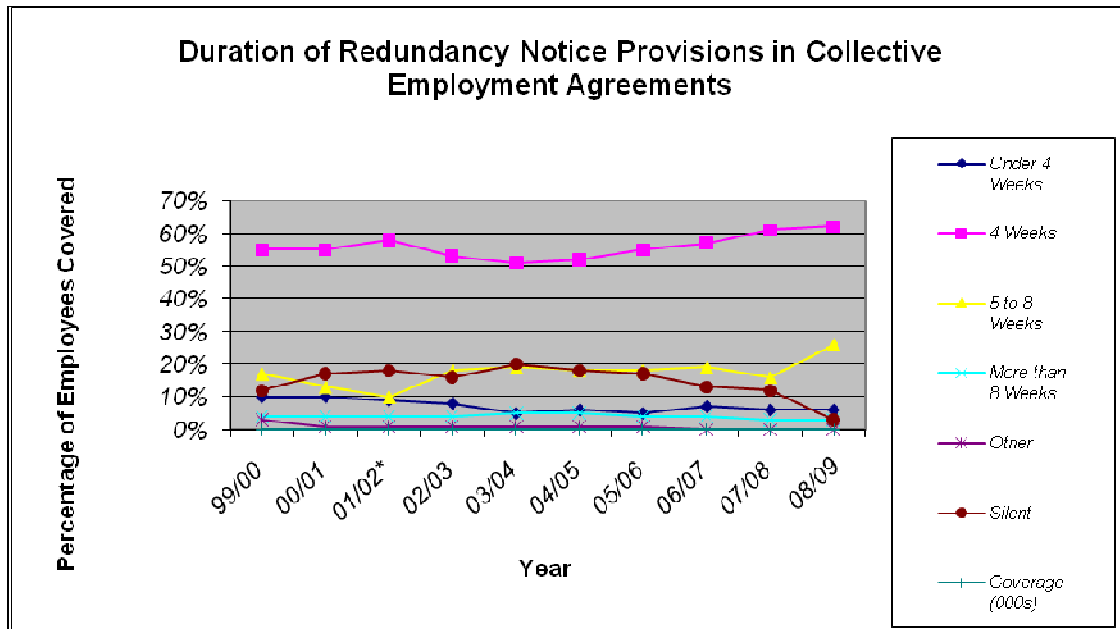
⁹³ Ibid. For discussion on this point see: J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 2, at [4.30].

⁹⁴ *Aoraki Corporation Limited v McGavin*, above n 18, at 622.

⁹⁵ See the data contained in appendix three which is taken directly from annual Employment Agreements: Bargaining Trends and Employment Law Update from the Industrial Relations Centre at Victoria University of Wellington.

⁹⁶ The Court of Appeal did note the need for caution when considering this data. Specifically it was noted that the contracts were a result of a bargaining process and part of an employment package which may need to be

Figure Two: Duration of Redundancy Notice Provisions in Collective Agreements⁹⁷



Given the specific wording of s 4 (1A), it has to be questioned whether the dicta in *Aoraki* and *Charta* regarding what would be deemed a reasonable period of prior notice of redundancy are in fact realistic, and to some extent good law.

Given that prior notice of redundancy under the ERA effectively needs to be communicated to employees when a proposal that may effect their employment is established, and the judicial interpretation of s 4 (1A) in *Simpson's Farms* expressed that although an employer is entitled to have a plan in mind, consultation may result in the need to start afresh, it is certainly arguable that one month as the period of prior notice as advocated by *Aoraki* and

balanced against other aspects of the contract. This caution was made in *Aoraki Corporation Limited v McGavin*, above n 18, at 622 as per Richardson P and Gault, Henry, Thomas, Keith, Blanchard, and Tipping JJ.

⁹⁷ This data is taken directly from annual Employment Agreements: Bargaining Trends and Employment Law Update from the Industrial Relations Centre of Victoria University in Wellington. The specific annual publications are listed in appendix three with the limitations associated with this data. The symbol * indicates that there are specific limitations associated with this data.

accepted in *Charta* is no longer an appropriate guide. It is certainly arguable that the time interval between prior notice of redundancy and fulfillment of all the consultation requirements necessary for procedural fairness will, in the majority of cases, need to be greater than one month in order to meet the explicit legislative requirements.

Arguably given this analysis, if procedural requirements associated with consultation are likely to surpass a time frame of one month, this will override the usefulness of express terms and conditions contained within an employee's employment agreement where the duration of prior notice of redundancy is set at less than one month. Industries such as communications (96 per cent of contracts specify prior notice as being under four weeks)⁹⁸ and construction (42 per cent of contracts specify prior notice as being under four weeks)⁹⁹ are prime examples of where this assertion is relevant. Arguably, express terms become meaningless and to some degree misleading for the parties in respect of what will, and will not, be deemed a procedurally fair process and in compliance with legislative requirements. As already discussed in respect of *Charter Trucks* the approach taken by the Court in that case may have been to stress the need for legislative compliance and the inability to contract out of it.¹⁰⁰

IV Future Approach to the Test of Justification¹⁰¹

In chapter three, the *Air New Zealand*¹⁰² case was discussed. In that case the Employment Court was asked to determine how s 103A should be interpreted and applied in respect of

⁹⁸ S Blumenfeld, S Ryall and P Kiely, above n 83, at 63. See appendix three, part A, Table AA19 for the data relating to this industry.

⁹⁹ Ibid. See appendix three, part A, Table AA26 for the data relating to this industry.

¹⁰⁰ This point is discussed in greater detail in chapter fourteen.

¹⁰¹ For full discussion on the assertions contained in this section see: D Dickinson, "Good Faith and Justification: Where to Now in the Law of Redundancy?" [2009] 8 Employment Law Bulletin 115.

¹⁰² *Air New Zealand v V* (Employment Court, Auckland, AC15/09, 3 June 2009, Chief Judge Colgan and Judges Travis, Shaw, and Couch).

personal grievances.¹⁰³ It was decided that s 103A required the “Authority or the Court to objectively review all the actions of an employer up to and including the decision to dismiss”.¹⁰⁴ Comment on the *Air New Zealand* case has clearly expressed the view that, given this interpretation of s 103A, it might be time to review the principles of law encapsulated in *Hale*. Specifically, it has been suggested that:¹⁰⁵

‘There could again be judicial scrutiny of a commercial genuine decision because it would need to be determined, on an objective basis, 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’.

The interpretation of s 103A in the *Air New Zealand* case has been approved and applied to cases of unjustifiable dismissal by reason of alleged redundancy.¹⁰⁶ As the factual circumstances of the cases particularly concerned the issue of redeployment, consequently substantive discussion on both the application and interpretation of s 103A in relation to redundancy is discussed in chapter ten regarding redeployment.

Furthermore, as of 1 April 2011, a new test of justification will be operative. This test and its potential implications for redundancy law are discussed in chapter fifteen.

¹⁰³ Ibid, at [1].

¹⁰⁴ Ibid, at [37].

¹⁰⁵ D Dickinson, above n 101, at 118.

¹⁰⁶ See *Jinkinson v Oceana Gold New Zealand Limited* [2010] NZEmpC 102 (this case has been granted leave to appeal) and *Wang v Hamilton Multicultural Services Trust* [2010] NZEmpC 142.

E *Proposed Reforms & International Obligations*

The Advisory Group Report on Restructuring and Redundancy¹⁰⁷ recommended that a statutory notice period be enacted in respect of redundancy termination. Although they considered a variety of notice options,¹⁰⁸ they concluded that a minimum of four weeks notice be required in all redundancy cases.¹⁰⁹ This recommendation differs from current judicial precedents¹¹⁰ which provide a defacto ceiling at one month. Arguably, the recommendation is an acknowledgement that, given the express words of s 4 (1A), there is significant potential for prior notice of redundancy to need to be in excess of one month in order to meet all procedural requirements. The recommendation by the Advisory Group in relation to notice was incorporated within the unsuccessful Private Member's Bill, which went before Parliament¹¹¹ earlier this year.¹¹²

The 2010 amendments to New Zealand's employment law are not aimed directly at notice requirements in redundancy situations.¹¹³

As far as New Zealand's international obligations are concerned, although not bound by the International Termination of Employment Convention and associated Recommendation, the

¹⁰⁷ *Report of the Public Advisory Group on Restructuring and Redundancy* (Prepared for the Ministers of Labour, Social Development and Employment and Economic Development, 30 June 2008).

¹⁰⁸ *Ibid*, at 33.

¹⁰⁹ *Ibid*, at 31-33; 48-50. A copy of the recommendations are contained in appendix four.

¹¹⁰ See *Aoraki Corporation Limited v McGavin*, above n 18; *Charta Packaging v Howard and Ors*, above n 10.

¹¹¹ Employment Relations (Statutory Minimum Redundancy Entitlements) Amendment Bill (2009) 65-1, Members Bill. A copy of this Bill is contained in appendix five.

¹¹² See clause 69ZL contained in the Employment Relations (Statutory Minimum Redundancy Entitlements) Amendment Bill (2009) 65-1. A copy of this Bill is contained in appendix five.

¹¹³ The 2010 amendments to the ERA are discussed in chapter fifteen.

enactment of s 4 (1A) does comply with the clauses and articles relating to the giving of prior notice of redundancy as outlined in these documents.¹¹⁴

¹¹⁴ See C158 Termination of Employment Convention 1982, article 13 and R166 Termination of Employment Recommendation 1982, s 20. A copy of this Convention and Recommendation are contained in appendix two.

Chapter Eight

Shades of Meaning

Procedural Fairness and Consultation

In a redundancy situation the concept of consultation is wide. Although historically this obligation has largely encompassed a duty in certain circumstances for the employer to discuss with affected employees procedural elements such as, selection processes,¹ redeployment opportunities² and outplacement support,³ the timing and extent of any obligation has been uncertain. The advent of the ERA has clarified the duty to a certain extent, but in doing so raised more fundamental questions about the strength of the managerial prerogative and the reality of the application of consultation in all circumstances.

This section focuses purely on the duties associated with consultation generally and the specific obligations which have developed through case law and subsequently refined by the enactment of express duties encapsulated within the provisions of the ERA. The consultation requirements associated with specific procedural elements are discussed individually within this paper.

A Consultation Defined

Consultation has been described as a word that “serves many purposes in quite different meanings or shades of meaning”.⁴ Consequently, what amounts to consultation is often

¹ See chapter nine for discussion on consultation requirements associated with selection processes.

² See chapter ten for discussion on consultation requirements associated with redeployment opportunities.

³ See chapter eleven for discussion on consultation requirements associated with outplacement support options.

⁴ *Communication and Energy Workers Union Incorporated v Telecom New Zealand Limited* [1993] 2 ERNZ 429, at 457 as per Chief Judge Goddard.

disputed, as what is perceived as consultation to one party to an employment relationship may be interpreted differently by another.⁵

In terms of dictionary definition, to consult means “to ask advice of, seek counsel or a professional opinion”⁶ from someone or “to refer to a source of information”.⁷ Additionally, it goes beyond communication as it also incorporates the notion of having “consideration for the interests, feelings...of a person or persons”.⁸ Therefore, the concept of consultation reflects the ideology underpinning what is perceived as good faith behaviour under the ERA.⁹

However, consultation does not require negotiation¹⁰ and is therefore less onerous an obligation than the concept of negotiation which involves an exchange of views amounting to actual bargaining, where bargaining itself may involve proposal, counter-proposal, concessions and the like.¹¹ In *Communication and Energy Workers Union Incorporated v Telecom New Zealand Limited*¹² (*Telecom*), Chief Judge Goddard noted that although the process of consultation resembles that of negotiation in some respects, the key difference relates to the fact that at the conclusion of the consultation process the employer may make a decision which may take into account some of the objections raised through the consultation process. Such a decision to accommodate objections may be made not because the employer

⁵ See for example the case of *HP Industries (NZ) Limited v Davison* (Employment Court, Auckland, AC44/08, 7 November 2008, Judge Shaw).

⁶ *Shorter Oxford English Dictionary* (5th ed, Oxford University Press, Oxford, 2002) vol 1, at 497.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ See the discussion on good faith in chapter three. See also the definition of good faith contained in s 4 of the ERA.

¹⁰ See for example the case of *Communication and Energy Workers Union Incorporated v Telecom New Zealand Limited*, above n 4.

¹¹ See the dictionary definition of negotiation contained in: *Shorter Oxford English Dictionary* (5th ed, Oxford University Press, Oxford, 2002) vol 2, at 1902. See also *Communication and Energy Workers Union Incorporated v Telecom New Zealand Limited*, above n 4.

¹² *Communication and Energy Workers Union Incorporated v Telecom New Zealand Limited*, above n 4.

is under any form of obligation or pressure to reach an agreement, as that would amount to negotiation, rather it is simply the employer acting in good faith and fulfilling its obligation to consult.¹³ Although this decision was decided under the ECA, arguably the legislative duty of good faith does not require an employer engaged in consultation to actually incorporate employees' objections. However, an employer would be required to consider and respond and therefore provide information as to why objections had not been incorporated.¹⁴

Following on from this assertion, consultation must be genuine and therefore more than simple notification.¹⁵ The obligation associated with consultation was nicely summarised in *Cammish v Parliamentary Service*¹⁶ (*Cammish*) by Chief Judge Goddard as:¹⁷

'Consultation is to be a reality, not a charade. The party to be consulted must be told what is proposed and must be given sufficiently precise information to allow a reasonable opportunity to respond. A reasonable time in which to do so must be permitted. The person doing the consulting must keep an open mind and listen to suggestions, consider them properly, and then (and only then) decide what is to be done. However, consultation is less than negotiation and the assent of the persons consulted is not necessary to the action taken following proper consultation'.

Given this definition, it could be hard for an employee to actually prove that any such consultation is not genuine as all the employer is obliged to do is consider the thoughts of an affected employee.¹⁸ Arguably to require otherwise would be inconsistent with managerial prerogative. However, in reality the actual ability of an employee to influence any proposed managerial decision¹⁹ is largely limited by the willingness and attitude of the employer

¹³ Ibid, at 457.

¹⁴ Section 4 (1A) of the ERA.

¹⁵ See for example *Communication and Energy Workers Union Incorporated v Telecom New Zealand Limited*, above n 4; *Association of Salaried Medical Specialists v Otago District Health Board* [2006] 1 ERNZ 492.

¹⁶ [1996] 1 ERNZ 404. This case followed the decision in *Wellington International Airport v Air New Zealand Limited* [1993] 1 NZLR 671.

¹⁷ *Cammish v Parliamentary Services* [1996] 1 ERNZ 404, at 417.

¹⁸ See the case of *Rolls v Wellington Gas Company* (Employment Court, Wellington, WC46/98, 9 July 1998, Chief Judge Goddard) where the Court noted the difficulty for an employee to prove any ulterior motive to redundancy. Arguably the same difficulty is present in respect of proving consultation was not genuine.

¹⁹ The precise timing of when consultation is required is discussed in parts C to E of this chapter.

concerned.²⁰ Therefore, in certain cases, the value of consultation for an affected employee is arguably associated more with the knowledge of how the changes will impact on the employee and why such decisions have been made.²¹

B Contractual Obligations

Where a contractual obligation relating to consultation exists, it must be complied with.²² Predominantly, where such an obligation applies, the applicable clause tends to define at which stages consultation will take place and with whom, as well as the broad content and process of such discussions.²³ The timing of consultation is now expressly defined by the 2004 amendments to the ERA.²⁴ Consequently, any provision must not be contrary to this express statutory obligation.²⁵

It is clear from IRC data that it is common for collective agreements within their sample to have a provision expressly relating to the need to consult with the union and or employees regarding any potential redundancy situation.²⁶ This is evidenced in figure three.

²⁰ This was accepted by Margaret Wilson when Parliament enacted the ERA. She acknowledged that legislation “cannot change individual values and beliefs” but it can “influence and change behaviours”. See: M Wilson, “The Employment Relations Act: A Framework For A Fairer Way” in E Rasmussen (ed), *Employment Relationships: New Zealand’s Employment Relations Act* (Auckland University Press, Auckland, 2004) 9, 17.

²¹ See the discussion on the *JetConnect* case in part E, V of this chapter.

²² See for example *Communication and Energy Workers Union Incorporated v Telecom New Zealand Limited*, above n 4. See also *Duggan v Wellington City Council* [1994] 1 ERNZ 241 where an interim injunction was granted as the Court felt that the Council had failed to comply with its contractual obligation to consult. This later case is discussed in: P Churchman, C Toogood and M Foley, *Brookers Personal Grievances* (online loose-leaf ed, Brookers) at [ERA 103.21].

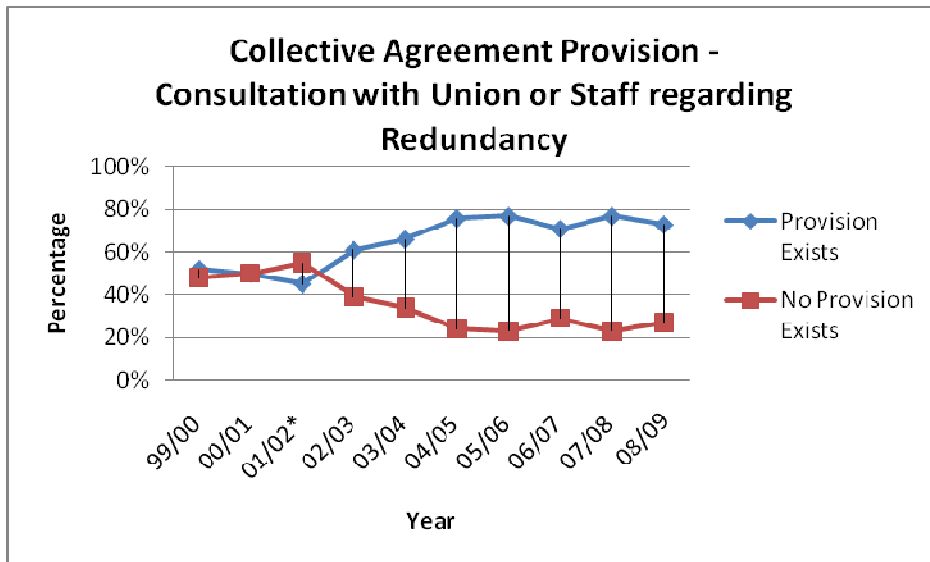
²³ J Hughes, P Roth and G Anderson, *Personal Grievances* (online loose-leaf ed, LexisNexis) at [4.32B].

²⁴ See part E of this chapter, which relates to the application of the ERA.

²⁵ See s 238 of the ERA.

²⁶ See appendix three, part B for a full copy of this data.

Figure Three: Consultation with Union and/or Staff Regarding Redundancy²⁷



However, there is a difference between collective agreements in the private and public sector.²⁸ In 2009, only 54 per cent of collective agreements in the private sector contained a consultation requirement as opposed to 89 per cent in the core government sector.²⁹ This differentiation arguably accords with the traditional union strongholds which are predominantly represented within the public sector.³⁰

As with other areas of procedural fairness, the absence of an express contractual provision relating to consultation does not necessarily exclude an obligation to consult. There remains the overarching duty of fairness which has historically, depending on the specific circumstances of the case, required such an obligation. The current legislative framework of

²⁷ This data is taken directly from the annual *Employment Agreements: Bargaining Trends and Employment Law Update* from the Industrial Relations Centre of Victoria University in Wellington. The specific annual publications are listed in appendix three with the limitations associated with this data. The symbol * indicates that there are specific limitations associated with this data.

²⁸ See appendix three, part B for a full copy of this data, in particular see Tables AB1 to AB12.

²⁹ S Blumenfeld, S Ryall and P Keily, *Employment Agreements: Bargaining Trends & Employment Law Update 2008/2009* (Industrial Relations Centre, Victoria University of Wellington, 2009) 69.

³⁰ For discussion on this point see chapter five.

the ERA has largely supplemented and confirmed this pre-existing duty. The legislative duty to consult will be discussed in part D of this chapter.

*C Duty of Fairness*³¹

Under both the LRA and the ECA, judicial determinations have held that in some, but not all circumstances, there might have been an obligation to consult with employees who face a potential redundancy situation. This obligation was often described as the duty of fairness and arose out of the jurisprudence on ‘justification’ in the concept of ‘unjustifiable’ action or dismissal.³² However, it was unclear, as to what point in the redundancy process this obligation actually arose.³³

Under the LRA, the decision of *Hale*³⁴ confirmed that fairness in terms of the test of justification for dismissal “may well require the employer to consult with the union and any worker whose dismissal is contemplated before taking a final decision on how a planned cost-saving is to be implemented”.³⁵ In this dictum Cooke P suggested that, if required, consultation seemed to relate to how a decision was to be implemented, rather than in relation to the decision itself. This interpretation was in-keeping with the strength of the managerial prerogative which existed under the LRA.

³¹ For full discussion on this see: J Hughes, P Roth and G Anderson, above n 23, at [4.32C]; Anderson and others, *Mazengarb’s Employment Law*, (online loose-leaf ed, LexisNexis) at [ERA 103.49].

³² J Hughes, P Roth and G Anderson, above n 23, at [4.32C].

³³ For full discussion on the decisions under the ECA and early ERA see: J Hughes, P Roth and G Anderson, above n 23, at [4.32]–[4.32C]. Anderson and others, above n 31, at [ERA 103.49]. For full discussion on the decisions under the LRA see: M Mulgan, “Redundancy Dismissals” in A Szakats and M Mulgan, *Dismissal and Redundancy Procedures* (2nd ed, Butterworths, Wellington, 1990) 193-268.

³⁴ *G N Hale & Son Limited v Wellington, etc, Caretakers, etc IUW* [1991] 1 NZLR 151.

³⁵ *Ibid*, at 156 as per Cooke P.

Most decisions under the ECA recognised a possible, but not mandatory, requirement to consult with employees who faced potential redundancy.³⁶ In *Aoraki*³⁷ the majority of the Court of Appeal stated:³⁸

‘It cannot be mandatory for the employer to consult with all potentially affected employees in making any redundancy decision. To impose an absolute requirement of that kind would be inconsistent with the employer’s prima facie right to organise and run its business operation as it sees fit. And consultation would often be impracticable, particularly where circumstances are seen to require mass redundancies. However, in some circumstances the absence of consultation where consultation could reasonably be expected may cast doubt on the genuineness of the alleged redundancy, or its timing’.

It is unclear from the majority judgment precisely what was anticipated as amounting to consultation. Given the context of the statement within the judgment, some authors have suggested that consultation relating to the actual decision to make employees redundant may not be required; however, consultation through the provision of prior warning might be required so as to deal with issues such as selection prior to the actual decision being made.³⁹ It was certainly the view of Thomas J in the dissenting judgment that the employer’s obligation to fair dealing in respect of consultation related only to the impact of the managerial decision and the measures taken to mitigate adverse consequences associated with it.⁴⁰ The actual majority decision in *Aoraki* held that, due to the circumstances of the case being a “company wide restructure in forced circumstances which warranted across the board action”,⁴¹ to be carried out promptly, consultation could not reasonably be expected. Conversely, Thomas J stated that some consultation in the sense of providing information and discussing the situation was required.⁴² Thomas J did however make the point that

³⁶ Note that there are cases decided under the ECA that suggest consultation is required, for an example see *Phipps v New Zealand Fishing Board* [1996] 1 ERNZ 195. This case is discussed in: Anderson and others, above n 31, at [ERA 103.49].

³⁷ *Aoraki Corporation Limited v McGavin* 1 ERNZ 601.

³⁸ *Ibid*, at 618 as per Richardson P, Gault, Henry, Keith, Blanchard and Tipping JJ.

³⁹ J Hughes, P Roth and G Anderson, above n 23, at [4.32].

⁴⁰ *Aoraki Corporation Limited v McGavin*, above n 37, at 631.

⁴¹ *Ibid*, at 624 as per Richardson P, Gault, Henry, Keith, Blanchard and Tipping JJ. This is discussed in: J Hughes, P Roth and G Anderson, above n 23, at [4.32C].

⁴² *Ibid*, at 631. This is discussed in: J Hughes, P Roth and G Anderson, above n 23, at [4.32C].

“consultation cannot be practicable in every situation”⁴³ giving specific examples of when urgency is required or when there are mass redundancies.⁴⁴

D Legislative Requirements to Consult

At its inception the ERA was not prescriptive in relation to any consultation requirements. However, the duty of good faith, which was expressly applicable to a redundancy situation,⁴⁵ possibly implied such an obligation.⁴⁶

I Employment Relations Act 2000

The first case to consider a redundancy situation under the ERA was that of *Coutts*.⁴⁷ There are three separate judgments within this decision. All the judgments offer a slightly different perspective on the provision of consultation.⁴⁸

The majority in *Coutts* believed that the obligations encapsulated within the amended legislation specifically in relation to s 4 and the duty of consultation did not impose any significantly different requirements as to those referred to within the *Aoraki* decision.⁴⁹ Specifically the majority judgment delivered by Gault J noted:⁵⁰

⁴³ *Coutts Cars Limited v Baguley* [2001] ERNZ 660, at [83] as per Gault.

⁴⁴ *Ibid.*

⁴⁵ See s 4 (d) and (e).

⁴⁶ For further discussion on the concept of good faith see chapter three.

⁴⁷ *Coutts Cars Limited v Baguley*, above n 43. For discussion on this case in respect of consultation requirements see: J Brown, “The Duty of Good Faith and Access to Information and Consultation in Redundancy Situations” [2001] 4 *Employment Law Bulletin* 70.

⁴⁸ For discussion on these differing views see: A Russell, “The ‘Emperor’s New Clothes’: The Judicial Fabric of Redundancy under the Employment Relations Act 2000” (2003) 9 *New Zealand Business Law Quarterly* 125.

⁴⁹ *Coutts Cars Limited v Baguley*, above n 43, at [37]-[38].

⁵⁰ *Ibid.*, at [42].

‘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 impracticalities in some situations’.

The majority also believed that the issue within the *Coutts* case was “not so much the fact of consultation as its adequacy and timing”.⁵¹ In particular it was noted that the seniority of the employee concerned⁵² must be taken into account when determining the extent of the consultation expected:⁵³ the higher the level of the position the greater the consultation requirements. Given the dictum of the Court of Appeal it appeared that although *Aoraki* was still applicable, the consultation requirements had nevertheless been strengthened⁵⁴ from being not mandatory⁵⁵ to “desirable, if not essential in most cases”.⁵⁶

Tipping J, although agreeing with the majority that the general “tenor of *Aoraki*”⁵⁷ still had application,⁵⁸ took a slightly stronger viewpoint expressing that the duty to consult with affected employees was “a natural corollary of the statutory duty of the parties to deal with each other in good faith”,⁵⁹ citing s 4 (1) and more specifically s 4 (4) (e) of the ERA.⁶⁰

Finally McGrath J took a completely different approach and disagreed with the majority decision in respect of their view that “the obligation of employers to consult over potential

⁵¹ *Ibid*, at [44] as per Gault J.

⁵² Note the Employment Court in *Aoraki* agreed with this approach and considered the seniority of the affected employee in respect of level of consultation required. See: *Aoraki Corporation Limited v McGavin*, above n 37, at 607.

⁵³ *Coutts Cars Limited v Baguley*, above n 43, at [44].

⁵⁴ A Russell, above n 48, at 129.

⁵⁵ *Aoraki Corporation Limited v McGavin*, above n 37, at 618.

⁵⁶ *Coutts Cars Limited v Baguley*, above n 43, at [43] as per Gault J.

⁵⁷ *Ibid*, at [66].

⁵⁸ *Ibid*.

⁵⁹ *Ibid*, at [57].

⁶⁰ *Ibid*.

redundancy remains as limited as that outlined in the *Aoraki* decision”.⁶¹ This approach was based on giving consideration to the express words of the ERA specifically focusing on ss 3, 4, and 101. McGrath J felt that these provisions imposed an obligation in excess of any contractual obligations in respect of consultation and asserted that the ERA “imposed a higher standard of conduct”⁶² where consultation with the provision of information was no longer a matter of discretion but an express statutory requirement.⁶³

It is important to note that the decision in *Coutts* predominantly focused on the provision of information in respect of the implementation process, specifically that of the selection criteria for determining which positions were to be made redundant. The decision also centered on the applicability of the *Aoraki* decision under the new legislative regime. As noted in part C of this chapter regarding the duty of fairness, it is difficult to gauge the ambit of any duty to consult in the *Aoraki* judgement.

Notwithstanding this, the subsequent decision of the Employment Court in *New Zealand Amalgamated Engineering, Printing and Manufacturing Union Incorporated v Carter Holt Harvey Limited*⁶⁴ (*CCH*) suggested that the ERA placed the onus of consultation on the employer at two specific points in a redundancy process. Firstly, when the employer is looking at making a decision which could potentially create redundancies and secondly, how such a decision, once decided, is to be implemented. This was a case where the union successfully argued that Carter Holt Harvey had breached both its contractual and statutory obligations in respect of consultation concerning a proposal to contract out work at its Kinleith Mill.⁶⁵ The Court ordered the parties to engage in discussions regarding the decision to restructure and suggested that four weeks would be adequate time for this. If no decision

⁶¹ Ibid, at [72].

⁶² Ibid, at [83].

⁶³ Ibid, at [82].

⁶⁴ [2002] 1 ERNZ 597.

⁶⁵ See discussion in: P Churchman, C Toogood and M Foley, above n 22, at [ERA4.17] and [ER103.21].

could be reached in this time period then Carter Holt Harvey was authorised to make a determination. The Court also noted that if a decision to restructure was made, the parties had to once again engage in consultation for at least a further two weeks to determine the implementation process.⁶⁶

A subsequent determination in the *Auckland City Council v The New Zealand Public Service Association*⁶⁷ (ACC) seemed to interpret the consultation requirements associated with the good faith behaviour somewhat more narrowly.⁶⁸ This was not a case concerned with a specific redundancy situation per se, rather it was an alleged breach of good faith behaviour as a result of a lack of consultation with the union in respect of a public sector restructure. In this case the Court of Appeal made the point that dictum encapsulated within the *Coutts* case was not a “comprehensive exposition of the obligations of good faith under the ERA”⁶⁹ and that “the content of an obligation of good faith will depend on the circumstances”.⁷⁰ In relation to consultation, the Court of Appeal found that there was no breach of the duty of good faith noting:⁷¹

‘to adopt an approach calling for mandatory consultation at specified times risks inflexibility. What is practicable in the exigencies of particular business operations and workplaces must be kept in mind. Similarly the issue in question may affect the nature and timing of the provision of information and consultation’.

⁶⁶ *New Zealand Amalgamated Engineering, Printing and Manufacturing Union Incorporated v Carter Holt Harvey Limited*, above n 64, at [298]. For discussion see also: P Churchman, C Toogood and M Foley, above n 22, at [ERA4.17] and [ER103.21].

⁶⁷ [2003] 2 ERNZ 386.

⁶⁸ For discussion on this case see: Anderson and others, above n 31, at [ERA103.49].

⁶⁹ *Auckland City Council v The New Zealand Public Service Association Incorporated*, above n 67, at [22] as per Gault P.

⁷⁰ *Ibid*, at [23] as per Gault P.

⁷¹ *Ibid*, at [24].

The Court of Appeal stated that it was not possible to develop protocols of rules as to what may or may not amount to dealing with each other in good faith.⁷²

Given the varying views and reasons of the judicial team responsible for the *Coutts* decision and the subsequent and arguably inconsistent case law such as the judgements of *CCH* decision and *ACC* decision during this period, it is no wonder that uncertainty remained as to the extent and timing of any obligation to consult with affected employees in a potential redundancy situation.⁷³

II ERA 2000 and the 2004 Amendments

The 2004 amendments to the ERA as outlined in chapter three marked legislative clarification in respect of justification as well as a significant expansion of the duty of good faith. In accordance with the definition of consultation mentioned earlier in this chapter, the expanded definition of the duty of good faith expressly imposed a minimum standard of consultation through s 4 (1A).⁷⁴ Arguably, the expansion of the duty of good faith was intended to reflect the duty in terms of the analysis as outlined in the dissent of McGrath J.⁷⁵

As discussed in the chapter seven, the decision in *Simpsons Farms*⁷⁶ confirmed that the new legislative provisions did not change the principles of law surrounding substantive

⁷² Ibid, at [25].

⁷³ For discussion on the case law under the ECA and early ERA see: J Hughes, P Roth and G Anderson, above n 23, at [4.32C].

⁷⁴ For general discussion on consultation post the 2004 amendments see: Anderson and others, above n 31, at [ERA103.50]; J Hughes, P Roth and G Anderson, above n 23, at [4.32D]; G Anderson, J Hughes, P Roth and M Leggat, *Employment Law: A Practical Guide* (LexisNexis New Zealand Limited, Wellington, 2010) at [18.70]; P Bartlett, W Hodge, P Muir, C Toogood, R Wilson, *Brookers Employment Law* (online loose-leaf ed, Brookers) at [4.03]; G Anderson, J Hughes, M Leggat, P Roth, *LexisNexis Employment Law Guide* (7th ed, LexisNexis, Wellington, 2005) at [ER103.49B].

⁷⁵ J Hughes, P Roth and G Anderson, above n 23, at [4.32D].

⁷⁶ *Simpsons Farms Limited v Aberhart* [2006] ERNZ 825.

justification but did affect the procedural requirements of which consultation forms a part. Specifically, the Employment Court in this case held that, given the amendments to the ERA, consultation was to be “mandatory in all cases”.⁷⁷

In determining this, the Employment Court noted that the new s 4 made an express stipulation that the parties to an employment relationship must deal with each other in good faith which not only included the obligation to restrain from behaviour which is or is likely to mislead or deceive the other party to the employment relationship,⁷⁸ but also extends the duty to go beyond the implied mutual term of trust and confidence, requiring all parties to be “active and constructive in establishing and maintaining a productive employment relationship” in which the parties were required to be “responsive and communicative”.⁷⁹

Furthermore, and in specific reference to s 4 (1A) (c), Chief Judge Colgan stated that:⁸⁰

‘...the law 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 an employee, to provide to that employee access to information, relevant to the continuation of the employee’s employment, about the decision and an opportunity to comment on the information to the employer before the decision is made’.

Given the earlier literal definition of consultation, this expanded duty clearly conforms to this and outlines the express legislative expectation now placed on employers in respect of the procedural obligation to consult.⁸¹

Additionally, the determination in *Simpsons Farms* neatly summarised the principles of law in relation to the application of consultation under the ERA. This involved a reiteration of

⁷⁷ Ibid, at [60] as per Chief Judge Colgan.

⁷⁸ See part E, IV of this chapter regarding the concept of misleading and deceptive conduct in relation to consultation.

⁷⁹ *Simpsons Farms Limited v Aberhart*, above n 76, at [34] as per Chief Judge Colgan.

⁸⁰ Ibid, at [35].

⁸¹ Ibid.

much of the pre-existing law relating to consultation; however these principles were strengthened by the requirements of s 4.⁸² In doing so the Employment Court also reemphasised the point that consultation does not require ultimate agreement reaffirming Chief Judge Goddard's comments in the *Cammish* case.⁸³ The fundamental principles of consultation were outlined as follows:⁸⁴

- 'Consultation requires more than a mere prior notification and must be allowed sufficient time. It is to be a reality, not a charade. Consultation is never to be treated perfunctorily or as a mere formality.
- If consultation must precede change, a proposal must not be acted on until after consultation. Employees must know what is proposed before they can be expected to give their view.
- Sufficient precise information must be given to enable the employees to state a view, together with a reasonable opportunity to do so. This may include an opportunity to state views in writing or orally.
- Genuine efforts must be made to accommodate the views of the employees. It follows from consultation that there should be a tendency to at least seek consensus. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done.
- The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew'.

These principles⁸⁵ in relation to consultation have consistently been applied in subsequent cases.⁸⁶

E Application of the 2004 Amendments

I Timing of Consultation

Prior to the introduction of the ERA there was uncertainty regarding precisely at what point any duty to consult actually commenced. With the enactment of the ERA, this point

⁸² Ibid, at [62].

⁸³ Ibid, at [63].

⁸⁴ Ibid, at [62].

⁸⁵ For full discussion on these principles see: J Hughes, P Roth and G Anderson, above n 23, at [4.32B].

⁸⁶ For example see *HP Industries (New Zealand) Limited v Davison*, above n 5, at [12].

appeared to be clarified by the express words in s 4 (1A) (c).⁸⁷ Specifically, the legislation states that the duty arises when the employer is ‘proposing’ to make a decision that is or is likely to have an adverse effect on one or more employees’ continued employment. Therefore, the formation of a proposal becomes the trigger point at which consultation needs to be provided. However, the ERA did not define what was meant by the term ‘proposal’ and therefore the judiciary was left to clarify its meaning.

Although not a case concerning redundancy, in *Commerce Commission v Fletcher Challenge*⁸⁸ (*Fletcher Challenge*), Judge McGechan considered the meaning of the term proposal⁸⁹ in relation to the Commerce Act 1986 expressing the view that:⁹⁰

‘...to amount to a “proposal”, things must have gone some significant distance....It is something which is put forward. It need not be a concluded enforceable contract. It may not yet be fully detailed, and it may still be in the balance or worse. However, it is something sufficiently formulated and determined to be put up for clearance and ultimately implemented. It is not something still a vague and unsettled notion. It is not something which is still merely under discussion, undecided. It has moved on past the discussion stage to a stage of formulation and acceptance’.

The term ‘proposal’ was however, expressly considered by the Employment Court in 2003, in the case of *New Zealand Public Service Association Incorporated v Auckland City Council*.⁹¹ Although not expressly citing the *Fletcher Challenge* case, the Court’s approach to the term was consistent with the definition. The council had been involved in a number of discussions with some consultants that they had hired. The Court held that these conversations were merely informational with the council having no obligation to act on them.⁹² Consequently, at

⁸⁷ For general discussion on the application of the 2004 amendments to the ERA see: Anderson and others, above n 31, at [ERA103.50]; J Hughes, P Roth and G Anderson, above n 23, at [4.32D].

⁸⁸ [1989] 2 NZLR 554, at 608.

⁸⁹ For discussion on the meaning of the term ‘proposal’ see: P Churchman, C Toogood and M Foley, above n 22, at [ER418].

⁹⁰ *Commerce Commission v Fletcher Challenge*, above n 88, at 608.

⁹¹ (Employment Court, Auckland AC22/03, 21 March 2003, Chief Judge Goddard and Judges Travis and Colgan).

⁹² *New Zealand Public Service Association Incorporated v Auckland City Council*, above n 91, at [87]. See also *Simpsons Farms Limited v Aberhart*, above n 76, at [62].

the time in question there was no proposal.⁹³ However, the Court held that the council had failed to comply with their duty of good faith as they did not consult as soon as these discussions became sufficiently formulated to be deemed proposals.⁹⁴

The enactment of the 2004 amendments appears to have codified the approach to the timing and content of consultation as advocated in the ECA decision in the *CHH* case. In *HP Industries (New Zealand) Limited v Davison*⁹⁵ (*HP*), Judge Shaw stated:⁹⁶

‘Generally when a restructure takes place there will have been at least two points at which decisions are made: first, where a review of the business leads to a decision that a restructure is necessary and second, the resulting decisions about how a restructure is to be implemented. At each of these stages the decision is likely to have an adverse effect on the continuation of the employment of employees and this gives rise to the employer’s obligation to give information about the decision and an opportunity for the employee to comment on that information.’

Arguably, this approach to consultation raises questions about continued supremacy of the managerial prerogative. To reiterate, historically there has been some confusion in respect of the extent of the obligation to consult. This uncertainty concerned whether the duty to consult merely relates to how a managerial decision is to be implemented as encapsulated in *Hale*, or whether it also includes the initial substantive business decision which might result in one or more redundancies.

Clearly the dicta in the *HP* case supports the later interpretation that due to the legislative definition encapsulated in s 4 (1A) (c) at both the initial decision phases and the subsequent implementation phase there is a proposal of some kind that will or is likely to have an adverse effect on the continuation of one or more employees’ employment. Therefore consultation at both these points becomes a legislative requirement.

⁹³ *New Zealand Public Service Association Incorporated v Auckland City Council*, above n 91, at [87].

⁹⁴ *Ibid*, at [93]. The discussion in respect of the term proposal was not effected on appeal. However, the substantive decision was.

⁹⁵ *HP Industries (New Zealand) Limited v Davison*, above n 5.

⁹⁶ *Ibid*, at [11].

However, it is debatable as to how this interpretation fits with the current approach of the judiciary to the supremacy of the managerial prerogative. If the sentiments of *Hale* are still to be believed, that “a reasonable employer cannot be expected to surrender the right to organise his own business”,⁹⁷ then arguably consultation regarding the actual substantive decision to engage in “automation, abandonment of unprofitable activities, re-organisation, or other cost saving measures”⁹⁸ weakens the ascendancy of the employers’ right to manage.⁹⁹

Although as noted in relation to the definition of consultation, agreement is not a prerequisite of genuine consultation, arguably evidence indicating that the employer has considered views, and some form of explanation of actions given the views expressed, must be required. Therefore the power of the managerial prerogative is not absolute and to some extent the need for demonstrable good managerial practice must be required.¹⁰⁰ In the case of *Duncan*,¹⁰¹ Judge Couch noted that effective consultation required three elements to be satisfied. These elements were:¹⁰²

‘...firstly, the provision of sufficient information to fully appreciate the proposal being made and the consequences of it and, secondly, an opportunity to consider that information, and thirdly, a real opportunity to have input into the process before a final decision is made’.

These elements needed to be satisfied “before any decisions were taken which would affect [the employees’] employment”.¹⁰³ This limitation on the managerial prerogative seems to provide greater support for the notion that a procedural element such as consultation or lack

⁹⁷ *G N Hale & Son Limited v Wellington, etc, Caretakers, etc IUW*, above n 34, at 156 as per Cooke P.

⁹⁸ *Ibid*, at 155 as per Cooke P.

⁹⁹ This point was expressly made in the dissent of Thomas J in *Aoraki*. Specifically see *Aoraki Corporation Limited v McGavin*, above n 37, at 631 where Thomas J states when considering the employers obligation of fair dealing in relation to consultation: “whether consultation, not as to the redundancy for that is the management’s prerogative, but as to the pending impact of the redundancy and the measures to be taken to mitigate that impact is practicable and necessary to ensure fair treatment for the employee..”.

¹⁰⁰ The need to be able to show good managerial practice is discussed in more detail in chapter nine.

¹⁰¹ (Employment Court, Christchurch, CC19/09, 20 November 2009, Judge Couch).

¹⁰² *T & L Harvey Limited v Duncan*, above n 101, at [36].

¹⁰³ *Ibid*, at [35].

of it must influence the determination as to whether a decision to make an employee redundant is in fact genuine. However, as discussed in chapter thirteen regarding substantive justification, the scope for judicial assessment as to genuineness seems somewhat limited.¹⁰⁴

Arguably, the interpretation of the extent and timing of consultation in the *HP* case aligns well with the *Air New Zealand*¹⁰⁵ decision concerning the interpretation of s 103A and the test for justification, being that justification requires an examination of all the employer's actions.¹⁰⁶ Consultation surrounding the substantive business decision rather than merely the implementation of such a decision, gives support to the notion that the strength and associated judicial application of the managerial prerogative as epitomised in *Hale* may require review.¹⁰⁷

II Extent of the Application

The provisions encapsulated within the amended ERA impact on the way employers approach a decision to make one or more employees redundant. The ERA makes consultation a clear obligation and the onus is placed directly on the employer to undertake it.¹⁰⁸ Such an obligation is supported by not only the express provisions of the ERA but also its underlying ideology to not only build but also maintain a productive employment relationship in a more equal environment.¹⁰⁹ The consultation requirements arguably recognise the importance of continued employment for all parties to an employment

¹⁰⁴ In particular, see the discussion in chapter six, part B, II.

¹⁰⁵ *Air New Zealand v V* (Employment Court, Auckland, AC15/09, 3 June 2009, Chief Judge Colgan and Judges Travis, Shaw and Couch).

¹⁰⁶ See *Jinkinson v Oceana Gold New Zealand Limited* [2010] NZEmpC 102 (this case has been granted leave to appeal) and *Wang v Hamilton Multicultural Services Trust* [2010] NZEmpC 142.

¹⁰⁷ See the discussion regarding this point in part IV of chapter seven.

¹⁰⁸ *Simpsons Farms Limited v Aberhart*, above n 76, at [35].

¹⁰⁹ Section 3 (a) (ii) of the ERA.

relationship. Specifically employees have a significant investment in their continued employment and are potentially likely to suffer both losses and insecurity as a result of termination. Therefore, employers must adjust their processes to gain genuine employee involvement.¹¹⁰

Simpsons Farms provides a useful illustration of this point.¹¹¹ Based on the evidence in this case, the Employment Court held that the respondent had not been consulted: rather he had merely been informed of what was going to happen. Specifically, the respondent, once aware of his situation, proposed that he be trialed in the newly created position to ascertain whether he would be suitable. The idea was rejected immediately with no consideration.¹¹² Although the Employment Court held that the appellant was not bound by any proposal,¹¹³ it went on to note: “The principles of consultation now accepted by SFL’s counsel required open-minded consideration by the employer and not an immediate rejection that indicated a closed mind, if not predetermination”.¹¹⁴ *Simpson Farms Limited* was also found to have failed to act in good faith regarding consultation concerning consideration of alternative options to redundancy.¹¹⁵

Although consultation is now clearly a statutory requirement, in certain circumstance the degree of the obligation to actively consult varies depending on the presence or absence of certain factors. These factors which can influence the degree of consultation required in any determination include, but are not limited to, the size of the organisation,¹¹⁶ the number of

¹¹⁰ Anderson and others, above n 31, at [ERA103.50].

¹¹¹ This point is discussed in: Anderson and others, above n 31, at [ERA103.50].

¹¹² *Simpsons Farms Limited v Aberhart*, above n 76, at [70].

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ Redeployment is considered in detail in chapter ten.

¹¹⁶ See for example: *Holmes v Ken Rintoul Cartage and General Contractors Limited* (Employment Court, Auckland, AC57/02, 4 September 2002, Judge Travis). In this case the Court noted that as the organisation was a small operation there was a clear obligation to conduct proper consultation with the affected employee. See also *McGuire v Rubber Flooring (New Zealand) Limited* (Employment Court, Auckland, AC9/06, 2

employees affected¹¹⁷ and their respective length of service,¹¹⁸ the seniority of the employee concerned¹¹⁹ as well as whether the employee is within the business or on leave at the time of the consultation.¹²⁰

F ERA and its Exceptions

It is clear that reasonable requests for information under the ERA must be granted.¹²¹ As noted in the *Air New Zealand*¹²² case in respect of good faith and grievances the Employment Court noted that the provisions in s 4 were intended to:¹²³

‘reflect the Act’s general emphasis upon open exchanges of relevant information and appropriate participation in decision making by offering opportunities to add to or contradict relevant information before decisions are made affecting employment relationships’

However, the ERA expressly provides in s 4 (1B) an exception to the requisite provision of information. Specifically it states that the employer is not required to comply with s 4 (1A) (c) and provide access to confidential information “if there is good reason to maintain the

March 2006, Judge Travis) where the Employment Court noted that the workforce was so small that proper consultation should have taken place.

¹¹⁷ See for example, *Holmes v Ken Rintoul Cartage and General Contractors Limited*, above n 116. In this case the Court noted that as there was only one affected employee there was a clear obligation to conduct proper consultation with that employee.

¹¹⁸ See for example: *McGuire v Rubber Flooring (New Zealand) Limited*, above n 116. The Employment Court in this case noted that as the plaintiff was the ‘sole long serving employee’ proper consultation should have taken place. See also: *Dymocks Franchised Systems (New Zealand) Limited v Robson* (Employment Court, Auckland, AC80/01, 4 December 2001, Judge Shaw).

¹¹⁹ See for example: *Coutts Cars Limited v Baguley*, above n 43, at [44]. In this case the Court of Appeal noted that as the affected employee held a relatively low level position, the extent of consultation had to be realistically assessed.

¹²⁰ Parental leave is a good example of this point. See for discussion *Lewis v Greene* [2004] 2 ERNZ 55. See also N Whittfield and P McBride, “Parental Leave and Redundancy – A Whole Different Ball Game?” [2005] 2 Employment Law Bulletin 23.

¹²¹ See for example: *Simpsons Farms v Aberhart*, above n 76, at [8]; *Harris v Charter Trucks Limited* (Employment Court, Christchurch, CC16/07, 11 September 2007, Judge Couch) at [76] – [77].

¹²² *Air New Zealand v V*, above n 105.

¹²³ *Ibid*, at [48] as per Chief Judge Colgan, and Judges Travis, Shaw and Couch.

confidentiality of the information”. The term good reason is expressly defined in subsection 4 (1C) as:

Section 4 (1C)

For the purposes of subsection (1B), good reason include –

- (a) complying with statutory requirements to maintain confidentiality;
- (b) protecting the privacy of natural persons;
- (c) protecting the commercial position of an employer from being unreasonably prejudiced.

The definition of “good reason”¹²⁴ was inserted into the ERA through the select committee process when considering the 2004 amendments. Again, in an attempt to balance the interests of the respective parties to the employment relationship, there were concerns that in some circumstances an absolute requirement to disclose information might have a negative effect on workplace relations, increase costs, litigation or undermine other business decisions such as the sale or transfer of the business.¹²⁵

In *Charter Trucks*,¹²⁶ the Employment Court considered the application of ss 4 (1B) and 4 (1C). Specifically, the respondent in this case had not disclosed to the appellant that they were about to lose a major contract which if disclosed would have helped the appellant to understand why the restructure was in fact needed. Rather the respondent believed that this information was confidential and therefore disclosure was not necessary.¹²⁷ The Employment Court stated in respect of the application of ss 4 (1B) and 4 (1C) that:¹²⁸

‘...the test is under subsections (1B) and (1C) is not the subjective belief of the employer. Rather, in a case such as this, the test is whether the commercial position of the employer would have been unreasonably prejudiced by the disclosure. That is an objective test’.

¹²⁴ For specific discussion on the exceptions see: Anderson and others, above n 31, at [ERA4.11B].

¹²⁵ See Anderson and others, above n 31, at [ERA4.11B]. In *Mazengarb* the Employment Relations Law Reform Bill, as reported from the Transport and Industrial Relations Committee, is cited at page 4.

¹²⁶ For a brief discussion on consultation requirements associated with this case see: J Douglas, “Good Faith Builds Productive Relationships” 2010 (March) New Zealand Business Magazine 61.

¹²⁷ *Harris v Charter Trucks Limited*, above n 121, at [74].

¹²⁸ *Ibid.*

Therefore it was held that the respondent in *Charter Trucks* should have disclosed this information to the appellant. Failure to do so meant that the respondents failed to meet the statutory requirement in respect of consultation.¹²⁹

G *Misleading and Deceptive Conduct*

Leading from this analysis, although good faith requires disclosure, the conduct of the parties and the information disclosed must not be, or be capable of being, misleading or deceptive. Arguably this concept of not engaging in conduct that is, or is likely to, mislead or deceive has always been apparent in employment law through the mutual obligation to maintain trust and confidence.¹³⁰ However, its application within judicial determinations has arguably only really become significant through the inception of the ERA¹³¹ and more specifically the definition of good faith through s 4. If affected employees are misled or deceived through discussions or by the provision of inaccurate information about aspects of the employer's substantive decision or the procedural processes associated with such a decision's implementation, they cannot effectively have a real opportunity to engage in consultation. It goes without saying that it is impossible for an affected employee to effectively and meaningfully discuss information of which they are unaware. Therefore any decision or process where this occurs is likely to be unfair, and as a result of this, unreasonable.

¹²⁹ Another useful illustration of the interpretation of these exceptions is seen in the case of *Nee Nee and Ors v TVNZ Auckland Limited* (Employment Court, Auckland, AC13/06, 16 March 2006, Judge Travis). This case is discussed in detail in chapter eight.

¹³⁰ See discussion in chapter three on this concept.

¹³¹ There are some judicial determinations prior to the ERA that have highlighted conduct and the lack of information in redundancy situations as being deceitful. See for example: *Hildred v Newmans Coach Lines* [1992] 3 ERNZ 165. In this case the Employment Tribunal held that the employers conduct was deceitful, when it advised the plaintiff that it was the restructure that led to his redundancy rather than the real reason, which was his performance. There are also a number of Employment Court decisions on ss 9 and 12 of the Fair Trading Act 1986 in relation to redundancy situations. See for example: *Ali v Savoy Capital Limited* [1999] 2 ERNZ 921; *D E Soysa v Porirua College Board of Trustees* [1996] 1 ERNZ 538.

Judicial determinations have applied this reasoning in cases such as, but not limited to, where decisions have been predetermined,¹³² where affected employees have not been advised of the true reasons behind a restructure¹³³ and in cases where the affected employees are not advised of the true selection process¹³⁴ or alternatively the real reason as to why they were the employees selected¹³⁵ for redundancy.¹³⁶

H Real Consultation in Certain Circumstances

According to the legislation and its subsequent interpretation, consultation is now mandatory. Although consultation does not require agreement it must be “a reality not a charade”.¹³⁷ However, realistically there are certain situations, where consultation would not change the inevitable outcome of redundancies. In such situations any statutory requirement to consult could arguable result in a charade.¹³⁸ A useful illustration of this point is where there is a complete failure of a company.¹³⁹ Although the right to consultation exists, in the majority of cases it will be of little value to the affected employees. Perhaps the only exception to this

¹³² See for example the case of *McGuire v Rubber Flooring (New Zealand) Limited*, above n 116.

¹³³ See for example the case of *Harris v Charter Trucks Limited*, above n 121.

¹³⁴ See for example the case of *Solid Energy New Zealand Limited v Manson and Ors* (Employment Court, Christchurch, CC21/09, 15 December 2009, Judge Couch) at [33].

¹³⁵ In this scenario performance is one of the most common reasons for none selection. For an example of this see the case of *Kozub v ABC Motor Group Limited* (Employment Court, Auckland, AC31/03, 23 April 2003, Judge Travis). This case is discussed in: G Anderson and J Hughes, “ER Act – Personal Grievances – Redundancy – Was Redundancy Genuine? – Notice Periods and Holiday Entitlements” [2003] 6(1) Employment Law Bulletin 86-89. The topic of performance in relation to selection is discussed in greater detail in part C, III, b of chapter nine.

¹³⁶ For discussion on judicial determinations which have held conduct has been misleading and/or deceptive see: J Hughes, P Roth and G Anderson, above n 23, at [4.32D].

¹³⁷ *Cammish v Parliamentary Services*, above n 17, at 417 as per Chief Judge Goddard.

¹³⁸ M Richards and N Belton, “Section 103A, Redundancy, and *Simpson’s Farms*” [2007] 5 Employment Law Bulletin 80.

¹³⁹ For discussion on the duty of good faith when a company has taken voluntary administration see: A Drake, “Unchartered Territory – Obligation of Good Faith During Voluntary Administration” [2009] 2 Employment Law Bulletin 33.

assertion would be where the circumstances are such that residual work can be given to the affected employee for the duration of the receivership.

Case law has historically also suggested that in certain situations, for example, where there were mass redundancies or where urgency was required, consultation might not be practicable.¹⁴⁰ Where urgency or mass redundancies are required, it is likely that the status quo has significant risk to the employer and by implication so too for the employees of that organisation. Changes may be required immediately for business survival. Arguably, although not explicit in case law, the judiciary has attempted to balance the rights of the effected parties to the employment relationship by not making consultation mandatory in all cases. There is a possibility that in certain circumstances enforced consultation will cause delays and create further risks of financial loss and redundancies as well as question the reality of any such consultation. It remains to be seen how the judiciary balance the legislative right to genuine consultation, the overarching managerial prerogative and in some cases the economic reality of a failing organisation within the current statutory framework.

A useful example of the complexity associated with enforcement of mandatory consultation in all cases is the decision in the *New Zealand Air Line Pilots Association Incorporated v JetConnect Limited*¹⁴¹ (*JetConnect*).¹⁴² This case arose out of a decision by Qantas Australia (the Australian parent company) to cease operation of its New Zealand subsidiary JetConnect within the domestic New Zealand market and replace it with another one of its subsidiaries, JetStar. This decision was announced on the Australian Stock Exchange (ASE) before there was any consultation or even advice given to the affected employees or their

¹⁴⁰ See for example: *Aoraki Corporation Limited v McGavin*, above n 37, at 618; *Coutts Cars Limited v Baguley*, above n 43, at [83].

¹⁴¹ (Employment Court, Auckland, AC23/09, 27 May 2009, Chief Judge Colgan).

¹⁴² For discussion on this case see: S Hornsby-Geluk, "Statutory Duties of Good Faith and Consultation" 2009 August/ September Human Resources Institute of New Zealand Magazine 12-13 ["Statutory Duties"]. See also: S Hornsby-Geluk, "Managing Organisational Change – Legally" (The Human Resources Institute of New Zealand Conference Engaging Change 2009, Wellington Convention Centre, Wellington, 2-4 December 2009) 6-7 ["Managing Organisational Change"].

representatives.¹⁴³ However, consultation with affected staff and their representatives commenced immediately after the decision was publicly announced on ASE to which all parties engaged in meaningful discussions.¹⁴⁴ It was not until some months later that the union raised questions about the unlawfulness of the actual decision which was announced on ASE, specifically that the employer breached s 4 (1A) (c) of the ERA.¹⁴⁵ At the time of this challenge the respondents had made significant and costly steps to implement their decision.¹⁴⁶

As already discussed, the enactment and subsequent interpretation of the 2004 amendments require consultation at two points in a restructuring process. Firstly at the point prior to the decision being made when the proposal is formulated and secondly regarding how any subsequent decision is implemented.¹⁴⁷ In *JetConnect*, consultation did not take place regarding the actual decision, rather it was announced on ASE without consultation with the affected employees. The reason for this was that the decision was not made by JetConnect but by Qantas in Australia. Consequently, consultation took place regarding how the decision would impact on the affected employees and what options were available to those affected.¹⁴⁸ It was argued that JetConnect should have engaged in consultation about the actual decision prior to its announcement as effectively JetConnect, JetStar and Qantas were the same corporate entity.¹⁴⁹ Therefore, the question the Employment Court needed to address was whether a decision to restructure, made by an overseas parent company, that

¹⁴³ *New Zealand Air Line Pilots Association Incorporated v JetConnect Limited*, above n 141, at [11].

¹⁴⁴ *Ibid*, at [14].

¹⁴⁵ *Ibid*, at [15].

¹⁴⁶ *Ibid*, at [16].

¹⁴⁷ See discussion on the *HP* case in part E, I of this chapter.

¹⁴⁸ S Hornsby-Geluk, "Statutory Duties", above n 142, at 12.

¹⁴⁹ *Ibid*.

impacts on a New Zealand subsidiary, actually faces the same consultation requirements as that of a solely New Zealand owned and operated company?¹⁵⁰

The actual decision to restructure the operations of Qantas's two subsidiaries was only one part of a major re-positioning of the parent company within the Asia Pacific region, which was made in a highly sensitive commercial environment governed by additional overseas statutory requirements.¹⁵¹ Realistically, any consultation regarding the actual decision was unlikely to change it and therefore JetConnect, as the New Zealand employer was faced with two options. These options were either to conduct a sham consultation regarding the actual decision which it knew would not change the parent company's decision, or alternatively hold meaningful consultation in good faith regarding the implementation of such a decision. This latter option was undertaken. The Employment Court considered the arguments of both parties and suggested that even if the affected employees had been given such an opportunity to consult about the decision, it was "unlikely that Qantas would have been persuaded to do other than it did..".¹⁵² The Employment Court went on to state that:¹⁵³

'The plaintiffs' entitlement in law, both under statute and contractually, is at best to know about, and have an opportunity to affect by submission or negotiation, what the employer intends to do that may affect the employment of pilots. There is no statutory or contractual right asserted by the plaintiffs, at least following consultation, that might require Qantas to make a different commercial decision. While such rights as the plaintiffs have about how restructuring is implemented are determinable particularly by reference to the collective agreement, the plaintiffs have no ultimate and decisive role in how Qantas operates its business in the manner announced on 17 February'.

One author cites this decision as an exemplification of "how the statutory duties of good faith and consultation do not exist in a vacuum"¹⁵⁴ and that "there is scope to argue that the extent

¹⁵⁰ Ibid.

¹⁵¹ *New Zealand Air Line Pilots Association Incorporated and Another v JetConnect Limited and Others*, above n 141, at [23]. See also: S Hornsby-Geluk, "Statutory Duties", above n 142, at 13.

¹⁵² *New Zealand Air Line Pilots Association Incorporated and Another v JetConnect Limited and Others* above n 141, at [30].

¹⁵³ Ibid, at [31].

¹⁵⁴ S Hornsby-Geluk, "Statutory Duties" above n 142, at 13. See also: S Hornsby-Geluk, "Managing Organisational Change", above n 142, at 7.

and timing of consultation may be up for debate, depending on the commercial sensitivity of the market and the corporate structure of the employer group of companies”.¹⁵⁵

Although the sentiments of the Employment Court in *JetConnect* conform to the definition of consultation as outlined at the beginning of this section they also reinforce managerial prerogative. Therefore the decision, although highly fact specific, arguably does not necessarily fit well with other ERA decisions which, as discussed, potentially weaken the strength of the managerial prerogative.¹⁵⁶ It also highlights that mandatory consultation is not enforceable in all situations and at all times irrespective of explicit judicial statements pronouncing it. As a result of this, some uncertainty regarding the actual obligation remains.¹⁵⁷

I Proposed Reform and International Obligations

In relation to consultation, the Advisory Group Report on Restructuring and Redundancy¹⁵⁸ expressly recommended: “That the consultation provisions required in case law between

¹⁵⁵ Ibid.

¹⁵⁶ See the discussion in part E, I of this chapter.

¹⁵⁷ It is important to note that the Department of Labour has produced a number of guides and factsheets to assist both employers and employees with procedural requirements in a redundancy situation. See: Department of Labour, “Disciplinary Action, Dismissal, Redundancy and Ill Health: Guide for Employees” (August 2009). A copy of this guide can be accessed as: <<http://ers.govt.nz/publications/pdfs/discipline-guide-employere.pdf>>; Department of Labour, “Disciplinary Action, Dismissal, Redundancy and Ill Health: Guide for Employers” (August 2009). A copy of this guide can be accessed as: <<http://ers.govt.nz/publications/pdfs/discipline-guide-employer.pdf>>; Department of Labour, “Guide to Restructuring” (18 June 2010). A copy of this guide can be obtained from <<http://www.ers.dol.govt.nz/redundancy/guide-restructuring.html>>; Department of Labour, “Fact Sheet: Information for Employees about Redundancy” (17 December 2008) <<http://ers.govt.nz/redundancy/employer-print.html>>; Department of Labour, “Fact Sheet: Information for Employers about Redundancy” (17 December 2008) <<http://ers.govt.nz/redundancy/employer-print.html>>.

¹⁵⁸ *Report of the Public Advisory Group on Restructuring and Redundancy* (Prepared for the Ministers of Labour, Social Development and Employment and Economic Development, 30 June 2008).

employers and workers in restructuring and redundancy situation are codified".¹⁵⁹ Although the unsuccessful Employment Relations (Statutory Minimum Redundancy Entitlements) Amendment Bill essentially attempted to formalise the recommendations made by the Advisory Group, it was silent in respect of consultation.¹⁶⁰ This could have been due to the fact that there remains some uncertainty in respect of the precise consultation obligations encapsulated in the common law.

In relation to international obligations, s 4(1A) in respect of consultation requirements complies with both the international Termination of Employment Convention and associated Recommendation.¹⁶¹

The 2010 amendments to the ERA do not specifically address the issue of consultation in relation to redundancy situations.¹⁶²

¹⁵⁹ See Recommendation 9 in Part Four of the *Report of the Public Advisory Group on Restructuring and Redundancy* (Prepared for the Ministers of Labour, Social Development and Employment and Economic Development, 30 June 2008) 48-50. A copy of the recommendations made by the Advisory Group is contained in appendix four.

¹⁶⁰ See appendix five for a copy of the Employment Relations (Statutory Minimum Redundancy Entitlements) Amendment Bill.

¹⁶¹ See C158 Termination of Employment Convention 1982, article 13 and R166 Termination of Employment Recommendation 1982, s 20. A copy of this Convention and Recommendation are contained in appendix two.

¹⁶² The 2010 amendments to the ERA are discussed in chapter fifteen.

Chapter Nine

A Subjective View - Procedural Fairness and Selection

A selection process in a redundancy situation only takes place when an employer has decided that they would like to reduce the number of similar positions within its organisation. A selection process therefore needs to take place involving the employees who carry out the work associated with those positions (often termed the selection pool).¹ This will determine which employees will remain within the organisation and those that are to be made redundant.²

Given this, selection processes can be perceived by employees as more of a reapplication for their existing role, rather than part of a wider redundancy process. The individual's position may not necessarily be redundant; it all depends on the selection process. Therefore, from the employee's perspective, it is hard to reconcile the notion that it is the position that is redundant rather than the person.³ As Chief Judge Goddard so aptly stated in respect of selection processes:⁴

'Effectively, what takes place is not a selection for redundancy but a process under which employees are required to apply all over again for the positions they already hold, with the employer regarding itself as at liberty to grant or withhold their application'.

¹ K Daniels, "Factsheet: Redundancy" (Chartered Institute of Personnel and Development, October 2010) <<http://www.cipd.co.uk/subjects/emplaw/redundancy/redundancy.htm>>.

² S Hornsby-Geluk, "Managing Organisational Change – Legally" (The Human Resources Institute of New Zealand Conference Engaging Change 2009, Wellington Convention Centre, Wellington, 2-4 December 2009) 9.

³ See the discussion on the definition of redundancy in chapter thirteen.

⁴ *Dunn v Methanex New Zealand Limited* (Employment Court, Wellington, WEC44/96, 22 July 1996, Chief Judge Goddard) 10.

Given this perception, it is no wonder that the selection process utilised is a key element in determining whether a decision to terminate an employee based on redundancy is justified.⁵

As Cooke P stated in *Hale*:⁶

‘I have no doubt that a dismissal for redundancy must be carried out by a fair procedure and that, on the facts of particular cases, this will extend to the manner of selecting the worker or workers declared to be redundant....’⁷

As with other aspects of procedural fairness, failure to follow a fair selection process can raise suspicions about the genuineness of the decision to make an employee redundant.⁸

A *Managerial Prerogative and its Limits*

In the absence of a specific contractual term concerning selection in a redundancy situation, the employer possesses wide discretion in regards to determining both the criteria for selection as well as its application.⁹ Although the discretion is wide, the exercise of this power must be carried out both “honestly and openly”.¹⁰ In theory the “prerogative does not

⁵ For general discussion on the selection process see: Anderson and others, *Mazengarb’s Employment Law*, (online loose-leaf ed, LexisNexis) at [ERA103.52A] [“*Mazengarb*”]; J Hughes, P Roth and G Anderson, *Personal Grievances* (online loose-leaf ed, LexisNexis) at [4.35] [“*Personal Grievances*”]; P Bartlett, W Hodge, P Muir, C Toogood, R Wilson, *Brookers Employment Law* (online loose-leaf ed, Brookers) at [ER103.22] [“*Brookers Employment Law*”]; P Churchman, C Toogood and M Foley, *Brookers Personal Grievances* (online loose-leaf ed, Brookers) at [6.8.10] [“*Brooker PG*”]; G Anderson, J Hughes, P Roth and M Leggat, *Employment Law: A Practical Guide* (LexisNexis New Zealand Limited, Wellington, 2010) at [18.73] [“*A Practical Guide*”]; G Anderson, J Hughes, M Leggat, P Roth, *LexisNexis Employment Law Guide* (7th ed, LexisNexis, Wellington, 2005) at [ER103.51A] [“*Employment Law Guide*”].

⁶ *G N Hale & Son Ltd v Wellington, etc, Caretakers, etc, IUW* [1991] 1 NZLR 151.

⁷ *Ibid*, at 156.

⁸ For an illustration of this assertion see *Staykov v Cap Gemini Ernst and Young New Zealand Limited* (Employment Court, Auckland, AC18/05, 20 April 2005, Judge Travis). See also *Pahono v Vice Chancellor of the University of Auckland* (Employment Relations Authority, Auckland, A153/08, 24 April 2008, L Robinson (Member)) where the redundancy was held to be unjustified as the dismissal was not a result of a fair selection process rather than of poor performance. This case was discussed in: P Bartlett, W Hodge, P Muir, C Toogood, R Wilson, *Brookers Employment Law*, above n 5, at [ER103.22].

⁹ *Baguley v Coutts Cars* [2000] 2 ERNZ 409, at [58].

¹⁰ *Ibid*.

give the employer carte blanche to select employees on irrelevant grounds or without proper enquiry as to the employee's suitability".¹¹ Therefore, in selecting an employee to be made redundant, where there is such a choice to be made, the selection process must be carried out in a way that is fair, reasonable¹² and in good faith.

In adherence to managerial prerogative and these latter limitations, the judiciary have consistently reiterated¹³ the spirit of the words of Judge Colgan in *New Zealand Building Trades Union v Hawkes Bay Area Health Board*¹⁴ (*Building Trade*) that they will only interfere with managerial decisions where: "they may not have been made in good faith, without reference to relevant criteria, by reference to irrelevant criteria or the like".¹⁵ In the application of the selection process the Courts have expressly stated that: "it is not the role of the Court to reassess an employee's ranking – neither is it in any position to do so".¹⁶

Notwithstanding this, the Court in the case of *Dunn v Methanex New Zealand Limited*¹⁷ (*Dunn*) did however, outline four key principles regarding when the judiciary may re-examine an employer's assessment of an employee. These principles were as follows:¹⁸

- 'the employer has not formed the requisite opinion at all; or
- no reasonable employer could have formed the opinion that the skill or attribute relied on could render the employees selected for retention necessary for effective and efficient operations; or

¹¹ *Murfit v Centreport Limited* (Employment Court, Wellington, WC47B/99, 5 November 1999, Judge Shaw) 15.

¹² The requirement for the selection process to be both fair and reasonable has been expressed in numerous cases. For example see *Baguley v Coutts Cars*, above n 9, at [58]; *New Zealand Building Trades Union v Hawkes Bay Area Health Board* [1992] 2 ERNZ 897, at 913.

¹³ See for example *Baguley v Coutts Cars*, above n 9, at [58]; *Dunn v Methanex New Zealand Limited*, above n 4, at 8; *Stevenson v The Chief Executive of the Auckland University of Technology* (Employment Court, Auckland, AC68/01, 17 October 2001, Judge Shaw) 23.

¹⁴ [1992] 2 ERNZ 897.

¹⁵ *New Zealand Building Trade Union v Hawkes Bay Area Health Board*, above n 1, at 913.

¹⁶ *Dunn v Methanex New Zealand Limited*, above n 4, at 15 as per Chief Judge Goddard.

¹⁷ (Employment Court, Wellington, WEC44/96, 22 July 1996, Chief Judge Goddard).

¹⁸ *Dunn v Methanex New Zealand Limited*, above n 4, at 15 as per Chief Judge Goddard.

- the employer had no material known to it on which it could support its selection, such as if it closed its eyes to the facts through a failure to inform and inquire; or
- the employer's assessment has been influenced by wrong motives or a failure to consider relevant criteria or consideration of irrelevant criteria.'

These principles have been accepted and applied in subsequent case law.¹⁹

I Statutory Limitations

As with other areas of redundancy law, the managerial prerogative is constrained by the statutory provisions encapsulated in the ERA concerning personal grievances²⁰ as well as the express obligation of good faith.²¹

II Contractual Limitations

If the parties to an employment relationship have agreed within the applicable employment agreement an express process in relation to the selection of an employee(s) in a redundancy situation then that process must be followed.²² If a party to the agreement does not comply with the terms and conditions contained within it, it will be difficult, if not impossible, for the party who is not complying to assert that their actions were justifiable.²³ In respect of a contractual selection process, Judge Colgan succinctly noted in the case of *Priest and Ors v*

¹⁹ See for example: *Stevenson v The Chief Executive of the Auckland University of Technology*, above n 13, at 23.

²⁰ See part 9 of the ERA.

²¹ See ss 3 and 4 of the ERA. These provisions are discussed in greater detail in chapter three.

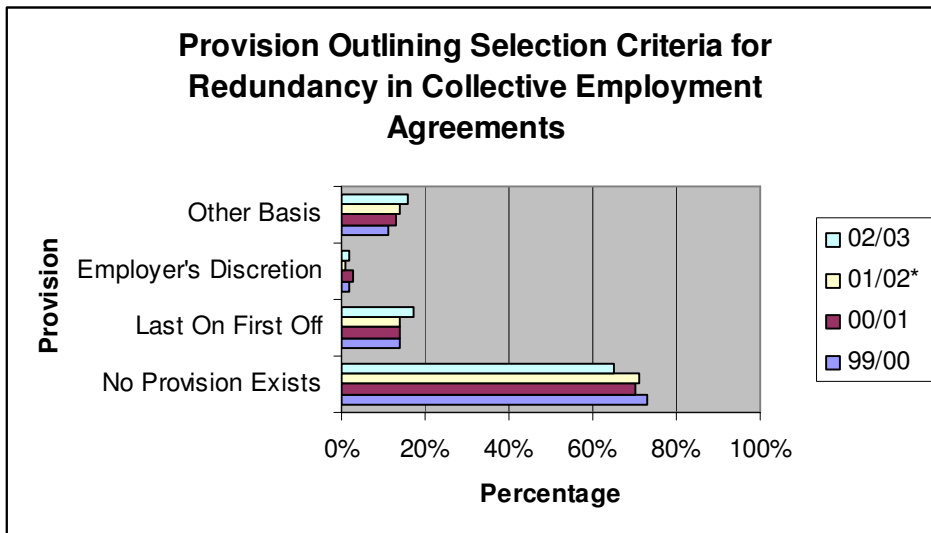
²² For an example of where the Court held that failure to follow a specified process contained in the affected employee's employment agreement amount to an unfair dismissal see: *Lane Walker Rudkin v Daymond*, (Employment Court, Christchurch, CEC46/98, 22 September 1999, Judge Palmer) 17.

²³ *Priest and Ors v Fletcher Challenge Steel Limited* (Employment Court, Auckland, AC81/99, 14 October 1999, Judge Colgan) 19.

*Fletcher Challenge Steel Limited*²⁴ (Priest): “No principle either replaces, or is superimposed upon, the clear and express provisions of the applicable contract”.²⁵

Up until 2003 the IRC collected data on selection provisions contained within collective agreements. As illustrated by figure four, very few organisations which were part of the data sample had a provision which expressly outlined the selection process in a redundancy situation.²⁶

Figure Four: Redundancy Selection Provision²⁷



As depicted by figure four, one common type of provision which the IRC felt warranted specific mention is that of the ‘last on first off’ clause which is based on the idea that the last

²⁴ (Employment Court, AC81/99, 14 October 1999, Judge Colgan).

²⁵ *Priest and Ors v Fletcher Challenge Steel Limited*, above n 23, at 14 as per Judge Colgan.

²⁶ This data is taken directly from the annual *Employment Agreements: Bargaining Trends and Employment Law Update* from the Industrial Relations Centre of Victoria University in Wellington. The specific annual publications and the limitations associated with the data are contained in appendix three.

²⁷ The symbol * indicates a need to review the limitations associated with this data. The limitations are outlined in appendix three.

employee to commence with an organisation should be the first to be made redundant.²⁸ This type of provision is traditionally found in private sector or local government employment agreements.²⁹

Although not represented in figure four, another form of selection provision which was analysed separately by the IRC was that of voluntary severance clauses. In 2003 approximately 22 per cent of agreements within the sample contained a clause relating to voluntary severance.³⁰ According to the IRC these clauses are typically configured in one of two ways. Predominantly, the most commonly used clause calls for volunteers once redundancies are deemed necessary. Alternatively, the second and less common approach is where employees can volunteer to take the place of another employee who has been selected for redundancy. The IRC also noted that most voluntary severance clauses provide the employer with the ultimate power to decide whether an application for voluntary severance will be accepted by the organisation, often as a way to preserve what are deemed to be valuable skills within the company.³¹ As with the 'last on first off clause', voluntary severance provisions are most common in the private and local government sectors.³²

B Certainty of Contract

Although it may be believed that a provision within an employment agreement provides all parties to the employment relationship with certainty in respect of the selection process, this is not always the case.

²⁸ R Harbridge, G Thickett and P Kiely, *Employment Agreements: Bargaining Trends & Employment Law Update 2000/2001* (Industrial Relations Centre, Victoria University of Wellington, 2001) 61.

²⁹ For a copy of the full IRC data see appendix three, part C.

³⁰ See appendix three, part C for the data relating to this type of clause.

³¹ R Harbridge, G Thickett and P Kiely, above n 28, at 62.

³² See appendix three, part C for a full copy of this data.

I Contractual Interpretation

As with any contract, subsequent interpretation can create results which may not have been perceived by the respective parties. Importantly, the case law concerning this area of redundancy law seems to allow managerial discretion as to the precise detail of broadly defined selection criteria within an employment agreement.

A useful example of this is the *Priest* case. The applicable employment agreement contained a clause which outlined selection criteria to be used for selecting an employee(s) for redundancy. The clause expressed the selection criteria to be the “skill, ability and experience”³³ of the employees. The appellants in this case were two of the dismissed employees who argued that in addition to these express criteria their employer took into account additional different considerations which were not contained in the employment agreement and that the parties had not agreed were relevant. Specifically the employer took into account the employees’ attitude, teamwork, motivation, and leadership potential. The employer stated that: “the overriding consideration in this process was the business’ need to maintain an effective workforce”.³⁴ The employer successfully argued in the Tribunal that the alleged additional criteria were merely a subset of the more broad selection criteria of skill, ability and experience as outlined in the employment agreement. The Employment Court in this case emphasised the need to comply with contractually agreed terms and conditions and provided a detailed analysis of the meaning of the broadly defined terms.³⁵ The Court found in favour of the employer, supporting the tribunal decision stating: “These were not extra contractual or irrelevant criteria applied by the employer. Rather, they were relevant and reasonable manifestations of those three broad criteria”.³⁶ The Court held that there was no requirement on the employer to negotiate regarding the selection criteria as they

³³ *Priest and Ors v Fletcher Challenge Steel Limited*, above n 23, at 20 as per Judge Colgan.

³⁴ *Ibid*, at 17.

³⁵ *Ibid*, at 23.

³⁶ *Ibid*.

were defined in the contract. Therefore, there was no need to consult. However the Court did note that if the specific criteria had not fallen within the broad criteria as defined by the contract, then a mutually agreeable variation of contract would have needed to be entered into.³⁷ The Court also stated that it did not agree with the employer that there was any “*overriding discretion* to select employees”³⁸ based on criteria that “would ensure an effective workforce in the future”³⁹ as this was not expressly authorised as criteria within the contract.⁴⁰

The case highlights that where there are contractual provisions regarding selection, they must be applied and complied with expressly. However, where selection criteria are defined broadly, it will allow greater managerial discretion in respect of the actual detailed criteria used within the selection process.

Notwithstanding the above points, it is important to note that, although an employer must comply with any agreed contractual terms in respect of selecting an employee(s) for redundancy, this compliance does not necessarily make the dismissal justified. There remains an overarching common law duty of fairness.⁴¹

II Duty of Fairness

The duty of fairness applies in addition to any contractual term regarding selection.⁴² Where a contract does not contain any provision relating to selection, it will, in conjunction with the

³⁷ Ibid, at 22.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ *Apiata v Telecom New Zealand Limited* (Employment Court, Auckland, AEC124/97, 28 October 1997, Judge Finnigan).

⁴² Ibid, at 9.

statutory requirements,⁴³ govern the process in relation to the determination and application of the selection criteria.

This assertion is supported by the case of *Apiata v Telecom New Zealand Limited*⁴⁴ (*Apiata*) where the Court held that Mr Apiata's situation (a redundancy situation) was "not solely governed by either the contract or by common law principles, but by both".⁴⁵ The Judge did acknowledge that the starting point in these situations is always the contract and that the normal principles of contractual interpretation are to be applied. However, the Judge went on to state that the next step is to consider whether the written terms contained within the contract are complete.⁴⁶ In this particular case the Court held that there was no express term stating that the parties were to treat each other fairly and therefore there needed to be a term to that effect implied.⁴⁷ Although the employer appeared to comply with its contractual requirements, it failed to comply with the duty of fairness. The Court held that the company had unfairly selected Mr Apiata for redundancy, as it failed to discuss the subjective assessments of Mr Apiata with him.⁴⁸ Specifically, Judge Finnigan noted:⁴⁹

'...what is fair about a subjective assessment of an employee's attributes behind closed doors without any opportunity for the employee to comment on those subjective assessments? The exercise should have involved, in the present case, telling Mr. Apiata what the individual assessments of him had been so that he could have the opportunity to object if he wished and in that case explain why he objected. The assessments were expressly the subjective assessments of the assessors, not objective assessments of objective criteria, as provided in other redundancy procedures that the Court has seen'.

⁴³ The statutory requirements are discussed in chapter three.

⁴⁴ (Employment Court, Auckland, AEC124/97, 28 October 1997, Judge Finnigan).

⁴⁵ *Apiata v Telecom New Zealand Limited*, above n 41, at 6 as per Judge Finnigan.

⁴⁶ *Ibid.*, at 7.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, at 7-8.

⁴⁹ *Ibid.*, at 9.

What is deemed fair and reasonable conduct will depend on the circumstances of each particular case.⁵⁰ In *Apiata* this was described simply as: “requiring the employer to act in a manner in which a fair and reasonable employer would act, or could act with a clear conscience”.⁵¹

C Elements of the selection process

I Selection Criteria

Although employers generally have a wide discretion in respect of determining what the selection criteria will be, this discretion is not omnipotent. In the *Dunn* case, Chief Judge Goddard stated:⁵²

‘The employer does not have a total free hand in nominating required qualities; for instance, the employer could not, by this means, require employees to be so self-effacing as to abandon their dignity as human beings or their natural aspirations as employees to advance their economic well being’.

In *Dunn* the appellant, Mr. Dunn, alleged that the selection process was unfair on three grounds. One of the grounds was that the actual selection criterion was unfair. Specifically, it was claimed that the employer was using “highly subjective selection criteria heavily weighed towards behaviour and attitudes”.⁵³ The applicable employment agreement stated that the criteria to be applied was that of “special skills or attributes”⁵⁴ which the company thought necessary for the “efficient and effective”⁵⁵ operation of the business. As in *Priest*, the employer argued that, although behaviour and attitude were not expressly included in the

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² *Dunn v Methanex New Zealand Limited*, above n 4, at 12.

⁵³ Ibid, at 4.

⁵⁴ Ibid, at 11.

⁵⁵ Ibid.

contract, they were implicit in the criteria regarding an efficient and effective operation, a point with which the Court duly agreed.⁵⁶

The main argument for the appellant centered on the fact that these elements were subjective. Taken literally, the term subjective means: “of pertaining to, or proceeding from an individual’s thoughts, views... derived from or expressing a person’s individuality or idiosyncrasy; not impartial...”.⁵⁷ It also includes where a person: “lays stress on one’s own feelings or opinions”⁵⁸ which “exist in the mind only”⁵⁹ and can be “illusory”⁶⁰ or “fanciful”⁶¹ Applying this literal definition, it can prima facie be asserted that if selection is conducted on the basis of criteria which is subjective in nature, how can the criteria and its subsequent application be deemed fair? It does not enable effective or accurate comparisons between employees within the selection pool to take place and suggests determination is based on perception rather than substance.

Notwithstanding this assertion, in the *Dunn* case, the respondent accurately pointed out that any assessment of an employee based on performance, skills or attitude would incorporate an element of subjectivity.⁶² However, the Court took the view that irrespective of this:⁶³

“An employer’s right to assess such things as attitudes and performance is, of course, constrained by the requirement that any assessment is made in good faith. This means that if the assessment appears to be biased, or made in bad faith, the Court can intervene”.

⁵⁶ Ibid, at 17.

⁵⁷ Shorter Oxford English Dictionary (5th ed, Oxford University Press, Oxford, 2002) vol 2, at 3086.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² *Dunn v Methanex New Zealand Limited*, above n 4, at 14 as per Chief Judge Goddard.

⁶³ Ibid.

The Court went on to note that the employer in this case adopted processes to ensure objectivity in respect of selection. Specifically, there was more than one person carrying out the assessment and that each assessor conducted their evaluations of the employees individually. Furthermore, the assessors did not assess criteria that they had insufficient knowledge of to apply fairly. Therefore the Court held that any potential bias would have been smoothed out through the application of the criteria within the selection process.⁶⁴

This case really highlights the fact that subjectivity in respect of selection criteria is both acknowledged and permissible as long as the criteria utilised is relevant and the application of such criteria ensures that the objectivity is applied.⁶⁵

II Relevance of selection criteria

The Courts have consistently held that selection cannot be made on irrelevant or erroneous criteria: the criterion must be appropriate.⁶⁶ What is deemed to be relevant will largely depend on the facts of the case.⁶⁷

There are several examples where the Court has held that the organisation's chosen selection criteria are not relevant. In *Charter Trucks*⁶⁸ the selection process was held to be unjustified as the central criterion used by the employer to select which one of the four employees would be made redundant was the fact that Mr Harris happened to be off work at the time the restructure took place.⁶⁹ This criteria was deemed "arbitrary"⁷⁰ and "entirely unreasonable

⁶⁴ Ibid.

⁶⁵ For another example of subjective criteria and its application see: *Solid Energy New Zealand Limited v Manson and Ors* (Employment Court, Christchurch, CC21/09, 15 December 2009, Judge Couch).

⁶⁶ See *New Zealand Building Trade Union v Hawkes Bay Area Health Board*, above n 14, at 913.

⁶⁷ See *Baguley v Coutts Cars Limited*, above n 9, at [55].

⁶⁸ (Employment Court, Christchurch, CC16/07, 11 September 2007, Judge Couch).

⁶⁹ *Harris v Charter Trucks Limited*, above n 68, at [85].

and unfair”⁷¹ with the employer being unable to justify Mr Harris’s selection on any reasonable grounds, which therefore made the dismissal unjustifiable. Mr Harris was the only employee aware that the restructuring was taking place and the criteria used did not enable any sort of comparison with the other three supposedly potentially affected staff members. On the facts of this case, which involved a number of procedural defects, it could not be said that Mr Harris would have been made redundant even if a proper selection process had been followed. To the contrary, the Court held that: “had a proper process been followed, no dismissal for redundancy would have been necessary at all”.⁷² The reason for this assertion was that had the employer communicated with the four people carrying out the role, they would have discovered that one of the employees intended to leave the organisation. Therefore, there was no need to make any employee redundant.

In *Owens y de Novoa v Ross and Lincoln University*⁷³ (*Lincoln*) an interim injunction which prevented Lincoln University making Ms. Owens y de Novoa redundant was granted. The Court held that the plaintiff had established an arguable case on procedural grounds that the plaintiff was unjustifiably dismissed.⁷⁴ In relation to the selection process, counsel for the plaintiff asserted that the criteria used were irrelevant whilst relevant criteria had been overlooked. Specifically it appeared that the plaintiff, an Assistant Lecturer/Tutor II in the Horticultural Department, had been selected for redundancy on the grounds that her expertise was not concentrated on teaching any horticultural subjects, she did not examine any horticultural subjects and that there was no established position available within the Plant Science department. Counsel for the plaintiff argued that this selection criterion was unfair as it “artificially encapsulated the plaintiff’s situation in a time warp relevant only to her

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid, at [107].

⁷³ (Employment Court, Christchurch, CEC39/94, 7 October 1994, Judge Palmer).

⁷⁴ *Owens y de Novoa v Ross and Lincoln University*, above n 73, at 29.

situation when the redundancy decision was made”.⁷⁵ Counsel also noted that it did not take into account how these factors on which the decision was made had eventuated. Counsel successfully argued that the criteria should not have only taken into account her immediate situation but also other relevant factors such as her overall capacity in respect of teaching, research, supervising, examining, laboratory and length of service. These criteria would have allowed a fair evaluation against other affected employees.⁷⁶

In respect of selection criteria these two abovementioned cases highlights that in the absence of any express contractual term regarding the criteria to be applied, criteria need to be relevant, taking into account all matters that could reasonably be expected in order to make a fair⁷⁷ and impartial⁷⁸ comparison between the employees within the selection pool.

The *Lincoln* case also shows that what will be deemed relevant criteria is linked to applicable industry, and the role itself.⁷⁹ Additionally specific business requirements may mean that certain criteria become relevant which would not necessarily be relevant in other organisations.⁸⁰ The Courts have expressly acknowledged that there are a wide range of factors which can be taken into account.⁸¹ Therefore, it is reiterated that what is deemed relevant is largely a judgment call based on the facts of each individual case.⁸² To some

⁷⁵ Ibid, at 26.

⁷⁶ Ibid, at 28.

⁷⁷ *Dunn v Methanex New Zealand Limited*, above n 4, at 17.

⁷⁸ Ibid.

⁷⁹ For a further example of this see *Priest and Ors v Fletcher Challenge Steel Limited*, above n 23.

⁸⁰ *EDS (New Zealand) Limited v Shaddox* (Employment Court, Wellington, WC9/04, 24 June 2004, Chief Judge Goddard). As EDS is a consulting firm, one of the selection criteria considered was how the loss of certain employees would impact on consulting business, specifically would clients be lost if their consultant was to be made redundant. Although this was a valid consideration given the type of business EDS were engaged in, the lack of consultation with employees regarding the use of this criterion lead to the selection process being held unjustifiable.

⁸¹ See *Law v G E Tregenza* [1992] 2 ERNZ 149 cited in the Employment Tribunal decision of *Orringe v Forestry Corporation of NZ Limited* (Employment Tribunal, Auckland, AT202/92, 16 September 1992, B W Stephenson).

⁸² See *Baguley v Coutts Cars Limited*, above n 9, at [55].

degree this creates uncertainty for all parties to the employment relationship as to what is truly relevant, since there is a degree of subjectivity in any such determination.⁸³

III Common Selection Criteria

Given this analysis common selection criteria used by organisations include some, or a combination of, the following factors:⁸⁴ skills,⁸⁵ experience,⁸⁶ qualifications,⁸⁷ performance,⁸⁸ ability,⁸⁹ attitude and behaviour,⁹⁰ length of service⁹¹ as well as general criteria such as to ensure an effective and efficient workforce⁹² or operation.⁹³

⁸³ It is important to note that the Department of Labour has produced a number of guides and factsheets to assist both employers and employees with procedural requirements in a redundancy situation. See: Department of Labour, “Disciplinary Action, Dismissal, Redundancy and Ill Health: Guide for Employees” (August 2009). A copy of this guide can be accessed as: <<http://ers.govt.nz/publications/pdfs/discipline-guide-employere.pdf>>; Department of Labour, “Disciplinary Action, Dismissal, Redundancy and Ill Health: Guide for Employers” (August 2009). A copy of this guide can be accessed as: <<http://ers.govt.nz/publications/pdfs/discipline-guide-employer.pdf>>; Department of Labour, “Guide to Restructuring” (18 June 2010). A copy of this guide can be obtained from <<http://www.ers.dol.govt.nz/redundancy/guide-restructuring.html>>; Department of Labour, “Fact Sheet: Information for Employees about Redundancy” (17 December 2008) <<http://ers.govt.nz/redundancy/employer-print.html>>; Department of Labour, “Fact Sheet: Information for Employers about Redundancy” (17 December 2008) <<http://ers.govt.nz/redundancy/employer-print.html>>.

⁸⁴ Please note that some of these factors can be deemed elements of another factor. For example see the discussion in section B, I, of this chapter concerning *Priest and Ors v Fletcher Challenge Steel Limited*, above n 23.

⁸⁵ For examples of where skills have been used as one of the selection criteria see *Dunn v Methanex New Zealand Limited*, above n 4; *Alexander and Ors v Honda New Zealand Limited* (Employment Court, Wellington, WEC51/94, 21 September 1994, Judge Castle); *Nea Nea and Ors v TLNZ Auckland Limited* (Employment Court, Auckland, AC13/06, 16 March 2006, Judge Travis); *Unilever New Zealand Limited v MacDonald* (Employment Court, Wellington, AC24A/01, 7 November 2001, Judge Shaw); *Mastertrade Limited v Te Kooro* (Employment Court, Christchurch, CC43/98, 17 November 1998, Judge Palmer).

⁸⁶ For an example of where experience has been used as one of the selection criteria see *Mastertrade Limited v Te Kooro*, above n 85.

⁸⁷ For an example of where qualifications have been used as one of the selection criteria see *Tua v ERG Connect Limited* (Employment Court, Wellington, WC60/99, 10 September 1999, Judge Shaw).

⁸⁸ For an example of where performance has been considered as one of the selection criteria see *Unilever New Zealand Limited v MacDonald*, above n 85.

⁸⁹ For an example of ability as one of the selection criteria see *Dunn v Methanex New Zealand Limited*, above n 4.

Traditionally, the length of service was often used in employment agreements as a very common mode of selection for redundancy, which, as mentioned in section B, was often described as the ‘last on, first off’ principle. Its usage has decreased in recent years with employers opting to place greater weight on factors such as skills and performance.⁹⁴

a) Length of Service⁹⁵

Ideologically, selection provisions which provide greater protection to employees based on their length of service arguably produces a mutual benefit to both employees and the employer. For the employee it rewards their loyalty and continued service. Alternatively, the employer retains a devoted employee who theoretically possess greater organisational and job specific knowledge. As redundancy is a no fault situation, looking after employees who have theoretically looked after the organisation through longer service and commitment appears both an ethical and responsible selection criteria for a good employer to use. Conversely

⁹⁰ For an example of attitude and behaviour as one of the selection criteria see *Dunn v Methanex New Zealand Limited*, above n 4.

⁹¹ For examples of where length of service has been considered as one of the selection criteria see *Alexander and Ors v Honda New Zealand Limited*, above n 85; *Smith and Ors v Wellington Newspapers Limited* (Employment Court, Wellington, WC26/02, 21 September 1994, Judge Castle); *Tua v ERG Connect Limited*, above n 87; *Nee Nee and Ors v TLNZ Auckland Limited*, above n 85; *Hildred v Newmans Coach Lines* [1992] 3 ERNZ 165; *McKechnie Metals Limited v Schreiber and Ors* (Employment Court, Wellington, WC5/02, 13 March 2002, Judge Shaw).

⁹² For examples of where an effective or efficient workforce has been considered as a selection criterion see *Smith and Ors v Wellington Newspapers Limited*, above n 91; *Nee Nee and Ors v TLNZ Auckland Limited*, above n 85; *Unilever New Zealand Limited v MacDonald*, above n 85; *Klusken and Ors v James Hardie Building Services and Technologies New Zealand Limited* (Employment Court, Auckland, AEC36/97, 9 May 1997, Judge Travis).

⁹³ For examples of where an effective or efficient operation has been considered as a selection criterion see *Smith and Ors v Wellington Newspapers Limited*, above n 91; *Hildred v Newmans Coach Lines*, above n 91; *MacDonald v Unilever New Zealand Limited*, above n 85; *Klusken and Ors v James Hardie Building Services and Technologies New Zealand Limited*, above n 92.

⁹⁴ J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 5, at [4.35].

⁹⁵ For further discussion on the last on first off principle see: J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 5, at [4.35].

some employers take the view that performance and skills, which are relevant to satisfy future organisational need, should be rewarded over loyalty.⁹⁶

The importance of an employee's length of service in relation to selection has historically been acknowledged by the judiciary who have expressed the view that: "It is a factor to which a reasonable employer should direct his attention and take into account".⁹⁷ However, the judiciary, whilst acknowledging its importance, have also asserted that it is just one factor which is not of "overriding importance"⁹⁸ and that the "whole facts of each case must be considered".⁹⁹ It appears in recent times that less weight is being given to this criterion.¹⁰⁰ Although analysis of the IRC data showed a very slight increase in the use of this provision up until 2003 in all sectors,¹⁰¹ it is important to note that case law suggests that where such a provision exists, it is common for there to be a caveat providing employers with the ability to avoid being constrained by this requirement.¹⁰² This caveat is normally articulated in such a way that the last on, first off principle only applies: "all things being equal".¹⁰³ Alternatively the principle is couched in such a way as to leave a broad overarching right for the employer to make selections based on ensuring an "efficient and effective workforce or operation".¹⁰⁴

⁹⁶ See J Welch and S Welch, "The Loyalty Fallacy" (January 2009) *Bloombergs Businessweek*, <http://www.businessweek.com/magazine/content/09_03/b4116068842178.htm>.

⁹⁷ *Nelson Timber Industry IUOW v Donnelly Milling Company Limited* [1984] ACJ 161, at 163 as per Chief Judge Horn.

⁹⁸ *Canterbury Hotel Worker's Union v Fiabiola Fashions Limited* [1981] ACJ 440, at 441 as per Judge Williamson.

⁹⁹ *Ibid.*

¹⁰⁰ J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 5, at [4.35].

¹⁰¹ See appendix three, part C for a copy of this data.

¹⁰² See the discussion in: J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 5, at [4.35]. See also: I R Harbridge, G Thickett and P Kiely, *Employment Agreements Bargaining Trends and Employment Law Update 2000/2001* (Industrial Relations Centre, Victoria University of Wellington, 2001) 61.

¹⁰³ *McKechnie Metals Limited v Schreiber and Ors*, above n 91.

¹⁰⁴ For examples of where an effective or efficient workforce has been considered as a selection criterion see: *Smith and Ors v Wellington Newspapers Limited*, above n 91; *Nee Nee and Ors v TLNZ Auckland Limited*, above n 85; *Unilever New Zealand Limited v MacDonald*, above n 85; *Klusken and Ors v James Hardie Building Services and Technologies New Zealand Limited*, above n 92.

In practice this has meant that the clause is often meaningless in providing any form of protection for longer serving employees.¹⁰⁵

b) Performance

It is very clear that an employer cannot take the performance of an employee into account when making a decision to make a position redundant. There must be a genuine reason for any redundancy.¹⁰⁶

However, the performance of an individual is quite a legitimate and relevant criterion to take into account when determining which employee(s) are to be made redundant.¹⁰⁷ Even where performance may not actually be a criterion for selection, its influence might be apparent on other arguably objective selection criterion. In *McKechnie Metals Limited v Schreiber*,¹⁰⁸ Judge Shaw appositely stated: “Judging of skills and attributes almost inevitably leads to value judgments based on past performance....”.¹⁰⁹

In circumstances where there are no pending redundancies, but an employer is faced with an employee who is performing unsatisfactorily, the employer must engage in a process to facilitate performance improvement prior to dismissal.¹¹⁰ This process can often be difficult

¹⁰⁵ See for example: *McKechnie Metals Limited v Schreiber and Ors*, above n 91. See also *Bay Milk Distributors Limited v Jopson* (Employment Court, Auckland, AC6A/09, 22 December 2009, Chief Judge Colgan) where the Employment Court held that it was not unfair to apply the ‘last on, first off’ principle to establish a selection pool of potentially affected employees and then to apply other criteria to determine final selection. For general discussion see also: J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 5, at [4.35].

¹⁰⁶ This point is discussed in more detail in chapter thirteen.

¹⁰⁷ See for example *Unilever New Zealand Limited v MacDonald*, above n 85.

¹⁰⁸ (Employment Court, Wellington, WC5/02, 13 March 2002, Judge Shaw).

¹⁰⁹ *McKechnie Metals Limited v Schreiber and Ors*, above n 91, at [23] as per Judge Shaw.

¹¹⁰ See the discussion in: R Rudman, *New Zealand Employment Law Guide* (2010 ed, CCH, Auckland, 2010) 207-208.

and time consuming for all parties involved. Conversely, in a redundancy situation, performance is a valued and predominant characteristic for review in a selection process.¹¹¹ Yet the procedural safeguards associated with non-redundancy related performance improvement processes, which may eventually result in dismissal, are not so obvious. Successful performance is only achieved through a mutual understanding between the employer and employee. The employee needs to be fully aware of what is expected of them and have the support mechanisms, such as adequate resources to enable achievement. Procedural processes in respect of performance issues ensure that both the employer and the employee work together to meet expectations and employees are not unfairly treated.

Given this, the Courts have regularly held it unjustifiable to take into account what the employer perceives as negative performance, where the employee in question has not had the opportunity to respond to such an allegation:¹¹² to allow otherwise would be “at odds with natural justice”.¹¹³ Likewise, consideration of a disputed warning letter for alleged poor performance which was subject to personal grievance proceedings was also held to be unjustifiable.¹¹⁴

Although this approach appears quite correct, arguably it would be hard for an employer to not subconsciously have these factors weighing in the back of their mind whilst conducting any supposedly objective selection analysis. Unintentionally any such thoughts may influence the assessment of other somewhat subjective criteria, such as attitude or behaviour, or even as recognised by Judge Shaw, some arguably objective criteria.

¹¹¹ J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 5, at [4.35].

¹¹² See for example: *MacLeod v Spinax Motors Limited* [1988] NZILR 253; *Solid Energy New Zealand Limited v Manson and Ors*, above n 63.

¹¹³ *Lewis v Greene* [2004] 2 ERNZ 55, at [129] as per Judge Shaw.

¹¹⁴ *Hildred v Newmans Coach Lines*, above n 91.

Consequently, objectivity associated with the application of the process is fundamental to balance any inadvertent bias. In the *Building Trades* case, Judge Colgan in relation to performance management pointed out that:¹¹⁵

‘an objective, well documented and employee-participatory performance assessment system will more likely result in soundly-based and acceptable consideration of such important decisions as determining staff surpluses than did the more subjective and less accountable method employed by the Board in this case’.

The use of performance assessment programmes was also discussed in *Swinden v Naylor Love Limited*¹¹⁶ (*Swinden*) where the comment was made that it was unfortunate that New Zealand organisations did not have a practice of utilising elaborate performance assessments. Notably, it was also stated that given the general size of New Zealand organisations being small to medium in number, to impose such a standard would be unrealistic.¹¹⁷ Arguably, given this assertion, it would appear that larger organisations may be expected to be able to provide better evidence of objectivity in their selection processes based on performance, where an expectation of such a performance system may in fact be deemed realistic.

What appears clear is that where an employer who has raised performance issues with an employee, in either a formal or an informal setting,¹¹⁸ and the employee has been given the opportunity to respond to the performance concerns, that situation may then be taken into account in respect of analysing the performance of the employee for the purposes of selecting which employee will be made redundant.¹¹⁹

¹¹⁵ *New Zealand Building Trades Union v Hawke’s Bay Area Health Board*, above n 14, at 915.

¹¹⁶ (Employment Court, Christchurch, CC5/99, 23 February 1999, Judge Palmer).

¹¹⁷ *Swinden v Naylor Love Limited*, above n 116, at 15. Judge Palmer cited the Employment Tribunal Adjudicators decision at 8-12.

¹¹⁸ See *Unilever New Zealand Limited v MacDonald*, above n 85. In this case informal performance issues were raised with the respondent and were deemed materially relevant to make an assessment of his skills and attitude when deciding which employee was to be made redundant.

¹¹⁹ For example see *Unilever New Zealand Limited v MacDonald*, above n 85.

This analysis accentuates the need for selection decisions to be based on proper motives¹²⁰ and through an objective and transparent process.¹²¹ The underlying motive for selection must genuinely be based on an objective application of relevant selection criteria rather than a guise for unacceptable ulterior considerations. Nonetheless this discussion arguably highlights how easy it is for an employer to effectively go through the motions creating a perception of objectivity when in fact subjective and improper factors are being taken into consideration.

IV Discrimination

In accordance with the Human Rights Act 1993 (HRA) and the ERA an employer cannot discriminate against an employee on any of the prohibited grounds specified within either of these Acts.¹²² These pieces of legislation encompass all aspects of the employment relationship and therefore specifically apply to selection criteria. The ERA duplicates the thirteen prohibited grounds¹²³ outlined in the HRA but also adds two additional grounds. One of these grounds relates to union activities.¹²⁴ Specifically, s 104 of the ERA prohibits either direct or indirect discrimination based on the employee's involvement in activities of a union. In cases where employees alleged discriminatory selection for redundancy, it is commonly asserted that they are being selected due to their involvement in union activities. Although as noted, an employer cannot discriminate based on this ground, it is hard to clearly separate union activities which may have resulted in challenging, even negative situations for an employer, and what would be seen as relevant selection criteria such as attitude and

¹²⁰ See the discussion on performance as a selection criterion in part C, III, b of this chapter.

¹²¹ S Hornsby-Geluk, above n 2, at 10.

¹²² For broad information concerning discrimination see: R Rudman, *New Zealand Employment Law Guide* (2010 ed, CCH, Auckland, 2010) 273-294.

¹²³ The prohibited grounds are contained in s 21 of the HRA.

¹²⁴ R Rudman, *New Zealand Employment Law Guide* (2010 ed, CCH, Auckland, 2010) 277.

behaviour.¹²⁵ As highlighted in relation to performance, despite objective selection processes that may have been instituted, it would arguably be hard for subjectivity to not influence managerial judgment on matters which are accepted as relevant selection criteria.

A good example of this assertion can be seen in the case of *Murfit v CentrePort Limited*¹²⁶ (*Murfit*). The selection requirements in this case were expressly articulated in the applicable collective agreement. Specifically, the criteria were either voluntary severance or last on, first off with an overarching caveat allowing the employer to decline voluntary severance or exclude an employee from compulsory redundancy if the employee's skills, knowledge or experience was deemed necessary to the organisation.¹²⁷ Although there were two employees who sought voluntary redundancy, these applications were declined, notwithstanding one of the employees concerned was suffering from an on-going illness, which given the medical evidence, did and would continue to have an impact on the employee's ability to carry out work.¹²⁸ The Court found that although the employer undertook a selection process based on a skilled matrix, which contained relevant criteria and which the employer was quite entitled to undertake, the employer's evidence and actual application of the selection process raised concern. Specifically, the Court stated:¹²⁹

'Although the stated reason for the plaintiff's redundancy was solely a lack of position, the fact that the port found his attitude to the conduct of the negotiations vexing raised a strong suspicion that it was not only the position but the man who was marked out for redundancy'.

This case presents a clear illustration of where the Courts have inferred that discriminatory thoughts have influenced the selection of an employee for redundancy. However, it does

¹²⁵ J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 5, at [4.35].

¹²⁶ (Employment Court, Wellington, WC47B/99, 5 November 1999, Judge Shaw).

¹²⁷ *Murfit v CentrePort Limited*, above n 126, at 10.

¹²⁸ *Ibid*, at 13.

¹²⁹ *Ibid*, at 15.

highlight that what may prima facie appear an objective process, may in fact contain elements of subjectivity which are potentially hard for an affected employee to substantiate.

Discrimination in respect of union activity is often alleged in relation to selection in redundancy cases.¹³⁰ However, it can be hard for the employee to substantiate any allegation. In *Smith and Ors v Wellington Newspapers Limited*¹³¹ it was alleged that the employer wished to retain employees who were on individual agreements and remove only those on collective agreements.¹³² All employees retained were employed on individual agreements, and the tribunal rejected this allegation. On appeal, the Court considered the appellants allegation and noted:¹³³

‘I am inclined to think that the Tribunal’s assessment of the situation is charitable to the respondents but such is the character of appeals that there is no reason why I should prefer my more skeptical view to the Tribunal’s sanguine one’.

D Application - Consultation & Disclosure in Selection

Although legislation prior to the ERA was silent in respect of consultation regarding selection processes with employees; as noted in section B, II, there remained the overarching duty of fairness.

In *Hale* it was stated that: “fairness, however, may well require the employer to consult with the union and any worker whose dismissal is contemplated before taking a final decision on

¹³⁰ See for example: *Collins v New Zealand Rail Limited* [1998] 3 ERNZ 1062; *Fenemor v Methanex New Zealand Limited* (Employment Tribunal, Wellington, WT188/94, 17 October 1994, B P Gray); *Tua v ERG Connect Limited*, above n 87.

¹³¹ (Employment Court, Wellington, EC26/02, 2 August 2002, Chief Judge Goddard).

¹³² *Smith and Ors v Wellington Newspapers Limited*, above n 91, at [5].

¹³³ *Ibid*, at [39] as per Chief Judge Goddard.

how a planned cost saving is to be implemented”.¹³⁴ Although *Hale* did not expressly require that consultation about selection be mandatory in all cases, it did suggest that fairness may require such consultation.

The first case to consider selection criteria under the ERA was the case of *Coutts*.¹³⁵ In this case the Court of Appeal expressed the view that if there was uncertainty before the introduction of the ERA as to whether selection criteria should be disclosed, the ERA has clarified the situation.¹³⁶ *Coutts* involved a case where the employer refused to disclose to the employee what the selection criteria were for determining which two of the four employees carrying out car grooming duties would be made redundant.

In the joint judgment delivered by Gault J, special reference was made to the object of part 9 of the ERA which accentuates the desire to resolve employment relationship issues by providing access to information and not adhering to rigid formal procedures.¹³⁷ The Court of Appeal stated that selection criteria should be provided to employees.

This assertion did seem to provide a clear and definitive statement regarding disclosure requirements in relation to selection processes. However, the majority of the Court of Appeal then went further to state:¹³⁸

‘It will not follow from non-disclosure of selection criteria that a dismissal for redundancy is necessarily flawed. If criteria are properly formulated and applied according to the standard of a reasonable employer acting fairly and in good faith towards the employee, subsequent challenge is unlikely to be fruitful’.

¹³⁴ *G N Hale & Son Limited v Wellington, etc, Caretakers, etc IUW*, above n 6, at 156 as per Cooke P.

¹³⁵ *Coutts Cars v Baguley* [2001] ERNZ 660.

¹³⁶ *Ibid*, at [34].

¹³⁷ *Ibid*.

¹³⁸ *Ibid*, at [35] as per Judge Gault.

At the time of this judgment, this statement appeared to create substantial uncertainty regarding disclosure obligations.¹³⁹ Although this dicta exists, subsequent cases appear to have applied the former sentiments that disclosure of selection criteria is required as part of a fair consultation process.¹⁴⁰

The case of *EDS (New Zealand) Limited v Shaddox*¹⁴¹ is a useful illustration of this point. The employer in this case notified employees that there were going to be redundancies and consulted them on the selection criteria. However, the employer then, without any consultation, added an additional criterion for determining selection. The Court held that:¹⁴²

‘the undisclosed process was such a departure from the requirements of s 4 of the Employment Relations Act 2000 and generally so influential that the absence of an opportunity for Mr. Shaddox to know what it was and to have input rendered it impossible for EDS to satisfy the Court, it having the onus to do so, that its dismissal of Mr. Shaddox was justifiable’.

If there was, in fact, any doubt about the need to consult with employees regarding the selection criteria and process, this requirement seems to have been made very clear by the subsequent amendments to the ERA.¹⁴³ Specifically, the expanded duty of good faith contained in section 4 (1A) made it clear that employers must consult, provide relevant information and give employee(s) the opportunity to comment on this information before any decision effecting their employment is made. This obligation clearly encapsulates the selection process.¹⁴⁴

¹³⁹ For discussion on this see: J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 5, at [4.35]; A Russell, “The ‘Emperor’s New Clothes’: The Judicial Fabric of Redundancy under the Employment Relations Act 2000” (2003) 9 *New Zealand Business Law Quarterly* 125.

¹⁴⁰ See *McKechnie Metals Limited v Schreiber and Ors*, above n 91 cited in J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 5, at [4.35].

¹⁴¹ (Employment Court, Wellington, WC9/04, 24 June 2004, Chief Judge Goddard).

¹⁴² *EDS (New Zealand) Limited v Shaddox*, above n 80, as per Chief Judge Goddard.

¹⁴³ See *Nee Nee and Ors v TLNZ Auckland Limited*, above n 85, at [78].

¹⁴⁴ *Ibid*, at [88]. See also *Solid Energy New Zealand Limited v Manson and Ors*, above n 63, at [28-37].

The case of *Nee Nee and Ors v TLNZ Auckland Limited*¹⁴⁵ (*Nee Nee*) is a good example of application of the amended provisions of the ERA to selection processes. In *Nee Nee* there was a specific clause within the applicable collective agreement which specified the criteria to be considered where selection was required. The clause stated:¹⁴⁶

16 (d) (v) Criteria for Selection of Redundant Employees

The company will select employees on a last on first off basis. However, it is recognised by the parties to this contract that the company has a need to maintain an efficient workforce. Skill and aptitude factors will therefore be taken into account in the selection of workers to be made redundant, and at all times in the selection process the company retains the right of final selection.

There was debate regarding how the clause was to be interpreted and applied. The employer applied it by producing a skills matrix to assess skills and aptitude and arranging for four assessors to conduct the assessment.¹⁴⁷ The employees within the selection pool were not advised of the actual criteria, the weighting or even who the four people were who were conducting the assessments.¹⁴⁸ The four assessors were assured that they would remain confidential so that there could be no impact on future working relationships.¹⁴⁹ In respect of the methodology used to conduct the assessment, the employer had attempted to assess employees on a range of skills, which due to the employer requiring some employees to specialize in one particular skill allegedly caused them to be disadvantaged in the assessment process.¹⁵⁰

¹⁴⁵ (Employment Court, Auckland, AC 13/06, 16 March 2006, Judge Travis). It is important to note that TLNZ sought leave to appeal this decision. TLNZ asserted that the findings of the Employment Court were wrong. In particular TLNZ claimed that the Employment Court was incorrect with its ruling that the particular circumstances of the case did not meet the definition of redundancy within the collective contract and that TLNZ had not acted in good faith. The Court of Appeal refused to grant leave to appeal. However, the Court of Appeal did note that the construction of the employment contract by the Employment Court was incorrect. Notwithstanding this, s 214 of the ERA prevented leave being granted as this provision prohibits appeals on issues of law which are concerned with the construction of an employment agreement. This judgment is reported at: *TLNZ Auckland Limited v Nee Nee* [2006] ERNZ 689.

¹⁴⁶ *Nee Nee and Ors v TLNZ Auckland Limited*, above n 85, at [40] as per Judge Travis.

¹⁴⁷ *Ibid*, at [25-26].

¹⁴⁸ *Ibid*, at [28-30].

¹⁴⁹ *Ibid*, at [26].

¹⁵⁰ *Ibid*, at [28].

The Court held that the employer had interpreted and subsequently applied the clause incorrectly, as it did not seem to have any regard to the last off first on principle which according to the Court should have been applied initially, with any further selection necessary being made on skills and aptitude.¹⁵¹ Additionally, the Court noted that to comply with s 4 (1A) the employees needed to be provided with relevant information as well as the opportunity to comment on it.¹⁵² This meant that they needed to know the precise criteria and how this criterion was to be assessed. Although the employees were given the results of the assessments and asked to comment, the Court held that they were not given enough information to be able to make any sort of informed response.¹⁵³ Furthermore, the Court also held that the assessment of skills and aptitude was unfair on employees who had been asked by the employer to specialise in certain specific skills and that there was a lack of consultation between the assessors and the employees.¹⁵⁴

In relation to the issue of keeping the assessors confidential the Court rejected the employer's argument stating:¹⁵⁵

'The good reasons for an employer maintaining the confidentiality of information and not providing access to it, contained in s 4(1) (C) of the Act, inserted in 2004, involved complying with the statutory requirements to maintain confidentiality, protecting the privacy of natural persons, and protecting the commercial position of the employer. None of these appear to have had application in the present case'.

In summary *Nee Nee* illustrates the need for employers to clearly explain and consult with employees regarding any selection criteria, the weighting of such criteria, as well as the actual process. Some form of employee participation within the selection process would

¹⁵¹ Ibid, at [79].

¹⁵² Ibid, at [88].

¹⁵³ Ibid.

¹⁵⁴ Ibid, at [89].

¹⁵⁵ Ibid, at [86].

appear to be desirable such as self assessments or an interview with the assessors.¹⁵⁶ The process needs to be as objective and transparent as possible.¹⁵⁷ Confidentiality of information will only be permissible if there is evidence to support it meeting the exceptions outlined in the ERA.¹⁵⁸

Given the abovementioned judicial determinations, prima facie it could be argued that the ERA with its statutory obligation of good faith has, over the last decade, merely confirmed in legislation the pre-existing common law duty of fairness. However, a recent Authority determination has potentially expanded the employers' obligations in relation to the provision of what is termed 'relevant information' in accordance with s 4(1A)(c) beyond what has traditionally been deemed acceptable.¹⁵⁹

In *Wrigley and Kelly v The Vice Chancellor of Massey University*¹⁶⁰ (*Wrigley*) the Authority determined that Massey University had failed to comply with their statutory obligations encapsulated in s 4 (1A) (c) when implementing their restructuring programme. In particular the alleged non-compliance concerned the lack of information provided to applicants in a contestable selection process.¹⁶¹

Massey University did in fact provide information to all applicants regarding the selection criteria, the composition of the selection panel, the identity of other applicants, feedback from the selection panel on their interview as well as their assessment sheets scores in relation to their individual responses.¹⁶²

¹⁵⁶ S Hornsby-Geluk, above n 2, at 10.

¹⁵⁷ Ibid.

¹⁵⁸ See ss 4 (1B) and 4 (1C) of the ERA. See also the discussion regarding confidentiality contained in: J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 5, at [4.32D].

¹⁵⁹ See for example the discussion in *Coutts Cars Limited v Baguley*, above n 135, at [33].

¹⁶⁰ (Employment Authority, Wellington, WA1/10, 6 January 2010, Asher (Member)).

¹⁶¹ *Wrigley and Kelly v The Vice Chancellor of Massey University*, above n 160, at [47].

¹⁶² Ibid, at [20].

However, the Authority determined that applicants were entitled to more information; specifically, information created by the selection panel about other applicants. The Authority stated that all the interview sheets, individual assessment sheets, candidate summary sheets and the panel recommendations should have been made available,¹⁶³ noting:¹⁶⁴

‘a comparison of the applicants with other candidates was fundamental to the termination of the formers’ employment and a scrutiny of those comparisons is consistent with their statutory entitlement to relevant information’.

The Authority expressly declined to address the claims by Massey University regarding the issues of privacy and confidentiality of this information.¹⁶⁵

Interestingly, the decision of the Authority departs from what would arguably be seen as acceptable practice by the judiciary. The Court of Appeal in *Coutts*, expressly stated that although the selection criteria should be made known to those affected employees, “it was entirely appropriate to maintain confidentiality in relation to the assessments of other employees”.¹⁶⁶ Furthermore, it arguably contravenes important legislative provisions such as the exceptions to s 4(1A) of the ERA¹⁶⁷ as well as provisions contained within the Privacy Act 1993.¹⁶⁸

As a result of the Authority decision in *Wrigley*, Massey University has appealed the determination and although the full Employment Court considered the case on 13 May 2010

¹⁶³ *Ibid*, at [44].

¹⁶⁴ *Ibid*, at [43] as per Asher (Member).

¹⁶⁵ *Ibid*, at [46].

¹⁶⁶ *Coutts Cars Limited v Baguley*, above n 135, at [33] as per Gault J.

¹⁶⁷ See ss 4 (1B) and 4 (1C) of the ERA.

¹⁶⁸ For discussion on this point see: P Chemis and A Pazlin, “Providing Information to Employees whose Employment is at Risk: s 4 (1A) (c)” (New Zealand Law Society, Employment Law Conference, 16-17 September 2010) 149, 157-162.

no decision has yet been released.¹⁶⁹ If the decision is to remain unchanged this will amount to a significant departure from previous judicial interpretation of legislative requirements regarding consultation and disclosure.¹⁷⁰

E Potential Procedural Differences under the ERA

As evidenced by the abovementioned discussion, the impact of the procedural fairness requirements associated with selection were, until recently, relatively unaffected by the introduction of the ERA.

However, as evidenced by the *Wrigley* case, the subsequent 2004 amendments have the potential to create a greater obligation on employers to actually produce explicit documentary evidence to justify selection decisions.¹⁷¹ It is asserted that certain historic cases which appeared to accentuate the managerial prerogative would arguably not necessarily discharge the good faith obligations encapsulated in s 4 (1A) of the ERA.

Prior to the introduction of the ERA there were cases where the employer made selection decisions in a somewhat unstructured manner where documentary evidence to support verbal assertions was not utilised and therefore could not be produced to substantiate claims.

¹⁶⁹ *The Vice Chancellor of Massey University v Wrigley and Kelly* (Employment Court, Wellington, File WRC2/10). For discussion on this case see: P Chemis and A Pazlin, above n 168. See also: J Rooney and H White, "Restructuring – Key Issues" (New Zealand Law Society, Employment Law Conference, 16-17 September 2010) 33, 36-37.

¹⁷⁰ In *The Vice Chancellor of Massey University v Wrigley and Kelly* [2010] NZEmpC 52 the defendants sought to have disclosed to them the documents that they claimed were unlawfully withheld. In the interlocutory judgment of Chief Judge Colgan it was held that the documents must be disclosed to the defendants subject to certain conditions. Therefore irrespective of the outcome of the final appeal the documents in question have already (subject to conditions) been released to the defendants.

¹⁷¹ In *Collins v New Zealand Rail Limited* [1998] 3 ERNZ 1062 Chief Judge Goddard noted in relation to selection criteria that in some cases where the relevance of the criteria is not immediately obvious the employer may be required to justify the relevance of the criteria. This was a case decided under the ECA and is discussed in: J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 5, at [4.35].

In *Priest*, the Court noted that it was “extraordinary”¹⁷² that those making the selection decision did not make any written records when undertaking the selection assessments particularly given that they were aware that the decisions were likely to be controversial and therefore challenged.¹⁷³ The Court also noted what made it even more surprising was that the employer was able to produce substantial documentary evidence in relation to other employment related processes.¹⁷⁴ The employees were advised by letter of their selection for redundancy with very little information regarding the reasons for their selection.¹⁷⁵ However, their dismissal, based on the facts of the case, was held to be justifiable.¹⁷⁶

In *Swinden* the selection assessment was conducted in an unstructured manner. In evidence the employer stated that a list was produced where a variety of factors were considered including matters such as personality, effectiveness, compatibility and skills. Specifically, it was noted in evidence:¹⁷⁷

‘he considered the employees against many criteria such as these, though he did not conduct this analysis in any sort of structured, criterion by criterion way. Rather, these were the sorts of things he had in mind in assessing and ranking the employees on a catchall ‘effectiveness and future contributions to the company’ scale’.

As with *Priest*, *Swinden* was held to be justifiably dismissed on the ground of redundancy.¹⁷⁸

Any redundancy situation will inevitably be traumatic for an employee. Given this and the notion of good faith, best practice suggests that the provision of information and any communication of decisions need to be clear and understandable. If assessment processes are

¹⁷² *Priest and Ors v Fletcher Challenge Steel Limited*, above n 23, at 15 as per Judge Colgan.

¹⁷³ *Ibid*, at 15.

¹⁷⁴ *Ibid*, at 15.

¹⁷⁵ *Ibid*, at 17.

¹⁷⁶ *Ibid*, at 36.

¹⁷⁷ *Swinden v Naylor Love Limited*, above n 116, at 8 as per Judge Palmer.

¹⁷⁸ *Ibid*, at 18.

not structured and applied consistently and clearly documented it is highly likely that the process will give rise to questions regarding how the decision was actually made and whether in fact it can be said to be made in good faith.

The case of *Solid Energy New Zealand Limited v Manson and Ors*¹⁷⁹ (*Solid Energy*) highlights this very point. In this case it was alleged that the selection process was unfair. Solid Energy had told affected employees that selection would be determined through the use of an assessment form with which they were provided. However, the Employment Court held that the actual selection process undertaken involved a largely subjective assessment with the form being a significantly irrelevant part of the process.¹⁸⁰ The selection process was severely flawed. In particular the Employment Court found that the assessors were biased; lacked knowledge about the affected employees; took into account irrelevant considerations, in particular performance concerns which had not been discussed with the individual employees; utilised undisclosed criteria and associated weightings and applied a significant subjectivity approach to selecting which employees were to be made redundant.¹⁸¹ Given the substantial procedural defects it was not surprising that the Employment Court found that the selection process was unjustifiable and that Solid Energy had breached its statutory good faith obligations.¹⁸² In the decision, Judge Couch expressly stated that: “A fair and reasonable employer in the position of the plaintiff would have used a structured method of assessment which was transparent and as objective as possible”.¹⁸³

Leading on from the *Solid Energy* decision, it has been asserted that “good faith behaviour requires consideration of the quality of employer processes and in particular HRM and

¹⁷⁹ (Employment Court, Christchurch, CC21/09, 15 December 2009, Judge Couch).

¹⁸⁰ *Solid Energy New Zealand Limited v Manson and Ors*, above n 63, at [33].

¹⁸¹ *Ibid*, at [23].

¹⁸² *Ibid*, at [34].

¹⁸³ *Ibid*, at [37].

decision making practices as they impact on employees”.¹⁸⁴ Although the judiciary has in some cases been prepared to require an employer to accord with what it perceives as good management practice,¹⁸⁵ there has been a reluctance to take the further step of compliance with good HRM practice.¹⁸⁶

It can be argued that the ERA supports the judiciary having greater power to review managerial practices given that the ERA acknowledges, and was enacted, with the aim of addressing the inherent inequality of power between employers and employees.¹⁸⁷ However, it could be debated that there is no definitively accepted idea of good managerial or HRM practice, therefore making interference impracticable.¹⁸⁸ Notwithstanding this, good faith behaviour requires parties to an employment relationship to be “active and constructive”¹⁸⁹ as well as “responsive and communicative”.¹⁹⁰ This arguably supports judicial power to review managerial practice in some cases in order to ensure these legislative ideals are a reality and that power is not being abused.¹⁹¹ This would however, require a review of managerial prerogative¹⁹² and could potentially create uncertainty through development of the judicial interpretation of good managerial practice through common law.

¹⁸⁴ G Anderson and J Bryson, “Developing the Statutory Obligation of Good Faith in Employment Law: What Might Human Resource Management Contribute?” (2006) 37 Victoria University of Wellington Law Review 487, 494.

¹⁸⁵ See *Auckland etc Local Authorities Officers’ IUW v Mount Albert City Council* [1989] 2 NZILR 651 cited in G Anderson and J Bryson, above n 184, at 494.

¹⁸⁶ G Anderson and J Bryson, above n 184, at 495. This article discusses the use of expert witnesses in relation to selection processes in redundancy situations.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid, at 496. In this article it is asserted that HRM is able to provide evidence of good management HR practice.

¹⁸⁹ See s 4 (1A) (b) of the ERA.

¹⁹⁰ See s 4 (1A) (b) of the ERA.

¹⁹¹ G Anderson and J Bryson, above n 184, at 495.

¹⁹² See D Davidson, “Good Faith and Justification: Where to Now in the Law of Redundancy?” [2009] 8 Employment Law Bulletin 115. This article discusses whether it is time to review the principles contained in *Hale*.

F Proposed Reforms & International Obligations

As noted in this chapter, managerial discretion is wide and there is no formal obligation in legislation or even in many contractual agreements to have any selection criteria or its appropriate priority and weighting determined in advance of a redundancy situation. The Advisory Group made no explicit recommendation in relation to selection criteria in their report.¹⁹³ Arguably this explains why the unsuccessful Employment Relations (Statutory Minimum Redundancy Entitlements) Amendment Bill was silent on this matter also.¹⁹⁴ As with notice, the latest amendments to New Zealand's employment law are not aimed directly at the issue of selection of employees in a redundancy situation.¹⁹⁵

The Termination of Employment Recommendation 1982 recommends that, wherever possible, selection criteria and the weighting associated with it should be established in advance of any redundancy situation. The criteria, order of priority and weighting should give due consideration to both the interests of the employer as well as the interests of the employee.¹⁹⁶

¹⁹³ See *Report of the Public Advisory Group on Restructuring and Redundancy* (Prepared for the Ministers of Labour, Social Development and Employment and Economic Development, 30 June 2008).

¹⁹⁴ See appendix five for a copy of the Employment Relations (Statutory Minimum Redundancy Entitlements) Amendment Bill.

¹⁹⁵ New Developments to New Zealand's employment law are discussed in detail in chapter fifteen.

¹⁹⁶ See R166 Termination of Employment Recommendation 1982, s23 (1) and (2). A copy of this recommendation is contained in appendix two.

Chapter Ten

Restyling the Design

Procedural Fairness and Redeployment

The term redeployment¹ literally means, “to transfer to another job, task or function”.² In the context of redundancy law, it is, put simply, an alternative option to making an employee redundant. Redeployment involves the employer offering the potentially redundant employee a new or alternative position therefore enabling continuation of employment albeit through the employee discharging the duties associated with a different position. Therefore redeployment of an employee within an organisation does not amount to redundancy; consequently there is no termination of employment.³ It is also important to note that redeployment is a separate concept to the notion of re-employment, which is not discussed in detail in this paper.⁴

¹ For further general discussion on redeployment see: J Hughes, P Roth and G Anderson, *Personal Grievances* (online loose-leaf ed, LexisNexis) at [4.34] [“*Personal Grievances*”]; Anderson and others, *Mazengarb’s Employment Law*, (online loose-leaf ed, LexisNexis) at [ERA 103.52B] [“*Mazengarb*”]; P Bartlett, W Hodge, P Muir, C Toogood, R Wilson, *Brookers Employment Law* (online loose-leaf ed, Brookers) at [ER103.16]-[103.19] [“*Brookers Employment Law*”]; P Churchman, C Toogood and M Foley, *Brookers Personal Grievances* (online loose-leaf ed, Brookers) at [6.3.02]-[6.8.16] [“*Brooker PG*”]; G Anderson, J Hughes, P Roth and M Leggat, *Employment Law: A Practical Guide* (LexisNexis New Zealand Limited, Wellington, 2010) at [18.74] [“*A Practical Guide*”]; G Anderson, J Hughes, M Leggat, P Roth, *LexisNexis Employment Law Guide* (7th ed, LexisNexis, Wellington, 2005) at [ER103.51B] [“*Employment Law Guide*”].

² Shorter Oxford English Dictionary (5th ed, Oxford University Press, Oxford, 2002) vol 2 at 2500.

³ This point was expressly made in the case of *Group Rentals NZ Limited v Canterbury Clerical Workers IUOW* [1987] NZILR 255, 259 cited in: P Bartlett, W Hodge, P Muir, C Toogood, R Wilson, *Brookers Employment Law*, above n 1, at [ER103.16].

⁴ For discussion relating to re-employment in redundancy situations see *Gates v Air New Zealand Limited* (Employment Court, Auckland, AC33/09, 11 September 2009, Judge Couch). See also: S Robson, “Employment Court – Additional Personal Grievance Raised – Whether Lawfully Raised – Whether Justification for Dismissal for Redundancy – Whether Re-Employment Option Fairly Considered” [2010] 1 Employment Law Bulletin 2; P Bartlett, W Hodge, P Muir, C Toogood, R Wilson, *Brookers Employment Law*, above n 1, at [ER103.26].

Although there are a variety of alternatives to redundancy such as retraining, early retirement or transferring an employee to an alternative work site,⁵ this paper focuses specifically on redeployment.

There has never been a common law obligation to redeploy employees who are facing a redundancy situation.⁶ However, as outlined in this discussion, obligations associated with redeployment have evolved through the enactment and interpretation of New Zealand's employment legislation.

A Contractual Obligations

It is very common for organisations to have express provisions relating to alternatives to redundancy within their respective employment agreements or company policies. As with other elements of procedural fairness⁷ where such a provision exists, compliance is mandatory.⁸

Up until 2003 the IRC collected data specifically on clauses prescribing alternative options to redundancy in collective agreements. Evidence showed that most collective agreements within the data sample contained such a provision. Between 2000⁹ and 2003 there was approximately a 22 per cent increase in the use of this form of provision over all settlements

⁵ S Hornsby-Geluk, "Managing Organisational Change – Legally" (The Human Resources Institute of New Zealand Conference Engaging Change 2009, Wellington Convention Centre, Wellington, 2-4 December 2009) 11.

⁶ *Ibid*, at 12.

⁷ Please note whether redeployment is in fact an element of procedural fairness is discussed in more detail within this chapter under each of the specific legislative regimes.

⁸ See Anderson and others, *Mazengarb*, above n 1, at [ERA103.52C].

⁹ In 2000, 67 per cent of all agreements contained such a provision. This data can be found in: R Harbridge, A Crawford and P Kiely, *Employment Agreements: Bargaining Trends & Employment Law Update 1999/2000* (Industrial Relations Centre, Victoria University of Wellington, 2000) 70.

with 82 per cent of all settlements in 2003¹⁰ containing an express provision outlining alternative options to redundancy.¹¹

Where contractual redeployment provisions exist they tend to provide set criteria governing the alternative positions that affected employees may be transferred to. Such criteria tend to relate to the nature and location of the position as well as the remuneration level.¹² There is substantial case law surrounding the interpretation of redeployment clauses,¹³ particularly regarding what will be deemed an appropriate or suitable alternative position.¹⁴ Additionally, interpretation of preferential or priority rehiring clauses have also seen considerable debate within case law.¹⁵

B *Redeployment under the LRA 1987*

Irrespective of any contractual or policy obligation, in *Hale*¹⁶ Cooke P took the view that redeployment was an element of procedural fairness and was in fact something that an

¹⁰ G Thickett, R Harbridge, Pat Walsh and P Kiely, *Employment Agreements: Bargaining Trends & Employment Law Update 2002/2003* (Industrial Relations Centre, Victoria University of Wellington, 2003) 73.

¹¹ See appendix three, part D for a full copy of the data relating to alternative to redundancy provisions in collective agreements.

¹² J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 1, at [4.34].

¹³ For example see *Bay Milk Distributors Limited v Jopson* (Employment Court, Auckland, AC6A/09, 22 December 2009, Chief Judge Colgan); *Fonterra Cooperative Group Limited v Van Heerden and Anor* (Employment Court, Auckland, AC61/07, 13 December 2007, Judge Travis). For discussion on this point see: J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 1, at [4.34].

¹⁴ For example see *Westpac Banking Corporation v Smythe* (Employment Court, Auckland, AC5/06, 9 February 2006, Judge Couch); *Smith v Sovereign Limited* (Employment Court, Auckland, AC68/05, 18 November 2005, Judge Travis); *Westpac Banking Corporation v Money* (Court of Appeal, CA44/03, 22 March 2004, McGrath, Hammond and O'Regan JJ); *AMI Insurance Limited v Kirk* [1999] 1 ERNZ 301.

¹⁵ For example see *Priest and Ors v Fletcher Steel Limited* (Employment Court, Auckland, AC81/99, 14 October 1999, Judge Colgan); *Fletcher Development and Construction Limited v New Zealand Labourers etc IUOW* [1991] 1 ERNZ 259; *Gates v Air New Zealand*, above n 4. It is beyond the scope of this paper to discuss the interpretation of specific redeployment or preferential rehiring clauses.

¹⁶ *G N Hale & Son Limited v Wellington, etc, Caretakers, etc IUW* [1991] 1 NZLR 151.

employer should take into account when executing a procedurally fair redundancy process. Specifically Cooke P noted:¹⁷

‘I have no doubt that a dismissal for redundancy must be carried out by a fair procedure and that, on the facts of particular cases, this will extend to the manner of selecting the worker or workers declared to be redundant and giving a fair opportunity to make representations on the possibility of redeployment’.

Although the judges in *Hale* were in agreement regarding the answer to the question of law posed by the Employment Court, their comments regarding procedural fairness were not unanimous. Contrary to Cooke P’s sentiments above, Richardson J, although noting that the Court did not need to rule on the precise content of procedural fairness, asserted that:¹⁸

‘..it may well be that consideration of the best means of implementing planned cost savings and of the feasibility of redeploying workers should be viewed as a matter of business judgment, not procedural fairness concerns.’

Furthermore, Somers J although less explicit than Richardson J, also questioned: “both the application and the supposed content of the concept of procedural fairness in cases of dismissal for redundancy”.¹⁹

This uncertainty of judicial option relating to the application of redeployment under the LRA was certainly still evident in judicial determinations governed by the ECA.

C Redeployment under the ECA 1991

As already discussed in chapter seven, the ECA with its strong contractual focus certainly influenced the reasoning encapsulated within the judicial decisions of that era.

¹⁷ Ibid, at 156.

¹⁸ Ibid, at 158. Richardson J also restated this view in *Brighouse Limited v Bilderbeck* [1994] 2 ERNZ 243, at 259.

¹⁹ *G N Hale & Son Limited v Wellington, etc, Caretakers, etc IUW*, above n 16, at 158.

I Aoraki

In *Aoraki*,²⁰ the Court of Appeal acknowledged that, while the actual decision to make a position redundant is focused directly on the position itself, as opposed to the employee who fills that role, the duty of fairness relates to the employee rather than the position.²¹ Therefore, the duty of fairness “cannot be submerged in the decision to make certain positions or jobs redundant”.²²

Notwithstanding this assertion, the Court of Appeal, when discussing consultation requirements, suggested that the failure to consider redeployment opportunities may cast doubt upon the genuineness of a redundancy.²³ So although the majority appeared to be acknowledging that redeployment may be a consideration in relation to fairness, its absence could also, in certain circumstances, raise suspicion about the substantive decision.²⁴ This assertion was not seen to be inconsistent with, or have a negative effect, on the power of the managerial prerogative.²⁵

II McKechnie

Following *Aoraki* was the case of *McKechnie Pacific (New Zealand) Limited v Clemow*²⁶ (*McKechnie*). The Court of Appeal in this case was tasked with reviewing the Employment Courts decision which had held that the employer had engaged in insufficient consultation

²⁰ *Aoraki Corporation Limited v McGavin* [1998] 1 ERNZ 601.

²¹ *Ibid*, at 629 as per Richardson P, Gault, Henry, Keith, Blanchard and Tipping JJ.

²² *Ibid*.

²³ *Ibid*, at 618 as per Richardson P, Gault, Henry, Keith, Blanchard and Tipping JJ.

²⁴ J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 1, at [4.34].

²⁵ *Aoraki Corporation Limited v McGavin*, above n 20, at 618 as per Richardson P, Gault, Henry, Keith, Blanchard and Tipping JJ. See also: J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 1, at [4.34].

²⁶ (Court of Appeal, CA233/97, 22 October 1998, Henry, Blanchard and McGechan JJ).

and in particular this lack of consultation had led to a failure to consider redeployment opportunities for the affected employee, being Mr Clemow. Specifically, Blanchard J stated that:²⁷

‘In circumstances in which there was no longer any requirement for a full-time company secretary, a fair employer should have given consideration to redeployment. Consultation, while not a mandatory requirement, was desirable in the interests of both employer and employee. If in fact another position existed within the McKechnie group in New Zealand which was suitable for Mr Clemow it could not be said that he was surplus to requirements, so that there would not be a situation of redundancy’.

This dictum was regularly cited in subsequent cases²⁸ as indicating that where an employer had an alternative position available and it decided not to redeploy an employee that was facing redundancy in to that position, it raised questions about the genuineness of that employee’s alleged redundancy.²⁹ This prima facie appeared to be taking the sentiments espoused in *Aoraki* a step further and to some extent reduced the power of the managerial prerogative, as the employer’s ability to determine and manage the reallocation of positions when faced with a redundancy situation was diminished. Put simply, *McKechnie* stated that if a suitable position exists and an employee is to be made redundant, the employer must consider that employee for the new or vacant position if they are in fact qualified to perform it. Furthermore, as evidenced by the above quote, the reasoning of the judgment appears to be suggesting that it is the person who is redundant rather than the position.³⁰ For this reason, the above dictum propounded within the *McKechnie* judgment has been questioned.³¹

²⁷ Ibid, at 5.

²⁸ For example see *Roberts v Capital Coast Health Limited* [1998] 3 ERNZ 1052.

²⁹ For an example of where the Employment Court has held that a failure to consult and consider redeployment options made the dismissal unjustifiable see *Edwards and Edwards (t/a Dickson Edwards and Co) v Stirling* (Employment Court, Auckland, AC61A/98, 15 October 1998, Judge Travis) cited in P Churchman, C Toogood and M Foley, *Brookers PG*, above n 1, at [6.8].

³⁰ This point is also discussed in chapter thirteen.

³¹ See the discussion in *New Zealand Fasteners Stainless Limited v Thwaites* [2000] 1 ERNZ 739, at [22]-[25] as per Gault J.

III Thwaites

The Court of Appeal reversed the emerging approach in *Thwaites*³² and reaffirmed the strength of the managerial prerogative. The Court emphasised that it is the position that is redundant not the person:³³

‘Redundancy is determined in relation to the position not the incumbent. Whether a position is truly redundant is a matter of business judgment for the employer. The genuineness of any determination of redundancy can be reviewed. If it is not one the employer acting reasonably and in good faith could have reached it may be impeached. In any such review it may be relevant that the employer did not consult with affected employees or consider whether the redundancy might be avoided by redeployment or otherwise. Absence of such steps might in the particular circumstances indicate absence of genuineness in the determination’

In *Thwaites* the Court of Appeal asserted that the approach followed in the *McKechnie* case did not in reality reflect the pre-existing and accepted law in *Aoraki*.³⁴ The Court of Appeal was unambiguous in asserting that if a position is genuinely redundant this finding cannot be abrogated by a failure to offer an alternative position.³⁵ Additionally *Thwaites* restricted employment obligations to the sphere of the specific contractual relationship rather than suggesting any wider ambit of obligation.³⁶ Explicitly the Court of Appeal stated:³⁷

‘In a situation of genuine redundancy, where the position truly is surplus to requirements, in the absence of a contractual provision to that effect, it cannot constitute unjustifiable dismissal not to offer the employee a different position. The relationship between the employer and employee applies in respect of the position and work the employee is contracted to provide. That may be varied consensually in the course of the relationship but it does not extend to any other position a Court might subsequently determine would be suitable to the employee. Nor does the obligation to deal fairly with an employee extend beyond the job in which he or she is employed. The obligation is implied into the contract for that employment’.

³² *New Zealand Fasteners Stainless Limited v Thwaites* [2000] 1 ERNZ 739.

³³ *Ibid*, at [22] as per Gault J.

³⁴ *Ibid*, at [23].

³⁵ *Ibid*.

³⁶ See *Victoria University of Wellington v Haddon* [1996] 1 ERNZ 139 cited in: Anderson and others, *Mazengarb*, above n 1, at [ERA 103.52B].

³⁷ *New Zealand Fasteners Stainless Limited v Thwaites*, above n 31, at [35] as per Gault J.

Therefore, as redeployment has never overtly been interpreted as impacting on substantive justification,³⁸ and given the decision in *Thwaites* that the obligation to deal fairly with an employee is limited to the job to which the employee is employed, arguably redeployment is not necessarily part of procedural fairness as it is beyond the contractual sphere.³⁹ Consequently, given this dictum it might appear that redeployment in a redundancy situation under the ECA was largely ineffective as an operative consideration.

However, Gault J went on in *Thwaites* to express the view that in some factual circumstances there may be exceptions to this assertion. It was suggested that if a lack of consultation and consideration of redeployment options, when viewed in totality of the factual circumstances, suggests that the decision to make the employee redundant was not genuine and the standard of the employer's behaviour falls below what would be expected from a reasonable employer acting fairly, then the affected employee may be entitled to a remedy.⁴⁰ However, the Court did stress that this remedy was for any procedural deficiencies in respect of how the redundancy was carried out and only in exceptionally rare cases would failure to consider redeployment options result in questioning the substantive justification of the decision.⁴¹ This approach appeared to suggest that redeployment was part of procedural fairness⁴² and therefore again confirms the approach advocated by Cooke P in *Hale* under the LRA.⁴³

³⁸ Note the comment by Richardson J in *G N Hale & Sons Limited v Wellington, etc, Caretakers, etc, IUW*, above n 16, at 158 where it was asserted that: "the best means of implementing planned cost savings and of the feasibility of redeploying workers should be viewed as a matter of business judgment, not procedural fairness concerns".

³⁹ A Russell, "The 'Emperor's New Clothes': The Judicial Fabric of Redundancy Under the Employment Relations Act 2000" (2003) 9 *New Zealand Business Law Quarterly* 125, 133.

⁴⁰ *New Zealand Fasteners Stainless Limited v Thwaites*, above n 31, at [27].

⁴¹ *Ibid.*

⁴² A Russell, above n 39, at 133.

⁴³ For discussion see: J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 1, at [4.34].

D *Redeployment under the ERA 2000*

In comparison to the ECA, the ERA was a significantly different regime. However, in respect of redeployment, the first decision under the ERA in *Coutts*⁴⁴ represented little change. Although *Coutts* was not expressly concerned with the issue of redeployment, some of the dicta encapsulated within the judgment signified how the Court of Appeal anticipated any future arguments about the obligation to redeploy affected employees were to be treated within the new good faith regime under the ERA.⁴⁵ Importantly, *Coutts* articulated that the legislative good faith obligations did not introduce any significant changes in approach to that which the judiciary had placed on parties to employment contracts over the preceding years.⁴⁶ The Court of Appeal expressly stated that “there is no reason why the decisions in *Aoraki* and *NZ Fasteners Stainless Ltd v Thwaites* should not continue to provide guidance on the applicable principles”.⁴⁷

Therefore, based on *Coutts*, the ERA with the statutory obligations of good faith would prima facie appear to make no overt requirement on employers to redeploy an employee who is to be made redundant, even if there is another position which would be a suitable alternative for the employee concerned.

Despite this assertion, the amendments to the ERA and subsequent case law clearly alter this controversial interpretation of the ERA as advocated in *Coutts* and, as a result of this, the approach to redeployment.

⁴⁴ *Coutts Cars Limited v Baguley* [2001] ERNZ 660.

⁴⁵ See A Russell, above n 39, at 132.

⁴⁶ *Coutts Cars Limited v Baguley*, above n 44, at [42].

⁴⁷ *Ibid*, as per Gault J.

I ERA 2000 as Amended in 2004

As outlined in chapter seven, Parliament enacted s 4 (1A) in response to the majority decision in *Coutts* in order to crystallize their legislative intention regarding the concepts and express words previously enacted. Additionally, the provision clarified certain procedural requirements as well as introducing a new test of justification. The case of *Simpson's Farms*⁴⁸ confirmed that in respect of redundancy, the test regarding substantive justification remained unchanged whereas procedural requirements became explicit and good faith obligations were to be considered in respect of justification.⁴⁹

Although the case of *Simpson's Farms* was not expressly concerned with the issue of redeployment, the Employment Court made some fundamental observations which influenced the interpretation and application of the new provisions in respect of redeployment obligations.

II Obligations contained in section 4 (1A)

In general the obligations contained in s 4 of the ERA impose a statutory duty on both parties to the employment relationship. Specifically, both parties need to be “active and constructive in establishing and maintaining a productive employment relationship”.⁵⁰

However, in *Simpson's Farms* the Employment Court noted that the obligations contained in s 4 (1A) (c) prescribe specific duties on the employer only.⁵¹ The procedural requirements

⁴⁸ *Simpsons Farms Limited v Aberhart* [2006] ERNZ 825.

⁴⁹ See discussion on this point in chapter three.

⁵⁰ See s 4 (1A) (b) of the ERA.

⁵¹ *Simpsons Farms Limited v Aberhart*, above n 48, at [65].

contained in this provision apply when any decision, “will, or is likely to, have an adverse effect on the continuation of employment”.⁵²

As already noted, the Employment Court in *Simpson’s Farms* did not expressly address the issue of redeployment. However, arguably the language utilised in this new provision, when read in conjunction with the objectives of the ERA, indicate that the party’s respective obligations are not simply limited to the contractual sphere of a particular position when dealing with redeployment as interpreted through earlier ECA judgments such as *Thwaites*.

The key object of the ERA is to “build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship”.⁵³ Consequently, the connotation associated with this objective and the notion of a relationship is beyond the ambit of a contract as it alludes to a more ongoing connection encompassing more than simply terms and conditions of employment as outlined in a contract. This factor, coupled with the amended duty of good faith which talks about not only “establishing”,⁵⁴ but also “maintaining”,⁵⁵ a productive employment relationship arguably further extends this obligation beyond the contract of employment. Taken literally, maintaining something suggests the notion of continuing to retain something and to keep it in existence.⁵⁶ Therefore, good faith clearly requires the parties to the employment relationship to be “active and constructive”⁵⁷ in ensuring it is maintained. This proactive approach in a redundancy situation suggests that employers must consider alternatives to redundancy as a way of maintaining the employment relationship. Therefore redeployment as an element of procedural fairness arguably becomes a necessary issue for

⁵² See s 4 (1A) (c) of the ERA.

⁵³ Section 3 (a) of the ERA.

⁵⁴ Section 4 (1A) (b) of the ERA.

⁵⁵ Section 4 (1A) (b) of the ERA.

⁵⁶ Shorter Oxford English Dictionary (5th ed, Oxford University Press, Oxford, 2002) vol 1, at 1674.

⁵⁷ Section 4 (1A) (b) of the ERA.

the employer to discuss with the employee. As a result of this, the provision of information and the opportunity to comment in relation to redeployment options becomes fundamentally important.

In *HP*⁵⁸ the obligations associated with redeployment were discussed by the Employment Court. It was accepted by the parties that Mr Davison was genuinely made redundant from HP Industries Limited in late 2006. The key question for the Employment Court was whether HP had acted justifiably in the circumstances that occurred in the period leading up to his termination.⁵⁹ Although Mr Davison's IEA contained a specific clause relating to redundancy, it was silent regarding consultation and redeployment.⁶⁰ Evidence presented by both parties suggested that Mr Davison and his representative had questioned HP about whether there were any other job opportunities within HP as an alternative to redundancy. HP attempted to place the onus on Mr Davison to establish some proposed options for HP to consider. Mr Davison's representative disputed the onus of such an obligation being placed on the employee suggesting that this was clearly the employer's responsibility.⁶¹ Although another offer of employment was eventually made, the manner in which this occurred with a lack of real information and consultation as well as an unrealistic timeframe were held to be unjustifiable. The Employment Court made it clear that:⁶²

'Section 4 (1A) recognises that the provision of information relevant to the continuation of an employee's employment is the responsibility of the employer. The obligation is on the employer to provide the employee with information about possible alternatives to redundancy or options for redeployment'.

⁵⁸ (Employment Court, Auckland, AC44/08, 7 November 2008, Judge Shaw).

⁵⁹ *HP Industries (NZ) Limited v Davison*, above n 58, at [44].

⁶⁰ *Ibid*, at [14].

⁶¹ *Ibid*, at [32].

⁶² *Ibid* at [51] as per Judge Shaw.

The Employment Court went further to comment that HP should have made “efforts to find an alternative for him at the beginning rather than the end of the process”.⁶³

This decision suggests that even where a contract is silent in respect of redeployment, s 4 (1A) (c) requires an employer to act proactively within the redundancy process to give real information about alternatives to redundancy for the employee to consider. This decision confirms that redeployment is clearly a definitive element of procedural fairness. Arguably it also questions the applicability of *Thwaites* strictly contractual approach concerning redeployment given the amended legislative environment. Recent case law seems to support this assertion and is discussed in relation to the test of justification.

III Test of Justification

As noted in chapter seven, the *Air New Zealand*⁶⁴ case which specifically reviewed the test of justification, expressed the view that the judiciary needs to objectively consider all the actions of an employer leading up to, and including the decision to dismiss.⁶⁵

This approach advocated in the *Air New Zealand* case was applied in *Jinkinson v Oceana Gold New Zealand Limited*⁶⁶ (*Jinkinson*) which was a case concerning a challenge to an alleged redundancy and subsequent non-selection of the appellant for redeployment into a new position created by the Oceana Gold’s restructure. Interestingly, Judge Couch expressly stated that the decision in *Thwaites* was decided under the ECA and that the enactment of the ERA and its amendments in 2004 has significantly altered the approach taken to this area of

⁶³ *Ibid*, at [57].

⁶⁴ (Employment Court, Auckland, AC15/09, 3 June 2009, Chief Judge Colgan and Judges Travis, Shaw and Couch).

⁶⁵ *Air New Zealand v V*, above n 64, at [37].

⁶⁶ [2010] NZEmpC 102 (note this case has been granted leave to appeal).

law,⁶⁷ specifically citing the importance of the new interpretation of s 103A as well as the obligations of good faith encapsulated in s 4 (1A) (c).⁶⁸ When applying the test of justification to the facts of this case Judge Couch stated:⁶⁹

‘In this case, a critical step in deciding to dismiss Ms Jinkinson was the decision that she would not be appointed to one of the mine technician positions. Put another way, had Ms Jinkinson been appointed to one of the mine technician positions, she would not have been dismissed. Thus the selection process and its outcome must form part of the employer’s conduct to be reviewed in deciding whether the dismissal was justified’

Given this approach, the debate regarding whether consideration of redeployment should be a part of the test for substantive justification or procedural fairness becomes largely irrelevant as all the actions of the employer are taken in totality. Therefore, as with other procedural fairness elements, consideration regarding alternatives to redundancy such as redeployment will influence justifiability.

In the case of *Wang v Hamilton Multicultural Services Trust*⁷⁰ (*Wang*), the decision to make the plaintiff redundant was made for genuine business reasons. However, the defendant Trust failed to meet its obligations under the redundancy process in respect of redeployment.⁷¹ Specifically, the defendant Trust although acknowledging that the newly created position could and would be suitable for the plaintiff to fill, it was decided to advertise the position externally.⁷² Although the plaintiff was encouraged to apply, no application was ever made. Consequently, the plaintiff was made redundant. In applying *Jinkinson*, Judge Perkins stated:⁷³

⁶⁷ Ibid at [37].

⁶⁸ Ibid at [38-39].

⁶⁹ Ibid at [38].

⁷⁰ [2010] NZEmpC 142.

⁷¹ Ibid at [40].

⁷² Ibid at [42].

⁷³ Ibid at [42].

‘the failure to consider redeployment in the context of the test of justification under s103A of the Act leads to the conclusion that in this case the employer failed to act in a way that a fair and reasonable employer, judged objectively would have done in all the circumstances at the time the dismissal occurred’.

The decisions in *Jinkinson* and *Wang* arguably more closely align with the reasoning espoused in the *McKechnie* judgment. Both decisions seem to be suggesting that if the employer has a vacant position for which the proposed redundant employee is suitable, then applying the test of justification, a fair and reasonable employer judged objectively would redeploy the affected employee into that position. As was the case following the *McKechnie* decision, this application of the law in respect of dismissal by redundancy, therefore arguably raises the question of whether it is the person who is actually redundant rather than the position. It also suggests the power of the managerial prerogative is diminished.

As with the other areas of procedural fairness, the 2010 amendments to the ERA do not impact directly on this aspect of redundancy law.⁷⁴ It is also important to note that the Report of the Public Advisory Group on Restructuring and Redundancy⁷⁵ as well as the Employment Relations (Statutory Minimum Redundancy Entitlements) Amendment Bill made no formal recommendations in respect of alternatives to redundancy, and more specifically, redeployment.⁷⁶

E International Obligations

The International Termination of Employment Convention expressly states that as early as possible within any potential redundancy process employees should have an opportunity for consultation on measures that could be taken to avert or to minimize the terminations as well

⁷⁴ For further discussion on the 2010 amendments to the ERA see chapter fifteen.

⁷⁵ *Report of the Public Advisory Group on Restructuring and Redundancy* (Prepared for the Ministers of Labour, Social Development and Employment and Economic Development, 30 June 2008).

as measures to mitigate the adverse effects of any terminations on the employees concerned, such as finding alternative employment.⁷⁷ The enactment and judicial interpretation of s 4 (1A) and s 103A in the cases of *Jinkinson*, *Wang* and *HP* certainly seem to comply with this international obligation.

However, in respect of the International Termination of Employment Recommendation the current law is perhaps still lacking. The Recommendation suggests that employees who are made redundant should be given in certain circumstances priority in respect of rehiring.⁷⁸ There has never been any form of obligation to this extent other than what is agreed between the parties in an individual or collective agreement. As evidenced by the data captured by the IRC in appendix three, part D, very few collective agreements within the data sample contain such a provision. Compliance with this recommendation would involve a significant change for most New Zealand employers and requires further consideration.⁷⁹ Notwithstanding this point, it is important to note that the scope of unjustifiable disadvantage was extended in 2000 to cover this type of situation.⁸⁰

⁷⁶ See appendix five for a copy of the Employment Relations (Statutory Minimum Redundancy Entitlements) Amendment Bill.

⁷⁷ See R166 Termination of Employment Recommendation 1982, Article 13. A copy of this recommendation is contained in appendix two. See also R166 Termination of Employment Recommendation 1982, s 21. A copy of the Convention and Recommendation are contained in appendix two.

⁷⁸ See R166 Termination of Employment Recommendation 1982, s 24 contained in appendix two.

⁷⁹ Such consideration is beyond the scope of this paper.

⁸⁰ See the Department of Labour, *Employment Relations Bill* (Report of the Department of Labour to the Employment and Accident Insurance Legislation Select Committee, June 2000) 117.

Chapter Eleven

Blurred Outlook

Procedural Fairness and Outplacement Support

Outplacement services can encompass a variety of different assistance measures for redundant employees. Such measures can include the provision of financial or career advice, retraining, as well as assistance with obtaining new employment such as job searches, curriculum vitae writing and interview training. Additionally, and probably the most commonly utilised support mechanism, is the offer of counselling to help alleviate issues associated with stress and anxiety as a result of the redundancy situation.¹ These forms of support mechanisms are not all inclusive and employers have never been expressly obliged in legislation to provide any specific outplacement support services.

However, historically the Courts have generally accepted that the provision of any outplacement services has formed a part of the assessment of whether the employer's actions in making affected employees redundant has been conducted in a procedurally fair manner.²

A *Contractual Obligations*

According to the only data available relating to specific outplacement support provisions within redundancy clauses of collective agreements, their use is minimal. Up until 2003 the IRC collected data specifically on outplacement support within redundancy clauses generally

¹ A Russell, "The 'Emperor's New Clothes': The Judicial Fabric of Redundancy Under the Employment Relations Act 2000" (2003) 9 New Zealand Business Law Quarterly 125, 134.

² For general discussion on outplacement support in redundancy cases see: J Hughes, P Roth and G Anderson, *Personal Grievances* (online loose-leaf ed, LexisNexis) at [4.33].

and also that of counselling and interview attendance leave as support mechanisms made available to affected employees.³

Evidence indicated that the use of outplacement support within redundancy clauses across all settlements within the sample was as low as 10 per cent in 2003⁴ and that this figure was in decline, having halved in usage since 2000.⁵ In respect of the use of counselling, data showed the converse result with up to 43 per cent of all settlements in 2003 stipulating the offer of this form of support.⁶ The usage of counselling as a service for affected employees increased marginally from 39 per cent in 2000.⁷ Likewise, the use of agreed leave for affected employees to attend interviews increased marginally from 59 per cent of all settlements in 2000⁸ to 61 per cent in 2003.⁹ Where such provisions exist, an employer must ensure that the agreed support services are provided to the affected employees.

As with other areas of procedural fairness, where a contractual term exists, the scope of the obligation depends on the interpretation of the particular clause. In the Employment Court case of *Bay Milk Distributors Limited v Jopson*,¹⁰ the respondent argued that despite having an express contractual right to the provision of “counselling if necessary to assist the employee”,¹¹ the appellant had neglected to provide such support and therefore had breached the employment agreement.¹² The Employment Court held that there was no such breach for

³ See appendix three, part E for a copy of this data.

⁴ G Thickett, R Harbridge, Pat Walsh and P Kiely, *Employment Agreements: Bargaining Trends & Employment Law Update 2002/2003* (Industrial Relations Centre, Victoria University of Wellington, 2003) 74.

⁵ R Harbridge, A Crawford and P Kiely, *Employment Agreements: Bargaining Trends & Employment Law Update 1999/2000* (Industrial Relations Centre, Victoria University of Wellington, 2000) 71.

⁶ G Thickett, R Harbridge, Pat Walsh and P Kiely, above n 4, at 74.

⁷ R Harbridge, A Crawford and P Kiely, above n 5, at 72.

⁸ *Ibid.*

⁹ G Thickett, R Harbridge, Pat Walsh and P Kiely, above n 4, at 74.

¹⁰ (Employment Court, Auckland, AC6A/09, 22 December 2009, Chief Judge Colgan).

¹¹ *Bay Milk Distributors Limited v Jopson*, above n 10, at [17] as per Chief Judge Colgan.

¹² *Ibid.*, at [18].

two reasons. Firstly, the clause specified that the obligation to provide counselling was limited to situations where it was ‘necessary’ and in this case as the process had been carried out in a sensitive manner, the obligation to provide counselling was not triggered. Secondly, the written advice of the dismissal for redundancy had expressly stated within it: “If we can be of any assistance to you during this time please do not hesitate to contact me”.¹³ As the respondent did not respond to the general offer of assistance, which the Employment Court asserted would have included counselling, it could not be said that the provision of counselling was in fact “necessary”.¹⁴

B No Contractual Obligation¹⁵

As already discussed,¹⁶ it has long been accepted that even where a redundancy is based on genuine grounds, it must still be carried out through a fair process.¹⁷ However, the precise elements of what is deemed a fair process in respect of outplacement services has never been explicitly defined by the Courts: rather the content of the support must be determined by the precise circumstances of the particular case.¹⁸ As a result of this approach, arguably there is some uncertainty surrounding what is required to ensure the support given is adequate.¹⁹

¹³ Ibid, at [33].

¹⁴ Ibid, at [34].

¹⁵ For further information on Redundancy law prior to the ECA see: M Mulgan, “Redundancy Dismissals” in A Szakats and M Mulgan, *Dismissal and Redundancy Procedures* (2nd ed, Butterworths, Wellington, 1990) 193-268.

¹⁶ *G N Hale & Son Limited v Wellington, etc, Caretakers, etc IUW* [1991] 1 NZLR 151, at 156.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ A Russell, above n 1, at 137. It is important to note that the Department of Labour has produced a number of guides and factsheets to assist both employers and employees with procedural requirements in a redundancy situation. See: Department of Labour, “Disciplinary Action, Dismissal, Redundancy and Ill Health: Guide for Employees” (August 2009). A copy of this guide can be accessed as: <<http://ers.govt.nz/publications/pdfs/discipline-guide-employere.pdf>>; Department of Labour, “Disciplinary Action, Dismissal, Redundancy and Ill Health: Guide for Employers” (August 2009). A copy of this guide can be accessed as: <<http://ers.govt.nz/publications/pdfs/discipline-guide-employer.pdf>>; Department of Labour, “Guide to Restructuring” (18 June 2010). A copy of this guide can be obtained from

As will be discussed in chapter twelve on redundancy compensation, the decision in *Aoraki*²⁰ overruled the decision in *Brighouse*²¹ in respect of the implied obligation to pay compensation to employees affected by redundancy. The Court of Appeal held that the “contract rules”²² and that the Court was not able to “extend the mutual obligation of trust and fair dealing in that way”²³ as it would change the value of the employment contract therefore eroding the notion of free negotiation as advocated by the ECA.²⁴ However, the Court of Appeal appeared to be expressing a completely different view in respect of outplacement support when it held that: “fair treatment may call for counselling, career and financial advice and retraining and related financial support”²⁵ and that “no doubt other considerations will be relevant in particular cases”.²⁶ It could be argued that by asserting that fair treatment may require one, or a combination of the abovementioned support services, that also has the effect of materially changing the pre-existing agreement that the parties to the employment relationship had established.²⁷

Notwithstanding this point, redundancy cases prior to the introduction of the ERA consistently held that in conducting a fair process, consideration of the provision of the abovementioned support mechanisms may be required in order for the process to be deemed

<<http://www.ers.dol.govt.nz/redundancy/guide-restructuring.html>>; Department of Labour, “Fact Sheet: Information for Employees about Redundancy” (17 December 2008) <<http://ers.govt.nz/redundancy/employer-print.html>>; Department of Labour, “Fact Sheet: Information for Employers about Redundancy” (17 December 2008) <<http://ers.govt.nz/redundancy/employer-print.html>>.

²⁰ *Aoraki Corporation Limited v McGavin* [1998] 1 ERNZ 601.

²¹ *Brighouse Limited v Bilderbeck* [1994] 2 ERNZ 243.

²² *Aoraki Corporation v McGavin*, above n 20, at 620 as per Richardson P, Gault, Henry, Keith, Blanchard and Tipping JJ.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*, at 619 as per Richardson P, Gault, Henry, Keith, Blanchard and Tipping JJ.

²⁶ *Ibid.*

²⁷ R Nelson, “The Implied Term of Trust and Confidence: The Change in Approach of the Court of Appeal to the Requirement to Pay Redundancy Compensation” (200) 31 *Victoria University of Wellington Law Review* 599, 621.

procedurally fair.²⁸ However, the actual legal obligation to undertake such services was unclear.²⁹

Given the advent of the ERA, there was speculation as to whether the duty of good faith would manifest a more overt obligation in respect of outplacement services.³⁰

C Employment Relations Act 2000

In *Coutts*,³¹ the Court of Appeal, although not addressing the issue of outplacement support directly, noted that employers must do more than simply be seen as “going through the motions”³² and that by “taking a series of steps each of which is appropriate will not justify the course of conduct if it is carried out in such a way as to bruise the employee rather than minimising the impact on him or her”.³³ This arguably implies that the employer has an obligation to not just tick off steps in an arbitrary process. Rather, they should have thought of steps that they can implement which provide real support for affected employees and consequently minimising “bruising”.³⁴ Arguably this assertion presupposes the importance of outplacement support strategies for employees affected by redundancy.³⁵ However, realistically this affirmation does not appear to change or enlarge the pre-existing obligations as pronounced under the former legislation.³⁶

²⁸ See for example *Brighouse Limited v Bilderbeck*, above n 21, at 255 as per Cooke P; at 261 as per Richardson J.

²⁹ A Russell, above n 1, at 135.

³⁰ *Ibid.*

³¹ *Coutts Cars Limited v Baguley* [2001] ERNZ 673.

³² *Ibid.*, at [48] as per Gault J.

³³ *Ibid.*

³⁴ A Russell, above n 1, at 135.

³⁵ *Ibid.*

³⁶ *Ibid.*, at 135-136.

I Employment Relations Act as Amended 2004

The 2004 amendments to the ERA made no explicit reference to outplacement support as part of the procedural requirements in a redundancy situation. However, as interpreted in *Simpson's Farms*,³⁷ the extended duty of good faith in s 4 represent only the minimum procedural obligations to be undertaken in a redundancy situation.³⁸ Given this, despite legislative silence on issues concerning outplacement support, with the existing case law remaining operative, the legislative amendments have arguably only strengthened their requirement as part of a fair process, and as noted in *Simpson's Farms*, their role in determining the legislative test for justification.³⁹

Specifically, the underlying notion of good faith was to encourage a change in behaviour,⁴⁰ therefore arguably encouraging good managerial practice⁴¹ to ensure that all aspects of the employment relationship were conducted fairly. As redundancy is a no fault situation, its application can have severe negative implications for an employee.⁴² Arguably the extended definition of good faith⁴³ which encompasses the entire employment relationship rather than simply the contractual sphere⁴⁴ enhances the requirement of the provision of support services.

³⁷ *Simpsons Farms Limited v Aberhart* [2006] ERNZ 825.

³⁸ *Ibid*, at [64].

³⁹ See the discussion in chapter seven on notice regarding the changes in approach to the test of justification.

⁴⁰ M Wilson, "The Employment Relations Act: A Framework for a Fairer Way" in E Rasmussen (ed), *Employment Relationships: New Zealand's Employment Relations Act* (Auckland University Press, Auckland, 2004) 9, 17.

⁴¹ See discussion on this point in chapter nine.

⁴² See the comments made by Richardson J in *G N Hale & Son Limited v Wellington, etc, Caretakers, etc, IUW*, above n 16, at 157.

⁴³ See chapter three, which discusses the 2004 amendments specifically noting the point that they were partially directed towards changing the interpretation of good faith in *Coutts*.

⁴⁴ See the discussion on this point in chapter ten concerning Redeployment.

This very point was made in the case of *Charter Trucks*⁴⁵ where the Employment Court held that:⁴⁶

‘Charter Trucks Limited offered Mr. Harris no support or assistance in coping with the effects of dismissal in circumstances where he had done no wrong and had no alternative employment prospects. This was a case in which a fair and reasonable employer would have provided the type of assistance referred to by the Court of Appeal in the passage from *Aoraki*’.

Notwithstanding this, there is still no definitive judicial interpretation of precisely what services should in fact be provided as a general rule. Uncertainty remains, as although it can be argued that the obligation to provide outplacement services has increased under the amended ERA, the actual type of service remains specific to the particular circumstances of the case.⁴⁷

D Proposed Reforms and International Obligations

Although New Zealand has not ratified the International Termination of Employment Convention 1982,⁴⁸ it articulates that employers who are contemplating terminations based on the grounds of redundancy should ensure they have support mechanisms in place to

⁴⁵ *Harris v Charter Trucks Limited* (Employment Court, Christchurch, CC16/07, 11 September 2007, Judge Couch).

⁴⁶ *Ibid*, at [95] as per Judge Couch.

⁴⁷ See discussion in chapter six, which emphasizes that the circumstances of the case will influence the standard of procedural fairness to be applied. It is important to note that the Department of Labour has produced a number of guides and factsheets to assist both employers and employees with procedural requirements including outplacement support in a redundancy situation. See: Department of Labour, “Disciplinary Action, Dismissal, Redundancy and Ill Health: Guide for Employees” (August 2009). A copy of this guide can be accessed as: <<http://ers.govt.nz/publications/pdfs/discipline-guide-employere.pdf>>; Department of Labour, “Disciplinary Action, Dismissal, Redundancy and Ill Health: Guide for Employers” (August 2009). A copy of this guide can be accessed as: <<http://ers.govt.nz/publications/pdfs/discipline-guide-employer.pdf>>; Department of Labour, “Guide to Restructuring” (18 June 2010). A copy of this guide can be obtained from <<http://www.ers.dol.govt.nz/redundancy/guide-restructuring.html>>; Department of Labour, “Fact Sheet: Information for Employees about Redundancy” (17 December 2008) <<http://ers.govt.nz/redundancy/employer-print.html>>; Department of Labour, “Fact Sheet: Information for Employers about Redundancy” (17 December 2008) <<http://ers.govt.nz/redundancy/employer-print.html>>.

⁴⁸ For a full copy of this Convention see appendix two.

mitigate the adverse effects of any terminations on the affected employees.⁴⁹ The Convention goes on to provide one example of mitigation being the location of alternative employment.⁵⁰

The associated International Termination of Employment Recommendation 1982⁵¹ expands on the Convention advocating that not only should assistance be given to affected employees to find alternative employment but consideration to training and retraining should be given.⁵² The Human Development Recommendation 1975 is cited as providing guidance in this area.⁵³ Additionally the recommendation suggests the provision of income protection during any course of training or retraining and partial or total reimbursement of expenses connected with training or retraining and with finding and taking up employment which requires a change of residence.⁵⁴

The Advisory Group Report on Restructuring and Redundancy⁵⁵ expressly recommended that the government consider a statutory requirement that provides redundancy support as well as active labour market mechanisms to both affected employees and organisations.⁵⁶ The unsuccessful Employment Relations (Statutory Minimum Redundancy Entitlements)

⁴⁹ See C158 Termination of Employment Convention 1982, article 13 (1) (b). A copy of this Convention is contained in appendix two.

⁵⁰ See the discussion on redeployment contained in chapter ten.

⁵¹ For a full copy of this Recommendation see appendix two.

⁵² See R166 Termination of Employment Recommendation 1982, s 25. A copy of this Recommendation is contained in appendix two.

⁵³ A copy of the R150 Human Resources Development Recommendation 1975 can be obtained at the following weblink: <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?R150>>.

⁵⁴ See R166 Termination of Employment Recommendation 1982, s 26. A copy of this Recommendation is contained in appendix two.

⁵⁵ *Report of the Public Advisory Group on Restructuring and Redundancy* (Prepared for the Ministers of Labour, Social Development and Employment and Economic Development, 30 June 2008).

⁵⁶ See Recommendation 1 (d) and Recommendation 8 in Part Four of the *Report of the Public Advisory Group on Restructuring and Redundancy*, above n 55, at 48-50. A copy of the recommendations made by the Advisory Group is contained in appendix four.

Amendment Bill did not attempt to incorporate this recommendation.⁵⁷ However, both the Advisory Group and the abovementioned Bill recommend compensation which could assist an affected employee in seeking appropriate support mechanisms and funding training or retraining opportunities.

Given the uncertainty surrounding what support services would be appropriate for an employer to provide to an affected employee in the particular circumstance of the case, arguably greater guidance needs to be given to employers about this obligation.⁵⁸

Interestingly, the 2010 amendments to the test of justification specifically noted procedural steps that must be taken into account by the Court or Authority when assessing the justifiability of an employer's actions. This was an attempt to clarify uncertainty associated with procedural fairness in disciplinary cases. Ironically they did not provide any guidance specifically for redundancy cases which, as highlighted by this discussion, requires clarification.

⁵⁷ See appendix five for a copy of this Bill.

⁵⁸ See Recommendation 2 in Part Four of the *Report of the Public Advisory Group on Restructuring and Redundancy*, above n 55, at 48-50. A copy of the recommendations made by the Advisory Group is contained in appendix four.

Chapter Twelve

Differing Perspectives

Procedural Fairness and Compensation

The topic of employers providing compensatory payments to employees affected by redundancy has probably been the most contentious and judicially polemic area of redundancy law in New Zealand to date.¹ Redundancy compensation payments can be defined broadly as an additional payment given on top of any payment in lieu of notice made by an employer to an employee affected by redundancy.² Their payment generally serves multiple purposes for both the employer and employee. For the employee it can provide a form of recognition for the service the employee has provided as well as acknowledging the loss of the benefits associated with employment and the fact that termination was made on a no fault basis.³ Additionally, compensatory payments provide an interim level of financial security often termed a ‘safety net’⁴ to assist the employee whilst alternative employment is sought.⁵ For the employer, compensatory payments are often perceived as being associated with good employment practices as they indicate a desire to look after staff in a redundancy

¹ For general discussion on this issue see: Anderson and others, *Mazengarb’s Employment Law*, (online loose-leaf ed, LexisNexis) at [ERA103.48] [“*Mazengarb*”]; J Hughes, P Roth and G Anderson, *Personal Grievances* (online loose-leaf ed, LexisNexis) at [4.36]-[5.29] [“*Personal Grievances*”]; P Bartlett, W Hodge, P Muir, C Toogood, R Wilson, *Brookers Employment Law* (online loose-leaf ed, Brookers) at [ER103.23] [“*Brookers Employment Law*”]; P Churchman, C Toogood and M Foley, *Brookers Personal Grievances* (online loose-leaf ed, Brookers) at [6.8.13]-[6.8.17] [“*Brooker PG*”]; G Anderson, J Hughes, P Roth and M Leggat, *Employment Law: A Practical Guide* (LexisNexis New Zealand Limited, Wellington, 2010) at [18.68] [“*A Practical Guide*”]; G Anderson, J Hughes, M Leggat, P Roth, *LexisNexis Employment Law Guide* (7th ed, LexisNexis, Wellington, 2005) at [ER103.50] [“*Employment Law Guide*”].

² S Hornsby-Geluk, “Managing Organisational Change – Legally” (The Human Resources Institute of New Zealand Conference Engaging Change 2009, Wellington Convention Centre, Wellington, 2-4 December 2009) 13.

³ *Report of the Public Advisory Group on Restructuring and Redundancy* (Prepared for the Ministers of Labour, Social Development and Employment and Economic Development, 30 June 2008) 34.

⁴ A safety net can be interpreted as “any means of protection against difficulty or loss”. See: *The Shorter Oxford English Dictionary* (5th ed, Oxford University Press, Oxford, 2002) vol 2, at 2648.

⁵ *Report of the Public Advisory Group on Restructuring and Redundancy*, above n 3, at 34.

situation.⁶ From a public relations perspective this can make the employer attractive to potential employees as well as customers. Furthermore, they can act as a deterrent in ensuring that the employer considers all options before making an employee redundant.⁷

There has never been a requirement in New Zealand's legislative history obligating employers to pay employees affected by redundancy any form of compensatory payment.⁸ Although historically New Zealand did have the Wage Adjustment Regulations 1974,⁹ this actually dealt with redundancy payments in a negative way by restricting both the entitlement of the claimant as well as the amount of redundancy compensation.¹⁰

In an environment where there is no express legislative requirement on an employer to make any such payment to an employee affected by redundancy, judicial debate has centered on the issue of whether consideration of compensation for redundancy can be implied into a pre-existing employment agreement which is silent on the matter. More specifically, the question has centered on whether procedural fairness in a redundancy situation involves any form of obligation to consider paying redundancy compensation.¹¹ This section outlines the key legislative developments and major judicial decisions that have directed the evolution of this issue. It focuses solely on compensation as an aspect of procedural fairness. This section excludes discussion on part 6A of the ERA, compensation as a form of remedy¹² as well as substantive analysis on the quantification of redundancy payments.

⁶ Ibid.

⁷ Ibid.

⁸ See chapter two on the History of Redundancy Law in New Zealand for further information on this point. See also: M Mulgan, "Redundancy Dismissals" in A Szakats and M Mulgan, *Dismissal and Redundancy Procedures* (2nd ed, Butterworths, Wellington, 1990) 193-268; J Ferguson, "Personal Grievances Arising from Redundancy: Life after *Hale* and the Employment Contracts Act 1991" (1992) 17(3) *New Zealand Journal of Industrial Relations* 371, 373-376.

⁹ For a copy of this regulation see appendix one.

¹⁰ *Report of the Public Advisory Group on Restructuring and Redundancy*, above n 3, at 12.

¹¹ Anderson and others, *Mazengarb*, above n 1, at [ERA103.48].

¹² Compensation as a form of remedy is discussed in chapter fourteen.

A Redundancy Payments

I Labour Relations Act 1987

Under the LRA an award or agreement could incorporate an express redundancy provision. Alternatively, the parties to the employment relationship could voluntarily negotiate and agree on a separate redundancy agreement.¹³

Where an agreement contained an express contractual provision requiring the employer to pay redundancy compensation, they were bound to comply with it.¹⁴ Where no such provision existed, the Courts had no jurisdiction to require the employer to pay redundancy compensation. The judiciary were clear that failure to pay redundancy compensation where there was no express provision requiring it could not make a dismissal unjustifiable.¹⁵

In *Hale*¹⁶ the Court of Appeal however opened up the possibility that compensation might in fact be an element of procedural fairness. Although Cooke P stated that “the mere offer of redundancy compensation does not make a dismissal for alleged redundancy justifiable”¹⁷ the President went on to note that an offer of compensation was “one factor in determining whether, as a whole, the employer’s conduct has been fair and reasonable”.¹⁸ Consequently, this assertion supported the concept that the presence or absence of redundancy compensation was an element to be considered in determining whether a dismissal based on the grounds of

¹³ See s 184 of the LRA. A copy of this provision is contained in appendix one. For discussion see: R Harbridge and K Thompson, “Redundancy – The Rise and Fall of Judicial Activism” [1998] 8 Employment Law Bulletin 160, 160.

¹⁴ For discussion on this point see: Anderson and others, *Mazengarb*, above n 1, at [ERA103.52C].

¹⁵ See *Canterbury Hotel, etc, IUW v Fabiola Fashions Ltd* [1981] ACJ 439 cited in R Nelson, “The Implied Term of Trust and Confidence: The Change in Approach of the Court of Appeal to the Requirement to Pay Redundancy Compensation” (2000) 31 Victoria University of Wellington Law Review 599, 606.

¹⁶ *G N Hale & Son Limited v Wellington, etc, Caretakers, etc, IUW* [1991] 1 NZLR 151.

¹⁷ *Ibid*, at 156.

¹⁸ *Ibid*.

redundancy was carried out in a procedurally fair manner. It was these obiter comments made by Cooke P which provided the foundation for substantial judicial debate on this issue under the ECA.¹⁹

II Employment Contracts Act 1991²⁰

a) Brighthouse

The landmark judgment in *Brighthouse*²¹ provided the first substantive discussion on this issue. The case centered on the question of what procedural obligation, if any, did an employer have in respect of paying compensation to employees dismissed on the grounds of genuine redundancy where the applicable employment contract made no mention of compensation.

The Court of Appeal decision was divided, with the majority consisting of Cooke P, and Casey J and Sir Gordon Bisson J, holding that there was no general obligation on an employer to pay compensation in all situations involving redundancy.²² However, the majority went on to state that:²³

‘obiter statements in *Hale* allowed the Court and Tribunal to find, as they did, that in some situations, despite no agreement regarding redundancy compensation, the employer’s implied obligation of fair treatment will require the payment of compensation to justify a dismissal for redundancy’.

Specifically, the majority noted that the factors to take into account when making such a decision were those encapsulated in *Hale*. These factors included the employee’s length of

¹⁹ See R Nelson, above n 15, at 606.

²⁰ For discussion on the case law associated with redundancy compensation payments under the ECA see: J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 1, at [4.36]. See also: Anderson and others, *Mazengarb*, above n 1, at [ERA103.48]; P Bartlett, W Hodge, P Muir, C Toogood, R Wilson, *Brookers Employment Law*, above n 1, at [ER103.23].

²¹ [1994] 2 ERNZ 243.

²² *Brighthouse Limited v Bilderbeck*, above n 21 at 244.

²³ *Ibid*, at 244.

service; the reasons for the redundancy; the employer's ability to pay compensation; and the period of notice given.²⁴ Consequently, the decision suggested that the implied duty of trust and confidence could impose greater obligations than those contractually provided for and this included the payment of redundancy compensation where the judiciary deemed that fair and reasonable conduct required it.²⁵

There was a strong dissent by both Richardson J and Gault J regarding the majority approach. Both Judges stressed the need for certainty and for redundancy law to be understandable for all parties.²⁶ Specifically it was asserted that redundancy law needed to be based on the principles encapsulated in the governing legislation, in this case the ECA.²⁷ Richardson J asserted that the decision ran counter to the legislative intention of the ECA and actually went beyond the Court's jurisdiction.²⁸ It was contended that the payment of redundancy compensation in cases where no express contractual provisions existed was a matter for the legislation to determine rather than the Courts.²⁹ Richardson J expressly noted:³⁰

'To impose obligations on an employer to pay redundancy where the parties have chosen not to provide for redundancy in their contracts and to do so in the guise of giving effect to the mutual trust requirement, would run counter to statutory intent. It is for the parties to negotiate the content of their employment contract and thereby to create enforceable rights and obligations. Requiring an employer to pay redundancy compensation in those circumstances is to alter the substantive obligations on which they agreed'.

²⁴ Ibid.

²⁵ For detailed discussion on the development and concept of the implied term of trust and confidence in New Zealand see: J Hodder, "Employment Contracts, Implied Terms and Judicial Law Making" (2002) 33 (3&4) Victoria University of Wellington Law Review 895; G Anderson, "Implied Terms" (New Zealand Law Society Employment Law Conference, Auckland, 31 October – 1 November 1996) 21, 25-26; R Nelson, above n 15, at 601-602.

²⁶ *Brighouse Limited v Bilderbeck*, above n 21, at 256 as per Richardson J; 270 as per Gault J.

²⁷ Ibid, at 258 as per Richardson J; 270 as per Gault J.

²⁸ Ibid, at 266 as per Richardson J.

²⁹ Ibid.

³⁰ Ibid, at 258.

It was no surprise that the decision was perceived as controversial and therefore resulted in much debate and discussion.³¹ Notwithstanding this, the Court of Appeal has referred to the majority decision in subsequent cases.³²

b) Aoraki

Only three years had passed since the decision in *Brighouse* when the case of *Aoraki*³³ came before the Court of Appeal. This gave the Court of Appeal another opportunity to review the issue of redundancy compensation and its decision in *Brighouse*. However, the formation of the Court of Appeal had changed somewhat since the decision in *Brighouse*. Cooke P, who advocated the majority viewpoint in *Brighouse*, had been granted a peerage and was therefore leaving the Court of Appeal, whilst Richardson J, who endorsed the minority perspective in *Brighouse*, became the new President.³⁴ Furthermore, all of the judges in the majority in *Brighouse* had retired.³⁵ Arguably the ideological shift in the governance of the Court of Appeal and its new membership influenced the reasoning underpinning subsequent decisions.³⁶

³¹ For discussion on this case see the following resources: R Francois, "Redundancy, Black Letter Law and the Obligation of Fair Dealing" (1998) 8(3) Auckland University Law Review 932; A Geare, "Full Circle? The Continuing Saga of Redundancy Legislation" (1999) 4(1) New Zealand Journal of Industrial Relations 75-82 ["Full Circle"]; K Johnston, "Editorial: Redundancy: Swings and Roundabouts" [1998] 5 Employment Law Bulletin 86; R Kerr, "Judging the Judiciary" (1998) New Zealand Law Journal 329; A Geare and F Edgar, "Stroking the Nettle: New Zealand Legislators and the Issue of Redundancy" (2006) 22 (3) The International Journal of Comparative Labour Law and Industrial Relations 369 ["Stroking the Nettle"]; R Nelson, above n 15; L Grantham, "Towards a Right to Redundancy Compensation" (1996) 21(2) New Zealand Journal of Industrial Relations 157; W Hodge, "Employment Law" [1999] New Zealand Law Review 63; K Toogood, "Facilitating and Regulating Employment" [2002] 33(3 &4) Victoria University of Wellington Law Review 40; A Russell, "The 'Emperor's New Clothes': The Judicial Fabric of Redundancy under the Employment Relations Act 2000" (2003) 9 New Zealand Business Law Quarterly 125.

³² For example see *Jones Schindler Limited v Johnston* [1995] 1 NZLR 190.

³³ *Aoraki Corporation Limited v McGavin* [1998] 1 ERNZ 601.

³⁴ A Geare, "Full Circle", above n 31, at 77.

³⁵ A Russell, "Aoraki: Panacea or Perversion?" (1999) 5 New Zealand Business Law Quarterly 106, 113.

³⁶ *Ibid*, at 114. See also: A Geare, "Full Circle", above n 31, at 77; R Nelson, above n 15, at 624-625; G Anderson, "Recent Case Comment – *Brighouse Limited v Bilderbeck*" [1994] 8 ELB 120, 123. For discussion

The Court of Appeal in *Aoraki* overruled the *Brighouse* decision.³⁷ Although this prima facie appeared to be counter to the doctrine of stare decisis,³⁸ the Court of Appeal asserted that although they would normally follow previous decisions they were also empowered to reconsider earlier determinations where the interests of justice dictated.³⁹ The Court of Appeal justified their decision to overrule *Brighouse* on three grounds. Firstly, it was asserted that the majority decision in *Brighouse* did not contain any obvious ratio. Secondly, the *Brighouse* decision provided the Employment Court with too much flexibility to develop the concept of unjustified dismissal and thirdly, redundancy was perceived as an important area of law where all parties to the employment relationship needed to be confident of their respective obligations and rights.⁴⁰

The *Aoraki* decision effectively constrained the judiciary's ability to imply into any employment agreement terms and conditions which the parties had not expressly agreed to. The approach taken by the judiciary epitomised the ideal of contractual supremacy encapsulated within the legislative framework of the ECA. The Court of Appeal stated:⁴¹

'The contract rules and there is no basis comfortable with the settled principles governing the implication of terms in other contracts to read in any implied obligation of that kind or to extend the mutual obligation of trust and fair dealing in that way. To do so would alter the substantive rights and obligations which the parties agreed; it would change the economic value of their overall agreement; it would erode the statutory emphasis on the free negotiation of employment contracts'.

on the ideological shift within the Court of Appeal see: G Anderson, "Employment Law: The Richardson Years" (2002) 33(3) Victoria University of Wellington Law Review 467-474.

³⁷ *Aoraki Corporation Limited v McGavin*, above n 33, at 605.

³⁸ For discussion relating to the issue of stare decisis see: A Russell, above n 35, at 107-114; G Harley, "The Expected Impact of the Supreme Court of New Zealand on Tax Cases" (2006) 22 New Zealand Universities Law Review 76, 77-79; R Nelson, above n 15, at 609-610.

³⁹ *Aoraki Corporation Limited v McGavin*, above n 33, at 616.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, at 620 as per Richardson P and Gault, Henry, Keith, Blanchard and Tipping JJ.

As with the *Brighouse* decision there was substantial discussion following *Aoraki* relating to the judiciary's approach to compensatory payments in redundancy situations where the affected employee's contract was silent.⁴² It was asserted by some authors that the decision in *Aoraki* helped to restore certainty⁴³ with the contract again becoming the sole document which contains all the rights, interests and duties of the parties to the employment relationship.⁴⁴

c) Judicial Activism

Many authors have suggested that the approach taken to the payment of redundancy compensation by the majority in *Brighouse* amounted to judicial activism.⁴⁵ In other words, the Court was going beyond its role of interpreting the applicable legislation and to some extent actually attempting to rewrite the legislation through common law principles.⁴⁶ The divergent views of members of the judiciary under the ECA had predominantly centered on the precise ambit of their jurisdiction in respect of the implied term of mutual trust and confidence.⁴⁷ There was never any dispute that the duty existed. Nevertheless, the extent of its application was unclear and the subject of deeply divided analysis.⁴⁸

It has been argued that, although there are many who might agree with the outcome of judicial activism, the problem rests with the process through which that outcome is achieved

⁴² For discussion see: M Robins "Redundancy" (New Zealand Law Society Employment Law Conference 1998) 67; R Nelson, above n 15; A Geare and F Edgar, "Stroking the Nettle", above n 31; R Francois, above n 31; A Geare, "Full Circle", above n 31; K Johnston, above n 31; W Hodge, above n 31; K Toogood, above n 31; A Russell, above n 31; A Russell, above n 35.

⁴³ M Robins, above n 42, at 85.

⁴⁴ L Grantham, above n 31, at 157.

⁴⁵ For discussion on this idea see: A Geare and F Edgar, "Stroking the Nettle", above n 31.

⁴⁶ *Ibid.*, at 372.

⁴⁷ R Nelson, above n 15, at 601.

⁴⁸ *Ibid.*

and the associated uncertainty that it can create.⁴⁹ Put simply, the law becomes dependent on the ideological stance of the members of the judiciary.⁵⁰ Arguably, this is precisely what happened with the divergent interpretations of the law propounded in *Brighouse* and *Aoraki*.

Through utilising the implied term of trust and confidence, the majority in *Brighouse* held that in some situations, despite there being no express agreement regarding redundancy compensation, employers had an implied obligation to pay it arising out of the duty of fairness.⁵¹

The reasoning of the majority decision in *Brighouse* highlights their perception that there exists an inequality in bargaining power between the parties to an employment relationship and how the personal grievance regime can assist in achieving “justice between an employer and employee”.⁵² Casey J was explicit in asserting that there would be many cases where employees would not possess the necessary bargaining power to successfully negotiate any meaningful redundancy provisions within their employment contracts. Therefore, the personal grievance procedure was a way of re-balancing the employment relationship in those situations particularly in smaller organisations where Casey J suggested that employees have no real bargaining power.⁵³

Therefore, the implied term of mutual trust and confidence was arguably being used to provide an “extra statutory concept of social justice”,⁵⁴ a concept which was expressly objectionable to Richardson J in the minority judgment. Specifically Richardson J noted:⁵⁵

⁴⁹ A Geare and F Edgar, “Stroking the Nettle”, above n 31, at 372.

⁵⁰ Ibid.

⁵¹ *Brighouse Limited v Bilderbeck*, above n 21, at 244.

⁵² Ibid, as per Cooke P.

⁵³ Ibid, at 245 as per Casey J.

⁵⁴ J Hodder, above n 21, at 897.

⁵⁵ *Brighouse Limited v Bilderbeck*, above n 21, at 258.

‘...it is not open to the Courts to construct an extra-statutory concept of social justice applicable to redundancy situations. In principle, there is no basis for concluding that a dismissal for genuine redundancy reasons which meet any fair procedural requirements is nevertheless unjustifiable’.

Some authors have suggested and even applauded⁵⁶ the fact that the implied term “has been seized upon by some enthusiastic commentators as a broad and flexible constraint on employers”.⁵⁷ It has been asserted that a contract no longer necessarily represents an exhaustive list of the parties’ interests and as with other areas of law such as matrimonial property⁵⁸ and consumer rights, obligations extend beyond those expressly specified in a contract.⁵⁹ It has been advocated that employment contracts should be no different and therefore they demand extra contractual obligations irrespective of any bargaining process.⁶⁰

Obviously those at the opposite end of the spectrum have raised concern regarding the certainty associated with the judicially determined ideals of “fairness, justice, equity, and good conscience”.⁶¹ Rather asserting that the “application of ‘black letter law’ and contract promotes values of ‘certainty and reliance’”.⁶² These latter sentiments certainly emanated in the reasoning espoused in the decision in *Aoraki* and have continued to hold true under the current legislative regime.

⁵⁶ See: Douglas Brodie, “The Heart of the Matter: Mutual Trust and Confidence” (1996) 25 ILJ 121, 126 quoted in Douglas Brodie, “Mutual Trust and the Values of the Employment Contract” (2001) 30 ILJ 84, 85 cited in J Hodder, above n 23, at 897.

⁵⁷ J Hodder, above n 23, at 897.

⁵⁸ See for example the Court of Appeal decision in *Gillies v Keogh* [1989] 2 NZLR 327 where the Court of Appeal made it clear that expectations which have been created may go beyond what are deemed strict legal entitlements. This case and comment was cited in L Grantham, above n 31, at 159.

⁵⁹ L Grantham, above n 31, at 159-160.

⁶⁰ *Ibid.*, at 158.

⁶¹ Associate Professor William Hodge in J P Horn (ed) *Brooker’s Employment Contracts* (Brooker’s, Wellington, 1991) para EC27.34.1, 1C 8/6/98 Update (Redundancy – Welcome Clarity Editorial) cited in R Nelson, above n 15, at 622.

⁶² *Ibid.*

III Employment Relations Act 2000

It was somewhat ironic that the debate regarding the payment of compensatory payments where a contract was silent on the issue was able to take place under a legislative regime that promoted the supremacy of the contract.

What was perhaps even more paradoxical was that despite the legislative enactment of the ERA, the strictly contractual approach to employment relationships appeared to remain under the new legislation. In *Coutts*,⁶³ when discussing the ERA and more particularly the concept of good faith, it was asserted that:⁶⁴

‘We do not find the new provisions warrant to introduce into what is still a contractual relationship terms and conditions the parties have not agreed to but which the Authority of the Court might think it fair to impose. That would be to detract from the process of bargaining the Act so clearly promotes to protect’.

The Court of Appeal in *Coutts* actually confirmed the ongoing applicability of the principles of law as encapsulated in *Aoraki*.⁶⁵ Arguably, the prevailing theory at the time was that collective bargaining would increase, and as a consequence of this, redundancy provisions would then become more common as the power within the employment relationship was rebalanced.⁶⁶

Interestingly in *Coutts*, the approach of the majority of the Court of Appeal seemed to interpret the role of the Authority and Court under the ERA narrowly and as a consequence of this, arguably affirmed managerial prerogative.⁶⁷ As Tipping J stated:⁶⁸

⁶³ *Coutts Cars v Baguley* [2001] ERNZ 660.

⁶⁴ *Ibid*, at [39] as per Gault J.

⁶⁵ *Ibid*, at [42].

⁶⁶ This point is discussed in chapter three.

⁶⁷ *Coutts Cars v Baguley*, above n 63, at [42]. This point is discussed in detail in: A, Russell, above n 31, at 140.

⁶⁸ *Ibid*, at [64].

‘...the idea that when “the contract”, as the Court puts it, is silent on the employer’s obligations in the events which have happened, the Court has some general power of imposing terms without reference to contractual principles, seems to me to be taking the tenor of the new legislation too far’.

Tipping J went on to consider s 101(d) of the ERA which contains the objects of part 9 which specifically deals with the personal grievances, disputes and enforcement and noted that:⁶⁹

‘This statutory objective makes a distinction between determining rights and obligations on the one hand, and fixing the terms and conditions of employment on the other. The Authority and the Court are intended to be involved in the former but not in the latter. In some circumstances the line between determining rights and obligations in fixing the terms and conditions may be a fine one, but the distinction was obviously viewed by the legislature as important’.

Therefore, the ability to imply the payment of compensation into an employment agreement which is silent on the issue as part of procedural fairness was confirmed as being beyond the jurisdiction of the Authority and Court.⁷⁰ Although as discussed in previous chapters *Simpson’s Farms*⁷¹ appears to have strengthened the requirement of good faith suggesting an interpretation that requires behaviour beyond that expected from the obligation of trust and confidence, the approach to compensation as advocated in *Aoraki* remains unchanged. As a consequence of this, the only way an employee is able to obtain compensatory payments in a redundancy situation is if there is an express agreement within their collective or individual agreements.⁷²

a) Fixing Terms & Conditions⁷³

However, it also appears that even where a provision providing for redundancy compensation exists within an individual’s employment agreement, where the amount is not specified or

⁶⁹ Ibid, at [65].

⁷⁰ G Anderson, J Hughes, M Leggat, P Roth, *Employment Law Guide*, above n 1, at [ER103.50].

⁷¹ *Simpsons Farms Limited v Aberhart* [2006] ERNZ 825.

⁷² Note that part 6A of the ERA currently makes express legislative protection for vulnerable employees. As already noted it is beyond the scope of this paper to discuss this part in any detail.

⁷³ For full discussion on this area of law see: Anderson and others, *Mazengarb*, above n 1, at [ERA129.16].

where no method for calculating such an amount is prescribed, the judiciary's ability to interpret such a clause has been viewed restrictively.⁷⁴

The leading case on this issue is that of *Canterbury Spinners v Vaughan*⁷⁵ (*Vaughan*).⁷⁶ Canterbury Spinners had suffered from a downturn in their business, and as a result of this a number of employees were made redundant, including Mr Vaughan. There was never any question of the genuineness of the decision to make the employees redundant, rather the issue centred on the determination of the quantum of redundancy compensation.⁷⁷ In Mr Vaughan's employment contract it stated that redundancy compensation was to be paid in accordance with clause 28, which stated:⁷⁸

'the employer shall negotiate a level of redundancy compensation to be paid to employees to be made redundant (with the employee's representative), which shall involve the employer making an offer of redundancy compensation to the employees to be made redundant'.

Due to the inability to agree on an amount to be paid, Mr Vaughan took the matter to the Authority by way of a dispute under s 129 of the ERA.⁷⁹ The Authority determined that it had no jurisdiction to make such a decision holding that to do so would effectively amount to fixing a new term and condition of employment which was contrary to s 161 (2) of the ERA.⁸⁰

⁷⁴ For discussion on this point see: A Russell, above n 31, at 137-141.

⁷⁵ [2003] 1 NZLR 176.

⁷⁶ For discussion on this case see: K Johnston, "Editorial: Disputes Relating to Redundancy Under the ERA: The *Vaughan* Case" [2001] 6 Employment Law Bulletin 105; A Russell, above n 31, at 137-140; R Nelson, above n 15, at 619-620; Anderson and others, *Mazengarb*, above n 1, at [ERA103.48]; P Bartlett, W Hodge, P Muir, C Toogood, R Wilson, *Brookers Employment Law*, above n 1, at [ER103.23].

⁷⁷ *Canterbury Spinners v Vaughan*, above n 75, at [29].

⁷⁸ *Ibid*, at [3] as per Keith J.

⁷⁹ Anderson and others, *Mazengarb*, above n 1, at [ERA129.16].

⁸⁰ *Canterbury Spinners v Vaughan*, above n 75, at [31].

Consequently, Mr Vaughan appealed this decision in the Employment Court, which held in the converse; specifically that the Authority did in fact have the jurisdiction.⁸¹ In making this determination the Employment Court noted that the ERA did not include any provision equivalent to s 46 of the ECA. Section 46 had limited the jurisdiction of the disputes process so as to exclude the judiciary ability to fix the quantum of redundancy compensation where a redundancy clause did not specify a particular level of compensation or a formula for determining the amount payable.⁸² Consequently, the Employment Court believed that the absence of this provision restored the law to that which had existed prior to the ECA and therefore the Authority had jurisdiction as fixing the compensatory level fell within the ambit of “interpretation, application or operation” under s 129 of the ERA.⁸³ Furthermore, the Employment Court held that such an approach was not contrary to s 161 (2) (a) as the contractual provision had already been negotiated and was contained in Mr Vaughan’s contract; therefore the Court was not making a decision that related to bargaining.⁸⁴ The Court went on to note that there was no breach of s 161 (2) (b) either as the determination about the quantum of redundancy compensation was not a new term or condition of employment.⁸⁵

Canterbury Spinners subsequently appealed this decision to the Court of Appeal. Although the Court of Appeal agreed with the Employment Courts interpretation of the statutory provisions within the ERA, it took the view that the Employment Court had omitted a key step in their analysis that was necessary in order to determine the issue of jurisdiction.⁸⁶ In reaching this conclusion, the members of the Court of Appeal had different views as to how

⁸¹ Ibid, at [39]. See also: Anderson and others, *Mazengarb*, above n 1, at [ERA 129.16].

⁸² Anderson and others, *Mazengarb*, above n 1, at [ERA 129.16].

⁸³ *Canterbury Spinners v Vaughan*, above n 75, at [39] as per Blanchard and Anderson JJ. See also: Anderson and others, *Mazengarb*, above n 1, at [ERA 129.16].

⁸⁴ *Canterbury Spinners v Vaughan*, above n 75, at [41]-[42]. This is also discussed in: Anderson and others, *Mazengarb*, above n 1, at [ERA 129.16]; A Russell, above n 31, at 137-141.

⁸⁵ *Canterbury Spinners v Vaughan*, above n 75, at [41]-[42].

⁸⁶ Ibid, at [49].

the interpretation of the clause should be made.⁸⁷ The majority decision of the Court of Appeal stated:⁸⁸

‘the proper question for the Authority to ask itself, when considering whether the disputed provision brought before it is one upon which it is prohibited from giving a determination is whether, correctly interpreted, the provision already creates rights which are legally enforceable and, if so, what those rights are. Or is it merely an agreement to agree, or an agreement which directs a certain procedure but does not go so far to indicate sufficiently an end result so that, in either case, it is incapable of creating contractual rights? If so, any determination would in law create a new term or condition and the Authority may not intervene’.

In summary the issue of jurisdiction turned on the interpretation of the clause within the employment contract. However, the majority of the Court of Appeal held that this did not mean that the “Authority (or the Court) could by strained interpretation expand its jurisdiction and, in effect, circumvent the limitations imposed by s 162 (2)”.⁸⁹ Arguably, the reasoning of the majority of the Court of Appeal appeared to be reinforcing the preservation of the managerial prerogative and defining the role of the Authority and Employment Court in a restrictive manner.⁹⁰ This approach is arguably in-keeping with the earlier ERA decision in *Coutts*.

b) Majority decision in Brighthouse under the ERA

Given the above analysis, it is unlikely that the reasoning encapsulated in the majority decision in *Brighthouse* will again be authoritative without some form of express legislative change. Notwithstanding this point, in theory at least, it is certainly arguable that key concepts that underpin the ERA actually embody an approach to redundancy compensation that is more in accord with the reasoning underlying the majority decision in *Brighthouse*.

⁸⁷ For discussion on this point see: A Russell, above n 31, at 137-141.

⁸⁸ *Canterbury Spinners v Vaughan*, above n 75, at [44], as per Blanchard and Anderson JJ.

⁸⁹ *Ibid*, at [47]. This point is discussed in: A Russell, above n 31, at 137-141.

⁹⁰ A Russell, above n 31, at 140.

The ERA is aimed at humanizing what was previously regarded under the ECA as a simple contractual exchange with the employment relationship being limited to the applicable contractual sphere.⁹¹ The ERA acknowledges that matters concerning employment do not happen in a vacuum and environmental factors play a part. The ERA introduces the idea that good faith applies not only to the employment relationship and the precise terms and conditions within a contract of employment, but also to the employment environment. When the words are taken literally, the legislation's applicability extends beyond simply the immediate work relationship but also encompasses "circumstances or conditions in which a person lives, works, develops"⁹² which have a mutual and interrelated impact on the parties to an employment relationship. Arguably, this fits with the ideal that the notion of good faith is the corollary of being a good employer.⁹³ Although this latter concept is legislatively only associated with the public sector,⁹⁴ some members of the judiciary have asserted it has much wider implications. In the case of *French v Chief Executive of the Department of Corrections*,⁹⁵ Judge Colgan asserted that the duty to be a good employer is not just related to purely public sector employers but also the private sector too.⁹⁶ If this interpretation is accepted, then arguably the factors such as those developed in *Hale* to determine whether the circumstances warrant compensation arguably become more relevant under the ERA,⁹⁷ as they are factors that a good employer would arguably take into account so as to ensure the implementation of any redundancy is carried out in a procedurally fair manner.

⁹¹ For an example of where the judiciary has highlighted this point see: *New Zealand Fasteners Stainless v Thwaites* [2000] 1 ERNZ 739.

⁹² Shorter Oxford English Dictionary (5th ed, Oxford University Press, Oxford, 2002) vol 1, at 840.

⁹³ D Raman, "Privatisation of Labour Standards Under Corporate Social Responsibility and Social Reporting In New Zealand" (2007) 15 Waikato Law Review 240, 253.

⁹⁴ For examples of where the term 'good employer' is used see: The Crown Entities Act 2004 s 118; State Owned Enterprises Act 1986 s 4; State Sector Act 1988 s 56 1(a) and 2; Local Government Act 2002, schedule 7, part 1, clause 36.

⁹⁵ [2002] 1 ERNZ 325.

⁹⁶ *French v Chief Executive of the Department of Corrections* [2002] 1 ERNZ 325, at [98].

To support this notion, s 3 of the ERA states that the legislation is aimed at promoting productive employment relationships through the advancement of good faith in all aspects of the employment environment and relationship.⁹⁸ It aims to achieve this by recognising that the employment relationship is not just built upon the implied mutual obligation of trust and confidence but also on the legislative requirement of good faith.⁹⁹ Section 4 (1A) (a) goes further to assert that good faith requires more than the mere obligation of trust and confidence.¹⁰⁰ As noted in *Simpson's Farms*, a reasonable and fair employer, if challenged, must be able "to establish compliance with the statutory obligations of good faith dealings in s 4 ERA".¹⁰¹ Given this is clearly both the legislative and judicial view, then in theory it is certainly arguable that prima facie the wider interpretation and application of the mutual duty of trust and confidence made by the majority in *Brighouse* was more in-keeping with the legislative concept of good faith. An example of this would be that the ERA aims to not only acknowledge but also address the inherent inequality of power within the employment relationship.¹⁰² As noted in Part A, II (c) of this section concerning Judicial Activism, the use of the implied term of trust and confidence was utilised by the judges within the majority decision in *Brighouse* to readdress what they perceived as an imbalance of power within the employment relationship.¹⁰³ Fairness thus required, in certain circumstances, the payment of redundancy compensation.¹⁰⁴

⁹⁷ See part A, II, a, of this chapter for the factors outlined in *Hale* for determining whether redundancy compensation should be implied into a contract of employment.

⁹⁸ See s 3 (a) of the ERA.

⁹⁹ See s 3 (a) (i) of the ERA.

¹⁰⁰ This point was made in *Coutts Cars v Baguley*, above n 63, at [83] as per McGrath J.

¹⁰¹ *Simpsons Farms Limited v Aberhart*, above n 71, at [65] as per Chief Judge Colgan.

¹⁰² See s 3 (a) (ii) of the ERA.

¹⁰³ The use of the implied term of trust and confidence to redress any inequality of power within the employment relationship is discussed in: J Hodder, above n 21.

¹⁰⁴ *Brighouse Limited v Bilderbeck*, above n 21, at 244.

In relation to justification, in *Brighouse* the majority of the Court of Appeal considered the implied duty of fairness globally taking into account all the circumstances of the case.¹⁰⁵ Specifically Cooke P suggested that when considering the duties of a reasonable employer, although it is convenient to consider the employer's obligations under the separate heads of substantive justification and procedural matter, "there is no sharp dividing line"¹⁰⁶ and it is "not correct to draw a distinction between the reasons for the dismissal and the manner of dismissal as if these were mutually exclusive".¹⁰⁷ The decision in the *Air New Zealand*¹⁰⁸ case which provided a clear interpretation of the test for justification encapsulated in s 103A of the ERA arguably supports the majority's approach. In the *Air New Zealand* case the Court suggested that an inquiry into the justifiability included a review of all the employers' actions which included the decision to dismiss.¹⁰⁹ Therefore, in theory at least, it is certainly arguable that the decision to make compensatory payments to affected employees irrespective of the terms and conditions of employment fits within this approach, particularly if the factors such as those mentioned in *Hale* exist.¹¹⁰

B Contractual Obligations

Notwithstanding the abovementioned discussion, the law currently states that if there is no express provision regarding the payment of redundancy compensation in an affected employee's employment agreement, then they are not entitled to any form of payment.

¹⁰⁵ See W Hodge, above n 31, at 64.

¹⁰⁶ *Brighouse Limited v Bilderbeck*, above n 21, at 244.

¹⁰⁷ *Ibid*, at 244-245.

¹⁰⁸ *Air New Zealand v V* (Employment Court, Auckland, AC15/09, 3 June 2009, Chief Judge Colgan and Judges Travis, Shaw and Couch).

¹⁰⁹ *Ibid*, at [37].

¹¹⁰ The application of *Air New Zealand v V* (Employment Court, Auckland, AC15/09, 3 June 2009, Chief Judge Colgan and Judges Travis, Shaw and Couch) in *Jinkinson v Oceana Gold New Zealand Limited* [2010] NZEmpC 102 (note this case has been granted leave to appeal) and *Wang v Hamilton Multicultural Services Trust* [2010] NZEmpC 142 in relation to redeployment arguably adds more weight to this assertion.

Although the employer can still choose to make a payment, there is no obligation to do so. A redundancy which is substantively justified and has otherwise been carried out in a procedurally fair manner will not be held unjustified simply because compensation was not paid. However, where there is a contractual obligation to pay compensation, the employer must conform to that obligation.¹¹¹

This part of the paper analyses the available data associated with clauses providing for redundancy compensatory payments contained in collective agreements in New Zealand.¹¹²

As a direct consequence of the *Brighouse* decision there was a dramatic rise in the number of collective contracts within the IRC sample which contained an express provision relating to redundancy and compensation.¹¹³ Data indicated that employees covered by collective contracts which contained redundancy provisions rose by 11 per cent,¹¹⁴ with employees expressly being provided with both compensation and notice rising by 23 per cent.¹¹⁵ In totality, there was a 15 per cent increase in employees covered by collective contracts which provided redundancy compensation¹¹⁶ immediately preceding the *Brighouse* decision.

¹¹¹ Anderson and others, *Mazengarb*, above n 1, at [ERA103.52C].

¹¹² This data is taken directly from the Industrial Relations Centre of the Victoria University of Wellington. A copy of the analysed data is contained in appendix three, part F including the precise references for the data as well as limitations associated with it.

¹¹³ For discussion see: R Harbridge and P Keily, “Redundancy – The Rise and Fall of Judicial Activism” [1998] 8 *Employment Law Bulletin* 160.

¹¹⁴ According to data pre-Brighouse 78 per cent of employees covered by a collective employment contract contained a redundancy provision. This increased to 89 per cent post Brighouse. This data is taken directly from: R Harbridge and P Keily, above n 113, at 161.

¹¹⁵ According to data pre-Brighouse 38 per cent of employees covered by a collective employment contract contained a redundancy provision which covered both notice and compensation. This increased to 61 per cent post Brighouse. This data is taken directly from: R Harbridge and P Keily, above n 113, at 161.

¹¹⁶ According to data pre-Brighouse 62 per cent of employees had a provision providing redundancy compensation. Post Brighouse this increased to 77 per cent of employees. This data is taken directly from: R Harbridge and P Keily, above n 113, at 161.

As discussed, the *Brighouse* decision meant that the Employment Tribunal and Court had the authority to imply the payment of redundancy compensation and its associated level. Therefore many employers immediately negotiated specific redundancy provisions encapsulating the payment of redundancy compensation to ensure certainty of their obligations if a redundancy situation was to arise.

As discussed in part A, II, b of this chapter, the decision in *Brighouse* was overruled by *Aoraki*. Arguably, employers have continued to seek the ongoing certainty surrounding compensatory redundancy payments provided through express contractual provisions. As noted by some authors, what is somewhat ironic is the fact that, had it not been for the *Brighouse* decision, many employment agreements would have probably remained silent on this issue. If they had remained silent under current law no obligation would have arisen.¹¹⁷ This therefore highlights that both certainty and consistency of judicial approach is desirable.¹¹⁸

According to recent data approximately 78 per cent of collective agreements contain a provision providing affected employees with redundancy compensation.¹¹⁹ Where redundancy compensation is provided it is quintessentially calculated according to a formula that stipulates payment based on a specified number of weeks of salary or wages in recognition of the employee's first year of service, followed by a specified number of weeks of salary or wages in recognition of each subsequent year of service. There is normally a maximum amount of redundancy compensation an individual employee is entitled to receive.¹²⁰

¹¹⁷ See appendix three, part F which contains data by sector and industry on the percentage of clauses within collective agreements which simply rule out the payment of redundancy compensation.

¹¹⁸ R Nelson, above n 15, at 623.

¹¹⁹ *Report of the Public Advisory Group on Restructuring and Redundancy*, above n 3, at 33.

¹²⁰ G Lafferty and P Kiely, *Employment Agreements: Bargaining Trends & Employment Law Update 2007/2008* (Industrial Relations Centre, Victoria University of Wellington, 2008) 47.

I Compensation Level for the First Year of Service

According to the IRC sample of collective agreements, and as noted by figure five, the most common amount payable in recognition of an employee's first year of service is the equivalent of six weeks of salary or wages.¹²¹ Although this prima facie appears to be the most common formula there is substantial diversity in respect of the duration of weeks payable depending on the particular sector and or industry the affected employee works within.¹²² To illustrate this point in 2009 an employee working in the agricultural¹²³ or construction¹²⁴ industries is most likely to receive only between one and three weeks payment in recognition of their first year of service.

Conversely, an employee working in the communication,¹²⁵ finance¹²⁶ or insurance¹²⁷ industry is most likely to receive between seven and ten weeks of salary or wages.¹²⁸

¹²¹ S Blumenfeld, S Ryall and P Kiely, *Employment Agreements: Bargaining Trends & Employment Law Update 2008/2009* (Industrial Relations Centre, Victoria University of Wellington, 2008) 65.

¹²² To review all the data associated with compensation levels for the first year of service see appendix three, part F.

¹²³ In 2009 IRC data indicated that 30 per cent of collective agreements covering workers in this industry were to receive between one and three week's salary or wages in recognition of an employee's first year of service. See S Blumenfeld, S Ryall and P Kiely, above n 121, at 65. See also table AF41 in appendix three, part F which outlines the IRC data relating to compensation levels for the first year of service for this industry since 1999.

¹²⁴ In 2009 IRC data indicated that 33 per cent of collective agreements covering workers in this industry were to receive between one and three weeks salary or wages in recognition of an employees first year of service. See S Blumenfeld, S Ryall and P Kiely, above n 121, at 65. See also table AF53 in appendix three, part F which outlines the IRC data relating to compensation levels for the first year of service for this industry since 1999.

¹²⁵ In 2009 IRC data indicated that 96 per cent of collective agreements covering workers in this industry were to receive between seven and ten week's salary or wages in recognition of an employee's first year of service. See S Blumenfeld, S Ryall and P Kiely, above n 121, at 65. See also table AF60 in appendix three, part F which outlines the IRC data relating to compensation levels for the first year of service for this industry since 1999.

¹²⁶ In 2009 IRC data indicated that 93 per cent of collective agreements covering workers in this industry were to receive between seven and ten week's salary or wages in recognition of an employee's first year of service. See S Blumenfeld, S Ryall and P Kiely, above n 121, at 65. See also table AF61 in appendix three, part F which outlines the IRC data relating to compensation levels for the first year of service for this industry since 1999.

¹²⁷ In 2009 IRC data indicated that 89 per cent of collective agreements covering workers in this industry were to receive between seven and ten week's salary or wages in recognition of an employees first year of service.

Figure Five: Compensation Payable for the First Year of Service across all Sectors and Industries.¹²⁹



Following on from this analysis, similar patterns of industry specific variations in formula used can be seen in the data relating to the calculation of compensatory levels for subsequent years of service.

II Compensation Level for Subsequent Years of Service

In 2009 IRC data indicated that 55 per cent of the collective agreements which contained redundancy compensation clauses stipulated two weeks of salary or wages for each

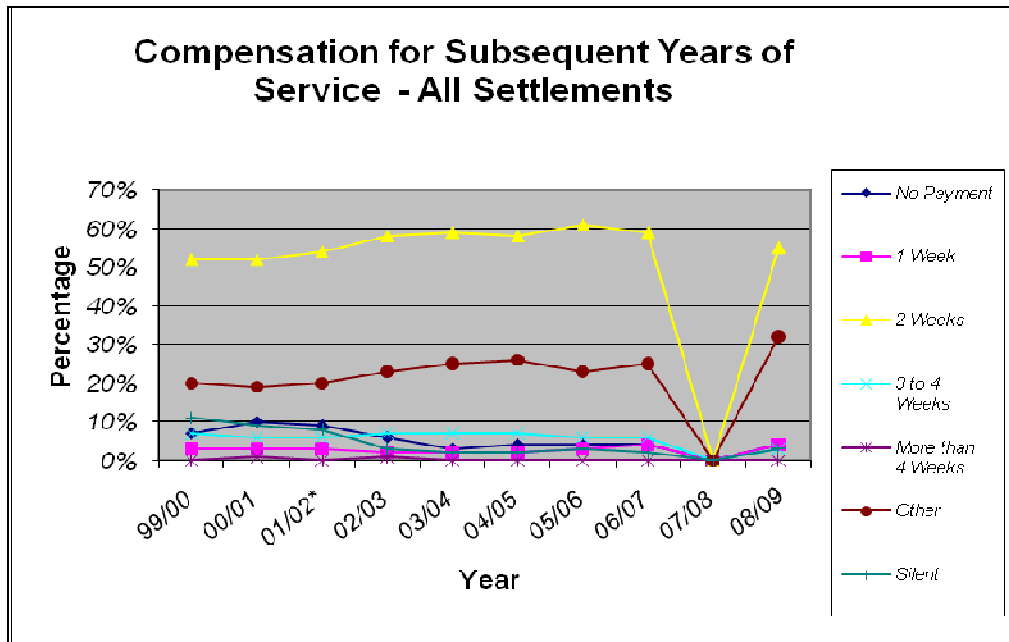
See S Blumenfeld, S Ryall and P Kiely, above n 121, at 65. See also table AF62 in appendix three, part F which outlines the IRC data relating to compensation levels for the first year of service for this industry since 1999.

¹²⁸ For a detailed summary of the formulas utilised by all sectors and industries which are encapsulated in the sample of collective agreements held by the IRC collective agreements see appendix three, part F.

¹²⁹ The symbol * indicates that there are specific limitations associated with the data. See appendix three for the limitations.

subsequent year as the determinant.¹³⁰ As illustrated by figure six, this formula has been relatively stable since the introduction of the ERA. The figure is distorted for the 2007 to 2008 year as no data in relation to this matter was collected for that period.

Figure Six: Compensation Payable Subsequent Years of Service across all Sectors and Industries.¹³¹



However, as illustrated by figure six, the data also indicate some variations to the standard determinant. As outlined in appendix three, part F, some industries have collective agreements which provide between three and four weeks of salary or wages for each subsequent year of service. In 2009, 33 per cent of collective agreements in the finance industry¹³² and 14 per cent in the printing industry contained such a provision.¹³³ In contrast,

¹³⁰ S Blumenfeld, S Ryall and P Kiely, above n 121, at 66.

¹³¹ The symbol * indicates that there are specific limitations associated with the data. See appendix three for the limitations.

¹³² S Blumenfeld, S Ryall and P Kiely, above n 121, at 66. See data contained in appendix three, part F.

¹³³ Ibid.

in the textile manufacturing industry 40 per cent of collective agreements provided only one week of salary or wages for each subsequent year of service.¹³⁴

Furthermore, the 2009 data also indicated that only four per cent of the sample data provided no payment for subsequent years of service.¹³⁵ Although this figure has been in decline,¹³⁶ the percentage remains high in certain industries. In 2009, 72 per cent of collective agreements in the mining industry,¹³⁷ 51 per cent of collective agreements in the metals manufacturing industry,¹³⁸ 16 per cent of collective agreements in the community services industry¹³⁹ and 16 per cent of collective agreements in the utilities industry¹⁴⁰ provided no payment for subsequent years of service.¹⁴¹ Additionally, it is also important to note that there are a high proportion of industries that appear to provide some 'other' form of compensation.¹⁴² The IRC have indicated that some collective agreements group service into bands and then provide employees a set level of compensation depending on the particular band the employee fits in to.¹⁴³

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ In 2001 10 per cent of collective agreements within the sample did not provide any payment for subsequent years of service. See: R Harbridge, G Thickett and P Kiely, *Employment Agreements: Bargaining Trends & Employment Law Update 2000/2001* (Industrial Relations Centre, Victoria University of Wellington, 2001).

¹³⁷ S Blumenfeld, S Ryall and P Kiely, above n 121, at 66.

¹³⁸ Ibid 66.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ See appendix three, part F for a copy of this data.

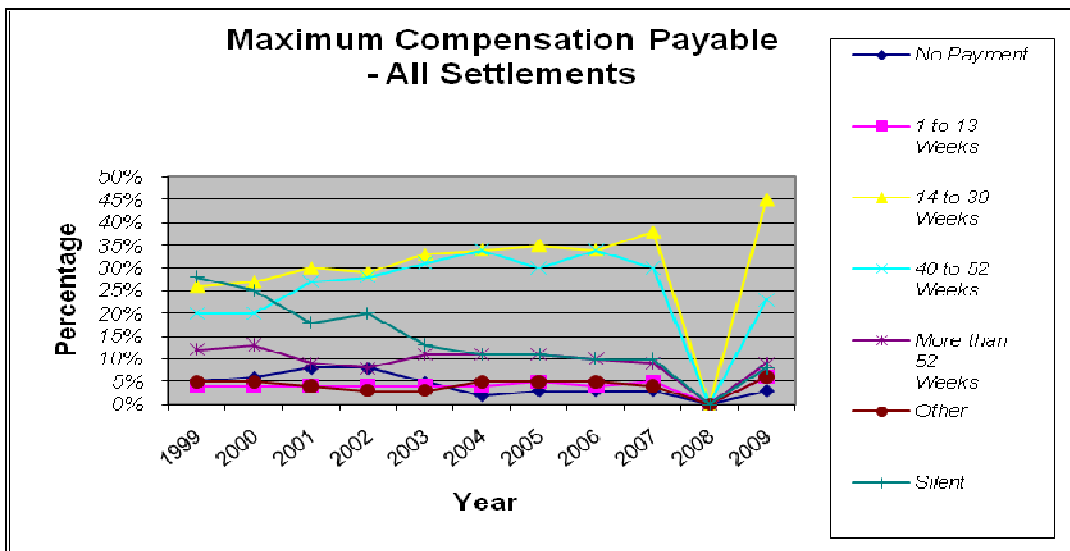
¹⁴² See for example the 2009 IRC data contained in appendix three, part F. Industries with a high percentage of other forms of compensation within their collective agreements for subsequent years of service include Food Manufacturing (55 per cent), Machinery Manufacturing (44 per cent), Construction (29 per cent), Finance (63 per cent), Government & Defence (32 per cent) and Education (66 per cent). This data is taken directly from: S Blumenfeld, S Ryall and P Kiely, above n 121, at 66. See the data contained in appendix three, part F.

¹⁴³ S Blumenfeld, S Ryall and P Kiely, above n 121, at 66. See the data contained in appendix three, part F.

II Maximum Level of Compensation

What is very clear is that almost all organisations who provide for redundancy compensation provide a ceiling on the amount of compensation they are prepared to provide a redundant employee. As depicted in figure seven, the most common maximum level of compensation payable is between 14 to 39 weeks. The figure is distorted for the 2007 to 2008 year as no data in relation to this matter was collected for that period.

Figure Seven: Maximum Level of Compensation Payable – All Settlements¹⁴⁴



Notwithstanding this point, as highlighted in relation to the calculation for compensation for the first and subsequent years of service, figure seven also shows the variation in the maximum amount of compensation levels that employers are contractually obliged to pay. In 2009, 33 per cent of collective agreements in the mining industry¹⁴⁵ and 31 per cent of collective agreements in the retailing industry¹⁴⁶ provided a maximum level of compensation

¹⁴⁴ The symbol * indicates that there are specific limitations associated with the data. See appendix three for the limitations.

¹⁴⁵ S Blumenfeld, S Ryall and P Kiely, above n 121, at 67. See data contained in appendix three, part F.

¹⁴⁶ Ibid.

within the range of one to thirteen weeks of salary or wages. Conversely, at the other end of the spectrum 59 per cent of collective agreements in the food manufacturing industry,¹⁴⁷ and 47 per cent of collective agreements in the machinery manufacturing industry¹⁴⁸ set the maximum level of compensation payable at much higher, being more than 52 weeks of salary or wages. Interestingly collective agreements in the finance industry vary considerably in respect of the maximum level of compensation payable. According to the 2009 data, 34 per cent of collective agreements pay a maximum amount of between one and 13 weeks, while 62% pay more than 52 weeks.¹⁴⁹

Figure seven also shows the reduction of collective agreements that remain silent in respect of maximum payments. Although there remain a number of industries which have a high level of collective agreements which do not specify a maximum level of compensatory payment,¹⁵⁰ these industries have over the past nine years tried to negotiate a maximum level. This is evidenced by industries such as storage. In 2000, 95 per cent of collective agreements in this industry were silent, compared to eight per cent in 2009.¹⁵¹

The abovementioned analysis of compensatory payments indicates that where provisions exist within collective agreements, there is a diversity of formulae used to calculate levels of compensation made available to employees affected by redundancy. What is clear is that the level of protection an employee affected by redundancy receives is largely dependent on the particular industry that the employee works within, rather than any form of overarching justice. Some industries provide no protection whilst others could be described as generous.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Industries in 2009 with a reasonably high percentage of collective agreements which are silent in relation to maximum compensatory levels include: Agriculture (51 per cent), Chemical Manufacturing (52 per cent), Other Manufacturing (39 per cent), Wholesaling (50 per cent). This data was taken directly from S Blumenfeld, S Ryall and P Kiely, above n 121, at 67. See data contained in appendix three, part F.

¹⁵¹ S Blumenfeld, S Ryall and P Kiely, above n 121, at 67.

It is also important to highlight that given the low levels of collective coverage¹⁵² and the lack of data relating to redundancy compensatory provisions in individual employment agreements,¹⁵³ it is likely that a large number of employees remain unprotected by any form of compensation should they be made redundant by their employer.¹⁵⁴ Additionally other forms of legislation may restrict an employee's right to compensation in certain circumstances.

C *Impact of Other Legislation on Compensation*

I *Insolvency*

Redundancy payments are subject to insolvency laws.¹⁵⁵ If an employer becomes insolvent,¹⁵⁶ an employee who is contractually entitled to unpaid wages, holiday pay and redundancy compensation becomes a priority debt.¹⁵⁷ This debt is limited to the values of \$18,700 per employee.¹⁵⁸ In this situation there remains no guarantee that any payment will be made to an affected employee.

¹⁵² See chapter five for discussion on this point.

¹⁵³ Although there is no data collected on terms contained in individual employment agreements the Public Advisory Group noted that it was very likely that senior managers' agreements would contain such a provision. Arguably those who were the least protected were those employees who lacked bargaining power. See *Report of the Public Advisory Group on Restructuring and Redundancy*, above n 3, at 173.

¹⁵⁴ Anderson and others, *Mazengarb*, above n 1, at [ERA103.48].

¹⁵⁵ For full discussion on this matter see: P Bartlett, W Hodge, P Muir, C Toogood, R Wilson, *Brookers Employment Law*, above n 1, at [ER103.25]. See also: Anderson and others, *Mazengarb*, above n 1, at [ERA103.48]; *Report of the Public Advisory Group on Restructuring and Redundancy*, above n 3, at 12.

¹⁵⁶ The Receiverships Act 1993 governs the rights of interested parties in a receivership situation. See s 30 in relation to employment.

¹⁵⁷ The Companies Act 1993, sch 7 sets out the priority rankings. Schedule 7, clause 1 (2) sets out the rights of employees.

¹⁵⁸ See The Companies Act 1993, sch 7, clause 3 (1).

II Taxation

Redundancy compensation payments are currently treated as part of an employee's income and as a result of this are subject to taxation.¹⁵⁹ The level of tax payable depends on the gross annual income of the employee concerned.¹⁶⁰ Redundancy compensatory payments are treated as a lump sum payment for the purposes of PAYE but are not liable for fringe benefit tax, the ACC earner levy or kiwiSaver contributions.¹⁶¹ Student loan payments are however deducted from any lump sum payment.¹⁶²

At the end of 2007, the government introduced a tax rebate scheme. This was announced with the intention of remedying the problem of overtaxing caused when a redundancy compensatory payment is added to an employee's income, which can result in pushing the employee into a higher tax bracket. The rebate scheme took effect on 1 April 2008 and provides a rebate of six cents in each dollar for the first \$60,000 of any redundancy payment. The maximum that can be claimed on any payment is \$3,600.¹⁶³ The Advisory Group on Restructuring and Redundancy advocated further changes to the law surrounding the taxation of compensatory payments. Specifically it was recommended that all redundancy

¹⁵⁹ See the Income Tax Amendment Act (No4) 1992.

¹⁶⁰ Until 1992 New Zealand only taxed up to five per cent of any redundancy payment as it was treated as compensation. For discussion see: *Report of the Public Advisory Group on Restructuring and Redundancy*, above n 3, at 12.

¹⁶¹ S Hornsby-Geluk, above n 2, at 13.

¹⁶² *Report of the Public Advisory Group on Restructuring and Redundancy*, above n 3, at 12. For a detailed outline of the tax requirements relating to redundancy payments see: Inland Revenue Department, "Retiring Allowances and Redundancy Payments" (April 2009) IRD <<http://www.ird.govt.nz/research/b/9/b913c4004bbe59158222d2bc87554a30/ir277.pdf>>.

¹⁶³ For comment and discussion see: Michael Cullen, "Government Introduces Fairer Taxation of Redundancy Pay" (11 December 2007) Beehive <<http://www.beehive.govt.nz/release/govt+introduces+fairer+taxation+redundancy+pay>>; New Zealand Law Society, "Redundancy Tax Credits" (2008) NZLS <http://www.lawsociety.org.nz/publications_and_submissions/lawtalk/2008_articles/21...>; NZPA, "Government To Pay Tax Rebate on Redundancy Payments" (1 January 2009) Stuff <<http://www.stuff.co.nz/national/politics/172682>>; Buddle Findlay, "Announcements: Redundancy Payments" (15 February 2008) Buddle Findlay <<http://www.budlefindlay.com/public/about/announcements.aspx?id=225>>; *Report of the Public Advisory Group on Restructuring and Redundancy*, above n 3, at 13.

compensation be non-taxable.¹⁶⁴ No further action has been taken in respect of this recommendation.

III Social Security Act 1964

Another form of financial support available to employees who have been made redundant is the unemployment benefit, which is administered under the Social Security Act 1964.¹⁶⁵ This Act specifies the criteria that a person must meet in order to be eligible to obtain an unemployment benefit.¹⁶⁶ Included in these criteria is that a person eligible for the unemployment benefit must have “no income”¹⁶⁷ or “income that is less than the amount that would fully abate the benefit”.¹⁶⁸ Redundancy compensation is classified as income for social security purposes. Where a person is entitled to the unemployment benefit, redundancy compensation, although deemed income, only affects the stand down period between employment ending and the commencement of that benefit.¹⁶⁹

In 2009, the National government utilised s 124 of the Social Security Act to implement a transitional relief package which was aimed at assisting the increasing number of employees who were, or were likely to be made redundant due to the economic climate at the time. This package built on existing support mechanisms, specifically the in-work tax credits, accommodation supplements and income support.¹⁷⁰ The details of the transitional relief package are discussed in detail in chapter fifteen of this paper. However, it is important to

¹⁶⁴ See Recommendation 7 in the *Report of the Public Advisory Group on Restructuring and Redundancy*, above n 3, at 5. A copy of this recommendation is contained in appendix four.

¹⁶⁵ Anderson and others, *Mazengarb*, above n 1, at [6900.2].

¹⁶⁶ The eligibility criteria are set out in s 86 of the Social Security Act 1964.

¹⁶⁷ Section 89 (4) (a) of the Social Security Act 1964.

¹⁶⁸ Section 89 (4) (b) of the Social Security Act 1964.

¹⁶⁹ See ss 80BA and 80BB of the Social Security Act 1964 for further information regarding the calculation of the stand down period.

acknowledge the existence of this package in this chapter as the package did provide financial support to a limited group of people faced with redundancy.

D Proposed Reforms & International Obligations

The Public Advisory Group on Restructuring and Redundancy recommended that a statutory requirement for the payment of redundancy compensation be introduced.¹⁷¹ It was recommended that there be a maximum level of compensation payable¹⁷² and that the precise amount of compensation be linked to the affected employee's length of service.¹⁷³

The Advisory Group highlighted a number of possible options to facilitate the implementation of a compensatory scheme. At one end of the spectrum it was suggested that a voluntary code¹⁷⁴ be utilised whilst at the opposing end there be an express legal right to compensation.¹⁷⁵ The Advisory Group highlighted that there were various options in respect of the formula to be used in calculating redundancy payments¹⁷⁶ and that this would require further policy consideration by the government.¹⁷⁷ The options presented considered

¹⁷⁰ J Hughes, "The Government's Transitional Relief Package for Redundant Workers" [2009] 1 ELB 15, 15.

¹⁷¹ See Recommendation 1 in the *Report of the Public Advisory Group on Restructuring and Redundancy*, above n 3, at 3. A copy of this recommendation is contained in appendix four.

¹⁷² See Recommendation 1 (b) in the *Report of the Public Advisory Group on Restructuring and Redundancy*, above n 3, at 3. A copy of this recommendation is contained in appendix four.

¹⁷³ See Recommendation 1 (c) in the *Report of the Public Advisory Group on Restructuring and Redundancy*, above n 3, at 3. A copy of this recommendation is contained in appendix four.

¹⁷⁴ See Recommendation 2 (a) in the *Report of the Public Advisory Group on Restructuring and Redundancy*, above n 3, at 3. A copy of this recommendation is contained in appendix four.

¹⁷⁵ See Recommendation 2 (b) in the *Report of the Public Advisory Group on Restructuring and Redundancy*, above n 3, at 3-4. A copy of this recommendation is contained in appendix four.

¹⁷⁶ See Recommendation 2 (c) (i) to (viii) in the *Report of the Public Advisory Group on Restructuring and Redundancy*, above n 3, at 4. A copy of this recommendation is contained in appendix four.

¹⁷⁷ See *Report of the Public Advisory Group on Restructuring and Redundancy*, above n 3, at 6.

excluding certain groups of employer (those who employ less than five employees)¹⁷⁸ and employees (those who earn above \$150,000 per annum¹⁷⁹ or have been employed by the employer for less than one year).¹⁸⁰ Furthermore, it was suggested that greater consideration would be required in respect of how the scheme was to be funded.¹⁸¹ The Advisory Group made several other recommendations concerning the administration,¹⁸² support mechanisms,¹⁸³ timing¹⁸⁴ and resources¹⁸⁵ associated with any scheme implemented.

Although the Advisory Group recognised that there were substantial details still to be ironed out, there appeared consensus that compensation should be made payable to employees affected by redundancy. If such a scheme was implemented it was also suggested that New Zealand should ratify the ILO convention 158 concerning the termination of employment.¹⁸⁶ In order to do this, the proposed scheme would need to provide compensation based on the

¹⁷⁸ See Recommendation 2 (c) (iv) in the *Report of the Public Advisory Group on Restructuring and Redundancy*, above n 3, at 4. A copy of this recommendation is contained in appendix four.

¹⁷⁹ See Recommendation 2 (c) (ii) in the *Report of the Public Advisory Group on Restructuring and Redundancy*, above n 3, at 4. A copy of this recommendation is contained in appendix four.

¹⁸⁰ See Recommendation 2 (c) (iii) in the *Report of the Public Advisory Group on Restructuring and Redundancy*, above n 3, at 4. A copy of this recommendation is contained in appendix four.

¹⁸¹ The options outlined are contained in Recommendation 2 (d) (i) to (iv) in the *Report of the Public Advisory Group on Restructuring and Redundancy*, above n 3, at 4-5. A copy of this recommendation is contained in appendix four.

¹⁸² See Recommendation 10 in the *Report of the Public Advisory Group on Restructuring and Redundancy*, above n 3, at 6. A copy of this recommendation is contained in appendix four.

¹⁸³ There are a number of support mechanisms available for both employers and employees who are affected by actual or potential redundancies. These are discussed in greater detail in chapter fifteen. For details of what the Public Advisory Group Recommended see recommendations 2 (e) and 8 in *Report of the Public Advisory Group on Restructuring and Redundancy*, above n 3, at 5. A copy of this recommendation is contained in appendix four.

¹⁸⁴ See Recommendation 4 in the *Report of the Public Advisory Group on Restructuring and Redundancy*, above n 3, at 5. A copy of this recommendation is contained in appendix four.

¹⁸⁵ See Recommendation 5 in the *Report of the Public Advisory Group on Restructuring and Redundancy*, above n 3, at 5. A copy of this recommendation is contained in appendix four.

¹⁸⁶ See Recommendation 3 in the *Report of the Public Advisory Group on Restructuring and Redundancy*, above n 3, at 5. A copy of this recommendation is contained in appendix four.

employee's length of service and the level of salary or wages. Payment would be made by the employer¹⁸⁷ or alternatively, through some other form of governmental agency.¹⁸⁸

The Advisory Group was established by the Labour Government as part of their 2005 policy manifesto.¹⁸⁹ It is very clear that if Labour had won the 2008 election, they would have implemented some form of redundancy compensation scheme.¹⁹⁰ The National led government elected in 2008 has expressed no desire to follow through with the Public Advisory Group's recommendations. This has been confirmed by the unsuccessful Employment Relations (Statutory Minimum Redundancy Entitlements) Amendment Bill¹⁹¹ which attempted to codify the Advisory Group's substantive recommendations. The Bill advocated the payment of redundancy compensation to all employees who had been in the employment of their employer for over one year. The payment would be made by the employer and calculated on the basis of four weeks for the first year of service and two weeks for each subsequent year up to a maximum of 26 weeks. Arguably the Bill has faltered as a result of the change in political power and associated ideological perspectives of those governing New Zealand as well as the severe economic conditions at the time of its introduction.

Arguably political change would be required before any form of compulsory legislative redundancy compensation becomes a reality in New Zealand. Meanwhile the employment agreement governs whether redundancy compensation is to be paid or not and, as noted in this chapter, this can vary considerably depending on the industry in which the affected

¹⁸⁷ See Article 12 (1) (a) of the Termination of Employment Convention 1982. A copy of this Convention is contained in appendix two.

¹⁸⁸ See Article 12 (1) (b) of the Termination of Employment Convention 1982. A copy of this Convention is contained in appendix two.

¹⁸⁹ *Report of the Public Advisory Group on Restructuring and Redundancy*, above n 3, at 1.

¹⁹⁰ T Mallard, "Improvements to Redundancy Rights Planned" (9 October 2008) Beehive <<http://www.beehive.govt.nz/release/improvements+redundancy+rights+planned>>.

¹⁹¹ See appendix five for a copy of the Bill.

employee works. It is unlikely that the 2010 amendments by the National led government to the ERA will have any impact on this particular area of law.¹⁹² Realistically, the only definitive way to provide certainty, consistency, equality and a clear comprehensible approach to this area of law is through legislation.

¹⁹² The 2010 amendments to the ERA are discussed in detail in chapter fifteen.

Chapter Thirteen

Illusions of Protection - Substantive Justification

A *Procedural Fairness & Substantive Justification*

As evidenced by the preceding chapters procedural fairness plays an important role in cases of termination of employment by reason of redundancy. Broadly put, procedural fairness enables employers to make properly informed, fair and reasonable decisions.¹ When considering a personal grievance claim the Authority or Court must have regard to both ‘what’ the employer has done (substantive justification)² and ‘how’ they have done it (procedural fairness)³ in order to determine whether the action is in fact justifiable in accordance with the test of justification in s 103A of the ERA. As a result of this, the concepts of procedural fairness and substantive fairness cannot be separated into two distinct and independent components. As Cooke P aptly remarked in *Brighouse*:⁴

‘In considering the duties of a reasonable employer, it is often convenient to use as different heads of discussion substantive justification and procedure, but there is no sharp dividing line...it is not correct to draw a distinction between the reason for dismissal and the manner of dismissal as if these were mutually exclusive...’

¹ J Hughes, P Roth and G Anderson, *Personal Grievances* (online loose-leaf ed, LexisNexis) at [4.2].

² For general discussion on substantive justification in redundancy cases see: Anderson and others, *Mazengarb’s Employment Law* (online loose-leaf ed, LexisNexis) at [ERA103.45] [“*Mazengarb*”]; J Hughes, P Roth and G Anderson, above n 1, at [5.26] and [5.28]; P Bartlett, W Hodge, P Muir, C Toogood, R Wilson, *Brookers Employment Law* (online loose-leaf ed, Brookers) at [ER103.17]-[ER103.18] [“*Brookers Employment Law*”]; P Churchman, C Toogood and M Foley, *Brookers Personal Grievances* (online loose-leaf ed, Brookers) at [6.6.03]-[6.6.11] [“*Brooker PG*”]; G Anderson, J Hughes, P Roth and M Leggat, *Employment Law: A Practical Guide* (LexisNexis New Zealand Limited, Wellington, 2010) at [18.65]-[18.66] [“*A Practical Guide*”].

³ For general discussion on the elements of procedural fairness in redundancy cases see: Anderson and others, *Mazengarb*, above n 2, at [ERA103.47]-[ERA103.52B]; J Hughes, P Roth and G Anderson, above n 1, at [4.28]-[4.37]; P Bartlett, W Hodge, P Muir, C Toogood, R Wilson, *Brookers Employment Law*, above n 2, at [ER103.19]-[ER103.26]; P Churchman, C Toogood and M Foley, *Brookers PG*, above n 2, at [6.7] and [6.8]; G Anderson, J Hughes, P Roth and M Leggat, *A Practical Guide*, above n 2, at [18.67]-[18.74].

⁴ *Brighouse Limited v Bilderbeck* [1994] 2 ERNZ 243, at 255.

Arguably the interrelationship between these two elements arises as a result of the nature of a personal grievance claim and the fact that the judiciary has the jurisdiction under the personal grievance regime to evaluate the actual decision under consideration.⁵ However, as will be discussed in this chapter, the judiciary has been reluctant to review the substantive decision to dismiss in cases of redundancy unless there is evidence to suggest that the decision is not genuine. It appears that the majority of determinations support the notion that where there has been a failure to comply with minimum standards of natural justice it may cast doubt on the genuineness of any decision to dismiss.⁶ Therefore, this provides a useful illustration of the interrelated, yet distinct, nature of these two elements.

Notwithstanding the above, there does remain some judicial debate about the extent of whether failure to adhere to minimum standards of natural justice may cast doubt on the genuineness of any decision. In Thomas J's dissenting judgment in *Aoraki*,⁷ it was noted that:⁸

‘It is unrealistic to suggest that a genuine redundancy decision is “vitiating” because the procedures followed in implementing that decision was unfair when the element of unfairness may have had no bearing on the substance of the decision’.

Furthermore, the idea that defects in procedural fairness can cast doubt on the genuineness of the employer's decision to make an employee redundant assumes that employers are fully aware of the precise process to follow. As evidenced by the preceding chapters, certainty of process in respect of redundancy cases is far from being certain.⁹ Moreover, it assumes that

⁵ J Hughes, P Roth and G Anderson, above n 1, at [4.2].

⁶ See the dissent of Thomas J in *Aoraki Corporation Limited v McGavin* [1998] 1 ERNZ 601, 630. Thomas J asserted that the genuineness of the redundancy can not be “vitiating because the procedure followed in implementing that decision was unfair when the element of unfairness may have had no bearing on the substance of the decision”.

⁷ *Aoraki Corporation Limited v McGavin*, above n 6.

⁸ *Ibid*, at 630.

⁹ It is important to note that the Department of Labour has produced a number of guides and factsheets to assist both employers and employees with procedural requirements in a redundancy situation. See: Department of Labour, “Disciplinary Action, Dismissal, Redundancy and Ill Health: Guide for Employees” (August 2009). A

the process to be implemented is the same irrespective of situation. Obviously, in certain circumstances, a redundancy decision is clearly genuine and therefore irrespective of procedure followed the outcome will be unchanged,¹⁰ for example where a company goes into receivership.¹¹

Following on from this analysis is the question of how the interrelated principles of substantive justification and procedural fairness actually operate in a redundancy situation. As New Zealand has never had a comprehensive legislative code in respect of rules and procedures to govern dismissal for reason of redundancy,¹² the judiciary has had wide discretion regarding the law's application and the consequent balancing of the rights and obligations of the parties to the employment relationship.¹³

It is this wide discretion and substantial flexibility which has created uncertainty within this area of law and made it very difficult for both employees and employers to understand their respective rights and obligations. The controversial subject of whether as a procedural issue, an employer might be required to consider the payment of redundancy compensation is a useful illustration of this assertion and discussed thoroughly in chapter twelve. However, uncertainty surrounding redundancy law is not purely associated with the issues of

copy of this guide can be accessed as: <<http://ers.govt.nz/publications/pdfs/discipline-guide-employere.pdf>>; Department of Labour, "Disciplinary Action, Dismissal, Redundancy and Ill Health: Guide for Employers" (August 2009). A copy of this guide can be accessed as: <<http://ers.govt.nz/publications/pdfs/discipline-guide-employer.pdf>>; Department of Labour, "Guide to Restructuring" (18 June 2010). A copy of this guide can be obtained from <www.ers.dol.govt.nz/redundancy/guide-restructuring.html>; Department of Labour, "Fact Sheet: Information for Employees about Redundancy" (17 December 2008) <<http://ers.govt.nz/redundancy/employer-print.html>>; Department of Labour, "Fact Sheet: Information for Employers about Redundancy" (17 December 2008) <<http://ers.govt.nz/redundancy/employer-print.html>>.

¹⁰ For discussion on this point see: J Hughes, P Roth and G Anderson, above n 1, at [5.28].

¹¹ For example see *Mobberley v Toy Warehouse Limited* (Employment Tribunal, Auckland, AT184/92, 11 September 1992, B M Stanton) cited in J Hughes, P Roth and G Anderson, above n 1, at [5.28].

¹² See chapter two for a brief discussion on the history of redundancy law in NZ. For in-depth discussion on the history of redundancy law see: M Mulgan, "Redundancy Dismissals" in A Szakats and M Mulgan, *Dismissal and Redundancy Procedures* (2nd ed, Butterworths, Wellington, 1990) 193-268.

¹³ For discussion on this point see: G Anderson, J Hughes, P Roth and M Leggat, *A Practical Guide*, above n 2, at [17.4].

compensation.¹⁴ Due to the very nature of the judiciary's approach, which focuses on the particular circumstances of each case, there has been ample room for confusion about each party's obligations in a redundancy situation.¹⁵ The judiciary has expressly stated that, "...it is not for us to try to render certain that which the legislation has left flexible".¹⁶

As noted in chapter six, redundancy is a different form of termination in comparison to other forms of dismissal. In a redundancy situation, the proposal to potentially dismiss one or more employees through redundancy is reached before any process is commenced. The process in a redundancy situation is used to analyse that proposal through consultation with the affected parties so as to determine what changes, if any, will in fact be implemented.

B Tension between Employer & Employee Rights

As a result of this, procedural fairness in a redundancy situation is unlike any other form of termination process and as such it enunciates the tension between a manager's right to manage and an employee's right to remain employed.¹⁷ Consequently, redundancy law has aptly been described as being in a "class of its own".¹⁸ Such a sentiment also conforms to the dicta in *Hale*¹⁹ where Richardson J stated:²⁰

'Redundancy is a difficult area of labour law as it is of industrial relations. It raises consideration of economic efficiency, individual autonomy and social justice. The employees affected have done no wrong. They are to be regarded as competent and loyal. As we have come to see in recent years,

¹⁴ This uncertainty is illustrated in chapters seven to twelve where each element of procedural fairness is discussed.

¹⁵ See A Russell, "The 'Emperor's New Clothes': The Judicial Fabric of Redundancy Under the Employment Relations Act 2000" (2003) 9 New Zealand Business Law Quarterly 125.

¹⁶ *Brighouse Limited v Bilderbeck*, above n 4, at 256 as per Richardson J.

¹⁷ M Mulgan, above n 12, at 193.

¹⁸ *G N Hale & Son Ltd v Wellington, etc, Caretakers, etc, IUW* [1991] 1 NZLR 151, at 159 as per Bisson J.

¹⁹ *G N Hale & Son Ltd v Wellington, etc, Caretakers, etc, IUW*, above n 18.

²⁰ *Ibid*, at 157 as per Richardson J.

redundancy may have a devastating and lasting social and economic impact on them and their families. But the employer is also in a difficult situation. In the circumstances that the employer faces the employees are considered to be surplus to the requirements of the business. That may be due to a decrease in business activity, perceived advantages of greater mechanization and technological change, deployment of capital resources in different ways, or reorganization of business operations with a view to enhancing profitability, or reducing losses either generally or in selected areas’.

Unlike most other forms of dismissal, it is a no fault²¹ situation which, regardless of the absence of culpability, produces the same severe consequences as if fault were present; that is termination of employment. As noted by Richardson J above, redundancy is often a mutually negative situation for all parties to the employment relationship and the balancing of rights between these parties is hard to reconcile easily.

C Managerial Prerogative

As outlined above, the tension between an employer’s right to manage and an employee’s right to remain employed is particularly evident in a redundancy situation. This is because the employer’s right to manage enables them to determine that an employee’s employment will end without the employee actually doing anything wrong to justify termination. In respect of redundancy law, substantive justification concerns the actual decision of an employer to make an employee redundant (the “what” element under s 103A). This is intrinsically linked with the ideology of managerial prerogative, because the Court or Authority needs to consider whether the decision to dismiss by means of redundancy is in fact genuine.

The Court of Appeal decision in *Hale* is often cited as representing the strength of the managerial prerogative in redundancy situations. In this case a cleaner was dismissed and replaced by a contractor. This was part of the organisation’s attempts to save costs.²² The

²¹ For discussion on this concept in relation to redundancy see: G Anderson, J Hughes, P Roth and M Leggat, *A Practical Guide*, above n 2, at [18.64].

²² For discussion see: J Hughes, P Roth and G Anderson, above n 1, at [5.26].

Labour Court held that the dismissal was unjustifiable. However, the matter was referred to the Court of Appeal. Specifically, in relation to substantive justification, the Labour Court had requested that the Court of Appeal assess whether they had applied the correct test of justification by holding that a decision to dismiss by means of redundancy will only be justifiable if the decision to dismiss is both “unavoidable”²³ and made as a result of “commercial necessity”.²⁴

The Court of Appeal held that this approach was incorrect and that, in order to justify a dismissal on the grounds of redundancy, it was not necessary for the employer to show that the decision to dismiss was “unavoidable or necessary to ensure the survival of the employer’s business”.²⁵ Furthermore, the Court of Appeal noted that although the judiciary can examine the “genuineness of an employer’s commercial reasons for redundancy”²⁶ the actual adequacy of those reasons was a matter for the employer to determine and not the Courts. Specifically, Cook P stated:²⁷

‘...this Court must now make it clear 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 otherwise go to the wall. A worker does not have a right to continued employment if the business can be run more efficiently without him. The personal grievance provisions of the Labour Relations Act, and in particular the existence of remedies for unjustifiable dismissal, should not be treated as derogating from the rights of employers to make management decisions genuinely on such grounds. Nor could it be right for the Labour Court to substitute its own opinion as to the wisdom or expediency of the employer’s decision’.

²³ *G N Hale & Son Ltd v Wellington, etc, Caretakers, etc*, IUW, above n 18, at 154 as per Cooke P.

²⁴ *Ibid.*

²⁵ *Ibid.*, at 151.

²⁶ *Ibid.*

²⁷ *Ibid.*, at 155.

This ideology epitomised in this statement has been applied and restated in numerous cases²⁸ becoming an intrinsic element of New Zealand's redundancy law and enduring through the enactment of quite antithetical pieces of employment legislation.

Although it may appear that this managerial right is unchallengeable, there are constraints upon its application. Specifically, these limits can be imposed by legislative enactments, contractual arrangements or judicial interpretation. Each of these limitations is discussed in detail below.

I Limitations on the Managerial Prerogative

a) Legislative Enactments

Although there is no comprehensive legislative regime specifically governing a redundancy situation²⁹ there are legislative provisions encapsulated in different enactments which may apply to specific situations surrounding the termination of employees where redundancy is professed to be the reason for that termination. Legislative enactments can curtail the apparent absolute managerial right to manage.

i) Employment Relations Act 2000

As already discussed, there are provisions within the ERA that expressly restrict how an employer is to manage their business in certain situations involving one or more redundancies, such as where an employer intends to restructure their business.³⁰

²⁸ For example see *Aoraki Corporation Limited v McGavin*, above n 6; *Simpsons Farms Limited v Aberhart* [2006] ERNZ 825.

²⁹ The ERA does contain some provisions that specifically relate to redundancy as a result of restructuring situations, specifically part 6A.

³⁰ See chapter four for discussion on part 6A of the ERA.

Furthermore, the good faith provisions are aimed at influencing and changing the way in which parties to an employment relationship deal with each other.³¹ The all encompassing nature of good faith means that the concept can curtail managerial prerogative in respect of how all aspects of the employment relationship are conducted as well as providing specific requirements for consultation and information sharing in restructuring situations.³²

ii) Parental Leave and Employment Protection Act 1987

Where an employee is on parental leave and the employer proposes to make the employee redundant, parental leave legislation imposes a much higher framework of obligations³³ associated with the process than in a non-parental leave situation.

In the leading case of *Lewis v Greene*³⁴ the Court reiterated this point by stating that the requirement on the employer to “conduct a fair procedure with active consultation increased when a person was on parental leave”.³⁵ The reason for the increased requirement was reflective of the employee’s vulnerability.³⁶ Therefore an employer contemplating making an employee, who is on parental leave, redundant is, “bound to take extra precautions to ensure that she has an opportunity to be actively involved in the consultation process in a meaningful way”.³⁷ Theoretically, although not discussed in the case, the reasoning surrounding this case

³¹ M Wilson, “The Employment Relations Act: A Framework For A Fairer Way” in E Rasmussen (ed), *Employment Relationships: New Zealand’s Employment Relations Act* (Auckland University Press, Auckland, 2004) 9, 17.

³² Note that there are limits placed on these requirements which are encapsulated in ss 4 (1B) and 4 (1C). These provisions are discussed in greater detail in chapter eight.

³³ See s 51 of the Parental Leave and Employment Protection Act 1987.

³⁴ *Lewis v Greene* [2004] 2 ERNZ 55

³⁵ *Ibid*, at 76.

³⁶ *Ibid*.

³⁷ *Ibid*.

would arguably apply to any employee who is on leave during a reorganisation process that could potentially affect their continued employment.

b) Contractual Limits

Where parties to an employment relationship have negotiated and mutually agreed on specific terms and conditions of employment that are incorporated into an employment agreement, these precise terms and conditions will govern the employment relationship over and above the managerial right to manage.³⁸ In this situation the right to manage has already been exercised as it is presumed that the employer would take into account their right to manage their own business when agreeing to any form of contract which potentially limits that right.³⁹ The employer's freedom of action has intentionally been curtailed through the establishment of an employment contract which creates enforceable rights and obligations.⁴⁰ The Courts have frequently asserted that it would be impermissible to allow the managerial prerogative to override contractual terms and conditions which have previously been mutually agreed between the parties.⁴¹ Consequently an argument that asserts an employer's right to manage can contravene contractual rights is unlikely to be successful.⁴² The Courts have stated that, "the various observations about the employer's right to manage are not available as a general pretext for avoiding legal obligations voluntarily entered into but which

³⁸ See *Duggan v Wellington City Council* (Employment Court, Wellington, WEC9/94, 21 March 1994, Chief Judge Goddard); *Auckland Regional Council v Sanson* (Court of Appeal, CA143/99, 16 December 1999, Thomas, Keith, Blanchard JJ).

³⁹ *Duggan v Wellington City Council*, above n 38, at 21.

⁴⁰ *Ibid.*

⁴¹ *Auckland Regional Council v Sanson*, above n 38, at [36].

⁴² A good example of this is the Authority decision of *New Zealand Amalgamated Engineering, Printing and Manufacturing Union v Carter Holt Harvey Limited* (Employment Relations Authority, Wellington, WA175/05, 14 November 2005, Asher (Member)) where the company tried to use performance criteria as a rationale for avoiding a preferential post redeployment clause in their contract.

it is no longer convenient to fulfill”.⁴³ Therefore, managerial prerogative is constrained by contractual terms. A case which exemplifies this is *Nee Nee*,⁴⁴ where the Court held that the dismissals were unjustified as the employer had failed to comply with their contractual requirements.⁴⁵

Importantly, as discussed in chapter three, the ERA intended to realign the power within the employment relationship and restrict the application of managerial prerogative through the promotion of collective action and specific redundancy provisions within collective employment agreements. However, as examined in chapter five, collectivism has not flourished under the ERA and only represents a small percentage of the total labour force.⁴⁶ This, coupled with the limited data available on the precise contents of individual employment agreements, means that the magnitude of this limitation is unable to be effectively assessed.

⁴³ *New Zealand Public Service Association v Electricity Corporation of New Zealand Limited* (Labour Court, Wellington, WLC54/91, 27 June 1991, Chief Judge Goddard) 19. This quote was cited in *Grant v Superstrike Bowling Centre Ltd* (Labour Court, Auckland, ALC81/91, 11 July 1991, Judge Finnigan) 11.

⁴⁴ *Nee Nee v TLNZ Auckland Ltd* [2006] ERNZ 95. It is important to note that TLNZ sought leave to appeal this decision. TLNZ asserted that the findings of the Employment Court were wrong. In particular TLNZ claimed that the Employment Court was incorrect with its ruling that the particular circumstances of the case did not meet the definition of redundancy within the collective contract and that TLNZ had not acted in good faith. The Court of Appeal refused to grant leave to appeal. However, the Court of Appeal did note that the construction of the employment contract by the Employment Court was incorrect. Notwithstanding this, s 214 of the ERA prevented leave being granted as this provision prohibits appeals on issues of law which are concerned with the construction of an employment agreement. This judgment is reported at: *TLNZ Auckland Limited v Nee Nee* [2006] ERNZ 689.

⁴⁵ *Nee Nee v TLNZ Auckland Ltd* [2006] ERNZ 95, at [67].

⁴⁶ As noted in chapter five collective agreements currently only cover approximately 15 per cent of the labour force.

c) Judicial Interpretation

Interestingly, it is arguably the Court's approach to substantive justification that has presented the greatest hurdle for an employee who wishes to successfully establish a personal grievance as a result of termination of employment for means of alleged redundancy.

Even before the 2004 amendment, scholars and the Courts acknowledged the difficulty employees experienced in establishing that their termination was substantively unjustified. Some academics have questioned whether substantive justification is in fact an "empty promise"⁴⁷ as it plays a "marginal role once there are sufficient grounds for the dismissal or other adverse action".⁴⁸ Although this assertion was made prior to the introduction of s 103A, arguably it remains particularly relevant in redundancy cases as the judiciary have consistently applied *Hale*⁴⁹ asserting that, where an employer makes a decision for genuine commercial reasons, it is deemed that the employer and only the employer has both the right and knowledge to make such a business decision.⁵⁰ Therefore it is not for the Courts or any other party to "look beyond a dismissal genuinely effected".⁵¹

The underlying sentiments associated with this assertion are not in dispute. A business needs to be operated in such a way as to enable it to be both commercially viable and successful. As the owners bear the risks associated with the operation of the business they should have the freedom to determine its direction.⁵² However, arguably these sentiments also underline a clear inequality of power in the employment relationship. The ERA expressly acknowledges

⁴⁷ P Roth, "The Poverty of Fairness in Employment Law" 2001 (5) Employment Law Bulletin 85, 85.

⁴⁸ *Ibid*, at 86.

⁴⁹ For example see *Nelson Aero Club Incorporated v Palmer* (Employment Court, Wellington, 10A/00, 7 March 2000, Judge Shaw) and *Tip Top Ice Cream Company Limited v Ikenasio* [2000] 1 ERNZ 612.

⁵⁰ *G N Hale & Son Ltd v Wellington, etc, Caretakers, etc*, IUW, above n 18.

⁵¹ *Ibid*, at 159 as per Casey J.

⁵² This right is subject to the legislative and contractual constraints already discussed.

the “inherent inequality of power”⁵³ between the parties⁵⁴ and attempts to address it through the promotion of productive employment relationships through good faith.⁵⁵ However, as outlined in chapter three, one of the ways to achieve this objective was intended to be through encouraging collective bargaining.⁵⁶ As collective bargaining has not increased as anticipated⁵⁷ and the good faith obligations for individual employees’ terms and conditions of employment are more limited than those for collective agreements,⁵⁸ arguably this imbalance has not been satisfactorily addressed. As noted by Richardson J in *Hale*, “it is not the function of the Courts to construct an overriding extra-statutory concept of social justice applicable to redundancy situations”.⁵⁹

Interestingly, the judiciary has acknowledged that the extent of “the employer’s right to manage its business is wide”⁶⁰ and that if any employee wants to establish that the reasons associated with their redundancy are not genuine it is “for obvious reasons, a very difficult thing for an employee to prove”.⁶¹ This acknowledgement is evidenced by case law.

Notwithstanding the above assertions, the judiciary in *Hale* did note that there are some limits on the managerial prerogative. However, in all cases such limitations outside of legislative or contractual constraints were to be dependent on the specific circumstances of the case⁶² with

⁵³ Section 3 (a) (ii) of the ERA.

⁵⁴ Section 3 (a) (ii) of the ERA.

⁵⁵ Section 3 (a) of the ERA.

⁵⁶ See discussion on this point in chapter two, part E.

⁵⁷ See chapter five of this paper for discussion.

⁵⁸ See s 60 of the ERA.

⁵⁹ *G N Hale & Son Ltd v Wellington, etc, Caretakers, etc, IUW*, above n 18, at 158 as per Richardson J.

⁶⁰ *Harris v Charter Trucks Limited* (Employment Court, Christchurch, CC16/07, 11 September 2007, Judge Couch) at [65].

⁶¹ *Rolls v Wellington Gas Company* (Employment Court, Wellington, WC46/98, 9 July 1998, Chief Judge Goddard) 8. See also *Harris v Charter Trucks Limited* above n 60, at [65].

⁶² *G N Hale & Son Ltd v Wellington, etc, Caretakers, etc, IUW*, above n 18, at 156.

the court avoiding the “temptation to formulate detailed principles and rules by which the justifiability or unjustifiability of dismissals are to be determined”.⁶³

The remainder of this chapter focuses on the limitations the judiciary has traditionally placed on managerial prerogative.

D Reviewing the Employer’s Decision

Technically alleged unjustifiable dismissal cases place the burden of proving justification on the employer.⁶⁴ The employer needs to justify the decision by pointing to a genuine decision reached after observing a fair process. In practice, it seems that in order for the Court or Authority to review an employer’s decision to make an employee redundant, the employee seems to need to present some form of evidence that suggests their dismissal was initiated for some other reason.

A useful illustration of this point is the the case of *Duncan*.⁶⁵ In *Duncan* the entire enquiry as to whether the decision to make Ms Duncan redundant was genuine was identified by Judge Couch in one statement articulating that: “I accept that proposition in the sense that the employer’s actions were genuine because they were not for an ulterior purpose”.⁶⁶ This presupposes that in order for the Court to examine an employer’s decision, evidence of an ulterior purpose must be present.

Interestingly, although in *Duncan* the Court held that the decision to dismiss on the grounds of redundancy was genuine it also held that the process was unfair due to a lack of proper

⁶³ Ibid, as per Richardson J.

⁶⁴ J Hughes, P Roth and G Anderson, above n 1, at [5.28].

⁶⁵ *T & L Harvey Limited v Duncan* (Employment Court, Christchurch, CC19/09, 20 November 2009, Judge Couch).

consultation.⁶⁷ Moreover, Judge Couch went on to state that if the process had been handled properly, which included the provision of proper consultation, then the outcome may well have been different.⁶⁸ Therefore, the entire range of remedies including loss of a job was to be awarded to the defendant.⁶⁹ Arguably it could be asserted that this reasoning is somewhat flawed. If consultation, as required by the legislation was not adhered to, and such adherence would have possibly prevented the need for a redundancy situation, realistically how can it be asserted that the redundancy was in fact genuine.

This case highlights that the concern expressed by some that substantive justification is somewhat insignificant in the judiciary's assessment of whether an employer's actions are justifiable, as it emphasises the weakness of the Court of Appeal's observation that failure to observe procedural fairness might cast doubt on substantive justification.

I Adequate Commercial Explanation

Notwithstanding the above analysis, in *Hale* the Court did note that it is "entitled to scrutinise with care claims that dismissals were for redundancy reasons and to expect an adequate commercial explanation from the employer for the course adopted".⁷⁰ The Court's analysis was that this approach was the best way to assess the genuineness of redundancy and determine whether redundancy was in fact the reason for the dismissal whilst also supporting the right to manage.⁷¹ This approach conforms with later decisions that suggests that although the Court or Authority cannot call into question the employer's "commercial

⁶⁶ *Ibid.*, at [32].

⁶⁷ *Ibid.*, at [38]-[39].

⁶⁸ *Ibid.*, at [40].

⁶⁹ *Ibid.*

⁷⁰ *G N Hale & Son Ltd v Wellington, etc, Caretakers, etc*, IUW, above n 18, at 157 as per Richardson J.

⁷¹ *Ibid.*

wisdom”⁷² for making a decision, they can and should ensure that the reasons given are genuine.⁷³ Specifically, in *Hale*, Bisson J asserted that:⁷⁴

‘An employer must be free to exercise his own judgment of market trend, even act on intuition. Whether or not the employer’s dismissal for redundancy is genuine must largely turn on the employer’s credibility’.

If the literal meaning of credibility is taken as being “believable, worthy of belief or support”⁷⁵ and being “convincing”⁷⁶ these behaviours are ones which can be influenced by the subjectivity of the individual making the assessment, for example their values, beliefs, preconceptions and generalisations.⁷⁷ Importantly, there are no formal rules that govern the assessment of credibility in employment law and given its “political and ideological”⁷⁸ nature and the wide judicial discretion due to the lack of legislative guidance associated with this area of law,⁷⁹ it is arguably susceptible to being subconsciously interpreted in such a way as to unintentionally support individual ideology,⁸⁰ which some authors have described as amounting to judicial activism.⁸¹

⁷² *Unkovich v Air New Zealand Limited* [1993] 1 ERNZ 526 as per Chief Judge Goddard. See also: J Hughes, P Roth and G Anderson, above n 1, at [5.28].

⁷³ J Hughes, P Roth and G Anderson, above n 1, at [5.28].

⁷⁴ *G N Hale & Son Ltd v Wellington, etc, Caretakers, etc*, IUW, above n 18, at 159.

⁷⁵ Shorter Oxford English Dictionary (5th ed, Oxford University Press, Oxford, 2002) vol 1, at 551.

⁷⁶ *Ibid.*

⁷⁷ Council of Canadian Administrative Tribunals, “Assessing the Credibility of Witnesses: A Practical Guide” (Council of Canadian Administrative Tribunals Annual Conference, 11-13 June 2000) 3. A copy of this paper can be accessed at: <http://www.ccat-ctac.org/downloads/conference_text.pdf>.

⁷⁸ R Nelson, “The Implied Term of Trust and Confidence: The Change in Approach of the Court of Appeal to the Requirement to Pay Redundancy Compensation” (2000) 31 Victoria University of Wellington Law Review 599, 624.

⁷⁹ See the discussion on judicial activism in chapter twelve of this paper.

⁸⁰ See R Nelson, above n 78, at 624 where the differences between *Brighouse* and *Aoraki* are discussed.

⁸¹ See A Geare and F Edgar, “New Zealand Legislators and the Issues of Redundancy” (2006) 22(3) The International Journal of Comparative Labour Law and Industrial Relations 369.

Given this concern, the role of evidence becomes increasingly important. According to Bisson J in *Hale*, in assessing an employer's credibility, "the employer's record of employment and relationships with employees in the past and in dealing with the dismissed employee in respect of the dismissal for redundancy should be the evidence".⁸² However, an assessment of the employer's business accounts was unnecessary and contrary to managerial prerogative.⁸³ This approach puts weight on the procedural elements associated with termination via redundancy⁸⁴ and was in keeping with the judgment of Cooke P who advocated that where a dismissal for redundancy is alleged to be unjustified, the Court could only review the employer's accounts where this would have direct relevance to substantiating the true reason for the dismissal.⁸⁵ Without providing an exhaustive list, Cooke P suggested that going so far as to review the employer's accounts could only be used where there is, "a suggestion that alleged redundancy was being used as a camouflage for getting rid of an unsatisfactory employee".⁸⁶ As already noted, this seems to require an employee to produce some evidence of an ulterior motive in order to encourage the judiciary to examine the commercial justification for the decision.⁸⁷ Obviously there will always be the odd exception to this assertion. Such was the case in *Samujh v Gould*⁸⁸ (*Samujh*), where Judge Colgan asserted that an examination of the employer's accounts is allowed where it is pertinent to the real reason for the termination.⁸⁹ However, the need for an examination of the employer's accounts was not actually in issue in that case.

⁸² *G N Hale & Son Ltd v Wellington, etc, Caretakers, etc*, IUW, above n 18, at 159.

⁸³ *Ibid.*

⁸⁴ The procedural elements in a redundancy situation are discussed in chapter's six to twelve.

⁸⁵ *G N Hale & Son Ltd v Wellington, etc, Caretakers, etc*, IUW, above n 18, at 155.

⁸⁶ *Ibid.*, at 155 as per Cooke P.

⁸⁷ Note the discussion regarding this point in: J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 1, at [5.28].

⁸⁸ (Employment Court, Auckland, AEC12A/95, 11 April 2005, Judge Travis).

⁸⁹ See *Samujh v Gould*, above n 88, at 16. For discussion see: J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 1, at [5.28].

Contrary to the approach in *Hale*, in *Rolls v Wellington Gas Company*⁹⁰(*Rolls*) the Court suggested that in assessing credibility and being convincing it would aid the employer's case if it could show, "a significant paper trail or other solid foundation of evidence demonstrating its consideration of a reorganisation".⁹¹ However, the Court went further to suggest that this kind of evidence would be expected in a large organisation.⁹² Interestingly, as was seen in chapter five, New Zealand is made up predominantly of small to medium sized enterprises and therefore it is more likely that neither party to the employment relationship is able to produce substantive documentary evidence to verify their respective assertions, a point also noted in the *Rolls* case by Chief Judge Goddard in respect of employees.⁹³

Arguably, looking at early case law concerning this matter, although the judiciary can assess the factual findings in relation to historic dealings and process, there is still a largely subjective assessment in relation to credibility as to the genuineness of the actual decision to make an employee redundant.

E Impact of the 2004 Amendments

In the 2004 amendment to the ERA s 4 (1A) was enacted which, as discussed in chapter three, strengthened the good faith requirements by placing an express obligation on employers to provide employees "access to information that will, or is likely to, have an adverse effect on the continuation of employment".⁹⁴ In theory, this means that employers, regardless of size, have an obligation to produce evidence justifying their decision to terminate an employee by means of redundancy, thus in accordance with the reasoning in

⁹⁰ *Rolls v Wellington Gas Company*, above n 61.

⁹¹ *Ibid*, at 8 as per Chief Judge Goddard.

⁹² *Ibid*.

⁹³ *Ibid*.

⁹⁴ See s 4 (1A) (c) of the ERA.

Rolls. However, as articulated in *Hale* and as discussed in the preceding analysis, if an employer is permitted to “act on intuition”⁹⁵ then in reality how much evidence beyond this is actually required.

The amendments through s 103A of the ERA also expressly set out a prescriptive test of justification that was to provide for an objective assessment of the employer’s actions both substantively and procedurally in all personal grievance claims. Despite these legislative changes, as noted in *Simpson’s Farms*,⁹⁶ they had no impact on the approach adopted by the judiciary in respect of establishing whether a redundancy was initiated for genuine commercial reasons. This is clearly evidenced by the approach taken in the *Duncan* case.

F Judicial Limitations on Managerial Prerogative

In cases of alleged redundancy, there often appears to be a very fine line between a genuine commercial reason and ulterior motives masking such decisions to dismiss. Where such an allegation exists, the employee has the onus of proving that there is substance to their claim notwithstanding the general obligation on the employer to provide evidence to prove justification.⁹⁷

The remainder of this section looks at how the Courts approach these allegations. The approaches applied by the judiciary in considering these claims are flexible. Consequently, there is overlap between the broad topics outlined in this section.

⁹⁵ *G N Hale & Son Limited v Wellington, etc, caretakers, etc, IUW*, above n 18, at 159 as per Bisson J.

⁹⁶ *Simpson Farms Limited v Aberhart*, above n 28.

⁹⁷ J Hughes, P Roth and G Anderson, above n 1, at [5.28].

I Definition – Is there actually a Redundancy Situation?

As already discussed in this paper, there is no express legislative definition of redundancy. Where a contract does not provide a specific definition of the term, the judiciary apply the commonly accepted definition, being termination of employment by the employer being “attributable wholly or mainly, to the fact that the position filled by that worker is, or will become, superfluous to the employer’s needs”.⁹⁸

Therefore, in order for there to actually be a redundancy, it must meet this definition.⁹⁹ Broadly speaking this definition has been interpreted to mean the disappearance of the position, rather than the employee.¹⁰⁰ However, the word “mainly” within the definition also suggests that the entire job does not need to be surplus to the employer’s requirements and therefore superfluity of the job need not be the only reason for the termination of employment.¹⁰¹

Two key areas highlighted for consideration in this paper relate to the use of independent contractors to replace employees and the issue of what amounts to a substantially similar position.

⁹⁸ See s 184 (5) (a) (i) of the LRA 1987. This definition was discussed by Cooke P in *G N Hale & Son Limited v Wellington, etc, Caretakers, etc, IUW*, above n 18, at 155.

⁹⁹ J Hughes, P Roth and G Anderson, above n 1, at [5.25]. See the following cases which are examples of where the definition of redundancy has not been met: *Farmers Transport v Kitchen* (Employment Court, Wellington, WC26/06, 14 December 2006, Judge Shaw); *Allen v Johnson’s House Removal Company Limited* (Employment Court, Auckland, AC59/03, 19 November 2003, Judge Shaw).

¹⁰⁰ See *New Zealand Fasteners Stainless Limited v Thwaites* [2000] 1 ERNZ 739 at [22]. This point is discussed in: J Hughes, P Roth and G Anderson, above n 1, at [5.25].

¹⁰¹ This point was discussed in Tribunal case of *Orringe v Forestry Corporation of New Zealand Limited* (Employment Tribunal, Auckland, AT202/92, 16 September 1992, Stephenson) 6.

a) Independent Contractor

As noted above, the definition of redundancy is very wide and includes “business restructuring by the engagement of an independent contractor in the place of a waged employee”.¹⁰² However, this aspect of the definition appears somewhat at odds with one of the key aspects of redundancy law, being it is the position that is redundant rather than the person. Technically if the definition of redundancy is taken literally, a key feature of it is the superfluity of the position.¹⁰³ The direct replacement of the redundant employee by another employee will amount to an unjustifiable dismissal.¹⁰⁴ Therefore, it is hard to argue that the duties, which make up the position, are in fact superfluous, when those same duties are being reallocated to a contractor.¹⁰⁵ Realistically, although the business structure has changed, in effect the only material difference to the disestablished position is that the duties associated with it will be carried out by an independent contractor rather than an employee. In many cases contractors are completely dependent on the company to which they provide services and are therefore more like an employee. However, they lack any form of direct legislative employment protection. This then raises the question of whether a contractor is in fact an employee.¹⁰⁶ Arguably, the demarcation between the position and the individual becoming superfluous appears somewhat diaphanous.

¹⁰² *New Zealand Nurses Union v Air New Zealand* [1992] 3 ERNZ 548, at 575 as per Judge Colgan. For discussion see: J Hughes, P Roth and G Anderson, above n 1, at [5.27].

¹⁰³ This point was raised in the case of *New Zealand Nurses Union v Air New Zealand* [1992] 3 ERNZ 548, 569. Counsel for the appellant cited a Commerce Clearing House volume entitled *New Zealand Employment Law Guide* and quoted: “the essential feature of redundancy is the worker’s superfluity....As a general rule, if the employee is going to be replaced by another in the same position, there is no redundancy. However, employees can probably be replaced with contractors engaged to do the same job being done by the employees, as long as that is a genuine business decision of the employer designed to improve the business: see *Davis v Ports of Auckland* (unrep, AEC 33/91, 15 Nov 1991), and *Culhane v Ports of Auckland Ltd* (unrep, AEC 39/91, 18 Nov 1991)...”. Judge Colgan stated that the cases cited may not authoritatively support the proposition articulated in the statement quoted. However, the proposition may not be incorrect.

¹⁰⁴ See the discussion in: J Hughes, P Roth and G Anderson, above n 1, at [5.25].

¹⁰⁵ This point was noted in chapter five.

¹⁰⁶ See s 6 of the ERA.

Interestingly, as discussed in chapter ten, recent case law¹⁰⁷ has suggested that the test of justification in s 103A of the ERA actually requires an employer to redeploy an employee if the organisation has a suitable vacant position available. Arguably, this changes the focus of the definition of redundancy to that of the person rather than the position being superfluous to the needs of the employer. Consequently, given this case law it could be argued that contracting out identical duties to those performed by an employee in the position that is to be made redundant, at the very least gives rise to an obligation to offer the affected employee the ability to become the independent contractor. Obviously, this raises other questions of law surrounding the level of legislative protection and support availed to contractors.

b) Substantially Similar Position

Following on from the above discussion, in cases of alleged unjustifiable dismissal by means of redundancy, it is often asserted that there is no genuine redundancy as the position remains or is substantially similar to a newly created position.

It is accepted that the test to determine such an allegation is that contained in *Carter Holt Harvey Limited v Wallis*,¹⁰⁸ being: “Would a reasonable person, taking into account the nature, terms and conditions of each position and the characteristics of the respondent, consider that there was sufficient difference to break the essential continuity of employment?”¹⁰⁹ It is also recognised that this test is an objective one and is inherently a question of fact and degree.¹¹⁰

¹⁰⁷ See *Jinkinson v Oceana Gold New Zealand Limited* [2010] NZEmpC 102 (note this case has been granted leave to appeal) and *Wang v Hamilton Multicultural Services Trust* [2010] NZEmpC 142.

¹⁰⁸ *Carter Holt Harvey Limited v Wallis* [1998] 3 ERNZ 984. This test has been applied in numerous cases including *Auckland Regional Council v Sanson*, above n 38.

¹⁰⁹ *Carter Holt Harvey Limited v Wallis* [1998] 3 ERNZ 984, at 995 as per Judge Travis.

¹¹⁰ See *Auckland Regional Council v Sanson*, above n 38.

In *Auckland Regional Council v Sanson*,¹¹¹ (*Sanson*) the Court of Appeal confirmed Judge Travis's earlier decision in the Employment Court that, although an employee cannot "expect his or her duties to remain unchanged",¹¹² the differences between the former and proposed positions were so substantial that the position was redundant. The changes could not be regarded as being mere alterations in the position description, which in this case would have been authorised by the respective employment agreement.¹¹³ Specifically, the position which was disestablished involved substantial managerial and leadership responsibilities. Conversely, the proposed position removed those responsibilities and was purely technical in nature.¹¹⁴ Therefore, the new position could not be deemed substantially similar to the former position.

The Court of Appeal's decision in *Thwaites*¹¹⁵ produced an alternative result. In this case, following an earlier company restructure and advances in technology, it was decided that the senior position of Finance Manager was no longer required; rather a lower-level accounting position was to be created.¹¹⁶ As a result of this, the Finance Manager position carried out by Mr Thwaites was to be made redundant. Importantly, Mr Thwaites was not advised of the plans to create a lower-level accounting role and as a corollary of this, he was not offered the position instead of redundancy.¹¹⁷

It was accepted by the Court that the new position created by the reorganisation involved substantially the same duties and responsibilities as those carried out by Mr Thwaites at the

¹¹¹ (Court of Appeal, CA143/99, 16 December 1999, Thomas, Keith, Blanchard JJ).

¹¹² *Auckland Regional Council v Sanson*, above n 38, at [18] as per Judge Travis. See also *Group Rentals NZ Ltd v Canterbury Clerical Workers IUOW* [1987] NZILR 255, at 257 as per Chief Judge Horn.

¹¹³ *Auckland Regional Council v Sanson*, above n 38, at [17]-[24].

¹¹⁴ *Ibid*, at [22].

¹¹⁵ *New Zealand Fasteners Stainless Limited v Thwaites*, above n 100.

¹¹⁶ *Ibid*, at [7].

¹¹⁷ *Ibid*.

time of his dismissal.¹¹⁸ Counsel for Mr Thwaites therefore argued that, given the fact that the new position reflected Mr Thwaites current duties, albeit under a different job title, he could not be regarded as redundant.¹¹⁹ As a result of this, it was asserted that the redundancy could not be genuine. The Court of Appeal however took a different view and stated that:¹²⁰

‘While some positions might become surplus to requirements abruptly, as on a restructure or change in technology, many will diminish over time to a point when it is recognised they should be declared redundant. In these later cases it would be quite unrealistic to regard the position as encompassing only those residual duties remaining at the time the inevitable is recognised. To do that would be to penalize the employers for retaining employees longer than is necessary’.

The Court went on to assert that where there is a genuine redundancy and there are no contractual provisions concerning redeployment, it does not amount to unjustified dismissal to not offer the affected employee an alternative position.¹²¹ The redundancy was held as being genuine. Given the recent case law concerning employers’ obligations in respect of redeploying a redundant employee, it is likely that in this respect the decision in *Thwaites* is no longer authoritative.¹²² Notwithstanding this point, both *Sanson* and *Thwaites* illustrate that some changes to an employee’s duties fall legitimately within the managerial prerogative. What is not so clear is the line between what is legitimately an acceptable managerial change resulting in continued employment and when such a change amounts to a genuine redundancy.

¹¹⁸ Ibid, at [26].

¹¹⁹ Ibid, at [15]–[16].

¹²⁰ Ibid, at [26] as per Gault J.

¹²¹ Ibid, at [25].

¹²² For discussion on redeployment see chapter ten.

II *Is the Real Reason for Termination Hidden?*

a) *Engineered Dismissals*¹²³

The concept of an engineered dismissal is the idea that the alleged redundancy is actually a “camouflage”¹²⁴ for another reason for termination of employment, or alternatively a genuine redundancy situation may exist but the selection of the employee to be made redundant is not made for genuine reasons.¹²⁵ This latter point is dealt with in chapter nine. The judiciary has stated that where there are issues unrelated to a redundancy situation, they must remain separate issues¹²⁶ and be dealt with accordingly. This fits with the definition of redundancy being focused on the position being redundant rather than the person.¹²⁷

b) *Issue of Performance*

The primary alternative motive for dismissal by means of redundancy is that of alleged poor performance.¹²⁸ This is generally concerned with the situation where an employee’s productivity or quality of work is not meeting the expectations of the employer. Where this

¹²³ For discussion on this point see: J Hughes, P Roth and G Anderson, above n 1, at [5.28].

¹²⁴ This term was used by Cook P in *G N Hale & Son Limited v Wellington, etc, Caretakers, etc, IUW*, above n 18, at 155.

¹²⁵ J Hughes, P Roth and G Anderson, above n 1, at [5.28].

¹²⁶ See for example *Godfrey v Sensation Yachts Limited* (Employment Court, Auckland, AC44A/99, 29 June 1999, Judge Travis) where the Court held that the redundancy was not genuine as there were pre-existing allegations of serious misconduct which had not been determined prior to the dismissal. See also the earlier case of *Marlborough Harbour Board v Goulden* [1985] 2 NZLR 378, where instead of addressing complaints made with the employee concerned, the Board decided to terminate the employee’s employment. Again this was deemed unjustifiable.

¹²⁷ *New Zealand Fasteners Stainless Limited v Thwaites*, above n 100.

¹²⁸ For examples of where performance has been alleged as one of the reasons for termination see *EDS (New Zealand) Limited v Inglis* (Court of Appeal, CA228/99, 13 November 2000, Gault, Thomas, Keith JJ); *Staykov v Cap Gemini Ernst & Young New Zealand Limited* (Employment Court, Auckland, AC18/05, 20 April 2005, Judge Travis); *Smith v Sovereign Limited* (Employment Court, Auckland, AC68/05, 18 November 2005, Judge Travis); *Rolls v Wellington Gas Company* (Employment Court, Wellington, WC46/98, 9 July 1998, Chief Judge Goddard).

situation exists the employer should engage in a structured performance management process at the time the issues arise¹²⁹ therefore making the employee aware of the issues and facilitating appropriate support and encouraging improvements.

A useful illustration of where performance was clearly the real reason for dismissal can be found in the case of *Samujh*.¹³⁰ In this case Ms Samujh, a Senior Lecturer in accounting at the University of Waikato, was made redundant due to alleged financial difficulties within the accounting and finance department in which she worked.¹³¹ The Employment Court held that this was merely a “means for camouflaging the true reason for her dismissal”,¹³² which was that of poor performance. According to the facts, there was a “perceived lack of ability”¹³³ in respect of Ms Samujh’s teaching and her research outputs were not commensurate with that expected of a senior lecturer.¹³⁴ Although Ms Samujh had been an employee of the University for many years, the alleged performance issues had not been properly addressed. Moreover, at the time the dismissal was implemented, there was work available that needed to be undertaken that Ms Samujh was suitable to undertake.¹³⁵ Therefore, she was not redundant in accordance with the definition of redundancy and her termination was held to be unjustifiable.¹³⁶

However, not all cases are so clear, and as a result of this there is uncertainty regarding what will, and what will not be held to be a justifiable means of termination where performance

¹²⁹ Department of Labour, “Employment relationships: Guide for Employers” <www.workplace.govt.nz/publications/pdfs/employers_guide_to_er.pdf> 7.

¹³⁰ *Samujh v Gould, the Vice Chancellor of the University of Waikato* (Employment Court, Auckland, AEC12A/95, 11 April 1995, Judge Travis).

¹³¹ *Ibid*, at 11.

¹³² *Ibid*, at 17.

¹³³ *Ibid*, at 18.

¹³⁴ *Ibid*, at 2.

¹³⁵ *Ibid*, at 18.

¹³⁶ *Ibid*, at 21.

issues are concerned. An effective illustration of this point is seen in the case of *Energy Enterprises Limited v Newland*.¹³⁷ Mr Newland was an experienced and successful radio broadcaster. When his employer sold the radio station that he worked for, the purchasers, his new employer, decided to re-market the station so as to target a new audience. The re-marketing involved the need for Mr Newland to alter his style of presentation. As Mr Newland was unable to meet with his new employer's expectations, he was dismissed based on performance issues. However, the Tribunal and subsequently the Employment Court determined that Mr Newland should not have been dismissed on the grounds of performance, but rather he had become redundant. Judge Colgan relied on the case of *New Zealand Nurses Union v Air New Zealand Limited*¹³⁸ in asserting that redundancy does not only mean the superfluity of a specific employee's function or position.¹³⁹ Specifically Judge Colgan noted:¹⁴⁰

'The significance of the case law on redundancy lies not in whether the position occupied by the grievant was surplus to the employer's requirements but rather whether, as here, justification for dismissal relied not upon a breach of the contract of employment by the employee (sometimes referred to as misconduct or performance issues) but upon a no-fault incompatibility or superfluity in that relationship'

Mr Newland's position had not been disestablished. Rather Mr Newland's style of presenting caused him, through no fault on his part, to be surplus to the requirements of his employer and therefore redundant. Mr Newland's position, as a radio presenter, did not disappear with his redundancy, rather that position remained to be filled by an employee whose style of presenting met with the employer's approval.

¹³⁷ (Employment Court, Auckland, AEC17/97, 28 February 1997, Judge Colgan).

¹³⁸ [1992] 3 ERNZ 548.

¹³⁹ *Energy Enterprises Limited v Newland*, above n 137, at 10.

¹⁴⁰ *Ibid*, at 10-11.

III Mixed Motive for Redundancy

A mixed motive¹⁴¹ is where an alleged redundancy appears to be founded on both a genuine commercial reason as well as a matter that is related to the specific individual such as personal performance.¹⁴² Where this scenario exists, the Court has held that it must “scrutinize the evidence with care”¹⁴³ and the employer must not only persuade the Court that the motive for the redundancy was genuine, but also it was the predominant reason for the termination.¹⁴⁴ Basically the predominant reason test requires the judiciary to “decide the probable motives for the dismissal”.¹⁴⁵ Where the predominant motive is based on a genuine commercial reason, the dismissal will be justified if the dismissal process was carried out fairly. Alternatively, if the predominant motive for the dismissal was for a result of anything other than a genuine commercial reason, then the dismissal will be held to be unjustified.¹⁴⁶ Consequently, the judiciary appears to accept that there can be more than one motive for an employee’s dismissal and that dismissal for redundancy is justified only if a genuine commercial motive is the prevailing reason.

In *Holmes v Ken Rintoul Cartage*,¹⁴⁷ (*Holmes*) the Employment Court accepted the Tribunal’s finding that there were real issues of mixed motives in this case.¹⁴⁸ Mr Holmes was a mechanic who was working in a sole charge position in the respondent’s workshop.

¹⁴¹ For discussion on approaches to mixed motive cases see *Forest Park (NZ) Ltd v Adams* (Employment Court, Auckland, AC83/00, 19 October 2000, Chief Judge Colgan) at [40] – [49]. See also *Savage v Unlimited Architecture Ltd* [1999] 2 ERNZ 40; *EDS (New Zealand) Limited v Inglis* (Court of Appeal, CA228/99, 13 November 2000, Gault, Thomas, Keith JJ); *Rillstone v Product Sourcing International 2000 Ltd* (Employment Relations Authority, Auckland, AA167/07, 7 June 2007, R Arthur (member)).

¹⁴² J Hughes, P Roth and G Anderson, above n 1, at [5.28].

¹⁴³ *Nelson Areo Club Inc v Palmer*, above n 49, at 7.

¹⁴⁴ *Ibid.*

¹⁴⁵ See *Bancorp Holdings Ltd v Nodder* (Employment Court, Auckland, AC105/99, 10 December 1999, Chief Judge Colgan) cited in *Forest Park (NZ) Ltd v Adams*, above n 141, at [49] as per Chief Judge Colgan.

¹⁴⁶ *Forest Park (NZ) Ltd v Adams*, above n 141, at [49].

¹⁴⁷ *Holmes v Ken Rintoul Cartage* [2002] 2 ERNZ 130.

¹⁴⁸ *Ibid.*, at [36].

According to the facts, there had been a number of performance concerns raised with Mr Holmes regarding his technical abilities in respect of his mechanical work¹⁴⁹ and attitude. Although Mr Holmes was in a sole charge position, his attitude was described as “proprietary”¹⁵⁰ and according to those who worked with him, he was unable to “accept advice gracefully”.¹⁵¹ Consequently, there were tensions within the working environment. According to the facts, the respondents had received advice from their accountant that “the workshop was not an efficient business unit within the company’s structure”¹⁵² and that contracting out this aspect of the business would result in considerable cost savings.¹⁵³ Although it was alleged by the respondent that discussions surrounding the possibility of contracting out the workshop had attempted to be made with Mr Holmes, no formal consultation process was entered into.

Whilst the manager of the respondent company was on holiday, Mr Holmes had argued with the manager’s nephew who was assisting during his absence. This resulted in the nephew leaving and the details of the argument being relayed to the respondent manager (his uncle). Subsequent to this, acting on the advice of the respondent, a junior staff member was instructed to make Mr Holmes redundant. These instructions were carried out immediately.¹⁵⁴ The Court recognised the Tribunal’s finding that: “The timing of the dismissal therefore was not predicated by operational or economic requirements on the part of the company but apparently in response to Mr Holmes’s reaction to the nephew”.¹⁵⁵ Furthermore, the Court found that in applying the decision in *Aoraki*, that this was a case

¹⁴⁹ Ibid, at [2].

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Ibid, at [3].

¹⁵³ Ibid.

¹⁵⁴ Ibid, at [6]–[8].

¹⁵⁵ Ibid, at [27].

where consultation was necessary and expected.¹⁵⁶ It also found on the evidence, although disputed, the level of consultation was inadequate.¹⁵⁷ In *Aoraki* the Court noted that “in some circumstances an absence of consultation where consultation could reasonably be expected may cast doubt on the genuineness of the alleged redundancy, or its timing”.¹⁵⁸ Furthermore, the Court noted that if Mr Holmes’s performance had been entirely acceptable, then the issue of the workshop’s closure and his subsequent redundancy would not have arisen.¹⁵⁹ Notwithstanding the fact that the Court acknowledged that there were mixed motives and that there were significant factors that the Tribunal and subsequently the Court identified as maybe casting doubt on the genuineness of the redundancy, the determination was that the redundancy was genuine and therefore substantively justified.

This case does not necessarily sit well with the comments outlined in *Hale* regarding the identification of facts within a case that would raise doubt about the genuineness of the decision to make the employee redundant. Rather, it supports the notion that substantial unequivocal evidence of a lack of genuineness is needed to dislodge the pre-eminence given to the managerial prerogative.

Arguably, given that redundancy is a no fault¹⁶⁰ situation, it prima facie appears in contravention of that principle to determine that a redundancy is genuine and therefore substantively justified where it is accepted that there are more than one motive for the dismissal, even if the predominant motive is based on genuine commercial reasons.¹⁶¹

¹⁵⁶ Ibid, at [24]–[26].

¹⁵⁷ Ibid.

¹⁵⁸ *Aoraki Corporation Limited v McGavin*, above n 6, at 618 as per Richardson P, Gault, Henry, Keith, Blanchard and Tipping JJ.

¹⁵⁹ *Holmes v Ken Rintoul Cartage*, above n 147, at [11].

¹⁶⁰ For discussion on this concept in relation to redundancy see: G Anderson, J Hughes, P Roth and M Leggat, *A Practical Guide*, above n 2, at [18.64].

¹⁶¹ In respect of performance issues, this argument is more persuasive where the situation is that of an individual being made redundant. It is not relevant where a number of employees are made redundant and performance is a legitimate part of the established and consulted selection criteria.

However, regardless of this assertion, realistically the predominant motive approach is aligned to, and supportive of, the prevalent managerial prerogative.

Although managerial prerogative has been accepted in numerous cases that preceded *Hale*,¹⁶² it is asserted that the degree to which it has been applied and the judicial scrutiny allowed has been both contentious and uncertain. Arguably this has been aided by the wide definition of redundancy and significant flexibility given to the judiciary in respect of interpreting the law in redundancy case. This has all resulted in cementing the perception held by some that substantive justification is of little use when trying to advance a personal grievance claim for unjustifiable dismissal on the grounds that the alleged redundancy is not genuine.¹⁶³

Additionally, it appears from the more recent case law, such as *Duncan*, and the points noted in this chapter that the concept of managerial prerogative is still very powerful. Arguably, the ERA and its subsequent amendments have provided little change to address the balance of power between employers and employees in respect of substantive justification in a redundancy situation.¹⁶⁴

¹⁶² See for example: *Aoraki Corporation Limited v McGavin*, above n 6; *New Zealand Fasteners Stainless Limited v Thwaites*, above n 100; *Simpson Farms Limited v Aberhart*, above n 28.

¹⁶³ For discussion on substantive justification in grievance claims generally see: P Roth, above n 47.

¹⁶⁴ The 2010 amendments to the ERA are discussed in chapter fifteen.

Chapter Fourteen

Final Touches - Remedies

The remedies available to a claimant in an employment case incorporate the full range of remedies that are available generally. This includes remedies in equity, tort, and damages arising in contract law. In addition to these, there are also the express statutory remedies which are applicable where a personal grievance is established.¹

This section briefly outlines the statutory remedies available in relation to personal grievances and their application in respect of redundancy cases.² Further sources are cited for a more in-depth discussion on each remedy. The issues relating to the determination of costs³, arrears⁴, penalties⁵ and enforcement⁶ are not considered in this paper.

A *Statutory Remedies under the Personal Grievance Regime*

Where an employee is held to have a legitimate personal grievance, the Authority or Court is able to grant one or more of the remedies outlined in the s 123 of the ERA.⁷ This legislative

¹ K Beck, “Remedies – Everything but Economic and Non-Economic Loss” (New Zealand Law Society Employment Law Conference 2006) 313, 313.

² Section 123 (1) (d) of the ERA is not discussed in this paper.

³ For discussion on the law regarding costs see: Anderson and others, *Mazengarb’s Employment Law*, (online loose-leaf ed, LexisNexis) at [ERA123.13]; P Bartlett, W Hodge, P Muir, C Toogood, R Wilson, *Brookers Employment Law* (online loose-leaf ed, Brookers) at [ER 123.10]; K Beck, above n 1, at 325-330.

⁴ See s 131 of the ERA. For discussion see: K Beck, above n 1, at 322-323.

⁵ See ss 133 to 136 of the ERA. For discussion see: K Beck, above n 1, at 323-325.

⁶ See ss 137 to 141 of the ERA.

⁷ For general discussion on statutory remedies under the personal grievance regime see: Anderson and others, above n 3, at [ERA123.1]–[ERA123.13]; J Hughes, P Roth and G Anderson, *Personal Grievances* (online

provision provides compensation for economic loss⁸ as well as non-economic loss⁹ through three remedies: reinstatement,¹⁰ reimbursement of loss,¹¹ and compensation. Compensation covers humiliation, loss of dignity, and injury to feelings¹² plus any loss of benefit arising out of the personal grievance.¹³

In determining which remedies are to be granted and any quantum associated with the remedy, the Authority or Court must give consideration to the extent to which the employee's actions contributed to the situation which gave rise to the grievance.¹⁴ Where it is held that the employee's actions did in fact contribute to the situation, the Authority or Court may, if it deems appropriate, reduce the remedies that would have otherwise been awarded accordingly.¹⁵

loose-leaf ed, LexisNexis) [11.1]-[11-51C] [*“Personal Grievances”*]; P Bartlett, W Hodge, P Muir, C Toogood, R Wilson, above n 3, at [ER123.04]-[ER123.09]; P Churchman, C Toogood and M Foley, *Brookers Personal Grievances* (online loose-leaf ed, Brookers) at [11.1]-[11.7] [*“Brooker PG”*]; G Anderson, J Hughes, P Roth and M Leggat, *Employment Law: A Practical Guide* (LexisNexis New Zealand Limited, Wellington, 2010) at [20.1]-[20.41] [*“A Practical Guide”*]; G Anderson, J Hughes, M Leggat, P Roth, *LexisNexis Employment Law Guide* (7th ed, LexisNexis, Wellington, 2005) at [ER123.1]-[ER128.5] [*“Employment Law Guide”*].

⁸ In *Telecom New Zealand Limited v Nutter* (Court of Appeal, CA127/03, 21 July 2004, Anderson P, Hammond and William Young JJ) at [68] the Court of Appeal stated that compensation for economic loss is provided for by ss 123(b) and (c) (ii) and 128.

⁹ In *Telecom New Zealand Limited v Nutter*, above n 8, at [68] the Court of Appeal stated that compensation for economic loss is provided for by ss 123 (c) (i) and perhaps (c) (ii) in relation to loss of benefit of a non monetary nature.

¹⁰ See s 123 (1) (a) of the ERA.

¹¹ See s 123 (1) (b) of the ERA.

¹² See s 123 (1) (c) (i) of the ERA.

¹³ See s 123 (1) (c) (ii) of the ERA.

¹⁴ See s 124 (a) of the ERA.

¹⁵ See s 124 (b) of the ERA. For discussion see: K Beck, above n 1, at 320-322.

I Reinstatement¹⁶

Put simply, the remedy of reinstatement recognises the value of a job to an employee as well as the importance of fair treatment. Where an employer has acted unjustifiably in terminating an employee's employment, the simplest way to remedy the situation is to give the employee their position back.¹⁷ In *Ashton v Shoreline Hotel*,¹⁸ Chief Judge Goddard when discussing the remedy of reinstatement stated:¹⁹

'...employees are entitled not to be deprived of their employment unjustifiably and when they have been they ought ordinarily to be put back, if that is their wish.....to award routinely compensation for the job loss instead of reinstating is to create a system for licensing unjustifiable dismissal'.

This philosophy was originally embedded in the ERA²⁰ with reinstatement being the primary remedy.²¹ The 2010 amendments to the ERA will remove the primacy associated with this remedy as of 1 April 2011.²²

Where reinstatement is sought by an employee who establishes that they have a personal grievance,²³ the Authority or Court must wherever practicable order reinstatement of the employee²⁴ to their former position or else to a position that is no less advantageous to the

¹⁶ For general discussion on reinstatement see: Anderson and others, above n 3, at [ERA125.1]-[ERA125.9]; J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 7, at [11.2]-[11.10]; P Bartlett, W Hodge, P Muir, C Toogood, R Wilson, above n 3, at [ER 123.04]-[ER123.24]; P Churchman, C Toogood and M Foley, *Brookers PG*, above n 7, at [11.2]; G Anderson, J Hughes, M Leggat, P Roth, *Employment Law Guide*, above n 7, at [ER125]-[ER127.3]; G Anderson, J Hughes, P Roth and M Leggat, *A Practical Guide*, above n 7, at [20.22]-[20.31] K Beck, above n 1, at 314-319.

¹⁷ A Scott-Howman, "Give Me My Job Back!" (4 October 2001) Bell Gully News <www.bellgully.com/resources/resource.00105.asp>.

¹⁸ [1994] 1 ERNZ 421.

¹⁹ *Ashton v Shoreline Hotel*, above n 18, at 436.

²⁰ A Scott-Howman, above n 17.

²¹ See ss 123, 125 and 101 (c) of the ERA.

²² The current s 125 was repealed and replaced by s 16 of the Employment Relations Amendment Act 2010, No 125. This is discussed in: Anderson and others, above n 3, at [ERA125.1].

²³ See s 125 (1) of the ERA.

²⁴ See s 125 (2) of the ERA.

employee.²⁵ When ordered, reinstatement is to occur immediately or else on a date specified by the Authority or Court.²⁶ The ERA also allows the Authority to grant interim reinstatement pending a personal grievance hearing where it is requested.²⁷ As with all aspects of employment law, terms and conditions contained in an employee's agreement may also play a part in determining whether an employer is obliged to reinstate an employee if certain circumstances are present.²⁸

Although the initial primacy of this remedy was not a new concept²⁹ and although it has not always been the primary remedy,³⁰ reinstatement has existed in New Zealand's employment law for many years.³¹ Notwithstanding this, it is used infrequently as a remedy by the judiciary.³² In 2009 the Authority ordered reinstatement on 8 occasions.³³ In 2008 the remedy was awarded 7 times and in 2007 it was awarded 14 times.³⁴ The Employment Relations Service of the Department of Labour conducted a snapshot analysis between 17

²⁵ See s 123 (1) (a) of the ERA. For discussion on the boundaries of this legislative provision see: J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 7, at [11.5].

²⁶ See s 126 of the ERA.

²⁷ See s 125 of the ERA. For an example of where the Court ordered interim reinstatement see *Owens y de Novoa v Ross and Lincoln University* (Employment Court, Christchurch, CEC39/94, 7 October 1994, Judge Palmer).

²⁸ For example see *Nee Nee and Ors v TLNZ Auckland Limited* (Employment Court, Auckland, AC13/06, 16 March 2006, Judge Travis).

²⁹ Reinstatement has been in existence since 1970 and was the primary remedy under the LRA. See s 228 of the LRA.

³⁰ Reinstatement was not the primary remedy under the ECA. Notwithstanding this it remained a remedy that the Tribunal or Courts could use in appropriate cases.

³¹ For discussion on the history of this remedy see: J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 7, at [11.2]; Anderson and others, above n 3, at [ERA125.1]-[ERA125.2].

³² For historical data on the use of reinstatement see: J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 7, at [11.2].

³³ Department of Labour, *Employment Relations Act 2000 Review of Part 9: Personal Grievances* (Prepared for the Minister of Labour, March 2010) at [8.2]. A copy of this report can be obtained from <http://www.dol.govt.nz/consultation/personal-grievance/discussion-doc/discussion-document.pdf>.

³⁴ *Ibid.*

July and 18 August 2006 on personal grievance determinations in the Authority.³⁵ The snapshot analysed 33 determinations³⁶ and out of these only two were awarded reinstatement.³⁷ As part of this study the Employment Relations Service also surveyed the mediation service³⁸ which during the same period of time dealt with 261 potential personal grievances.³⁹ The results of this study show that of these potential personal grievances 169 were settled.⁴⁰ However, only four of those settled involved reinstatement.⁴¹ This data applies to personal grievances generally. There is currently no specific data available relating to reinstatement in redundancy cases.

Some authors have suggested that the remedy's low usage is a direct result of the judiciary's interpretation of the statutory wording "where practicable".⁴² Although not a case concerning redundancy, in the interlocutory judgement of *Air New Zealand v Hudson*⁴³ Judge Colgan pointed out that "practicability does not include inconvenience or difficulty or impracticability because of resistance to reinstatement".⁴⁴ Instead, "it means feasibility or practical workability"⁴⁵ which needed to be "determined on a case by case basis".⁴⁶

³⁵ Department of Labour, *Personal Grievance Determinations in Employment Relations Authority 17 July to 18 August 2006* (Prepared for the Department of Labour, July 2007). A copy of this report can be obtained from <<http://www.ers.dol.govt.nz/publications/pdfs/authority-statisticsreport07.pdf>>.

³⁶ *Ibid*, at 9.

³⁷ *Ibid*, at 14.

³⁸ M Martin and B Woodhams, *Personal Grievance Mediations Conducted at the Department of Labour: A Snapshot* (Prepared for the Workplace Policy Group of the Department of Labour, July 2007) A copy of this report can be obtained from <<http://www.ers.dol.govt.nz/publications/pdfs/mediation-report07.pdf>>.

³⁹ *Ibid*, at 8.

⁴⁰ *Ibid*, at 13.

⁴¹ *Ibid*, at 14.

⁴² A Russell, "The 'Emperor's New Clothes': The Judicial Fabric of Redundancy under the Employment Relations Act 2000" (2003) 9 NZBLQ 125,141. For discussion on the issue of practicability see: J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 7, at [11.4].

⁴³ (Employment Court, Auckland, AC46/05, 17 August 2005, Judge Colgan).

⁴⁴ *Air New Zealand v Hudson*, above n 43, at [8] as per Judge Colgan.

⁴⁵ *Ibid*.

⁴⁶ *Ibid*.

Even though reinstatement was the primary remedy under the ERA its application in redundancy situations is arguably problematic. In cases where the judiciary holds that there is a genuine redundancy situation, the remedy of reinstatement is arguably impossible as the affected employee's position legitimately ceases to exist. Consequently, it makes it "impracticable" for the employee to be reinstated into their former position.⁴⁷ Where a redundancy is held to be genuine but procedurally unfair, the redundancy is treated as an unjustifiable action rather than unjustifiable dismissal.⁴⁸

Under the ECA the judiciary appeared to develop a policy against awarding reinstatement in cases which could generally be categorised as being unfair purely on procedural deficiencies and where the employer was able to establish that due to the substantive reasons for the dismissal it would realistically be impracticable to adhere with an order of reinstatement.⁴⁹

This approach under the ECA has appeared to continue under the ERA. In the Employment Court decision of *Baguley v Coutts Cars Limited*⁵⁰ the Court refused reinstatement. The case involved procedural deficiencies but was deemed substantively justifiable. Coutts Cars for genuine commercial reasons had decided to reduce its number of car groomers from four to two employees; therefore reinstatement would serve no purpose. If the employee was reinstated they would face the real likelihood of being made redundant again.⁵¹ Specifically the Court stated:⁵²

'There is a good deal to be said in favour of reinstating the applicant and requiring Coutts to go through a proper process which, on our findings, may or may not reach the same result. We consider, however,

⁴⁷ A Russell, above n 42, at 141-142.

⁴⁸ See the discussion in *Simpson Farms Limited v Aberhart* [2006] ERNZ 825 at [72]-[73].

⁴⁹ J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 7, at [11.4].

⁵⁰ [2000] 2 ERNZ 409. It is important to note that the Employment Courts decision in respect of reinstatement was not effected by the subsequent Court of Appeal decision. The Court of Appeal decision is reported at: *Coutts Cars Limited v Baguley* [2001] ERNZ 660.

⁵¹ See *Baguley v Coutts Cars*, above n 50, at [66]. This point is also discussed in: A Russell, above n 42, at 141.

⁵² *Ibid*, at [66] as per Chief Judge Goddard and Judges Travis and Shaw.

that to grant reinstatement in this case would serve no useful purpose, especially as the applicant's fitness for work is not clear. It would not be proper to grant it in any case because it would not be practical to do so. It would not work. We accept that Coutts has reduced its groomer workforce to two persons and that it has currently two persons doing that work. There is at least one chance in three that, if reinstated, the applicant might again be made redundant and in short order. To reinstate the applicant to a position in which the sword of Damocles would hang over his head would not help to heal the grievance. We decline this remedy⁷.

This approach appears to have been consistently applied in subsequent decisions under the ERA.⁵³ Arguably the 2010 amendments to the ERA will support the pre-existing approach to reinstatement.⁵⁴

II Compensation for Economic Loss⁵⁵

(a) Reimbursement⁵⁶

Where a personal grievance is established, the Court or Authority is authorized under s 123 (1) (b) of the ERA to reimburse the employee “a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance”.⁵⁷ Where the loss relates to remuneration s 128 provides that the minimum compensation payable is three months salary or the amount of the actual loss if it is less than three months.⁵⁸ The legislation confers wide discretion on the judiciary and therefore they are authorised to award larger

⁵³ For example see *Simpson Farms Limited Limited v Aberhart*, above n 48.

⁵⁴ For discussion on the 2010 amendments to the ERA see chapter fifteen.

⁵⁵ For further discussion regarding this type of remedy see: Anderson and others, above n 3, at [ERA128.2]–[ERA128.5]; J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 7, at [11.11] – [11.16]; P Churchman, C Toogood and M Foley, above n 3, at [ER 123.05]; P Churchman, C Toogood and M Foley, *Brookers PG*, above n 7, at [11.4] and [11.6]; G Anderson, J Hughes, P Roth and M Leggat, *A Practical Guide*, above n 7, at [20.36]–[20.41]; G Anderson, J Hughes, M Leggat, P Roth, *Employment Law Guide*, above n 7, at [ER128]–[ER128.5]; G Anderson, “Reimbursement and Compensation for Unjustified Dismissal” (2006) 12 New Zealand Business Law Quarterly 230; T Cleary, “Compensation Under Section 123 Employment Relations Act 2000” [2005] 8 Employment Law Bulletin 151.

⁵⁶ For the purposes of this discussion reimbursement includes compensation for loss of a job.

⁵⁷ This wording is taken directly from s 123 (1) (b) of the ERA.

⁵⁸ For discussion on the application of this provision see: J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 7, at [11.12 - 11.13]; G Anderson, above n 55, at 234.

amounts if they deem the particular circumstances warrant such a payment.⁵⁹ The Court or Authority is also able to award loss of a benefit pursuant to s 123 (1) (c) (ii).

In applying these provisions, the leading authority is *Telecom New Zealand Limited v Nutter*⁶⁰ (*Nutter*).⁶¹ Although not a redundancy case, the decision has had wide application.⁶² In relation to reimbursement of financial loss, which includes loss of a financial benefit under s 123 (1) (c) (ii),⁶³ the Court of Appeal has asserted that the starting point in determining the quantum of any award was always the actual loss suffered taking into account any contingencies.⁶⁴ In other words, factors which might, but for the unjustifiable dismissal, have resulted in the employee's termination.⁶⁵ The Court of Appeal also stressed that there is no mandatory entitlement to full compensation.⁶⁶ Specifically it was noted:⁶⁷

'it is now well established in New Zealand that a "full" assessment of the financial loss suffered by an employee as a result of an unjustifiable dismissal merely sets the upper limit on an award of compensation (in that no award can be for more than has been lost) and there is no automatic entitlement to "full" compensation'

⁵⁹ For an example of where this discretion was exercised see *Solid Energy v Manson and Ors* (Employment Court, Christchurch, CC21/09, 15 December 2009, Judge Couch).

⁶⁰ (Court of Appeal, CA127/03, 21 July 2004, Anderson P, Hammond and William Young JJ).

⁶¹ For discussion on this case see: P Kiely, "Remedies for Economic and Non-Economic Loss" (New Zealand Law Society Employment Law Conference 2006) 295, 298-301.

⁶² Applied in redundancy cases when considering economic and non economic loss. For example see: *Staykov v Cap Gemini Ernst and Young New Zealand* (Employment Court, Auckland, AC18/05, 20 April 2005, Judge Travis) at [39]; *Charter Holt Harvey Limited v Yukich* (Court of Appeal, CA42/04, 4 May 2005, Glazebrook, Hammond and O'Regan JJ) at [22].

⁶³ *Telecom New Zealand Limited v Nutter*, above n 8, at [68].

⁶⁴ *Ibid.*, at [81].

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*, at [78] the Court of Appeal cited with approval the case of *Telecom South Limited v Post Office Union* [1992] 1 ERNZ 711.

⁶⁷ *Ibid.*, at [74] as per William Young J.

The decision advocated the need for consistency⁶⁸ and moderation⁶⁹ in the nature and extent of any award. The employee also has an obligation to mitigate losses as a result of the grievance normally by attempting to secure alternative employment.⁷⁰

In *Aoraki*,⁷¹ the Court of Appeal respectfully questioned the approach Cooke P took in *Brighouse*⁷² to the assessment of redundancy compensation. Cooke P had noted that there is no sharp dividing line between the reason for a dismissal and the manner of that dismissal.⁷³ However, in the main judgment of *Aoraki* the majority asserted that in a redundancy situation these two elements determine the remedies that are available stating: “the remedy can relate only to what has been lost as a result of the particular breach or failure”.⁷⁴ The Court of Appeal went on to confirm that when a redundancy is held to be deemed genuine, it obviates the suggestion that the dismissal was substantively unjustifiable.⁷⁵ As a result of this, the redundant employee cannot seek reimbursement for the lost remuneration associated with the termination of their position except in so far as it is expressly provided for in the employee’s contract.⁷⁶ If the dismissal is substantively justified but procedurally flawed, then the

⁶⁸ *Ibid.*, at [75].

⁶⁹ See the points discussed in *Telecom New Zealand Limited v Nutter*, above n 8, at [79]. See also: G Anderson, above n 55, at 245-249.

⁷⁰ For discussion on mitigating loss see: J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 7, at [11.13A]; Anderson and others, above n 3, at [ERA128.4]. For an example of the application of this duty by the judiciary see: *Charter Holt Harvey Limited v Yukich*, above n 62, at [33-39].

⁷¹ *Aoraki Corporation Limited v McGavin* [1998] 1 ERNZ 601.

⁷² *Brighouse Limited v Bilderbeck* [1994] 2 ERNZ 243.

⁷³ *Ibid.*, at [7].

⁷⁴ *Aoraki Corporation Limited v McGavin*, above n 71, at 620 as per Richardson P and Gault, Henry, Keith, Blanchard and Tipping JJ.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*, at 621.

remedies are “limited to the effects of the procedural deficiencies”,⁷⁷ being “compensation for the resulting hurt and loss of benefit”.⁷⁸

There does however appear to be an exception to this general rule. Where a redundancy process is carried out in a procedurally unfair manner and adherence to a fair procedure would have resulted in a decision not to make the position redundant, it cannot be said that the redundancy was actually genuine.⁷⁹ A useful illustration of this scenario can be found in the *Charter Trucks*⁸⁰ case. In this decision it was held by Judge Couch that, given the procedural deficiencies surrounding the selection process and lack of consultation with all employees who performed the same role as Mr Harris, it meant that the redundancy was not genuine. If a proper process had been followed it would have been discovered that one of the employees who performed the same role as Mr Harris was intending to leave the organisation. Therefore, there would have been no need to make Mr Harris redundant.⁸¹ Consequently, it was held that it was not only appropriate to award remedies associated with the distress caused by the way in which the decision was implemented, but also remedies relating to the loss of his employment.⁸²

⁷⁷ Ibid.

⁷⁸ Ibid. For discussion on the points raised in this paragraph see: A Russell, above n 42, at 141-142; Graham Rossiter, “Fair Treatment in Redundancy Dismissals” 1999 New Zealand Law Journal 163, 166-170.

⁷⁹ See *Aoraki Corporation Limited v McGavin*, above n 71, at 630 as per Thomas J.

⁸⁰ *Harris v Charter Trucks Limited* (Employment Court, Christchurch, CC16/07, 11 September 2007, Judge Couch).

⁸¹ Ibid, at [106-107].

⁸² Ibid, at [111].

b) Loss of a Benefit⁸³

As discussed in the above section on economic loss, when a personal grievance is established s 123 (1) (c) (ii) enables an employee to be awarded financial compensation for the loss of benefits “which the employee might reasonably have been expected to obtain if the personal grievance had not arisen”.⁸⁴ Benefits claimed must be quantifiable and demonstrably proximate to the employment relationship.⁸⁵ There are a variety of benefits that can be awarded and these can include potential redundancy payments.⁸⁶

A useful illustration of this can be seen in the case of *Carter Holt Harvey v Yukich*⁸⁷ (*Yukich*). Mr Yukich was employed as an electrician at Carter Holt Harvey’s Kinleith Pulp and Paper Mill. In 2001 Mr Yukich was dismissed from this position. The Authority held that Mr Yukich had been constructively dismissed. Carter Holt Harvey appealed this finding in the Employment Court.⁸⁸ At the time of the hearing Mr Yukich had been dismissed for 58 weeks and Carter Holt Harvey had decided to close its Kinleith Pulp and Paper Mill.⁸⁹ As a result of this, Mr Yukich sought compensation for the loss of redundancy payments he would have received had he not been constructively dismissed. The Employment Court agreed with the Authority and held that Mr Yukich had been constructively dismissed and was therefore entitled to redundancy compensation.⁹⁰ Carter Holt Harvey appealed the remedies that the Employment Court awarded in the Court of Appeal. In relation to the award of redundancy compensation Carter Holt Harvey asserted that they were too remote for it to give rise to a

⁸³ For general discussion on this remedy see: G Anderson, above n 55, at 236; J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 7, at [11.35]–[11.40]; P Churchman, C Toogood and M Foley, *Brookers PG*, above n 7, at [11.6].

⁸⁴ See s 123 (1) (c) (i) of the ERA.

⁸⁵ G Anderson, above n 55, at 236.

⁸⁶ *Ibid.*

⁸⁷ (Court of Appeal, CA42/04, 4 May 2005, Glazebrook, Hammond and O’Regan JJ).

⁸⁸ *Charter Holt Harvey Limited v Yukich*, above n 62, at [3].

⁸⁹ *Ibid.*, at [4].

⁹⁰ *Ibid.*, at [5].

benefit under s 123 (1) (c) (ii).⁹¹ The Court of Appeal dismissed this ground of the appeal noting that although the decision “was a very favourable finding for Mr Yukich”,⁹² it was not a decision that the Court of Appeal could interfere with as the Judge in the Employment Court was entitled to review the evidence and hold that redundancy compensation should be paid.⁹³

III Compensation for Non-Economic Loss⁹⁴

(a) Humiliation, Loss of Dignity and Injury to Feelings

The purpose of an award for humiliation, loss of dignity and injury to feelings (humiliation) has been designed to afford some redress for the effect that the employer’s actions have had on the employee concerned.⁹⁵

This remedy is particularly important in redundancy situations. As discussed in chapter thirteen on substantive justification, it is difficult for an employee to substantiate that their redundancy has not been made for genuine business reasons. Where a redundancy is held to be genuine, then the remedies available are limited. Only in a situation where a genuine redundancy decision is implemented in a procedurally deficient manner can an affected employee be awarded compensation for humiliation. As Chief Judge Colgan so aptly stated

⁹¹ Ibid, at [6].

⁹² Ibid, at [31] as per Glazebrook, Hammond and O’Regan JJ.

⁹³ Ibid.

⁹⁴ For general discussion on the remedy of compensation for non-economic loss see: J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 7, at [11.16A]–[11.34]; Anderson and others, above n 3, at [ERA123.9]; P Bartlett, W Hodge, P Muir, C Toogood, R Wilson, above n 3, at [ER 123.06]; P Churchman, C Toogood and M Foley, *Brookers PG*, above n 7, at [11.5]; G Anderson, J Hughes, M Leggat, P Roth, *Employment Law Guide*, above n 7, at [ER123.9]; G Anderson, J Hughes, P Roth and M Leggat, *A Practical Guide*, above n 7, at [20.9]–[21.10]; G Anderson, above n 55; T Cleary, above n 55. For information on this form of remedy under the ECA see: M Leggat, “Editorial: Compensation for Non-Financial Losses” [1998] 4(1) *Employment Law Bulletin* 62.

⁹⁵ J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 7, at [11.18].

in *Simpsons Farms*⁹⁶ the whole redundancy process is exceptionally important and where a fair procedure is not followed section 123 (1) (c) (ii) is available. Specifically it was stated:⁹⁷

‘Knowledgeable and objective observers can understand that role disestablishment leading to dismissal for redundancy is not a criticism of an employee’s work performance. However, long-standing, loyal and competent employees as Mr Aberhart nevertheless suffer from real senses of failure, betrayal and disillusionment in their reasonable and lawful attempts to be fully involved in a process that is likely to have significant effects upon their employment and career, when they are deprived of that opportunity. That is especially when, as now, Parliament has specified the steps that a fair and reasonable employer must take in such circumstances. The feelings of powerlessness in a formulaic “consultation” that is in some respects just going through the motions are not to be underestimated. They translate into the “humiliation, loss of dignity and injury to...feelings” of which s 123 (1) (c) (i) speaks’.

However, the applicability of this remedy for redundancy is somewhat of a mismatch with its ideological purpose. When a redundancy decision is genuine, due to the prevalence of redundancies,⁹⁸ such a decision is not generally perceived as holding the same level of negativity or stigma compared to other reasons for termination. Consequently, in theory, a redundant employee should not usually be exposed to the mental distress to which this form of compensation is designed.⁹⁹ Notwithstanding this point, given the limited remedies available in a redundancy situation, the application of this remedy is imperative in order for a redundant employee to gain some form of redress in circumstances where they have been unfairly treated.

Through case law, principles have developed governing the ambit of this remedy.¹⁰⁰ Like reimbursement, the judiciary is conferred substantial discretion in terms of its application, meaning that not every personal grievance will give rise to compensation for humiliation.¹⁰¹

⁹⁶ *Simpsons Farms Limited v Aberhart*, above n 48.

⁹⁷ *Ibid*, at [83]. This point is also discussed in: J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 7, at [11.24].

⁹⁸ See chapter five for discussion on the prevalence of redundancies in New Zealand.

⁹⁹ J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 7, at [11.24].

¹⁰⁰ For a summary of these points see: J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 7, at [11.18].

¹⁰¹ For further discussion on this point see: *Ibid*, at [11.19].

However, the judiciary is not authorised to award sums greater than that which are claimed¹⁰² and any award given is not to be perceived as a punishment of the employer irrespective of how unfair their actions may have been.¹⁰³ In determining the applicability of this remedy, the judiciary is charged with looking at the emotional impact of the employer's actions on the employee which can include the employee's awareness on the effects of the situation on their family.¹⁰⁴ Importantly, the principles regarding remoteness and causation apply to the assessment of compensation¹⁰⁵ and so too does the employer's ability to pay.¹⁰⁶ Although there is no precise calculation used for determining the quantum of any award under this head, the level of awards in similar cases is relevant¹⁰⁷ as well as the size of any other awards sought.¹⁰⁸ As with other remedies the employee's conduct is considered in determining the nature and extent of any award.¹⁰⁹

(b) Level of payment¹¹⁰

The ERA provides no express guidance on how payments for humiliation are to be calculated and therefore determination of such is rather an imprecise exercise.¹¹¹ The judiciary has generally taken a conservative approach to the level of compensation awarded under this

¹⁰² For further discussion on this point see: *Ibid*, at [11.18].

¹⁰³ For further discussion on this point see: *Ibid*, at [11.22].

¹⁰⁴ For further discussion on this point see: *Ibid*, at [11.23].

¹⁰⁵ For further discussion on this point see: *Ibid*, at [11.30].

¹⁰⁶ For further discussion on this point see: *Ibid*, at [11.34].

¹⁰⁷ For further discussion on this point see: *Ibid*, at [11.32].

¹⁰⁸ For further discussion on this point see: *Ibid*, at [11.33].

¹⁰⁹ See s 124 of the ERA.

¹¹⁰ For general discussion on this topic see: G Anderson, above n 55; M Leggat, above n 94; T G Goddard, "A Right Without A Remedy? Compensation and Costs in Personal Grievance Cases" unpublished paper delivered to the Employment Law Institute, 2002, cited in G Anderson, above n 55, at 250. See also *New Zealand Fasteners Stainless Limited v Thwaites* [2000] 1ERNZ 739, at [34]-[44] as per Thomas J.

¹¹¹ For discussion on this point see: P Kiely, above n 61, at 303.

head.¹¹² The case of *NCR (New Zealand) Corporation Limited v Blowes*¹¹³ (*Blowes*) provides a useful discussion on the case law surrounding how quantum levels for non-economic loss have been determined. Within this review the Court of Appeal cited the case of *Telecom South v Post Office Union*¹¹⁴ (*Telecom*) where an award of \$20,000 was made for what was described as an “almost brutal”¹¹⁵ dismissal. Conversely, at the opposite end of the spectrum, in other cases the Court has held that an award of \$10,000 has been described as being “on the high side”.¹¹⁶

The Court of Appeal in the *Blowes* case noted that the Employment Court Judge had accepted counsel’s assertion that the range of awards in similar cases for humiliation was between \$10,000 and \$25,000 depending on the level of unfairness.¹¹⁷ The Court of Appeal went on to state that the “upper end of that range may need to be lifted to \$27,000 to allow for inflation”.¹¹⁸ However, notwithstanding this, members of the Court of Appeal have also commented that the award in the *Telecom* case of \$20,000 for humiliation “must have been at or near the upper end of the permissible range”.¹¹⁹ In *Simpsons Farms*, Chief Judge Colgan asserted that the *Blowes* case did not set a ceiling for which awards of this kind must fall¹²⁰ but most would be within a range of up to \$27,000 with exceptional circumstances receiving higher payments.¹²¹ The approach in these judgments highlights the differing perceptions of

¹¹² G Anderson, above n 55, at 252.

¹¹³ (Court of Appeal, CA186/04, 24 August 2005, Robertson, Williams and Wild JJ).

¹¹⁴ [1992] 1 NZLR 711.

¹¹⁵ *Telecom South v Post Office Union*, above n 114, at 278 as per Cooke P.

¹¹⁶ *Air New Zealand v Johnston* [1992] 1 NZLR 159, at 169 as per Cooke P.

¹¹⁷ *NCR (NZ) Corporation Limited v Blowes*, above n 113, at [42] as per Robertson, Wild and Williams JJ.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*, at [40] as per Robertson, Williams and Wild JJ.

¹²⁰ *Simpsons Farms Limited v Aberhart*, above n 48, at [75].

¹²¹ *Ibid.*, at [79].

the judiciary in respect of what is and is not an acceptable level of compensation under this head.¹²²

Having said this, the judiciary has, as noted above, generally decided to award very modest levels of compensation for humiliation. The assertion is evidenced by data captured by the Employment Relations Service of the Department of Labour which records the levels of compensatory payments awarded for humiliation.¹²³ Although there is no data specifically identifying the levels awarded in redundancy cases per se, in general, the data clearly highlights the low level of awards particularly in the Authority. Between the period of 1 January 2002 to 30 June 2010 there were 1541 awards providing compensation for humiliation in the Authority. Of these, approximately 51 per cent of the awards ranged between \$2,000 and \$6,000 with the highest percentage being between \$2,000 and \$2,999.¹²⁴ Some authors have asserted that awards of less than \$5000 suggest “a degree of tokenism in the amounts awarded and a possible failure to recognise the non-economic consequences of employment being lost without a justifiable reason”.¹²⁵

During the same duration as outlined above, the Employment Court awarded compensatory payments for humiliation in 113 cases and of those 22 per cent were granted an award of \$15,000 or higher.¹²⁶ This analysis seems to show an increase in higher awards than that identified in the *Thwaites* case in 2000 where only 10 per cent of cases were awarded in excess of \$10,000.¹²⁷ Having said that, for the majority of cases, the data reveals that employees more often than not receive low levels of compensation under s 123 (1) (c) (i) of the ERA.

¹²² P Kiely, above n 61, at 305.

¹²³ See appendix six for a copy of this data.

¹²⁴ See appendix six for the analysis of this data captured in Table AG1.

¹²⁵ G Anderson, above n 55, at 251.

¹²⁶ See appendix six for the analysis of this data captured in Table AG2.

¹²⁷ *New Zealand Fasteners Stainless v Thwaites*, above n 110, at [39].

It would be incorrect to assert that high awards are not granted in certain circumstances. However, these circumstances are very rare. A useful illustration of where a high level of compensation was awarded under this head was in *Staykov*.¹²⁸ The Employment Court in this case awarded the employee \$30,000 for humiliation associated with implementation of the employer's decision to dismiss the employee for reasons of redundancy.¹²⁹ This case involved a particularly poor example of a redundancy process being deficient both substantively and procedurally.

Arguably, apart from the extreme cases represented by *Staykov*, the approach of the judiciary to assessing the quantum of awards under this head has encouraged the maintenance of low compensatory payments. As Judge Colgan once noted, "awards for non-economic loss are in part matters of impression and discretion within reasonable parameters".¹³⁰ It is these parameters which have over time arguably led to the decreasing value of awards under this head. This point was clearly made by Thomas J in *Thwaites* where it was asserted that there is a lack of generosity and realism¹³¹ associated with the level of compensatory payment for humiliation, going so far as to suggest that it is in fact an "empty right".¹³² Thomas J levelled criticism at the amounts awarded to the "innate judicial conservatism and the doctrine of precedent"¹³³ which taken together "preclude any effective review which would increase the awards to a level which would provide fair, reasonable and just compensation".¹³⁴ Thomas J asserted that Parliament's intention was to support an effective remedy for those employees

¹²⁸ *Staykov v Cap Gemini Ernst and Young New Zealand Limited*, above n 62.

¹²⁹ *Ibid.*

¹³⁰ Judge Colgan's remarks were cited in *NCR (New Zealand) Corporation Limited v Blowes*, above n 113, at [38] as per Robertson, Williams and Wild JJ.

¹³¹ *New Zealand Fasteners Stainless v Thwaites*, above n 110, at [38] as per Thomas J.

¹³² *Ibid.*

¹³³ *Ibid.*, at [41].

¹³⁴ *Ibid.*

who have unjustly suffered humiliation through their employment and that this is something that has not eventuated through the interpretation and application of legislation.¹³⁵

Thomas J has not been the only member of the judiciary to overtly criticize the level of compensation. Chief Judge Goddard of the Employment Court has also been outspoken in respect of the levels awarded, suggesting that \$10,000 compensation for humiliation should become the base level rather than the ceiling.¹³⁶ However, other authors have asserted that this approach is not the correct answer either given the “infinite variety of circumstances of dismissed employees”.¹³⁷ Rather, a better approach would be for the Courts to give greater express direction as to what should be the range of awards and the appropriate criteria to be applied when assessing where within the range the award should sit.¹³⁸ This issue remains unresolved and continues to be a topic for ongoing discussion.¹³⁹

As discussed in this paper, it is generally recognised that a genuine redundancy situation is a special situation where the employee has committed no wrong, yet the consequences of such a dismissal can have a profound economic, emotional and social impact on an employee. Given that compensation for humiliation is potentially the only redress in most redundancy cases, its value becomes of utmost importance. Therefore the effectiveness of the remedy has to be real so that the credibility of the employee’s right to protection against unjustifiable dismissal is upheld.¹⁴⁰ Arguably, given the current situation, the words of Thomas J appear to still ring true a decade after they were first spoken. Compensation for humiliation is more often than not an “empty right”.¹⁴¹ Arguably the cumulative effect of low awards and the

¹³⁵ Ibid, at [36] and [37].

¹³⁶ T G Goddard, above n 110, cited in G Anderson, above n 55, at 250.

¹³⁷ M Leggat, above n 94, at 42.

¹³⁸ Ibid, at 43.

¹³⁹ See for example: G Anderson, above n 55.

¹⁴⁰ Ibid, at 252.

¹⁴¹ *New Zealand Fasteners Stainless v Thwaites*, above n 110, at [38] as per Thomas J.

judiciary's reluctance to question an employer's substantive decision makes it uneconomic for employees to bring personal grievances in this area of employment law.¹⁴²

IV Good Management Practice

In chapter nine of this paper, the potential differences between the approaches to selection under the ERA in comparison to that adopted under the ECA was discussed. As part of that analysis it was suggested that the judiciary may need to look more closely at the managerial practices of the employer in determining whether their actions meet the standard of good faith.

In 2004, the government inserted s 123 (1) (ca) into the ERA. This provision states that where it is found that the workplace conduct or practices are deemed to be a significant factor in the personal grievance, the Authority or Court is empowered to make recommendations in relation to the employer's actions to prevent a similar problem arising in the future.¹⁴³

Arguably it could be asserted that this provision is attempting to enforce what the judiciary perceives as good management practice and to that extent is actually acting as a constraint on the managerial prerogative. The judiciary is able to make recommendations that ensure that the balance of power within the employment relationship is not being abused by conduct or practice within a workplace and that good faith is in fact a reality. Having said this, the provision does limit its applicability to where the workplace practices or conduct are "significant", meaning that in a lot of cases the provision will not apply. Furthermore the judiciary is only able to make recommendations which are not binding on the employer. If

¹⁴² S Hornsby and P Muir, "Redundancy – A Legal Update Focussing on Recent Cases and Good Faith Obligations" (New Zealand Law Society Employment Law Conference 2002) 3, 4.

¹⁴³ For discussion on this provision see: P Bartlett, W Hodge, P Muir, C Toogood and R Wilson, above n 3, at [ER123.06A]; Anderson and others, above n 3, at [ERA123.11]; J Hughes, P Roth and G Anderson, *Personal Grievances*, above n 7, at [11.43A]; G Anderson, J Hughes, M Leggat, P Roth, *Employment Law Guide*, above n 7, at [ER123.11]; G Anderson, J Hughes, P Roth and M Leggat, *A Practical Guide*, above n 7, at [20.11].

however, another grievance arises in similar circumstances and the employer has failed to adhere to the recommendations, it is highly likely that the Court or Authority would take a dim view of the employer's lack of compliance.¹⁴⁴

Although this clause has not been reviewed or applied in the Courts, the Employment Authority in *Naughton v Vice Chancellor University of Auckland*¹⁴⁵ (*Naughton*) has applied s 123 (1) (ca) to make recommendations about the employer's work practices. Although not a redundancy case per se, the case is a useful illustration of the judiciary's ability to direct managerial actions. In *Naughton*, the Authority member made recommendations that the employer work with the union to review the University's Continuation Policy to ensure that it complied with the minimum standards of natural justice and that the University took positive steps to ensure that all staff were aware of the policy and provided guidance as to how it should be administered.¹⁴⁶

¹⁴⁴ P Bartlett, W Hodge, P Muir, C Toogood and R Wilson, above n 3, at [ER123.06A].

¹⁴⁵ (Employment Relations Authority, Auckland, AA124/05, 11 April 2005, Wilson (Member)).

¹⁴⁶ *Ibid*, at [25]-[26].

Chapter Fifteen

Changing the Scene - New Developments

Successive governments appear to have always been aware of the issues associated with redundancy and the negative implications they have for not only the parties involved, but also the economy and social wellbeing of a nation. Although Bills have been introduced into Parliament in an attempt to combat some of these implications none have passed into law.¹ Rather, consecutive governments have chosen to implement other approaches to minimise the effects of redundancies. This chapter concentrates on the developments in employment law that have occurred in the latter part of the last decade and how such changes have, or are likely to affect redundancy law.

A Labour Government Initiatives

During Labour's term in government they introduced a number of services aimed at providing support and assistance to both employers and employees affected by redundancy. Services provided were administered through the Ministry of Social Development (MSD) and referred to as part of the "security in change initiative".² This initiative involved the government, unions, employers and other relevant agencies working together to help employers who potentially needed to make employees redundant whilst also supporting the affected employees.³

¹ For discussion on this point see: B Ewart and M Harcourt, "The Effects of Redundancy at a New Zealand Airline" [2000] 25(2) New Zealand Journal of Industrial Relations 151, 152-153.

² Cabinet Paper "Report of the Public Advisory Group on Restructuring and Redundancy" (June 2008) 4. A copy of this report can be accessed at: <www.ers.dol.govt.nz/relationships/r-r-cab-paper_print.html>.

³ Ibid, at 4.

Primarily, assistance focused on encouraging employers to report potential redundancies as soon as possible so as to enable services such as job search assistance and the provision of information regarding income support through government agencies to be administered.⁴ Particular attention was given to employees with low skill levels or employees who worked in vulnerable industries or locations.⁵ This initiative acknowledged the impact and implication of redundancies for all parties in the employment relationship and provided reactive measures to try to limit negative consequences at an early stage in the process.⁶

I Public Advisory Group

As part of the Labour Party's 2005 manifesto a commitment was formulated to establish "a Ministerial Advisory Group to examine the adequacy of redundancy law and provision".⁷ This commitment was realised in 2007 with the creation of the "Public Advisory Group to the Minister of Labour on Restructuring and Redundancy" (the Advisory Group).⁸ This independent body⁹ was commissioned with the responsibility of producing a report for the Ministers of Labour, Economic Development and Social Development and Employment by 30 June 2008.¹⁰ The object of the report was to "assess the adequacy of redundancy laws and provisions and recommend options for addressing perceived gaps and issues with existing laws and policy provisions".¹¹

⁴ Ibid, Appendix 2.

⁵ Ibid, at 4.

⁶ Ibid, at Appendix 2.

⁷ *Report of the Public Advisory Group on Restructuring and Redundancy* (Prepared for the Ministers of Labour, Social Development and Employment and Economic Development, 30 June 2008) at [8].

⁸ Ibid, at [9].

⁹ For information regarding how the Advisory Group was formed see: *Report of the Public Advisory Group on Restructuring and Redundancy*, above n 7, at [10].

¹⁰ Ibid, at [9].

¹¹ Ibid, at [12].

Although the report reviewed various areas of interest that concerned redundancy law,¹² the terms of reference specifically required that the Advisory Group make recommendations in respect of four key areas. These key areas consisted of the statutory consultation requirements; the amount of notice that an employer must provide an employee in a redundancy situation; the consultation requirements aimed at avoiding mass redundancies; and finally whether there should be any express statutory requirement to provide redundancy compensation or any alternative form of entitlement to an employee who is made redundant.¹³

The report made a total of ten recommendations¹⁴ in what was New Zealand's most significant review of redundancy law to date. Recommendation one contained the key essence of the group's review, which advanced the conclusion that the government should consider introducing a statutory requirement for the payment of redundancy compensation in circumstances where employees are made redundant.¹⁵ The Advisory Group elaborated on this suggestion advocating that any legislative amendment should incorporate specific notice provisions outlining a specified duration of notice to be given to an employee affected by redundancy; compensation levels to be determined in accordance with the affected employees length of service; a capped level of compensation payable; and the provision of support and labour market mechanisms to be made available to employees affected by redundancy. Subsequent recommendations enhanced the substantive concept as outlined in recommendation one by suggesting different options¹⁶ and approaches to the implementation

¹² For details see: *Report of the Public Advisory Group on Restructuring and Redundancy*, above n 7, at 16-17.

¹³ *Ibid*, at 18.

¹⁴ See appendix four for a full copy of the recommendations.

¹⁵ Note that some have asserted that given the make up of the group with two union representatives, one employer representative and another member from the State Services Commission this conclusion was always likely to be reached. See: Greg Cain, "Compulsory Redundancy Pay – The Way To Go" (14 October 2008) *The New Zealand Herald* <<http://blogs.nzherald.co.nz/blog/all-days-work/2008/10/14/compulsory-redundancy-pay-...>>

¹⁶ See recommendation 2 contained in appendix four.

of a legislative scheme¹⁷ as well as canvassing other interrelated policy issues,¹⁸ such as encouraging the notification of redundancy situations to government agencies¹⁹ and extending the security in change initiative.²⁰

The recommendation to create some form of statutory compensation system in cases of redundancy accorded with the Court of Appeal's early determinations relating to what amounted to fairness in redundancy situations.²¹ In *Hale*²² it was asserted that the payment of redundancy compensation to an affected employee was a relevant factor in ascertaining whether the employer's conduct in the dismissal was in fact fair and reasonable.²³ Conversely, as discussed in chapter twelve, more recent judgments espoused a more restrictive approach limiting compensatory payments to situations where an affected employee had an express right within their employment agreement.²⁴ Therefore, if the recommendations were enacted, this would significantly increase the protection provided to employees affected by redundancy as well as align New Zealand's employment legislation with those of overseas jurisdictions.²⁵

¹⁷ See recommendations 4, 5, 7, 9 contained in appendix four.

¹⁸ For example see: Recommendation 3 which advances that consideration be given to the ratification of ILO Convention 158. See also recommendation 6 which discusses notice becoming a priority debt under the Companies Act 1993. A copy of this recommendation is contained in appendix four.

¹⁹ See recommendation 10 contained in appendix four.

²⁰ See recommendation 8 contained in appendix four.

²¹ See the discussion on this point in chapter twelve.

²² [1991] 1 NZLR 151.

²³ *G N Hale & Son Limited v Wellington, etc, Caretakers, etc, IUW*, above n 22, at 156.

²⁴ For discussion see: Greg Cain, above n 15.

²⁵ *Ibid.* See also: *Report of the Public Advisory Group on Restructuring and Redundancy*, above n 7, at Appendix J.

II The Government's Response

It was very clear that the intention of the Labour Party was to advance the recommendations contained in the Advisory Group's report²⁶ and make them a priority for further consultation and subsequent implementation.²⁷ However, it was apparent from the Labour Minister, Trevor Mallard that any further consultation regarding the report was to be focused more on how, rather than if, the core recommendations in the report were to be implemented.²⁸ Specifically the Minister noted: "The Labour-led government has improved workers rights in numerous areas over the last nine years, and this consultation on redundancy is an ongoing part of our plans looking ahead".²⁹ It was also asserted that not only would these recommendations, if implemented, improve workers rights but they would also "bring New Zealand's legal protections in-line with international trends".³⁰ Such a prospect is clearly in keeping with the express intent of the ERA.³¹

B Economic Crisis

At around the same time as the government responded to the groups report, it was clear that the international community was about to face one of the largest global economic crises the world had seen since the infamous Great Depression of the 1930's. Although there is still much discussion regarding the precise causes of this crisis, it is clear that irresponsible and unsustainable lending practices of many major financial institutions played a significant

²⁶ For discussion on this intention see: R Towner and S Leslie, "Changes to Redundancy Laws Possible" (October 2008) Bell Gully <www.bellgully.com>; NZPA, "Payout Plan for Laid-off Workers" (10 October 2008) New Zealand Herald <www.nzherald.co.nz/news/print.cfm?objectid=10536729>; Trevor Mallard, "Improvements to Redundancy Rights Planned" (9 October 2008) Beehive <www.beehive.govt.nz/release/improvements+redundancy+rights+planned>.

²⁷ See Cabinet Paper, above n 2, at 2.

²⁸ R Towner and S Leslie, above n 26.

²⁹ Trevor Mallard, above n 26.

³⁰ Ibid.

³¹ See s 3 (b) ERA.

part.³² Despite the economic recession commencing in the United States of America in late 2007, by mid 2008 much of the industrialised world was feeling its full force.³³

New Zealand certainly did not escape what some aptly described as the “global economic meltdown”,³⁴ formally being declared in recession in late 2008.³⁵ The reality of the global crisis meant that significant numbers of New Zealand workers were potentially going to face redundancy as businesses struggled to cope with the economic pressures. A Business New Zealand survey in 2008 showed that 33 per cent of businesses surveyed had surplus staff and 62 per cent of those businesses were considering redundancy as a way to manage the situation.³⁶ Employees themselves were also expressing concern for their jobs as a Business Council for Sustainable Development survey showing that 39 percent of low paid workers interviewed believed that they were going to face redundancy.³⁷

Consequently, the way political parties intended to manage this situation became a significant element of each party’s campaign for the 2008 general election.

³² For discussion on the many interrelated causes of the global economic crisis see: M Fein and others, *The Financial Crisis of 2007-2009: Causes and contributing Circumstances* (Prepared for the task force on the causes of the financial crisis of the American Bar Association’s Banking Law Committee, September 2009).

³³ For discussion on this see: A Shah, “Global Financial Crisis” (December 2010) Global Issues <www.globalissues.org/article/768/global-financial-crisis>.

³⁴ John Braddock, “New Zealand “Job Summit” Places Burden of Recession on Working People” (3 March 2009) World Socialist Website <www.wsws.org/tools/index.php?page=print&url=http%3A%2F%2Fwww.wsws.org>.

³⁵ NZPA, “Recession Confirmed – GDP Falls” (26th September 2008) New Zealand Herald <www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10534347>.

³⁶ Business NZ survey was discussed in John Braddock, above n 34.

³⁷ John Braddock, above n 34.

a) The Labour Party Approach

The Labour Party's pre-election stance was consistent with their intention to implement, in one form or another, the recommendations of the Advisory Group.³⁸ Specifically they intended to introduce into law legislation which prescribed minimum levels of notice and compensation payable to employees affected by redundancy.³⁹ In addition to this permanent legislative change Labour also advanced increasing entitlements to the unemployment benefit. This proposal would have enabled employees affected by redundancy to receive the unemployment benefit for a period of 13 weeks without being subjected to means-testing. This proposal also included the removal of any deductions as a result of an affected employees partner's income, if the employee had been in paid work for at least five years at the time of the redundancy.⁴⁰

b) The National Party Approach

At the outset of the campaign, the National Party made it clear that it was keen to eliminate what it perceived as bureaucratic processes and compliance costs that arguably threatened businesses.⁴¹ It was asserted that this ideology was supported by the economic atmosphere at the time.⁴² As a result of this it was exceptionally unlikely that the National Party would be inclined to support the idea of the implementation of any form of legislation that accorded

³⁸ Labour Party Manifesto 2008, 168. A copy of this document can be accessed at <http://nzlabour.3cdn.net/19411a45225075c23c_ufm6vt6nl.pdf>.

³⁹ Ibid.

⁴⁰ John Hughes, "The Governments Transitional Relief Package For Redundant Workers" [2009] Employment Law Bulletin 15, 15.

⁴¹ NZPA, "Nats Release Workers' 'Rescue' Package" (31 October 2008) New Zealand Herald <www.nzherald.co.nz/new/print.cfm?objectsid=10540377>.

⁴² See John Key "My Key Commitments to You" (National Party Campaign Opening, Sky City, Auckland, 13 October 2008). A copy of this speech can be accessed at: <www.scoop.co.nz/stories/PA0810/S00265.htm>.

with the recommendations prescribed by the Advisory Group in relation to redundancy laws in New Zealand.⁴³

In contrast to the Labour Party's proposal, National's approach to the concerns surrounding the economic crisis and potential job losses was to temporarily enhance the Social Security scheme.⁴⁴ Their aim was to provide a package "to ease the income shock caused by people losing their jobs as a result of the downturn of the economy" whilst also facilitating a "more manageable transition back into the paid workforce, or – in the worst-case scenario – into a longer period of time on reduced income".⁴⁵ However, the package was to be limited to affected employees who had been employed in the same position for the past six months at the time the redundancy occurred.⁴⁶ The National Party proposed to achieve this by firstly providing an increase to the Working for Families programme by providing a top up which would be equivalent to the in-work tax credit.⁴⁷ This top up would be available for up to 16 weeks⁴⁸. Secondly, it was proposed that the weekly accommodation supplement⁴⁹ would be increased. Specifically, the supplement would be increased by up to \$100 per week for a maximum of 16 weeks.⁵⁰

⁴³ Ibid. See also: NZPA, "No Plans For Minimum Redundancy Payment" (25 June 2009) Guide2 <www.guide2.co.nz/politics/news/no-plans-for-minimum-redundancy-payments-.>.

⁴⁴ John Hughes, above n 40, at 15.

⁴⁵ National Party Policy Document, "Transitional Relief Package" (31 October 2008). A copy of this document can be accessed at <www.national.org.nz>.

⁴⁶ Ibid.

⁴⁷ The in-work tax credit is normally only paid to families not receiving a benefit and who are in full-time work (Couples must normally work 30 hours a week between them; and sole parents must normally work 20 hours a week). For further information see: National Party Policy Document, above n 45.

⁴⁸ See National Party Policy Document, above n 45.

⁴⁹ The accommodation supplement is an extra payment that provides assistance towards a person's accommodation costs (This can include where a person is renting, boarding or paying a mortgage). The payment is available for beneficiaries and some low income workers. See National Party Policy Document, above n 45.

⁵⁰ See National Party Policy Document, above n 45. For discussion on the National Party's approach see: John Hughes, above n 40, at 15.

In summary, the two parties offered significantly different approaches to manage the economic crises and the expected impact of redundancies on New Zealanders. The Labour Party's proposal involved making a permanent legislative change to provide ongoing employee protection in accordance with the Advisory Group's report and international trends. Conversely, the National Party proposed to implement short term financial assistance by enhancing the existing Social Security scheme,⁵¹ therefore, leaving existing redundancy laws unchanged.

C General Election

On 8th November 2008 the general election⁵² for the 49th New Zealand Parliament was held and the Labour Party was removed from government. The National Party led by John Key were victorious in establishing a government with ACT, United Future and the Maori Party providing support on issues of confidence and supply. Not only did the change in political control have significant implications for redundancy law in New Zealand but so too did the growing international economic crisis.

I National's Approach to Governance

Within the first 100 days of governance the National led government introduced a number of new initiatives and legislative changes.⁵³ This included the introduction of a transitional relief package providing extra assistance for people facing redundancy. This package was

⁵¹ NZPA, "Nats Release Workers' 'Rescue' Package", above n 41.

⁵² For information on the general election see: Electoral Commission, "New Zealand Election Results" <www.electionresults.govt.nz/>.

⁵³ See NZPA, "Factbox, Nationals first 100 Day Promises" (26 February 2009) Television New Zealand <<http://tvnz.co.nz/politics-news/factbox-nationals-first-100-days-promises-2505096>>.

implemented through s 124 of the Social Security Act 1964⁵⁴ and was formally known as the 'Re-Start Transitional Relief Programme'. However, it was more commonly referred to as "ReStart" (the ReStart programme). The ReStart programme was announced on 15 December 2008⁵⁵ and provided relief for eligible employees who were affected by redundancy on or after the 8 November 2008.⁵⁶

To be eligible to receive assistance under this scheme, the affected employee had to be a New Zealand citizen or permanent resident who normally lived in New Zealand. Furthermore, they had to have been working full time for at least 6 months prior to being made redundant and be legally entitled to receive an unemployment benefit.⁵⁷ Due to its transitional nature the ReStart programme ended on 31 December 2010.⁵⁸

a) Re-Start Transitional Relief Programme

The ReStart programme consisted of two key financial assistance elements known as 'ReCover' and 'RePlace'.⁵⁹ Additionally a third administrative element was incorporated within the package and was referred to as 'ReConnect'. This latter element was made available to employees irrespective of eligibility for ReCover and RePlace.⁶⁰

⁵⁴ See s 124 of the Social Security Act 1964. For discussion on this provision see: John Hughes, above n 40, at 15.

⁵⁵ Paula Bennett, "ReStart Assistance Package for Redundant Worker" (15 December 2008) Beehive <www.beehive.govt.nz/release/restart+assistance+package+redundant+workers>; NZPA, "Redundancy Package Enough for 70,000 Job Losses" (15 December 2008) New Zealand Herald <www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10548160>.

⁵⁶ See Work and Income, "Restart FactSheet". A copy of this can be accessed at <www.workandincome.govt.nz/individuals/a-z-benefits/restart.html>.

⁵⁷ Ibid. For further analysis on the programme's eligibility requirements see: John Hughes, above n 40, at 15-16.

⁵⁸ See Work and Income, "Restart". This website can be accessed at: <www.workandincome.govt.nz/individuals/a-z-benefits/restart.html>.

⁵⁹ Detailed criteria for eligibility see Work and Income, "Restart" at: <www.workandincome.govt.nz/individuals/a-z-benefits/restart.html#Whocangetit>. For discussion see: John Hughes, above n 40, at 15-16.

⁶⁰ See Work and Income, "Restart FactSheet", above n 56.

i) ReCover

The ReCover part of the ReStart programme built on the Working for Families scheme (the scheme) which was introduced by the Labour government in 2004.⁶¹ The ideology behind the scheme was to make it easier for people to work and raise a family simultaneously by providing financial assistance if certain conditions apply.⁶² Therefore it encourages people to work whilst ensuring that incomes for New Zealanders with a family are adequate and, as a result of this, issues associated with child poverty are reduced.⁶³ As part of this scheme certain employees are entitled to receive in-work tax credits (IWTC) which are effectively a cash payment that is paid weekly or fortnightly through the tax system. The amount received depends on the total income of the family and the number of children.⁶⁴

Traditionally, under the scheme, when an employee who was receiving IWTC was made redundant, their entitlement would potentially stop. The stoppage may result from being granted another form of benefit, such as the unemployment benefit or alternatively, as a result of the redundant employee's partner working less than the required full time allocation.⁶⁵ As a consequence of the loss of entitlement to any IWTC the financial hardship associated with redundancy would be further increased.⁶⁶

⁶¹ Working for Families was announced in the 2004 budget and commenced as at 1 April 2005. For discussion on the Working for Families scheme see: B Perry, "Working for Families: The Impact on Child Poverty" (July 2004) Social Policy Journal of New Zealand. A copy of this paper can be obtained from the following website: <http://findarticles.com/p/articles/mi_hb6480/is_22/ai_n29113853/?tag=content;coll>.

⁶² See the Working for Families website at: <www.workingforfamilies.govt.nz/>.

⁶³ New Zealand Government, "Press Release - Working for Families Q & As" (22 April 2008) Scoop Independent Newspapers <www.scoop.co.nz/stories/PA0804/S00526.htm>. See also: John Hughes, above n 40, at 17.

⁶⁴ For specific details on this see: Working for Families website, above n 62.

⁶⁵ John Hughes, above n 40, at 17.

⁶⁶ Ibid.

The government's approach, through ReCover, was to provide a redundant employee, who prior to being made redundant, was entitled to IWTC, with a 'top-up' payment.⁶⁷ This payment effectively substituted the IWTC and was to be paid for a maximum period of 16 weeks or until the affected employee secured alternative employment. If employment was gained prior to the conclusion of the 16 week period the payment would cease as soon as the new employment commenced.⁶⁸ Obviously, to be entitled to this form of assistance the affected employee must have a child or children.⁶⁹

ii) RePlace

This aspect of the ReStart programme was an extension of the existing accommodation supplement scheme⁷⁰ and was aimed at assisting people to meet accommodation costs where they have been affected by redundancy.⁷¹ RePlace provided an additional non-taxable sum of up to \$100 per week (depending on individual circumstances) on top of any accommodation supplement already received for a maximum period of 16 weeks.⁷² Therefore, to be entitled to gain this assistance, the individual must have been entitled to receive an accommodation supplement⁷³ and must not have received any form of redundancy compensation equal to or over \$25,000 after tax.⁷⁴

⁶⁷ This payment is \$60 per week for a family that has three or less dependent children with an extra \$15 available for each additional dependent child. See Work and Income, "Restart FactSheet", above n 56. See also: John Hughes, above n 40, at 17.

⁶⁸ John Hughes, above n 40, at 17.

⁶⁹ Work and Income, "Restart FactSheet", above n 56.

⁷⁰ See s 61EA of the Social Security Act 1964.

⁷¹ John Hughes, above n 40, at 17.

⁷² See Work and Income, "Restart" at <www.workandincome.govt.nz/manuals-and-procedures/income_support/extra_help/restart/replace.htm>. See also: John Hughes, above n 40, at 17.

⁷³ See Work and Income, "Accommodation Supplement" at <www.workandincome.govt.nz/individuals/a-z-benefits/accommodation-supplement.html>. See also: John Hughes, above n 40, at 17.

⁷⁴ See Work and Income, "ReStart", above n 72. See also: John Hughes, above n 40, at 17.

iii) ReConnect

As noted above, the third largely administrative element of the ReStart programme was known as ReConnect. This aspect of the programme was aimed at helping redundant employees through a variety of outplacement services. Specifically, assistance could be provided to an individual affected by redundancy through help with sourcing job vacancies, developing a curriculum vitae, preparing for job interviews, providing career and budgetary guidance, as well as assisting with the provision of information and advice on training and development opportunities.⁷⁵

b) Implications of the ReStart Programme for Redundancy Law

The implications of the implementation of this programme for redundancy law have arguably been negligible. As the programme introduces no permanent change to employment legislation its implications are predominantly more practical rather than legal in nature.⁷⁶ A leading employment law expert suggested that the limited ambit and temporary nature of the programme was unlikely to encourage any overt or obvious change in collective bargaining behaviour in respect of redundancy provisions within collective agreements.⁷⁷ Specifically this author suggests that the ReStart programme was unlikely to encourage any form of tactical negotiation to get around the \$25,000 cut-off point⁷⁸ associated with the RePlace element of the ReStart programme.⁷⁹ This belief has been confirmed by recent IRC data on collective agreements that indicates no significant change to the standard approach to

⁷⁵ See <www.workandincome.govt.nz/documents/redundancy-services-for-employees.pdf>.

⁷⁶ John Hughes, above n 40, at 18.

⁷⁷ Ibid.

⁷⁸ See the discussion contained in section C, I, a), ii) on RePlace in this chapter.

⁷⁹ John Hughes, above n 40, at 18.

redundancy compensation provision of four weeks notice, four weeks compensatory payment for the first year of service and two weeks for each subsequent year of service.⁸⁰

The limitations associated with the eligibility requirements for ReCover and RePlace mean that their application left those that do not fit within the narrow criteria without the additional financial assistance.⁸¹ Specifically, the ReStart programme only applied to those employees affected by redundancy that received working for families in work tax credits and or qualified for the accommodation supplement prior to being made redundant. Furthermore, access to the support was limited due to the eligibility criteria. Therefore the programme left a large number of New Zealanders without any form of additional financial protection in the advent of a redundancy situation, even though the ReStart programme was designed to assist in combatting what was described by many as the imminent increase in redundancies associated with the dire global economic and financial climate at the time.⁸²

The ReStart programme arguably continued to highlight the history of New Zealand's redundancy law in the sense that when the economy is good, there is a lack of tangible progress towards embedding greater rights and protection for workers in law. Conversely, when the economy is weak, there is the perception by those in power that it is arguably not feasible to act favourably towards implementing law that is perceived to constrain or threaten business activity.⁸³

⁸⁰ See the discussion on this point in chapter twelve.

⁸¹ John Hughes, above n 40, at 19.

⁸² (10 February 2010) 652 NZPD 1044.

⁸³ See the discussion on this point in chapter two.

c) Job Summit & Proposals

In addition to the ReStart transitional relief programme, the new government also initiated a 'Job Summit', which involved discussions between approximately 250 of New Zealand's business, government and union leaders.⁸⁴ The aim was to provide a united approach with the establishment of solid plans to combat the anticipated job losses as a result of the global economic crisis.⁸⁵ It was held on 27th February 2009 and produced several initiatives aimed at stimulating employment whilst also minimising the occurrence of redundancies.⁸⁶

One of the initiatives advocated and given priority was the establishment of a job support scheme which became more commonly known as the nine-day fortnight.

d) Nine-Day Fortnight

The nine-day fortnight was introduced on 11 March 2009 and was heralded as a means of governmental financial assistance provided to employers so as to encourage them to retain employees. John Key described it as a, "practical measure that will give businesses some extra time to ride out the tough conditions, and to retain jobs as they do".⁸⁷ It was specifically aimed at private sector businesses which employed more than 50 staff and which

⁸⁴ John Braddock, above n 34; J McManus, "Job Summit: What did it really achieve" (8 March 2010) Fairfax Business Group <<http://cio.co.nz/cio.nsf/printer/61015B9E864D2E88CC2576DC00766EEF>>.

⁸⁵ John Braddock, above n 34.

⁸⁶ For a list of the recommendations made see: Mark Weldon, "The Prime Ministers Summit on Employment - Portfolio of Initiatives Summary" (March 2009) Beehive <www.beehive.govt.nz/sites/all/files/Weldon_Job_Summit_Summary_of_Initiatives.pdf>. For government discussion on these initiatives see: Cabinet Paper, "Prime Minister Summit on Employment: Lead Ministers" (9th March 2009) Beehive <www.beehive.govt.nz/sites/all/files/Summit_Lead_Ministers.pdf>; Cabinet Paper, "Prime Ministers Summit on Employment – Maintaining the Momentum" (9th March 2009) Beehive <www.beehive.govt.nz/sites/all/files/Cabinet_paper_Summit_Mar_9.pdf>; Cabinet Paper, "Prime Ministers Summit on Employment Maintaining the Momentum – Ideas for Longer Term Development and Consideration" (30 March 2009) Beehive <www.beehive.govt.nz/sites/all/files/Employment_Summit_STR_paper.pdf>.

⁸⁷ John Key "Government Moves Fast to Help Retain Jobs" (11 March 2009) National Party Announcement <www.johnkey.co.nz/archives/639-Government-moves-fast-to-help-retain-jobs.html>.

were experiencing a loss of production, and as a direct consequence of this, were looking at making employees redundant.⁸⁸

Much debate surrounded the precise detail of how the nine-day fortnight was to actually operate in practice.⁸⁹ However, the end result was that eligible employers needed to have negotiated a temporary contractual variation with their applicable full time employees⁹⁰ to reduce their hours of work by up to 10 hours per fortnight.⁹¹ This variation to the employee's terms and conditions of employment was to only be in place for a period not greater than six months. In consideration for this reduction in working hours, the employer agreed not to make the employee redundant whilst the scheme was in place. Furthermore, the government's financial assistance was passed on directly to the employee to cover some of the costs associated with the loss in wages.⁹² This nine-day fortnight operated until the 31st December 2010.⁹³

Despite the recommendations of the Advisory Board and the economic climate which was predicted to produce significant redundancies, the government determined that legislative

⁸⁸ (11 March 2009) 652 NZPD 1828.

⁸⁹ For discussion on this point see the following resources: Newstalk ZB, "Nine-Day fortnight Numbers Unclear" (17 March 2009) New Zealand Herald <www.nzherald.co.nz/small-business/news/print.cfm?c_id=85&objectid=10562116>; Newstalk ZB, "MTA Criticises 9-Day Fortnight Scheme" (14 March 2009) New Zealand Herald <www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10561685>; Newstalk ZB and NZ Herald Staff, "Nine-Day Plan 'Disappointing', EPMU says" (11 March 2009) New Zealand Herald <www.nzherald.co.nz/small-business/news/article.cfm?c_id=85&objectid=10561053>; NZPA, "Larger Workplaces First To Get Government Nine-Day Subsidy" (11 March 2009) New Zealand Herald <www.nzherald.co.nz/wages-and-salaries/news/article.cfm?c_id=277&objectid=10561076>; Patrick Gower, "Nine-Day Plan Must Protect Pay: Unions" (2 March 2009) New Zealand Herald <www.nzherald.co.nz/employment/news/print.cfm?c_id=11&objectid=10559448>.

⁹⁰ Full time for the purposes of this scheme means more than 37.5 hours per week. See: Work and Income, "Job Support Scheme" at <www.workandincome.govt.nz/business/a-z-services/job-support-scheme.html>.

⁹¹ Employees must not work less than 30 hours per week. See: Work and Income, "Job Support Scheme", above n 90.

⁹² The scheme provided employers with an allowance of \$12.50 per hour for each employee who is participating in the scheme for up to a maximum of five hours a fortnight. See: Work and Income, above n 90.

⁹³ John Key, above n 87.

options for protecting employees facing a redundancy situation was not the best approach in the circumstances. Rather, the government's approach focused on assisting businesses through temporary measures to maintain the employment of its workers during the recession and find ways to stimulate the economy to facilitate further employment opportunities through both the establishment and the bringing forward of pre-approved capital works and infrastructure projects.⁹⁴

D Minimum Entitlement Bill

At the same time as the above initiatives were being implemented, Darien Fenton, a Labour Party MP, introduced a Private Members Bill.⁹⁵ The Employment Relations (Minimum Redundancy Entitlements) Amendment Bill 2009 (Minimum Entitlements Bill).⁹⁶

Importantly the Minimum Entitlements Bill incorporated the key recommendations that the Public Advisory Group advocated. Specifically, it specified that in all redundancy cases affected employees must be given “notice of dismissal of no less than four weeks”.⁹⁷ Furthermore, affected employees would be entitled to receive redundancy compensation. The level of compensation would be dictated by the employee's length of service at the time the redundancy was to take effect. It expressly specified that an affected employee would be entitled to four weeks remuneration after the first full year of service and two weeks remuneration for each full or part year after, capping the maximum level of compensation at

⁹⁴ See: John Key, “Message from the Prime Minister – Job Summit” (20 July 2009) Beehive <www.beehive.govt.nz/feature/summit>.

⁹⁵ See NZPA, “Labour Lodges Redundancy Bill” (25 May 2009) Television New Zealand <<http://tvnz.co.nz/business-news/labour-lodges-redundancy-bill-2755440>>; NZPA, “Redundancy Compensation Bill Lodged” (24 May 2009) Stuff.co.nz <www.stuff.co.nz/national/politics/2436873/Redundancy-compensation-bill-lodged>.

⁹⁶ See appendix five for a copy of this Bill.

⁹⁷ See clause 69ZL of the Employment Relations (Statutory Minimum Redundancy Entitlements) Amendment Bill. A copy of this Bill is contained in appendix five.

26 weeks.⁹⁸ Furthermore, the Minimum Entitlements Bill sought to direct the Minister of Labour to undertake a public education campaign regarding the contents of the Bill should it be enacted.⁹⁹

The Minimum Entitlements Bill was drawn from the Parliamentary ballot on 5th August 2009¹⁰⁰ amid both jubilation and disquiet. Whilst the union movement strongly supported its enactment,¹⁰¹ some in the business community described the proposed legislation as a “death knell for many small New Zealand businesses”.¹⁰² It is not surprising that given the reaction of the business community and the perceived threat of compliance costs to businesses amidst an environment of recession, the National government’s reaction to the Minimum Entitlements Bill was not favourable.¹⁰³

Furthermore, although the Minimum Entitlements Bill essentially attempted to enact the recommendations of the Public Advisory Group, it left key matters undetermined, such as who was going to cover the costs associated with the Bill’s implementation; how the compensation was actually going to be calculated (specifically for employees who work irregular hours of work); and what happens to employees that are made redundant due to their

⁹⁸ See clauses 69ZI to 69ZL of the Employment Relations (Statutory Minimum Redundancy Entitlements) Amendment Bill. A copy of this Bill is contained in appendix five.

⁹⁹ See clauses 69ZK of the Employment Relations (Statutory Minimum Redundancy Entitlements) Amendment Bill. A copy of this Bill is contained in appendix five.

¹⁰⁰ New Zealand Labour Party, “Fenton Bill for Redundancy Protections Drawn” (5 August 2009) Scoop.co.nz <<http://business.scoop.co.nz/2009/08/05/fention-bill-for-redundacy-protections-drawn/>>. For further discussion see: Darien Fenton’s website at <www.dariefenton.org.nz>.

¹⁰¹ See Engineering Printing and Manufacturing Union, “Press Release - EPMU backs Redundancy Protection Bill” (9 September 2009) Scoop.co.nz <www.scoop.co.nz/stories/BU0909/S00252.htm>.

¹⁰² See Niko Kloeten, “Redundancy Bill Would Be ‘Death Knell’ For Small Businesses” (18 August 2009) The National Business Review <www.nbr.co.nz/print/107570>.

¹⁰³ NZPA, “No Minimum Redundancy Payment Plans” (25 June 2009) Sunday Star Times <www.stuff.co.nz/sunday-star-times/news/latest-news/2535851/No-plans-for-minimum-redundancy-payment-plan>.

employer becoming insolvent.¹⁰⁴ Therefore significant debate and discussion would be needed before any enactment could have occurred.

Realistically, the Minimum Entitlements Bill was never likely to gain the support required to become law. Darien Fenton had actually delayed the scheduled first reading of the Bill to enable and encourage “all political parties to properly consider the implications of the current law”.¹⁰⁵ Unsurprisingly, during the first reading National Party MPs advocated the view that any form of mandatory redundancy compensation payment would potentially cause job losses and inhibit the creation of jobs which was contrary to National Party policy.¹⁰⁶ Furthermore, it was also asserted that some businesses would close as a result of its enactment.¹⁰⁷ Consequently, with only Labour, the Greens and the Maori Party supporting the Minimum Entitlement Bill it was defeated by 64 to 57 votes.¹⁰⁸

E Government Reviews

National’s employment relations agenda was not limited to the first 100 days of governance. The government took an active approach to reviewing and obtaining research on key areas of employment law. Two reviews of particular significance for redundancy law were the review of part 6A of the ERA and the review of the personal grievance regime contained in part 9 of the ERA.

¹⁰⁴ These points were raised in Simpson Grierson, “Stop Press – Proposed Statutory Minimum Redundancy Entitlements” (12 August 2009) Simpson Grierson <www.simpsongrierson.com/employment-law-proposed-statutory-minimum/?archivequarter=2009Q3>.

¹⁰⁵ Darien Fenton, “Redundancy Protection Bill Held Back for National Debate” (19 August 2009) Darien Fenton <www.dariefenton.org.nz/?tag=redundancy>.

¹⁰⁶ (5 May 2010) 662 NZPD 10767 (Dr Jackie Blue).

¹⁰⁷ Ibid.

¹⁰⁸ (5 May 2010) 662 NZPD 10767. See also: NZPA, “Labour’s Redundancy Bill Defeated” (5 May 2010) 3 News <www.3news.co.nz/defaultStrip.aspx?tabid=213&articleID=154363>.

I Part 6A Review

As discussed in chapter four, on 1 December 2009, the review of the continuation of employment provisions contained in part 6A of the ERA was announced.¹⁰⁹ The review was to be conducted by the Department of Labour for the Minister of Labour, Kate Wilkinson. There were three key objectives of the review. Firstly, to assess whether the operation of part 6A has met its objectives, and if not, whether any amendments to part 6A were necessary to ensure the objectives were achieved. Secondly, to consider both the relevance and desirability of the policy of having provisions that specifically provide protection for a defined group of people, and thirdly to facilitate informed decisions on how to improve part 6A in respect of both achieving its objectives and in improving the operation of the provisions.¹¹⁰ The discussion document was released in February 2010 with submissions sought until March 2010. As yet no significant amendments relating to this section have been introduced. As noted in the introduction of this thesis, it is beyond the scope of this research to engage in substantive analysis of part 6A of the ERA.

II Personal Grievance Review

The second major review was initiated in March 2010, when the Minister of Labour requested that the Department of Labour examine New Zealand's personal grievance system as established under part 9 of the ERA 2000¹¹¹ ('the review'). The review represented a

¹⁰⁹ Kate Wilkinson, "Review of the Continuity of Employment Provisions" (1 December 2009) Beehive <www.beehive.govt.nz/release/review-continuity-employment-provisions>.

¹¹⁰ See the Reviews Terms of Reference. A copy of these can be obtained from: <www.dol.govt.nz/consultation/tor-review-part6a/discussion/part-6a-review-terms-of-reference.pdf>.

¹¹¹ Department of Labour, *Employment Relations Act 2000, Review of Part 9: Personal Grievances (Discussion Paper)* (Prepared for the Minister of Labour, March 2010) 6. See also the review's terms of reference, above n 110.

subjective assessment of the personal grievance system¹¹² and as a result of this more objective research was also commissioned by the Minister of Labour.¹¹³

The purpose of the review was to assess whether the current system was providing a “fair balance between employer flexibility and employee protection”¹¹⁴ and “met its obligations as set out in the ERA 2000”.¹¹⁵ It was also concerned with identifying whether the system was “imposing unnecessary costs or obligations for employers and employees”,¹¹⁶ whether it was “supporting workplace productivity”¹¹⁷ and whether it was operating efficiently and effectively.¹¹⁸

Furthermore the review aimed at identifying areas where improvements were thought to be required, the ambit of issues associated with such improvements as well as the options that could be undertaken to rectify and implement solutions.¹¹⁹ In order to achieve the objectives of the review, feedback was sought from both employees and employers.¹²⁰ However, both the content of the review and the process in which it has been initiated has been the subject of criticism.¹²¹ In particular, it was identified that the review document contained some legal

¹¹² Department of Labour, above n 111, at 3.

¹¹³ See Department of Labour, *Employer and Employee Views of the Personal Grievance Process: A Qualitative Study* (Prepared for the Minister of Labour, April 2010); Department of Labour, *International Provision of Unfair Dismissal Protections. A Stocktake of Practice in Australia, Canada, Germany, Great Britain, New Zealand and Sweden* (Prepared for the Workplace Policy Group of the Department of Labour, February 2010); Department of Labour, *Issues with the Personal Grievance System in New Zealand? A Review of the Literature* (Prepared for the Workplace Policy Group of the Department of Labour, February 2010).

¹¹⁴ Department of Labour, above n 111, at 6.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Ibid, at 3.

¹²¹ For discussion see: Gordon Anderson, “Reviewing Part 9: Personal Grievances: Is a Review Needed?” [2010] 3 Employment Law Bulletin 33; Helen Kelly, “The Government Review of Part 9 of the Employment Relations Act 2000: Is There Need to Change The Status Quo?” [2010] 3 Employment Law Bulletin 37.

inaccuracies¹²² and focused on alleged perceptions rather than substantiating such assertions with quantifiable data.¹²³ Furthermore, the timeframe for obtaining comment was perceived as unnecessarily short.¹²⁴

This review was particularly significant in relation to the law of redundancy in respect of two key aspects. Firstly, it sought feedback on whether the personal grievance system provides a fair balance between the duties and rights of employers and employees,¹²⁵ and secondly, the review questioned the appropriateness of the test for justification in a personal grievance case and whether it created uncertainty.¹²⁶ In relation to this latter point, the comment was sought on whether, in its current objective form, the test created uncertainty and therefore enabled a disproportionate weight of analysis to be placed on procedural elements rather than the substance of a case.¹²⁷ Moreover, the review questioned whether “minor irregularities in procedure should be given less emphasis than actual substance of the personal grievance claim?”¹²⁸

In relation to the first point, as noted by the submissions received in relation to this review, people’s perception of what is fair and reasonable will often be influenced by an individual’s personal interests, that is to say, employers will most likely believe that the system is unfairly

¹²² An example of this would be that the discussion paper suggests that minor procedural irregularities can make substantively justified action into an unjustified action. This has never been the case. See the discussion on this point in chapter six, section B. See also section G of this chapter.

¹²³ For discussion on this point see: Buddle Findlay, “Announcements: Legal Update on Employment Law – Review of Personal Grievance System” (11 March 2010) Buddle Findlay <www.budlefindlay.com/public/about/announcements.aspx?id=439>; Gordon Anderson, above n 121, 34; Helen Kelly, above n 121, at 37-38.

¹²⁴ Gordon Anderson, above n 121, 34.

¹²⁵ See question 6 in the Operation of the Personal Grievance System Questionnaire in Department of Labour, above n 111, at 38.

¹²⁶ See question 7 in the Operation of the Personal Grievance System Questionnaire in Department of Labour, above n 111, at 38.

¹²⁷ Ibid.

¹²⁸ Ibid.

weighted against them, whilst employees will take the contrary view. This point was recognised by the Department of Labour when compiling all the submissions received in their report to the Minister of Labour.¹²⁹ However, overall the Department of Labour determined that the personal grievance regime was, in large, perceived as representing a fair balance between the respective parties.¹³⁰ Notwithstanding this assertion, the application of the personal grievance system in respect of redundancy law is arguably one of the areas where there still remains an unequal balance between the rights and duties of the employer vis a vis the employee. As noted in chapter two, New Zealand remains one of the only countries within the OECD where no specific legislative protection is available for employees affected by redundancy. This is contrary to the ideology encapsulated within the ERA which advocates observance to certain ILO conventions.¹³¹ Although not expressly mentioned within the ERA, the ILO termination of employment convention 158 and associated recommendation 166 actually support greater protection of employees affected by redundancy, particularly in relation to notice and financial support.¹³²

Imperatively, as noted in chapter three, the test for justification contained in s 103A of the ERA is a key element in determining whether a fair balance between the rights and duties of employees and employers in the personal grievance system actually exists. The potential implications of proposed changes are discussed in section G of this chapter.

F Employment Relations Amendment Bill (No 2) 2010

The outcome of the Personal Grievance Review was the development of the Employment Relations Amendment Bill (No.2) 2010 (the Bill).

¹²⁹ Department of Labour, above n 111, at [58].

¹³⁰ Ibid.

¹³¹ See s 3 (b) of the ERA.

¹³² For a copy of Convention 158 and Recommendation 166 see appendix two.

Initially the proposed changes contained in the Bill were broadly outlined by Prime Minister John Key at the National Party Conference in July 2010.¹³³ However, the Bill was formally introduced to Parliament on 19th August 2010 and was proclaimed by Kate Wilkinson, Minister of Labour, as a way of assisting both New Zealand and New Zealanders “grow out of the recession”.¹³⁴

The Bill was controversial with opposing views openly being expressed as the Bill tracked through the the Parliamentary process. The National government described the Bill as providing, “flexibility, greater choice, and ensuring a balance of fairness for both employers and employees in the principal Act while improving its overall operation and efficiency”.¹³⁵ Conversely, those at the opposite end of the political spectrum described it as “unfair, unbalanced, unnecessary and ideologically driven”¹³⁶ being a “backward step”¹³⁷ and “a sad day for workers in New Zealand”.¹³⁸

According to the government, the purpose of the Bill was to be achieved through a variety of amendments to employment law. In general these amendments related to restricting the entitlement of New Zealanders to access the personal grievance procedure in certain situations (exclusion to apply during a 90 day trial period),¹³⁹ changing the test of

¹³³ John Key, “Speech to the National Party Convention” (18 July 2010) New Zealand Herald <www.nzherald.co.nz/news/print.cfm?objectid=10659625>. See also: John Key, “Securing a Brighter Future – Employment Law Package” (18 July 2010) National Party <www.johnkey.co.nz>; One News, “Employment Laws in Line for Shake-up” (15 July 2010) Television New Zealand Limited <<http://tvnz.co.nz/national-news/employment-laws-in-line-shake-up-3646512>>.

¹³⁴ (19 August 2010) 665 NZPD 13305 (Kate Wilkinson).

¹³⁵ Employment Relations Amendment Bill (No 2) 2010 196-1, Explanatory note, 1.

¹³⁶ (19 August 2010) 665 NZPD 13305 (Trevor Mallard).

¹³⁷ (19 August 2010) 665 NZPD 13305 (Clare Curran).

¹³⁸ (19 August 2010) 665 NZPD 13305 (Lynne Pillay).

¹³⁹ See clause 12 of the Employment Relations Amendment Bill (No 2) 2010 196-1.

justification,¹⁴⁰ altering the law relating to union access to worksites,¹⁴¹ changes to communication during collective bargaining,¹⁴² modifications to holiday legislation¹⁴³ and changes to dispute resolution processes¹⁴⁴ as well as remedies.¹⁴⁵

This Bill was passed into law on 23 November 2010 by a vote of 64 to 56.¹⁴⁶ The majority of the Bill's provisions come into force on 1 April 2011.¹⁴⁷

Although each of these abovementioned amendments has important implications for employment law, on the face of it the change which could potentially have the most impact on redundancy law is the modification to the test of justification. The importance of the test of justification cannot be overstated, as it is this test that determines whether specified conduct is justifiable or not.¹⁴⁸

¹⁴⁰ See clause 14 of the Employment Relations Amendment Bill (No 2) 2010 196-1.

¹⁴¹ See clause 5-8 of the Employment Relations Amendment Bill (No 2) 2010 196-1.

¹⁴² See clause 9 of the Employment Relations Amendment Bill (No 2) 2010 196-1.

¹⁴³ See the discussion on these changes in: Russell McVeagh "Employment Law Update – Employment Relations Amendment Bill and Holidays Amendment Bill" (18 August 2010) Russell McVeagh <www.russellmcveagh.com/docs/EmploymentNewsAug10_325.pdf>; Bell Gully, "Employment Bills Released to Amend Employment Relations Act and Holidays Act" (18 August 2010) Bell Gully <www.bellgully.com/resources/resources.02621.asp>; Buddle Findlay, "Employment Relations and Holiday Bills Introduced" (August 2010) Buddle Findlay <www.buddlefindlay.com/article/2010/08/24/employment-relations-and-holidays-bills-introduced-august-2010>.

¹⁴⁴ See clauses 16-35 and 38 of the Employment Relations Amendment Bill (No 2) 2010 196-1.

¹⁴⁵ See clause 13 and 15 of the Employment Relations Amendment Bill (No 2) 2010 196-1. For general discussion on these changes see: John Key, above n 133; National Party, "Backgrounder – Planned Changes to Employment Relations Act 2000" [2010] 5 Employment Law Bulletin 51. Russell McVeagh, above n 143; Bell Gully, above n 143; Buddle Findlay, above n 143.

¹⁴⁶ (23 November 2010) 229 NZPD 15656. For discussion see: NZPA, "90 Day Employment Bill Passed" (23 November 2010) Stuff.co.nz <www.stuff.co.nz/national/politics/4378279/90-day-employment-bill-passed>.

¹⁴⁷ Note s 10 concerning s 64 of the ERA will take effect on 1 July 2011.

¹⁴⁸ For discussion on the importance and standard of justification see: G Anderson, J Hughes, P Roth and M Leggat, *Employment Law: A Practical Guide* (LexisNexis New Zealand Limited, Wellington, 2010) at [18.105].

G The Employment Relations Amendment Act

I The New Test of Justification

It was asserted that feedback gained through the Personal Grievance Review suggested that the “test of justification in the current legislation is confusing”¹⁴⁹ with too much emphasis being placed on an employer’s process rather than the substance of the decision to actually dismiss.¹⁵⁰

As a result of this, the government advocated the replacement of the word ‘would’ to ‘could’ in the actual test of justification contained in s 103A (2) as well as providing guidance in relation to the procedural elements that the Court or Authority must take into account when considering whether a dismissal or action was justifiable (s 103A (3)-(5)). The new test reads accordingly:

103A Test of justification

- (1) For the purposes of section 103(A)(1) and (b), the question of whether a dismissal or action was justifiable must be determined, on an objective basis, by applying the test in **subsection (2)**.
- (2) The test is whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.
- (3) In applying the test in **subsection (2)**, the Authority or the Court must consider –
 - (a) Whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
 - (b) Whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
 - (c) Whether the employer gave the employee a reasonable opportunity to respond to the employer’s concerns before dismissing or taking action against the employee; and
 - (d) Whether the employer genuinely considered the employee’s explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.
- (4) In addition to the factors described in **subsection 3**, the Authority or Court may consider any other factors it thinks appropriate.
- (5) The Authority or the Court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –
 - (a) minor; and
 - (b) did not result in the employee being treated unfairly.

¹⁴⁹ (19 August 2010) 665 NZPD 13305 (Kate Wilkinson). See also the Employment Relations Amendment Bill (No 2) 2010 196-1, Explanatory Note.

¹⁵⁰ (19 August 2010) 665 NZPD 13305 (Kate Wilkinson). See also: Office of the Minister of Labour, Cabinet Business Committee – Proposal to Amend the ERA 2000 and Related Work (2010) at Appendix One, 2-3. A copy of this document can be obtained at <www.ers.govt.nz/law/reviews/employment-relations-act-2010.html>.

In relation to substantive justification, it was believed that the change in wording would reflect the notion that there is always a range of reasonable responses open to an employer in any situation and it is not within the jurisdiction of the Authority or Court to substitute its view for that of the employer.¹⁵¹ In relation to procedural justification, the new section sets out procedural guidelines that the Authority and Court must take into account when applying the test of justification to any factual scenario.¹⁵² The government advocated that, “we want employers to be assured that minor or technical procedural defects in their processes will not mean that a fundamentally justified decision can be deemed wrong”.¹⁵³

As will be discussed, in relation to both substantive and procedural justification in a redundancy situation, these legislative amendments arguably represent little change.

II Impact of the Change to the Test of Justification

a) Substantive Justification

As discussed in chapter thirteen, substantive justification in a redundancy situation is concerned with the actual decision of an employer to make an employee redundant. The notion of managerial prerogative is inherent in such a decision, as the employer’s right to manage means that an employer has the power to terminate an employee’s employment irrespective of there being no wrongful conduct justifying such a decision.¹⁵⁴ The law in respect of redundancy is one area where there arguably still remains an unequal balance of power between the employer and the employee. This assertion is based on the fact that

¹⁵¹ Employment Relations Amendment Bill (No 2) 2010 196-1, Explanatory note, 3-4. See also: National Party, above n 145.

¹⁵² See s 103A (3) of the ERA.

¹⁵³ (19 August 2010) 665 NZPD 13305 (Kate Wilkinson).

¹⁵⁴ See the discussion in chapter thirteen, part C.

substantive justification plays a minimal role in respect of redundancy due to the strength of the managerial prerogative and the judiciary's longstanding view that it should not enquire into the actual decision to make an employee redundant,¹⁵⁵ unless there is significant evidence to suggest a lack of genuineness.¹⁵⁶ A lack of genuineness is exceptionally hard for an employee to establish.¹⁵⁷ This approach to justification is significantly different to any other form of termination, where managerial prerogative has not been interpreted so authoritatively. Redundancy law has always been regarded as a 'special situation',¹⁵⁸ different from other forms of termination, which is recognised in the approach taken by the judiciary to the test of justification.¹⁵⁹

As noted in chapter three, the enactment of s 103A of the ERA in 2004 was the first time that there was a statutory test of justification. Prior to this point the Judiciary had predominantly defined the term, 'unjustifiable' in accordance with whether the employer could demonstrate fair treatment of the employee given the particular circumstances.¹⁶⁰ Although it is beyond the scope of this paper to engage in any form of significant historical analysis, it is important to briefly outline some key developments in the evolution of the test of justification in non-redundancy cases in order to explain why it is asserted that the 2010 amendment to s 103A is not directly aimed at redundancy law per se. Consequently, it is suggested that the impact on redundancy law will arguably be minimal.

¹⁵⁵ See discussion in chapter thirteen, part C.

¹⁵⁶ See discussion in chapter thirteen, part C, I, c).

¹⁵⁷ Ibid.

¹⁵⁸ *Aoraki Corporation Limited v McGavin* 1 ERNZ 601, at 618 as per Richardson P, Gault, Henry, Keith, Blanchard and Tipping JJ.

¹⁵⁹ See the discussion on the approach taken by the judiciary to redundancy cases contained in chapter three.

¹⁶⁰ J Hughes, P Roth and G Anderson, *Personal Grievances* (online loose-leaf ed, LexisNexis) at [3.33]. For discussion on the approach in respect of redundancy law see chapter three, section D, I.

b) Development of the test of justification - Non-redundancy

As the judicial approach to the interpretation of ‘unjustifiable’ evolved, the test applied was perceived by many as gradually becoming unbalanced,¹⁶¹ with what some believed to be a “strongly employer focused test”.¹⁶² Over time, the test arguably shifted from an objective analysis by an impartial third party of an employer’s conduct against a neutral standard, to a more subjective assessment of an employers conduct.¹⁶³ The case of *Oram*¹⁶⁴ is seen as the pinnacle of this approach.

The statutory test of justification enacted in 2004 was predominantly aimed at overriding the decision in *Oram*. The *Oram* case involved a personal grievance for alleged unjustifiable dismissal by reason of serious misconduct. The case went all the way to the Court of Appeal which held in respect of justification that: “the Court had to be satisfied that the decision to dismiss was one which a reasonable and fair employer could have taken”.¹⁶⁵

Furthermore, in *Oram* the Court of Appeal made the point that, “there may be more than one correct response open to a fair and reasonable employer”.¹⁶⁶ Therefore, this approach appeared to move the test away from measuring the employer’s conduct against what had historically been that of a “hypothetical fair employer” to an evaluation of an employer’s

¹⁶¹ For a historical review of justification see: J Hughes, P Roth and G Anderson, above n 160, at [3.33A]; G Anderson, J Hughes, M Leggat, P Roth, *LexisNexis Employment Law Guide* (7th ed, LexisNexis, Wellington, 2005) at [ER103A.3]-ER103A.6]; G Anderson, J Hughes, P Roth and M Leggat, *Employment Law: A Practical Guide* (LexisNexis New Zealand Limited, Wellington, 2010) at [18.103]-[18.106] [“A Practical Guide”]; Anderson and others, *Mazengarb’s Employment Law*, (online loose-leaf ed, LexisNexis) at [ERA103A.1]-[ERA103A.6]; P Bartlett, W Hodge, P Muir, C Toogood, R Wilson, *Brookers Employment Law* (online loose-leaf ed, Brookers) at [ER103.06]; P Churchman, C Toogood and M Foley, *Brookers Personal Grievances* (online loose-leaf ed, Brookers) at [4.7.01].

¹⁶² G Anderson, J Hughes, P Roth and M Leggat, *A Practical Guide*, above n 161, at [18.106].

¹⁶³ See *W&H Newspapers Ltd v Oram* [2000] 2 ERNZ 448 at [40]-[44] cited in G Anderson, J Hughes, P Roth and M Leggat, *A Practical Guide*, above n 161, at [18.103].

¹⁶⁴ *W & H Newspapers Limited v Oram* [2000] 2 ERNZ 448.

¹⁶⁵ *Ibid*, at [31] as per Gault J.

¹⁶⁶ *Ibid*.

actions measured in accordance with their own standards.¹⁶⁷ In other words, the test clearly became subjective and arguably provided employers with significant power to justify their actions. Moreover, the Court of Appeal indirectly stressed the importance of managerial prerogative by emphasising the Court or Authority cannot substitute its view for that of the employer.¹⁶⁸ The Court of Appeal went on to note that:¹⁶⁹

‘The dismissal might have seemed harsh, but the correct issue was whether it was open to the employer, acting fairly and reasonably, to have seen that as the appropriate response to Mr Oram’s conduct.’

Therefore, the Court of Appeal accepted that although the decision to dismiss in *Oram* could be perceived as harsh, it was still justified, as it was within the range of options that a fair and reasonable employer, faced with the same factual situation, could have taken.¹⁷⁰

The decision in *Oram* arguably moved the test of justification in cases of dismissal for cause to be more closely aligned with the interpretation of substantive justification and the notion of a strong managerial prerogative in redundancy cases. Put simply, the employer had more power to determine what actions they took in certain circumstances, and as with redundancy cases, the Authority and Court had limited jurisdiction in respect of modifying an employer’s decision.

The new test of justification arguably restores the test of justification to the *Oram* position prior to the enactment of s 103A. The wording prescribed replicates the *Oram* approach being: “whether the employer’s actions, and how the employer acted, were what a fair and

¹⁶⁷ G Anderson, J Hughes, P Roth and M Leggat, *A Practical Guide*, above n 161, at [18.106].

¹⁶⁸ *Ibid.*

¹⁶⁹ *W&H Newspapers Ltd v Oram*, above 164, at [44] as per Gault J.

¹⁷⁰ Andrew Caisley, “Clarity or Confusion: The Employment Relations Amendment Act 2004 Under the Lens” in E Rasmussen (ed), *Employment Relationships, Workers, Unions and Employers in New Zealand* (Auckland University Press, Auckland, 2010) 56, 64.

reasonable employer could have done in all the circumstances...”.¹⁷¹ Furthermore, extrinsic material surrounding the Bill seemed to expressly support the approach taken to the test of justifiability in *Oram*.¹⁷² The new test will arguably strengthen the managerial prerogative in cases involving dismissal for cause.

Given this analysis, the amendment to the legislative test of justification does not appear to be directed at redundancy law. Therefore, it is unlikely to produce any significant change to the pre-existing approach of the judiciary in respect of substantive justification in redundancy cases.

c) Procedural Fairness

As noted above, the new test of justification encapsulated in s 103A specifies express procedural guidelines that the Court and Authority must take into account when applying the statutory test. In the extrinsic material to the Bill, the Minister of Labour appeared to be endorsing employer concerns that, “there is too much emphasis on the employer’s process and not enough focus on the substantive reasons for the employer’s action”.¹⁷³ As a result of this arguably ill found belief,¹⁷⁴ the Bill incorporated what was deemed minimum procedural standards for a ‘fair and reasonable’ process in the case of termination of employment.¹⁷⁵

For the purposes of completeness only, consideration of the amendment to the test of justification is broken into two parts. Firstly the amended test of justification is briefly discussed in respect of procedure in non-redundancy cases. Secondly the test is reviewed in respect of procedure for situations involving redundancy.

¹⁷¹ See s 103A (2) of the Employment Relations Amendment Act 2010.

¹⁷² Office of the Minister of Labour, above n 150, at Appendix One, 2-3.

¹⁷³ Ibid, at Appendix One, 3.

¹⁷⁴ See chapter six introducing procedure fairness.

¹⁷⁵ Section 103A (3) of the Employment Relations Amendment Act 2010.

i) Non-Redundancy Situations

Although the *Oram* approach to substantive justification is likely for situations other than redundancy, certain procedural steps as outlined in the legislation will be required of an employer in order to justify their action.¹⁷⁶ Therefore in theory the procedural requirements curtail managerial prerogative in this respect. However, the outlined steps do not change what has always been required of a fair and reasonable employer. Rather, they appear to represent a fraction of the procedural steps what would normally be expected of an employer undertaking a fair process. Critical procedural elements, such as the right to representation, are absent from the legislation.¹⁷⁷ Furthermore, the actual weight of importance given to none specified procedural elements are unknown at this stage.¹⁷⁸ Although s 103A (4) does enable a Court or Authority to have regard to other procedural matters as it deems fit, arguably it defeats the purpose of the provision which was aimed at creating certainty of process. As a result of the discussion in chapter six, s 103A (5) appears to simply codify pre-existing case law in respect of procedure.¹⁷⁹

ii) Redundancy Situations

Importantly for redundancy law, the wording of these procedural guidelines appears to be designed for unjustifiable action or dismissal for cause situations, rather than for termination on the grounds of redundancy. Whether this is intentional or not is unknown. However, it would suggest that the procedural elements traditionally required in termination on the grounds of redundancy remain unchanged. This again seems to support the assertion that the amended test of justification is not aimed directly at redundancy law and that the legislation will in effect result in little change to pre-existing procedural requirements.

¹⁷⁶ See s 103A (3) of the Employment Relations Amendment Act 2010.

¹⁷⁷ Buddle Findlay, 'Employment Relations and Holiday Bills Introduced' (August 2010) Buddle Findlay <www.buddlefindlay.com/article/2010/08/24/employment-relations-and-holidays-bills-introduced-august-2010>.

¹⁷⁸ Ibid.

¹⁷⁹ See the discussion in chapter six of this paper.

d) Judicial Interpretation

In 2009 the Employment Court had the opportunity in the *Air New Zealand*¹⁸⁰ decision to consider how the former s 103A should be construed in respect of personal grievances.¹⁸¹ After consideration of all extrinsic material, the Employment Court concluded that an inquiry into justifiability must be considered in totality. In other words, an objective review of all the employer's actions is to be undertaken and this includes the actual decision to dismiss.¹⁸²

This approach to justification has raised questions about whether the judiciary might actually consider scrutinising the substantive decision of employers to dismiss in redundancy cases.¹⁸³ As noted, this would be contrary to the pre-existing approach where there is very limited examination in respect of substantive justification. However, if the test as interpreted in the *Air New Zealand* case suggests reviewing all actions in totality, then this must include both the process followed and the actual decision to dismiss.¹⁸⁴ This approach has been applied in cases concerning the issue of redeployment in redundancy cases.¹⁸⁵ The Court has taken the view that, when considering the issue in totality, the process and its outcome must be reviewed in order to determine whether the dismissal was actually justified.¹⁸⁶ Consequently, this approach to justification arguably reduces the strength of managerial prerogative in redundancy cases.

¹⁸⁰ *Air New Zealand v V* (Employment Court, Auckland, AC15.09, 3 June 2009, Chief Judge Colgan and Judges Travis, Shaw and Couch).

¹⁸¹ *Ibid*, at [1].

¹⁸² *Ibid*, at [37].

¹⁸³ See D Dickinson, "Good Faith and Justification: Where to Now in the Law of Redundancy", [2009] 8 ELB 115.

¹⁸⁴ *Ibid*.

¹⁸⁵ *Jinkinson v Oceana Gold New Zealand Limited* [2010] NZEmpC 102 (note this case has been granted leave to appeal) and *Wang v Hamilton Multicultural Services Trust* [2010] NZEmpC 142.

¹⁸⁶ See *Jinkinson v Oceana Gold New Zealand Limited* [2010] NZEmpC 102, at [37].

Although the test of justification has been amended since the *Air New Zealand* decision, there is nothing in the extrinsic material leading up to the Act's enactment that casts doubt on the Court's interpretation and approach. Therefore it is arguable that the approach adopted in the *Air New Zealand* decision may in fact survive the legislative change. Obviously subsequent judicial confirmation would be needed to substantiate this assertion. However, if this assertion is correct, although the legislative amendment to the test of justification arguably has little impact on redundancy law, the judicial approach to determining justification will to some extent diminish the power of the managerial prerogative in redundancy cases. Consequently, the assertion by some authors that the *Air New Zealand* decision potentially makes the enduring principles contained in *Hale* ready for "challenge, review or refinement"¹⁸⁷ seem more plausible.

However, if the recent legislative changes are an attempt to increase managerial prerogative in non- redundancy situations, it is unlikely that the current government would be supportive of any judicial interpretation in redundancy cases that effectively reduces managerial prerogative. Arguably, such an approach would potentially result in the government enacting legislation to reverse such an interpretation.

Given the recentness of the amendment of the test of justification, uncertainty surrounds how it will in fact be interpreted. As it stands at the moment, redundancy law remains an area of employment law where the ERA has arguably not fulfilled its objective of readdressing the balance of power in the employment relationship. The events that have occurred in the latter part of the last decade provide a useful illustration that employment relations do not happen in vacuity, rather they are influenced by a myriad of interrelated and finely balanced political, economic and social factors. Only time will tell precisely how this area of law will evolve.

¹⁸⁷ D Dickinson, above n 183, at 118.

Chapter Sixteen

A Portrait in Need of Restoration

This paper has taken the reader on a journey painting a picture of redundancy law in New Zealand from its historical roots to present day. In doing so the paper considered whether current substantive and procedural requirements for redundancy, as construed by the Courts, are in keeping with the intentions underpinning the ERA. Specific attention was placed on whether the law fits with the notion of good faith and whether it equally balances the rights of the employer and the employee.

A *Evolution of Redundancy Law*

The direction of redundancy law has been effected by the evolving political, social and economic environment in which it operates. As there is no comprehensive legislative code governing all redundancy situations in New Zealand, employees are forced to rely on the terms and conditions contained in their employment agreements for matters such as notice and compensation. This is unlike many jurisdictions which provide minimum levels of protection to employees affected by redundancy.¹ Despite numerous attempts to legislate in this area of employment law, no substantive and all encompassing law has ever eventuated.² The ideological stance of those in political power has not surprisingly influenced this. This is clearly evidenced by the approach of the respective political parties to the Advisory Group Report.³ Furthermore, the economic and social environment has played its part too. In times of economic prosperity the desire and motivation for making concrete improvements to

¹ For discussion see chapter two.

² See the discussion in: B Ewart and M Harcourt, "The Effects of Redundancy at a New Zealand Airline" [2000] 25(2) New Zealand Journal of Industrial Relations 151, 152-153. See also the discussion on the Minimum Entitlements Bill in chapter fifteen, part D.

redundancy law through permanent means has been negligible. Arguably this is due to a perceived absence of a need for change and therefore the impetus is lacking. Conversely, in times of economic adversity, although the drive for change is present, successive governments have feared the implications of legislative change on the business community. This is particularly so given the high percentage of small to medium businesses in operation which are arguably more exposed to risks associated with significant variances in economic fortune.⁴ Redundancy law clearly highlights the interplay between the business environment and the law.

The lack of legislative direction has given the judiciary substantial discretion and therefore flexibility to interpret the law. It has been the judiciary's role to balance the rights of the respective parties to the employment relationship. As a consequence of this the ideological stance of the judiciary also appears to have played a significant role in crafting its application.⁵ This assertion is demonstrated by the debate surrounding the payment of redundancy compensation.⁶ Ironically the judiciary acknowledged the need for redundancy law to be certain for all parties to the employment relationship,⁷ yet it has been their somewhat capricious and heavily fact specific approach that has aided uncertainty.⁸

³ See the discussion in chapter fifteen regarding this point.

⁴ See the discussion in chapters two and five regarding this point.

⁵ For discussion on this point see: R Nelson, "The Implied Term of Trust and Confidence: The Change in Approach of the Court of Appeal to the Requirement to Pay Redundancy Compensation" (2000) 31 Victoria University of Wellington Law Review 599, 602-603.

⁶ See the discussion in chapter twelve regarding redundancy compensation.

⁷ See the discussion on this point in: *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601, 617 as per Richardson P, Gault, Henry, Keith, Blanchard and Tipping JJ.

⁸ See chapters six to twelve for examples of uncertainty for each individual procedural element of redundancy law.

B The intention of the ERA

Although initially not addressing the issue of redundancy directly,⁹ the ERA promised much by way of addressing the balance of power within the employment relationship by promoting good faith and encouraging collectivism as well as seeking a commitment to international labour obligations.¹⁰

I Good Faith and Equality

The initial good faith provisions encapsulated within the ERA were not directed at redundancy law per se. They were an overarching concept which was directed at influencing and changing the way in which parties to an employment relationship work together.¹¹ Notwithstanding this, the concept of good faith had the power to curtail managerial prerogative in respect of how all aspects of the employment relationship were conducted, therefore indirectly it impacted on the law of redundancy.

At the ERA's inception, in order to address the inherent inequality of power within the employment relationship, collectivism was encouraged believing that this would weaken the managerial prerogative whilst strengthening and protecting the rights of employees. Terms and conditions of employment concerning matters such as redundancy notice and compensation would potentially be gained through collective bargaining. In order to encourage collectivism, the ERA limited good faith obligations in respect of IEAs.¹²

⁹ Note part 6A of the ERA was introduced in 2004 as well as the expanded duty of good faith in s 4. As outlined in chapter three and four, these provisions have direct implications for redundancy law in New Zealand.

¹⁰ See the discussion in chapters two and three regarding the intention of the ERA.

¹¹ M Wilson, "The Employment Relations Act: A Framework For A Fairer Way" in E Rasmussen (ed), *Employment Relationships: New Zealand's Employment Relations Act* (Auckland University Press, Auckland, 2004) 9, 17.

¹² See the discussion regarding this in chapter five.

However the rejuvenation of collectivism never transpired and as a consequence of this a significant majority of the New Zealand work force are employed under IEAs. As discussed in chapter five, an employee entering into an IEA often does not engage in negotiations rather just accepting the terms and condition offered. If negotiations are entered into, the issue of redundancy protections are not necessarily at the forefront of these negotiations. As noted, this situation creates vulnerability and a lack of balance within the employment relationship.¹³ Therefore, in this respect, the notion of good faith has not really assisted all employees to address the balance of power and provide employment protection as far as redundancy law is concerned.

However, the 2004 amendments to the ERA provided greater statutory guidance in respect of the meaning of good faith with express applicability being given to redundancy situations.¹⁴ Consequently, not only did good faith have the power to curtail managerial prerogative in general, but it also imposed specific requirements for consultation and information sharing in restructuring situations.¹⁵ Therefore, prima facie the concept of good faith restricts the power of managerial prerogative in this respect and appears to go some way to address the acknowledged inequality of power within an employment relationship: a matter which the ERA intended to remedy.

However, as evidenced in this discussion, notwithstanding the express legislative requirements, there remains some uncertainty regarding the interpretation of the provisions and, as noted in some cases, the requirements of good faith simply cannot be complied with.¹⁶ Furthermore, in cases of redundancy the judiciary have interpreted good faith

¹³ Ibid.

¹⁴ Note also the introduction of part 6A of the ERA.

¹⁵ There are limits placed on these requirements which are encapsulated in sections 4 (1B) and 4 (1C). These provisions are discussed in greater detail in chapter eight.

¹⁶ See the discussion in chapter eight, part H concerning the case of: *New Zealand Air Line Pilots Association Incorporated and Another v JetConnect Limited and Others*, (Employment Court, Auckland, AC23/09, 27 May 2009, Chief Judge Colgan).

provisions in such a way as to only restrict the employer's power in respect of process.¹⁷ The Courts approach to substantive justification and the protection of the managerial prerogative has arguably created the biggest obstacle for employees wishing to establish a personal grievance.¹⁸

Realistically the Courts interpretation of the law has traditionally meant that substantive justification plays a negligible part in establishing justifiability in cases involving redundancy. In addition to this, the onus appears to be on the employee to establish a lack of genuineness regarding the employer's decision to dismiss. This is particularly difficult for an employee to do. Therefore good faith has provided only limited assistance for employees alleging that they have been unjustifiably dismissed by reason of redundancy.¹⁹ Consequently, the inherent inequality of power between the parties remains.

II Amendments to the ERA

As discussed in chapter fifteen, the 2010 amendments to the ERA do not appear to really change the pre-existing law in respect of redundancy. The amendment to the test of justification seems to be directed at circumstances involving unjustifiable action or dismissal for cause, rather than redundancy situations. This is certainly evidenced by the list of procedural requirements in the new s 103A. If, as argued in this paper, the amendments do not change redundancy law, the status quo will remain.

As already noted, the status quo does not completely address the acknowledged inequality in power that exists within the employment relationship. As outlined in chapter thirteen,

¹⁷ See the discussion on each of the procedural elements in chapters six to twelve.

¹⁸ See the discussion in chapter thirteen regarding substantive justification.

¹⁹ *Ibid.*

substantive justification arguably plays a minimal part in redundancy cases. Therefore it makes the ability of an employee to challenge their employer's actions in an alleged redundancy case undersirable. The financial cost and emotional turmoil involved in pursuing an action seem somewhat fruitless. Although the law relating to managerial prerogative in redundancy situations has traditionally been very clear, the same can arguably not be true for the procedural aspects of redundancy law. The procedural uncertainties identified in this paper will remain without further clarification. It is somewhat ironic that an area of employment law which requires greater certainty of process is an area that seems to be missed from the legislative clarification of process in the test of justification. Arguably at this particular point in time it appears to be the judiciary that yet again holds the key to balancing the power in the employment relationship in redundancy cases. The Courts new approach to the current test of justification may in fact be the only real restriction placed on the arguably overbearing power of the managerial prerogative in redundancy cases.

C Addressing the Issues

The only conclusive way to address the issues identified is through legislation, either by amending the ERA, or through the introduction of a separate enactment. Specifically, some form of minimum level of notice and compensation should be provided to employees affected by redundancy. This would aid clarity, provide some form of employee protection whilst also adhering to international standards. Furthermore, clearer guidance should be available to both employers and employees about minimum standards in redundancy processes as well as what should be regarded as minimum support mechanisms. Support mechanisms whether coordinated through the governments current schemes or through a private provider, should be made available to all employees affected by redundancy. Arguably, this would help to not only reduce the impact of redundancy on individuals but it would also aid in providing some certainty for all parties to the employment relationship. Obviously there are costs associated with such a proposal and further research would be required in order to ascertain the source

of such funding. These recommendations conform to those contained in the Advisory Group Report,²⁰ which provide a solid foundation for further analysis.

Such an approach would be in keeping with the intention of the ERA as it would be a way of addressing the issue of employee protection whilst not impacting too negatively on managerial prerogative. It would arguably provide the balance of power within employment relationships that the ERA intended to achieve. Moreover, given the reasons outlined in chapter five, collectivism is unlikely to provide the immediate need of establishing protection for employees in redundancy situations. Therefore legislation would enable protection for all workers in New Zealand irrespective of the type of employment agreement they are governed by. Additionally, such an approach would accord with other OECD jurisdictions and the express desire as outlined in the ERA to encourage New Zealand's commitment to international labour obligations.

D The Image that Remains

In conclusion, despite the calls for clarity, balance and certainty, a somewhat murky, lopsided picture of redundancy law has emanated. The background of the picture depicts an operational environment which possesses a myriad of interrelated yet distinct factors each tussling for supremacy at the forefront of the scene. The ERA promised much. Its notion of good faith, equality and employee protection to be effected through collectivism provided the portraits subject with an aura of expectation. However, its gloss has started to fade as individualism has prospered and managerial prerogative has remained strong, with recent legislative changes potentially extending its reach. Consequently, the centerpiece of this picture appears to yet again be obscured from view. Given the magnitude and severity of the implications of redundancy for all New Zealanders, surely this centerpiece needs to be given prominence. Put simply, this aging picture requires restoration.

²⁰ See discussion in chapter fifteen. For a copy of the recommendations see appendix four.

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Appendices

Appendix One – Legislation & Regulations

Wage Adjustment Regulation 1974

Part IIIA, Regulation 45A (1):

- (a) A worker or state employee whose employment is terminated by his employer if that action of the employer is attributable, wholly or mainly, to the fact that the position filled by that worker or state employee has or will become superfluous to the needs of the employer.
- (b) A person who is employed, or is usually employed, as a seasonal worker in an export slaughterhouse and whose position has or will become superfluous to the needs of the employer; and “redundant” and “redundancy” have corresponding meanings.

Industrial Relations Amendment Act 1983

100 Prohibition on preference

- (1) Except as otherwise expressly provided in this Act, nothing in any award or in any collective agreement or in any agreement filed under section 141 of this Act or in any other agreement made between one or more workers or a union of workers or an organisation of workers and an employer or employers or a union of employers or an organisation of employers shall confer on any person, by reason of that person’s membership or non-membership of a union, -
 - a. Any preference in obtaining or retaining employment; or
 - b. Any preference in relation to terms of employment or conditions of employment or fringe benefits or opportunities for training, promotion, or transfer; or
 - c. Any preference in relation to the formula that will be used to access compensation for redundancy.

Labour Relations Act 1987

184 Redundancy

- (1) Any worker, union, employer, employers organisation, or association may, notwithstanding anything in any other section of this Act or in any award or agreement, at any time negotiate an agreement dealing with compensation for redundancy (in this Act referred to as a redundancy agreement).
- (2) If -
 - (a) There is no current registered redundancy agreement; or
 - (b) The award or agreement applicable to the workers concerned does not deal with compensation for redundancy –The Commission may register a redundancy agreement negotiated pursuant to subsection (1) of this section.
- (3) The Commission may register a redundancy agreement under subsection (2) of this section notwithstanding any other section of this Act and notwithstanding that, in respect of the workers covered by the redundancy agreement, a current award or agreement is registered.
- (4) [Subject to section 184A of this Act] any redundancy agreement registered by the Commission under this section shall have effect according to its tenor and may be enforced by the parties to it under this Act as if it were an agreement registered under section 164 of this Act.

[(4A) For the purposes of this section, the Commission shall consist only 3 Commissioners.]

- (5) In this section redundancy -
 - (a) Means a situation where -
 - (i) A worker's employment is terminated by the employer, the termination being attributable, wholly or mainly, to the fact that the position filled by that worker is, or will become, superfluous to the needs of the employer; or
 - (ii) In the case of a seasonal worker, that worker's usual seasonal employment is made unavailable by the employer, the unavailability being attributable, wholly or mainly, to the fact that the worker's position or usual position is, or will become, superfluous to the needs of the employer, but
 - (b) Does not include a situation solely involving a seasonal lay-off or the completion of a fixed term engagement.

[184A Restrictions on Compensation for Redundancy

- (1) Where a worker's employment is being terminated by his or her employer by reason only of the sale or transfer by the employer of the whole or part of the employer's business, nothing in any award or agreement or any registered redundancy agreement shall require the employer to pay compensation for redundancy to the worker if -
 - (a) The person acquiring the business or the part being sold or transferred -
 - (i) Has offered the worker employment in the business or the part being sold or transferred; and
 - (ii) Has agreed to treat service with the employer as if it were service with that person and as if it were continuous; and
 - (b) The conditions of employment offered to the worker by the person acquiring the business or part of the business being sold or transferred are the same as, or are no less favourable than, the worker's conditions of employment, including -
 - (i) Any service related conditions; and
 - (ii) Any conditions relating to redundancy; and
 - (v) Any conditions relating to superannuation –

Under the employment being terminated; and
 - (c) The offer of employment by the person acquiring the business or part of the business being sold or transferred is an offer to employ the worker in that business or that part of that business either -
 - (i) In the same capacity as that in which the worker was employed by his or her employer; or
 - (ii) In a capacity that the worker is willing to accept.
- (2) Nothing in subsection (1) of this section shall be construed as affecting the right of any worker, union, employer, employer organisation, or association to enter into at any time any agreement relating to redundancy.]

233 Strikes and lockouts in relation to dispute of interest

- (1) Subject to [section 234 (3)] of this Act, a strike or lockout shall be lawful if -
 - (a) It relates to a matter that is the subject of a dispute of interest created with intent to procure an award or agreement in substitution for an award or agreement and the date of expiry of that award or agreement is not more than 60 days after the date of the commencement of the strike or lockout; or
 - (b) It relates to a matter that is the subject of a dispute of interest created with intent to procure an award or agreement to cover workers not currently covered by an award or agreement; or
 - (c) It relates to a matter that the Labour Court has determined under section 180 of this Act is a new matter; or
 - (d) It relates to a dispute created with intent to procure a redundancy agreement and -
 - (i) There is no current redundancy agreement, or award or agreement dealing with compensation for redundancy, applying; and
 - (ii) The only workers involved in the strike or lockout are those of the employer to whom the redundancy agreement will apply [or]
 - [(e) It relates to a matter that is the subject of a dispute of interest created with intent to procure an enterprise agreement under section 165A of this Act]
- (2) A strike or lockout is lawful under subsection (1) of this section shall not give rise to proceedings founded on any of the torts specified in section 242(1) of this Act.

Employment Contracts Act 1991

Long Title

An Act to promote an efficient labour market and, in particular –

- (a) To provide for freedom of association:
- (b) To allow employees to determine who should represent their interests in relation to employment issues:
- (c) To enable each employee to choose either –
 - a. To negotiate an individual employment contract with his or her employer; or
 - b. To be bound by a collective employment contract to which his or her employer is a party:
- (d) To enable each employer to choose –
 - a. To negotiate an individual employment contract with any employee:
 - b. To negotiate to elect to be bound by a collective employment contract that binds 2 or more employees:
- (e) To establish that the question of whether employment contracts are individual or collective or both is itself a matter for negotiation by the parties themselves:
- (f) To repeal the Labour Relations Act 1987

Appendix Two: International Conventions & Recommendations

C158 Termination of Employment Convention, 1982

Source: C158 Termination of Employment Convention, 1982 <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C158>> at 21 August 2009

Convention concerning Termination of Employment at the Initiative of the Employer (Note: Date of coming into force 23:11:1985)

Convention: C158

Place: Geneva

Session of the Conference: 68

Date of adoption: 22:06:1982

Subject classification: Termination of Employment – Dismissal

Subject: Employment security

The Geneva Conference of the International Labour Organisation, Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Sixty-eighth Session on 2 June 1982, and Noting that since the adoption of the Termination of Employment Recommendation, 1963, significant developments have occurred in the law and practice of many member States on the questions covered by that Recommendation, and Considering that these developments have made it appropriate to adopt new international standards on the subject, particularly having regard to the serious problems in this field resulting from the economic difficulties and technological changes experienced in recent years in many countries, Having decided upon the adoption of certain proposals with regard to termination of employment at the initiative of the employer, which is the fifth item on the agenda of the session, and Having determined that these proposals shall take the form of an international Convention; Adopts this twenty-second day of June of the year one thousand nine hundred and eighty-two the following Convention, which may be cited as the Termination of Employment Convention, 1982:

PART 1. METHODS OF IMPLEMENTATION, SCOPE AND DEFINITIONS

Article 1

The provisions of this Convention shall, in so far as they are not otherwise made effect by means of collective agreements, arbitration awards or court decisions or in such other manner as may be consistent with national practice, be given effect by laws or regulations.

Article 2

- 1 This Convention applied to all branches of economic activity and to all employed persons.
- 2 A Member may exclude the following categories of employed persons from all or some of the provisions of this Convention:
 - (b) workers engaged under a contract of employment for a specified period of time or a specified task;
 - (c) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;
 - (d) workers engaged on a casual basis for a short period.
- 3 Adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention.
- 4 In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention, or certain provision thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements which as a whole provide protection that is at least equivalent to the protection afforded under the Convention.
- 5 In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist to exclude for the application of this Convention or certain provisions thereof other limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them.
- 6 Each Member which ratifies this Convention shall list in the first report on the application of the Convention submitted under Article 22 of the Constitution of the International Labour Organisation any categories which may have been excluded in pursuance of paragraphs 4 and 5 of this Article, giving reasons for such exclusion, and shall state in subsequent reports the position of its law and practice regarding the categories excluded, and the extent to which effect has been given or is proposed to be given to the Convention in respect of such categories.

Article 3

For the purpose of this Convention the terms *termination* and *termination of employment* means termination of employment at the initiative of the employer.

PART 2. STANDARD OF GENERAL APPLICATION

DIVISION A: JUSTIFICATION OF TERMINATION

Article 4

The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity of conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

Article 5

The following, inter alia, shall not constitute valid reasons for termination:

- (a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;
- (b) seeking office as, or acting or having acted in the capacity of, a workers' representative;
- (c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws of regulations or recourse to competent administrative authorities;
- (d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- (e) absence from work during maternity leave.

Article 6

- 1 Temporary absence from work because of illness or injury shall not constitute a valid reason for termination.
- 2 The definition of what constitutes temporary absence from work, the extent to which medical certification shall be required and possible limitations to the application of paragraph 1 of this Article shall be determined in accordance with the methods of implementation referred to in Article 1 of this Convention.

DIVISION B: PROCEDURE PRIOR TO OR AT THE TIME OF TERMINATION

Article 7

The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.

DIVISION C: PROCEDURE OF APPEAL AGAINST TERMINATION

Article 8

- 1 A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.
- 2 Where termination has been authorized by a competent authority the application of paragraph 1 of this Article may be varied according to national law and practice.
- 3 A worker may be deemed to have waived his right to appeal against termination of his employment if he has not exercised that right within a reasonable period of time after termination.

Article 9

- 1 The bodies referred to in Article 8 of this Convention shall be empowered to examine the reasons given for the termination and the other circumstance relating to the case and to render a decision on whether the termination was justified.
- 2 In order for the worker not to have to bear alone the burden of proving that the termination was not justified, the methods of implementation referred to in Article 1 of this Convention shall provide for one or the other or both of the following possibilities:
 - (a) the burden of proving the existence of a valid reason for the termination as defined in Article 4 of this Convention shall rest on the employer;
 - (b) the bodies referred to in Article 8 of this Convention shall be empowered to reach a conclusion on the reasons for the termination having regard to the evidence provided by the parties and according to procedures provided for by national law and practice.
- 3 In cases of termination stated to be for reasons based on the operational requirements of the undertaking, establishment or service, the bodies referred to in Article 8 of this Convention shall be empowered to decide whether these reasons are sufficient to justify that termination shall be determined by the methods of implementation referred to in Article 1 of this Convention.

Article 10

If the bodies referred to in Article 8 of this Convention find that termination is unjustified and if they are not empowered or do not find it practicable, in accordance with national law and practice, to declare the termination invalid and/or order or propose reinstatement of the worker, they shall be empowered to order payment of adequate compensation or such relief as may be deemed appropriate.

DIVISION D: PERIOD OF NOTICE

Article 11

A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period.

DIVISION E: SEVERANCE ALLOWANCE AND OTHER INCOME PROTECTION

Article 12

- 1 A worker whose employment has been terminated shall be entitled, in accordance with national law and practice, to -
 - (a) a severance allowance or other separation benefits, that amount of which shall be based inter alia on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employer's contributions; or
 - (b) benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or
 - (c) a combination of such allowance and benefits.
- 2 A worker who does not fulfill the qualifying conditions for unemployment insurance or assistance under a scheme of general scope need not be paid any allowance or benefit referred to in paragraph 1, subparagraph (a) of this Article solely because he is not receiving an unemployment benefit under paragraph 1, subparagraph (b).
- 3 Provision may be made by the methods of implementation referred to in Article 1 of this Convention for loss of entitlement to the allowance or benefits referred to in paragraph 1, subparagraph (a), of this Article in the event of termination for serious misconduct.

PART 111. SUPPLEMENTARY PROVISIONS CONCERNING TERMINATIONS OF EMPLOYMENT FOR ECONOMIC, TECHNICAL, STRUCTURAL OR SIMILAR REASONS

DIVISION A: CONSULTATION OF WORKERS' REPRESENTATIVES

Article 13

- 1 When the employer contemplates terminations for reasons of economic, technological, structural or similar nature, the employer shall:
 - (a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;
 - (b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimize the terminations and measures to mitigate the adverse

effects of any terminations on the workers concerned such as finding alternative employment.

- 2 The applicability of paragraph 1 of this Article may be limited by the methods of implementation referred to in Article 1 of this Convention to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.
- 3 For the purposes of this Article the term the workers' representatives concerned means the workers' representatives recognised as such by national law or practice, in conformity with the Workers' Representatives Convention, 1971.

DIVISION B: NOTIFICATION TO THE COMPETENT AUTHORITY

Article 14

- 1 When the employer contemplates terminations for reasons of economic, technological, structural or similar nature, he shall notify, in accordance with national law and practice, the competent authority thereof as early as possible, giving relevant information, including a written statement of the reasons for the terminations, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out.
- 2 National laws or regulations may limit the applicability of paragraph 1 of this Article to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.
- 3 The employer shall notify the competent authority of the terminations referred to in paragraph 1 of this Article a minimum period of time before carrying out the terminations, such period to be specified by national laws or regulations.

PART 1V. FINAL PROVISIONS

Article 15

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 16

- 1 This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.
- 2 It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.
- 3 Therefore, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

Article 17

- 1 A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration.

Such denunciations shall not take effect until one year after the date on which it is registered.

- 2 Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 18

- 1 The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and denunciations communicated to him by the Members of the Organisation.
- 2 When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 19

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with article 102 of the Charter of the United Nations full particulars of all ratifications and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.

Article 20

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 21

- 1 Should the Conference adopt a new Constitution revising this Convention in whole or in part, then, unless the new Convention otherwise provides-
 - (a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 17 above, if and when the new revising Convention shall have come into force;
 - (b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.
- 2 This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 22

The English and French versions of the text of this Convention are equally authoritative.

R166 Termination of Employment Recommendation, 1982

Source: R166 Termination of Employment Recommendation, 1982
<<http://www.ilo.org/ilolex/cgi-lex/convde.pl?R166>> at August 2009.

Recommendation concerning Termination of Employment at the Initiative of the Employer

Recommendation: R166

Place: Geneva

Session of the Conference: 68

Date of adoption: 22:06:1982

Subject classification: Termination of Employment – Dismissal

Subject: Employment security

The Geneva Conference of the International Labour Organisation,
Having been convened at Geneva by the Governing Body of the International Labour Office,
and having met in its Sixty-eighth Session on 2 June 1982, and
Having decided upon the adoption of certain proposals with regard to termination of
employment at the initiative of the employer, which is the fifth item on the agenda of the
session, and
Having determined that these proposals shall take the form of a Recommendation
supplementing the Termination of Employment Convention, 1982;
adopts this twenty-second day of June of the year one thousand nine hundred and eighty-two
the following Recommendation, which may be cited as the Termination of Employment
Recommendation, 1982:

PART 1. METHODS OF IMPLEMENTATION, SCOPE AND DEFINITIONS

- 1 The provisions of this Recommendation may be applied by national laws or regulations, collective agreements, work rules, arbitration awards or court decisions or in such other manner consistent with national practice as may be appropriate under national conditions.
2.
 - (1) This Recommendation applied to all branches of economic activity and to all employed persons.
 - (2) A Member may exclude the following categories of employed persons from all or some of the provisions of this Recommendation:
 - (a) workers engaged under a contract of employment for a specified period of time or a specified task;
 - (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;
 - (c) workers engaged on a casual basis for a short period.

- (3) In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Recommendation or certain provision thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements which as a whole provide protection that is at least equivalent to the protection afforded under the Recommendation.
- (4) In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude for the application of this Recommendation or certain provisions thereof other limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them.

3

- (1) Adequate safeguards should be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from the Termination of Employment Convention, 1982, and this Recommendation.
- (2) To this end, for example, provision may be made for one or more of the following:
 - (a) limiting recourse to contracts for a specified period of time to cases in which, owing either to the nature of the work to be effected or to the circumstances under which it is to be effected or to the interests of the worker, the employment relationship cannot be of indeterminate duration;
 - (b) deeming contracts for a specified period of time, other than in the cases referred to in clause (a) of this subparagraph, to be contracts of employment of indeterminate duration;
 - (c) deeming contracts for a specified period of time, when renewed on one or more occasions, other than in the cases mentioned in clause (a) of this subparagraph, to be contracts of employment of indeterminate duration.
- (3) For the purposes of this Recommendation the term *termination* and *termination of employment* means termination of employment at the initiative of the employer.

PART II. STANDARDS OF GENERAL APPLICATION

Justification for Terminations

5. In addition to the grounds referred to in Article 5 of the Termination of Employment Convention, 1982, the following should not constitute valid reasons for termination:
 - (a) age, subject to national law and practice regarding retirement;
 - (b) absence from work due to compulsory military service or other civic obligations, in accordance with national law and practice.

6

- (1) Temporary absence from work because of illness or injury should not constitute a valid reason for termination.
- (2) The definition of what constitutes temporary absence from work, the extent to which medical certification should be required and possible limitations to the application of subparagraph (1) of this Paragraph should be determined in accordance with the methods of implementation referred to in Paragraph 1 of this Recommendation.

Procedure Prior to or at the Time of Termination

7. The employment of a worker should not be terminated for misconduct of a kind that under national law or practice would justify termination only if repeated on one or more occasions, unless the employer has given the worker appropriate written warning.
8. The employment of a worker should not be terminated for unsatisfactory performance, unless the employer has given the worker appropriate instructions and written warning and the worker continues to perform his duties unsatisfactorily after a reasonable period of time for improvement has elapsed.
9. A worker should be entitled to be assisted by another person when defending himself, in accordance with Article 7 of the Termination of Employment Convention, 1982, against allegations regarding his conduct or performance liable to result in the termination of his employment; this right may be specified by the methods of implementation referred to in Paragraph 1 of this Recommendation.
10. The employer should be deemed to have waived his right to terminate the employment of a worker for misconduct if he has failed to do so within a reasonable period of time after he has knowledge of the misconduct.
11. The employer may consult workers' representatives before a final decision is taken on individual cases of termination of employment.
12. The employer should notify a worker in writing of a decision to terminate his employment.

13

- (1) A worker who has been notified of termination of employment or whose employment has been terminated should be entitled to receive, on request, a written statement from his employer of the reason or reasons for the termination.
- (2) Subparagraph (1) of this Paragraph need not be applied in the case of collective termination for the reasons referred to in Article 13 and 14 of the Termination of Employment Convention, 1982, if the procedure for therein is followed.

Procedure of Appeal against Termination

14. Provision may be made for recourse to a procedure of conciliation before or during appeal proceedings against termination of employment.
15. Efforts should be made by public authorities, workers' representatives and organisations of workers to ensure that workers are fully informed of the possibilities of appeal at their disposal.

Time Off from Work during the Period of Notice

16. During the period of notice referred to in Article 11 of the Termination of Employment Convention, 982, the worker should, for the purpose of seeking other employment, be entitled to a reasonable amount of time off without loss of pay, taken at times that are convenient to both parties.

Certificate of Employment

17. A worker whose employment has been terminated should be entitled to receive, on request, a certificate from the employer specifying only the dates of his engagement and termination of his employment and the types of work on which he was employed; nevertheless, and at the request of the worker, an evaluation of his conduct and performance may be given in this certificate or in a separate certificate.

Severance Allowance and Other Income Protection

18.

- (1) A worker whose employment has been terminated should be entitled, in accordance with national law and practice, to –
 - (a) a severance allowance or other separation benefits, the amount of which should be based, inter alia, on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions; or
 - (b) benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or
 - (c) a combination of such allowance and benefits.
- (2) A worker who does not fulfill the qualifying conditions for unemployment insurance or assistance under a scheme of general scope need not be paid any allowance or benefit referred to in subparagraph (1) (a) of this Paragraph solely because he is not receiving an unemployment benefit under subparagraph (1) (b).

- (3) Provision may be made by the methods of implementation referred to in Paragraph 1 of this Recommendation for loss of entitlement to the allowance or benefits referred to in subparagraph (1)(a) of this Paragraph in the event of termination for serious misconduct.

PART III. SUPPLEMENTARY PROVISIONS CONCERNING TERMINATION OF EMPLOYMENT FOR ECONOMIC, TECHNOLOGICAL, STRUCTURAL OR SIMILAR REASONS

19.

- (1) All parties concerned should seek to avert or minimize as far as possible termination of employment for reasons of economic, technological, structural or similar nature, without prejudice to the efficient operation of the undertaking, establishment or service, and to mitigate the adverse effects of any termination of employment for these reasons on the worker or workers concerned.
- (2) Where appropriate, the competent authority should assist the parties in seeking solutions to the problems raised by the terminations contemplated.

Consultation on Major Changes in the Undertaking

20.

- (1) When the employer contemplates the introduction of major changes in production, programme, organisation, structure or technology that are likely to entail terminations, the employer should consult workers' representatives concerned as early as possible, inter alia, the introduction of such changes, the effect they are likely to have and the measures for averting or mitigating the adverse effects of such changes.
- (2) To enable the workers' representatives concerned to participate effectively in the consultations referred to in subparagraph (1) of this Paragraph, the employer should supply them in good time with all relevant information on the major changes contemplated and the effects they are likely to have.
- (3) For the purposes of this Paragraph the term the workers' representatives concerned means the workers' representatives recognised as such by national law or practice, in conformity with the Workers' Representatives Convention, 1971.

Measures to Avert or Minimise Termination

21. The measures which should be considered with a view to averting or minimizing terminations of employment for reasons of an economic, technological, structural or similar nature might include, inter alia, restrictions of hiring, spreading the workforce reduction over a certain period of time to permit natural reduction of the workforce, internal transfers, training and retaining, voluntary early retirement with appropriate income protection, restriction of overtime and reduction of normal hours of work.
22. Where it is considered that a temporary reduction of normal hours of work would be likely to avert or minimise terminations of employment due to temporary economic difficulties, consideration should be given to partial compensation for loss of wages for

normal hours not worked, financed by methods appropriate under national law and practice.

Criteria for Selection for Termination

23.

- (1) The selection by the employer of workers whose employment is to be terminated for reasons of economic, technological, structural or similar nature should be made according to criteria, established wherever possible in advance, which give due weight both to the interests of undertaking, establishment or service and to the interests of the workers.
- (2) These criteria, their order of priority and their relative weight, should be determined by the methods of implementation referred to in Paragraph 1 of this Recommendation.

Priority of Rehiring

24.

- (1) Workers whose employment has been terminated for reasons of an economic, technological, structural or similar nature, should be given a certain priority of rehiring if the employer again hires workers with comparable qualifications, subject to their having, within a given period from the time of their leaving, expressed a desire to be rehired.
- (2) Such priority of rehiring may be limited to a specified period of time.
- (3) The criteria for the priority of rehiring, the question of retention of rights-particularly seniority rights-in the event of rehiring, as well as the terms governing the wages of rehired workers, should be determined according to the methods of implementation referred to in Paragraph 1 of this Recommendation.

Mitigating the Effects of Termination

25.

- (1) In the event of termination of employment for reasons of an economic, technological, structural or similar nature, the placement of the workers affected in suitable alternative employment as soon as possible, with training or retraining where appropriate, should be promoted by measures suitable to national circumstances, to be taken by the competent authority, where possible with the collaboration of the employer and the workers' representatives concerned.
- (2) Where possible, the employer should assist the workers affected in the search for suitable alternative employment, for example through direct contacts with other employers.
- (3) In assisting the workers affected in obtaining suitable alternative employment or training or retraining, regard may be had to the Human Resources Development Convention and Recommendation, 1975.

26.

- (1) With a view to mitigating the adverse effects of termination of employment for reasons of an economic, technological, structural or similar nature, consideration should be given to providing income protection during any course of training or retraining and partial or total

reimbursement of expenses connected with training or retraining and with finding and taking up employment which requires a change of residence.

- (2) The competent authority should consider providing financial resources to support in full or part the measure referred to in subparagraph (1) of this Paragraph, in accordance with national law and practice.

IV EFFECT ON EARLIER RECOMMENDATION

27. This Recommendation and the Termination of Employment Convention, 1982, supersede the Termination of Employment Recommendation, 1963.

Appendix Three: Analysed IRC Data

Data Source:

The following information is taken directly from data collected and published by the Industrial Relations Centre of Victoria University of Wellington between the years 1999 and 2009. Specifically the following data sources have been used to create the tables in this Appendix:

- Blumenfeld, S Ryall and P Kiely, *Employment Agreements: Bargaining Trends & Employment Law Update 2008/2009* (Industrial Relations Centre, Victoria University of Wellington, 2009).
- G Lafferty and P Kiely, *Employment Agreements: Bargaining Trends & Employment Law Update 2007/2008* (Industrial Relations Centre, Victoria University of Wellington, 2008).
- L Blackwood, G Feinberg-Danieli, G Lafferty, P O'Neil, J Bryson and P Kiely, *Employment Agreements: Bargaining Trends & Employment Law Update 2006/2007* (Industrial Relations Centre, Victoria University of Wellington, 2007).
- L Blackwood, G Feinberg-Danieli, G Lafferty and P Kiely, *Employment Agreements: Bargaining Trends & Employment Law Update 2005/2006* (Industrial Relations Centre, Victoria University of Wellington, 2006).
- L Blackwood, G Feinberg-Danieli, G Lafferty and P Kiely, *Employment Agreements: Bargaining Trends & Employment Law Update 2004/2005* (Industrial Relations Centre, Victoria University of Wellington, 2005).
- R May, P Walsh and P Kiely, *Employment Agreements: Bargaining Trends & Employment Law Update 2003/2004* (Industrial Relations Centre, Victoria University of Wellington, 2004).
- G Thickett, R Harbridge, Pat Walsh and P Kiely, *Employment Agreements: Bargaining Trends & Employment Law Update 2002/2003* (Industrial Relations Centre, Victoria University of Wellington, 2003).
- G Thickett, R Harbridge, Pat Walsh and P Kiely, *Employment Agreements: Bargaining Trends & Employment Law Update 2001/2002* (Industrial Relations Centre, Victoria University of Wellington, 2002).

- R Harbridge, G Thickett and P Kiely, *Employment Agreements: Bargaining Trends & Employment Law Update 2000/2001* (Industrial Relations Centre, Victoria University of Wellington, 2001).
- R Harbridge, A Crawford and P Kiely, *Employment Agreements: Bargaining Trends & Employment Law Update 1999/2000* (Industrial Relations Centre, Victoria University of Wellington, 2000).

General Limitations Associated with the Data

It is important to note that there are some limitations associated with the data that has been analysed. The limitations are taken directly from the IRC reports and are relevant to the data incorporated in this analysis:

- All contracts received from employers, unions and bargaining agents are obtained on a voluntary basis. Therefore, as some employers and unions decline to participate the data collected is incomplete.
- The analysis focuses only on collectivised sectors. Although the IRC analyse the reach or influence of collective terms and conditions on individual employment agreements this data has not been included in this particular data analysis.
- The sample of contracts for which the IRC base their analysis continues to grow.
- Collective bargaining coverage is considerably higher in the public sector compared with the private sector. This bias needs to be considered when reviewing the data.
- Bargaining is a process of negotiation. Therefore in order to achieve one objective a concession in another area may be given. This could explain some significant changes from one year to the next in respect of data relating to specific industries.

Specific Limitations:

- **2000/2001¹** – With the introduction of the ERA there were some 700 collective employment agreements which had not been re-negotiated. In reviewing wage increments these agreements were removed from the data set. However, they were retained in the data for determining terms and conditions of employment. The IRC felt that this approach was a fair representation of the situation. However, it was

¹ R Harbridge, G Thickett and P Kiely, “Employment Agreements: Bargaining Trends & Employment Law Update 2000/2001” (Industrial Relations Centre, Victoria University of Wellington, 2001).

noted that due to the new bargaining rules that were applicable since October 2000, the contracts would subsequently be removed from the live system.²

- **2001/2002³** – The data presented for this period includes settlements (being employment contracts and employment agreements combined) and employment agreements separately. There was a compositional difference between the two data sets. This period was a transitional period between employment contracts and employment agreements and the timing of negotiations had the effect of skewing the data. This means that particular care is needed when reviewing the data on agreements as there was a considerable public sector effect.⁴ Note that for the purposes of this data analysis only the data on settlements was utilised.

Note:

- The data presented by the IRC is reported by the institutional sector and by industry classification. The Australia New Zealand Standard Industrial Classification (ANZSIC) system is used.
- The data reported is based on settlements (where applicable: contracts and agreements combined). As noted in the Specific Limitation section this is particularly relevant when considering the data for the period 2001-2002.

² Ibid 13.

³ G Thickett, R Harbridge, Pat Walsh and P Kiely, “Employment Agreements: Bargaining Trends & Employment Law Update 2001/2002” (Industrial Relations Centre, Victoria University of Wellington, 2002).

⁴ Ibid 13.

Part A: Provisions Relating to Notice

Redundancy Notice Provisions by Sector

Table AA1: Redundancy Notice Provision – All Settlements

Redundancy Notice Provision - All Settlements*							
	Under 4 Weeks	4 Weeks	5 to 8 Weeks	More than 8 Weeks	Other	Silent	Coverage (000s)
99/00	10%	55%	17%	4%	3%	12%	363.0
00/01	10%	55%	13%	4%	1%	17%	350.1
01/02*	9%	58%	10%	4%	1%	18%	352.4
02/03	8%	53%	18%	4%	1%	16%	289.9
03/04	5%	51%	19%	5%	1%	20%	269.0
04/05	6%	52%	18%	5%	1%	18%	272.9
05/06	5%	55%	18%	4%	1%	17%	297.1
06/07	7%	57%	19%	4%	0%	13%	287.4
07/08	6%	61%	16%	3%	0%	12%	312.7
08/09	6%	62%	26%	3%	0%	3%	269.3

Table AA2: Redundancy Notice Provision – Private Sector

Redundancy Notice - Private Sector							
	Under 4 Weeks	4 Weeks	5 to 8 Weeks	More than 8 Weeks	Other	Silent	Coverage (000s)
99/00	13%	62%	16%	1%	5%	3%	201.2
00/01	13%	66%	16%	1%	2%	2%	193.8
01/02*	12%	69%	13%	1%	2%	3%	190.4
02/03	11%	65%	19%	1%	1%	3%	133.1
03/04	5%	66%	24%	0%	1%	3%	108.9
04/05	6%	65%	23%	1%	2%	3%	110.4
05/06	7%	64%	22%	3%	1%	3%	114.5
06/07	9%	65%	22%	2%	0%	3%	121.6
07/08	8%	71%	16%	1%	1%	3%	139.7
08/09	8%	72%	16%	1%	0%	3%	122.4

Table AA3: Redundancy Notice Provision – Government Core

Redundancy Notice - Government Core							
	Under 4 Weeks	4 Weeks	5 to 8 Weeks	More than 8 Weeks	Other	Silent	Coverage (000s)
99/00	1%	44%	19%	9%	1%	26%	135.8
00/01	0%	41%	9%	9%	11%	40%	132.3
01/02*	1%	42%	8%	8%	0%	41%	137.6
02/03	0%	43%	18%	9%	0%	30%	137.4
03/04	0%	40%	17%	8%	0%	34%	139.5
04/05	0%	42%	17%	9%	0%	32%	141.4
05/06	0%	49%	17%	5%	0%	28%	160.4
06/07	1%	52%	19%	6%	0%	23%	143.8
07/08	0%	53%	18%	6%	0%	22%	150.4
08/09	0%	53%	39%	5%	0%	3%	128.2

Table AA4: Redundancy Notice Provision – Government Trading

Redundancy Notice - Government Trading							
	Under 4 Weeks	4 Weeks	5 to 8 Weeks	More than 8 Weeks	Other	Silent	Coverage (000s)
99/00	72%	21%	0%	4%	0%	3%	9.5
00/01	77%	17%	0%	3%	0%	3%	9.7
01/02*	77%	15%	0%	4%	0%	4%	9.7
02/03	79%	11%	0%	4%	0%	6%	8.9
03/04	78%	16%	0%	4%	0%	2%	9.4
04/05	75%	18%	0%	4%	0%	3%	8.5
05/06	75%	18%	0%	4%	0%	3%	8.5
06/07	78%	16%	0%	4%	0%	2%	8.2
07/08	78%	16%	0%	4%	0%	2%	8.2
08/09	83%	12%	0%	4%	0%	0%	7.7

Table AA5: Redundancy Notice Provision – Local Government Core

Redundancy Notice - Local Government Core							
	Under 4 Weeks	4 Weeks	5 to 8 Weeks	More than 8 Weeks	Other	Silent	Coverage (000s)
99/00	5%	76%	10%	4%	0%	5%	10.6
00/01	2%	82%	7%	4%	0%	5%	9.5
01/02*	2%	82%	4%	1%	0%	11%	10.0
02/03	3%	74%	2%	2%	0%	19%	7.4
03/04	2%	77%	2%	1%	0%	18%	8.2
04/05	2%	77%	3%	1%	0%	17%	9.0
05/06	2%	75%	5%	2%	0%	17%	9.0
06/07	2%	81%	4%	2%	0%	11%	10.4
07/08	2%	81%	5%	2%	0%	11%	10.6
08/09	2%	88%	8%	2%	0%	1%	8.6

Table AA6: Redundancy Notice Provision – Local Government Trading

Redundancy Notice - Local Government Trading							
	Under 4 Weeks	4 Weeks	5 to 8 Weeks	More than 8 Weeks	Other	Silent	Coverage (000s)
99/00	16%	70%	7%	4%	1%	2%	5.8
00/01	18%	68%	7%	2%	1%	4%	4.8
01/02*	20%	68%	5%	0%	2%	5%	4.7
02/03	24%	64%	5%	0%	2%	5%	3.1
03/04	32%	54%	7%	0%	1%	6%	3.0
04/05	29%	59%	6%	0%	1%	5%	3.6
05/06	20%	49%	26%	0%	1%	5%	4.6
06/07	23%	63%	5%	0%	1%	8%	3.4
07/08	25%	67%	4%	0%	1%	3%	3.7
08/09	23%	58%	6%	9%	2%	2%	2.4

Redundancy Notice Provisions by Industry

Table AA7: Redundancy Notice Provision – Agricultural Industry

Redundancy Notice - Agriculture etc							
	Under 4 Weeks	4 Weeks	5 to 8 Weeks	More than 8 Weeks	Other	Silent	Coverage (000s)
99/00	0%	88%	8%	0%	0%	4%	0.5
00/01	0%	90%	5%	0%	0%	5%	0.4
01/02*	0%	74%	4%	0%	0%	22%	0.6
02/03	3%	65%	0%	0%	0%	32%	0.3
03/04	2%	82%	0%	0%	0%	15%	0.5
04/05	2%	93%	0%	0%	0%	5%	0.5
05/06	2%	92%	0%	0%	0%	5%	0.4
06/07	0%	100%	0%	0%	0%	0%	0.3
07/08	0%	100%	0%	0%	0%	0%	0.4
08/09	0%	68%	22%	0%	0%	10%	0.5

Table AA8: Redundancy Notice Provision – Mining

Redundancy Notice - Mining							
	Under 4 Weeks	4 Weeks	5 to 8 Weeks	More than 8 Weeks	Other	Silent	Coverage (000s)
99/00	7%	49%	0%	2%	0%	42%	1.2
00/01	23%	34%	0%	2%	0%	41%	1.2
01/02*	28%	31%	0%	2%	0%	39%	1.2
02/03	23%	66%	0%	4%	0%	7%	0.8
03/04	19%	69%	2%	4%	0%	6%	0.8
04/05	20%	69%	1%	3%	0%	7%	1.2
05/06	15%	74%	1%	3%	0%	7%	1.2
06/07	14%	74%	2%	1%	0%	9%	0.7
07/08	8%	85%	1%	1%	0%	5%	1.4
08/09	27%	61%	3%	0%	0%	10%	0.5

Table AA9: Redundancy Notice Provision – Food Manufacturing

Redundancy Notice - Food Manufacturing							
	Under 4 Weeks	4 Weeks	5 to 8 Weeks	More than 8 Weeks	Other	Silent	Coverage (000s)
99/00	3%	80%	11%	0%	0%	6%	18.5
00/01	2%	87%	9%	0%	0%	2%	19.5
01/02*	1%	84%	10%	0%	0%	5%	20.2
02/03	0%	85%	10%	0%	0%	5%	20.0
03/04	0%	81%	12%	0%	0%	7%	18.0
04/05	2%	81%	11%	0%	0%	6%	18.5
05/06	2%	79%	13%	0%	0%	7%	17.2
06/07	3%	78%	13%	0%	0%	6%	18.0
07/08	3%	81%	10%	0%	0%	6%	22.6
08/09	2%	84%	7%	0%	0%	7%	18.7

Table AA10: Redundancy Notice Provision – Textile Manufacturing

Redundancy Notice - Textile Manufacturing							
	Under 4 Weeks	4 Weeks	5 to 8 Weeks	More than 8 Weeks	Other	Silent	Coverage (000s)
99/00	18%	66%	11%	0%	2%	3%	8.0
00/01	19%	61%	13%	1%	3%	3%	6.9
01/02*	21%	69%	2%	1%	1%	6%	6.1
02/03	17%	68%	3%	1%	2%	9%	3.9
03/04	15%	72%	3%	0%	3%	8%	3.4
04/05	17%	70%	3%	0%	2%	8%	3.5
05/06	24%	66%	3%	0%	3%	5%	3.7
06/07	21%	69%	1%	0%	3%	6%	3.5
07/08	14%	75%	1%	0%	4%	7%	3.8
08/09	18%	73%	1%	0%	2%	7%	3.5

Table AA11: Redundancy Notice Provision – Wood & Paper Manufacturing

Redundancy Notice - Wood & Paper Manufacturing							
	Under 4 Weeks	4 Weeks	5 to 8 Weeks	More than 8 Weeks	Other	Silent	Coverage (000s)
99/00	3%	88%	4%	0%	0%	5%	6.3
00/01	4%	85%	6%	0%	0%	5%	5.6
01/02*	6%	87%	5%	0%	0%	2%	6.0
02/03	4%	87%	8%	0%	0%	1%	5.9
03/04	3%	88%	7%	0%	0%	2%	5.3
04/05	3%	85%	8%	0%	0%	4%	5.7
05/06	3%	84%	8%	0%	0%	4%	6.0
06/07	3%	82%	10%	0%	0%	4%	5.7
07/08	3%	81%	10%	0%	0%	5%	5.6
08/09	5%	81%	10%	0%	0%	4%	4.8

Table AA12: Redundancy Notice Provision – Printing

Redundancy Notice - Printing							
	Under 4 Weeks	4 Weeks	5 to 8 Weeks	More than 8 Weeks	Other	Silent	Coverage (000s)
99/00	15%	72%	3%	0%	4%	6%	6.2
00/01	14%	75%	3%	0%	3%	5%	5.5
01/02*	14%	77%	6%	0%	1%	2%	5.5
02/03	10%	77%	9%	0%	2%	2%	3.4
03/04	10%	67%	19%	0%	1%	3%	3.6
04/05	11%	72%	13%	0%	2%	2%	3.6
05/06	10%	73%	14%	0%	2%	2%	3.6
06/07	10%	68%	21%	0%	0%	1%	3.5
07/08	13%	65%	20%	0%	0%	1%	3.6
08/09	10%	60%	29%	0%	0%	0%	2.5

Table AA13: Redundancy Notice Provision – Chemical Manufacturing

Redundancy Notice - Chemical Manufacturing							
	Under 4 Weeks	4 Weeks	5 to 8 Weeks	More than 8 Weeks	Other	Silent	Coverage (000s)
99/00	2%	94%	2%	1%	1%	0%	11.7
00/01	1%	96%	1%	1%	1%	0%	10.8
01/02*	1%	96%	0%	1%	2%	0%	11.1
02/03	0%	85%	5%	0%	9%	1%	3.9
03/04	0%	85%	6%	0%	8%	0%	3.6
04/05	0%	87%	5%	0%	8%	0%	4.1
05/06	0%	90%	4%	0%	5%	0%	5.2
06/07	8%	89%	2%	0%	0%	0%	5.4
07/08	0%	90%	2%	0%	8%	0%	5.4
08/09	1%	86%	3%	0%	10%	0%	4.2

Table AA14: Redundancy Notice Provision – Mineral Manufacturing

Redundancy Notice - Mineral Manufacturing							
	Under 4 Weeks	4 Weeks	5 to 8 Weeks	More than 8 Weeks	Other	Silent	Coverage (000s)
99/00	2%	62%	25%	0%	7%	4%	1.3
00/01	1%	67%	21%	0%	7%	4%	1.3
01/02*	8%	68%	16%	0%	5%	3%	1.7
02/03	5%	79%	12%	0%	0%	4%	1.3
03/04	4%	68%	19%	0%	6%	2%	1.6
04/05	4%	68%	19%	0%	7%	2%	1.6
05/06	1%	70%	20%	0%	6%	3%	1.5
06/07	5%	76%	10%	0%	0%	2%	1.5
07/08	1%	78%	11%	0%	6%	3%	1.5
08/09	2%	90%	2%	0%	0%	6%	0.9

Table AA15: Redundancy Notice Provision – Metals Manufacturing

Redundancy Notice - Metals Manufacturing							
	Under 4 Weeks	4 Weeks	5 to 8 Weeks	More than 8 Weeks	Other	Silent	Coverage (000s)
99/00	2%	94%	3%	0%	0%	1%	9.4
00/01	2%	96%	1%	0%	0%	1%	9.1
01/02*	2%	95%	2%	0%	0%	1%	9.1
02/03	4%	90%	5%	0%	0%	1%	4.5
03/04	5%	88%	7%	0%	0%	1%	3.6
04/05	3%	91%	6%	0%	0%	0%	4.0
05/06	5%	91%	4%	0%	0%	0%	5.2
06/07	5%	90%	4%	0%	0%	0%	5.2
07/08	3%	93%	3%	0%	0%	0%	5.1
08/09	3%	94%	3%	0%	0%	0%	3.5

Table AA16: Redundancy Notice Provision – Machinery Manufacturing

Redundancy Notice - Machinery Manufacturing							
	Under 4 Weeks	4 Weeks	5 to 8 Weeks	More than 8 Weeks	Other	Silent	Coverage (000s)
99/00	3%	79%	14%	1%	1%	2%	13.3
00/01	3%	77%	15%	1%	1%	3%	12.0
01/02*	5%	72%	16%	1%	2%	4%	11.0
02/03	6%	70%	22%	0%	1%	1%	8.3
03/04	6%	62%	30%	0%	1%	1%	8.2
04/05	6%	62%	30%	0%	1%	1%	8.4
05/06	8%	62%	29%	0%	1%	0%	8.7
06/07	5%	59%	34%	0%	2%	0%	9.2
07/08	5%	61%	32%	0%	0%	2%	9.4
08/09	5%	49%	43%	0%	1%	2%	7.2

Table AA17: Redundancy Notice Provision – Other Manufacturing

Redundancy Notice - Other Manufacturing							
	Under 4 Weeks	4 Weeks	5 to 8 Weeks	More than 8 Weeks	Other	Silent	Coverage (000s)
99/00	4%	93%	0%	0%	3%	0%	1.7
00/01	18%	81%	0%	0%	1%	0%	1.1
01/02*	12%	86%	2%	0%	0%	0%	1.2
02/03	2%	89%	7%	0%	0%	2%	0.5
03/04	2%	88%	8%	0%	0%	2%	0.4
04/05	1%	94%	4%	0%	0%	1%	0.7
05/06	13%	82%	4%	0%	0%	1%	0.8
06/07	12%	83%	5%	0%	0%	1%	0.8
07/08	11%	84%	4%	0%	0%	1%	0.9
08/09	16%	79%	4%	0%	0%	0%	1.1

Table AA18: Redundancy Notice Provision – Utilities

Redundancy Notice - Utilities							
	Under 4 Weeks	4 Weeks	5 to 8 Weeks	More than 8 Weeks	Other	Silent	Coverage (000s)
99/00	10%	70%	11%	5%	2%	2%	3.6
00/01	2%	77%	13%	2%	3%	3%	2.2
01/02*	4%	80%	8%	2%	2%	4%	2.4
02/03	7%	80%	9%	0%	3%	1%	1.5
03/04	3%	79%	12%	0%	0%	6%	1.7
04/05	2%	80%	12%	0%	0%	6%	1.9
05/06	2%	80%	11%	0%	0%	7%	2.1
06/07	1%	82%	7%	0%	0%	10%	2.0
07/08	10%	83%	5%	0%	0%	2%	2.1
08/09	2%	85%	11%	0%	0%	2%	1.5

Table AA19: Redundancy Notice Provision – Construction

Redundancy Notice - Construction							
	Under 4 Weeks	4 Weeks	5 to 8 Weeks	More than 8 Weeks	Other	Silent	Coverage (000s)
99/00	25%	66%	0%	2%	0%	7%	5.4
00/01	24%	69%	0%	2%	0%	5%	5.1
01/02*	21%	70%	0%	0%	1%	8%	5.2
02/03	38%	54%	2%	0%	1%	5%	3.1
03/04	37%	54%	2%	0%	1%	7%	3.0
04/05	48%	48%	2%	0%	0%	2%	3.8
05/06	46%	49%	0%	0%	1%	4%	3.6
06/07	50%	45%	0%	0%	0%	4%	4.9
07/08	46%	50%	0%	0%	0%	4%	5.5
08/09	42%	48%	1%	0%	0%	9%	5.6

Table AA20: Redundancy Notice Provision – Wholesaling

Redundancy Notice - Wholesaling							
	Under 4 Weeks	4 Weeks	5 to 8 Weeks	More than 8 Weeks	Other	Silent	Coverage (000s)
99/00	5%	90%	3%	0%	0%	2%	2.7
00/01	6%	91%	2%	0%	0%	1%	2.1
01/02*	7%	91%	1%	0%	0%	1%	2.2
02/03	0%	92%	3%	0%	0%	5%	0.9
03/04	1%	89%	3%	0%	0%	7%	0.8
04/05	1%	93%	4%	0%	0%	2%	0.8
05/06	1%	95%	1%	0%	0%	3%	0.8
06/07	1%	92%	5%	0%	0%	2%	1.0
07/08	4%	91%	4%	0%	0%	1%	1.2
08/09	7%	88%	4%	0%	0%	0%	0.6

Table AA21: Redundancy Notice Provision – Food Retailing

Redundancy Notice - Food Retailing							
	Under 4 Weeks	4 Weeks	5 to 8 Weeks	More than 8 Weeks	Other	Silent	Coverage (000s)
99/00	3%	76%	0%	0%	21%	0%	19.7
00/01	3%	97%	0%	0%	0%	0%	19.3
01/02*	3%	97%	0%	0%	0%	0%	19.4
02/03	4%	96%	0%	0%	0%	0%	8.2
03/04	0%	100%	0%	0%	0%	0%	7.3
04/05	1%	99%	0%	0%	0%	0%	4.3
05/06	1%	99%	0%	0%	0%	0%	4.3
06/07	1%	98%	1%	0%	0%	0%	7.8
07/08	1%	98%	1%	0%	0%	0%	19.8
08/09	9%	90%	0%	0%	0%	0%	18.7

Table AA22: Redundancy Notice Provision – Other Retailing

Redundancy Notice - Other Retailing							
	Under 4 Weeks	4 Weeks	5 to 8 Weeks	More than 8 Weeks	Other	Silent	Coverage (000s)
99/00	15%	68%	0%	0%	13%	4%	11.3
00/01	10%	85%	1%	0%	0%	4%	8.3
01/02*	9%	86%	1%	0%	0%	4%	9.1
02/03	11%	84%	1%	3%	0%	1%	5.4
03/04	5%	91%	3%	0%	1%	0%	2.9
04/05	4%	82%	3%	0%	11%	0%	3.3
05/06	4%	82%	2%	0%	11%	0%	3.3
06/07	16%	80%	4%	0%	0%	0%	4.2
07/08	13%	78%	9%	0%	0%	0%	5.9
08/09	14%	76%	10%	0%	0%	0%	5.3

Table AA23: Redundancy Notice Provision – Accommodation & Cafes etc

Redundancy Notice - Accommodation & Cafes etc							
	Under 4 Weeks	4 Weeks	5 to 8 Weeks	More than 8 Weeks	Other	Silent	Coverage (000s)
99/00	70%	29%	0%	0%	0%	1%	12.9
00/01	70%	29%	0%	0%	0%	1%	11.5
01/02*	65%	33%	0%	0%	0%	2%	10.2
02/03	79%	19%	0%	0%	0%	2%	8.5
03/04	23%	71%	2%	0%	0%	4%	1.3
04/05	15%	82%	1%	0%	0%	2%	2.0
05/06	12%	85%	1%	0%	0%	2%	1.9
06/07	15%	82%	1%	0%	0%	2%	1.4
07/08	14%	82%	1%	0%	0%	3%	1.4
08/09	16%	84%	0%	0%	0%	0%	1

Table AA24: Redundancy Notice Provision – Transport

Redundancy Notice - Transport							
	Under 4 Weeks	4 Weeks	5 to 8 Weeks	More than 8 Weeks	Other	Silent	Coverage (000s)
99/00	11%	40%	41%	3%	1%	4%	19.7
00/01	10%	41%	41%	3%	2%	3%	18.3
01/02*	14%	54%	23%	1%	2%	6%	13.9
02/03	11%	48%	37%	1%	0%	3%	14.3
03/04	11%	47%	40%	1%	0%	2%	13.5
04/05	13%	37%	46%	1%	0%	3%	12.1
05/06	12%	38%	45%	1%	0%	3%	12.8
06/07	26%	37%	33%	0%	0%	3%	13.6
07/08	26%	38%	31%	0%	0%	4%	14.5
08/09	13%	54%	30%	0%	0%	4%	13.6

Table AA25: Redundancy Notice Provision – Storage

Redundancy Notice - Storage							
	Under 4 Weeks	4 Weeks	5 to 8 Weeks	More than 8 Weeks	Other	Silent	Coverage (000s)
99/00	0%	95%	0%	0%	0%	5%	0.3
00/01	0%	94%	0%	0%	0%	6%	0.3
01/02*	0%	95%	0%	0%	0%	5%	0.3
02/03	0%	100%	0%	0%	0%	0%	0.1
03/04	5%	66%	29%	0%	0%	0%	0.1
04/05	4%	54%	24%	0%	0%	18%	0.2
05/06	4%	59%	21%	0%	0%	16%	0.2
06/07	15%	61%	13%	0%	0%	11%	0.3
07/08	14%	63%	12%	0%	0%	10%	0.3
08/09	9%	51%	11%	0%	0%	30%	0.9

Table AA26: Redundancy Notice Provision – Communication

Redundancy Notice - Communication							
	Under 4 Weeks	4 Weeks	5 to 8 Weeks	More than 8 Weeks	Other	Silent	Coverage (000s)
99/00	76%	24%	0%	0%	0%	0%	8.7
00/01	78%	22%	0%	0%	0%	0%	9.1
01/02*	77%	23%	0%	0%	0%	0%	9.1
02/03	99%	1%	0%	0%	0%	0%	6.5
03/04	100%	0%	0%	0%	0%	0%	7.2
04/05	98%	2%	0%	0%	0%	0%	6.4
05/06	98%	2%	0%	0%	0%	0%	6.4
06/07	97%	3%	0%	0%	0%	0%	6.5
07/08	97%	3%	0%	0%	0%	0%	6.5
08/09	96%	3%	0%	0%	0%	1%	6.6

Table AA27: Redundancy Notice Provision – Finance

Redundancy Notice - Finance							
	Under 4 Weeks	4 Weeks	5 to 8 Weeks	More than 8 Weeks	Other	Silent	Coverage (000s)
99/00	0%	6%	94%	0%	0%	0%	15.6
00/01	0%	3%	95%	0%	0%	2%	15.5
01/02*	0%	5%	95%	0%	0%	0%	14.8
02/03	0%	5%	95%	0%	0%	0%	13.0
03/04	0%	6%	94%	0%	0%	0%	11.6
04/05	0%	6%	94%	0%	0%	0%	11.5
05/06	0%	3%	97%	0%	0%	0%	11.1
06/07	0%	3%	97%	0%	0%	0%	11.0
07/08	0%	5%	95%	0%	0%	0%	7.5
08/09	0%	8%	92%	0%	0%	0%	5.6

Table AA28: Redundancy Notice Provision – Insurance

Redundancy Notice - Insurance							
	Under 4 Weeks	4 Weeks	5 to 8 Weeks	More than 8 Weeks	Other	Silent	Coverage (000s)
99/00	0%	29%	50%	21%	0%	0%	5.1
00/01	0%	22%	77%	0%	0%	1%	3.3
01/02*	0%	22%	78%	0%	0%	0%	3.3
02/03	0%	23%	77%	0%	0%	0%	2.4
03/04	26%	74%	0%	0%	0%	0%	2.1
04/05	31%	69%	0%	0%	0%	0%	1.8
05/06	0%	13%	87%	0%	0%	0%	1.5
06/07	0%	10%	90%	0%	0%	0%	1.9
07/08	0%	12%	88%	0%	0%	0%	1.6
08/09	0%	8%	92%	0%	0%	0%	1.3

Table AA29: Redundancy Notice Provision – Business Services

Redundancy Notice - Business Services							
	Under 4 Weeks	4 Weeks	5 to 8 Weeks	More than 8 Weeks	Other	Silent	Coverage (000s)
99/00	36%	29%	1%	19%	11%	4%	14.8
00/01	49%	20%	1%	17%	10%	3%	16.4
01/02*	49%	25%	4%	9%	9%	4%	17.0
02/03	24%	31%	9%	25%	0%	11%	6.4
03/04	19%	39%	9%	25%	0%	9%	6.4
04/05	18%	43%	6%	26%	0%	7%	6.6
05/06	18%	44%	6%	25%	0%	7%	6.3
06/07	18%	45%	6%	26%	0%	5%	6.3
07/08	20%	47%	6%	24%	0%	4%	6.7
08/09	6%	45%	15%	34%	0%	0%	2.4

Table AA30: Redundancy Notice Provision – Government Administration & Defence

Redundancy Notice - Government Administration & Defence							
	Under 4 Weeks	4 Weeks	5 to 8 Weeks	More than 8 Weeks	Other	Silent	Coverage (000s)
99/00	2%	79%	4%	1%	0%	14%	32.1
00/01	1%	83%	3%	1%	0%	12%	26.1
01/02*	1%	77%	2%	1%	0%	19%	25.2
02/03	1%	81%	2%	0%	0%	16%	24.2
03/04	1%	77%	1%	0%	0%	21%	27.2
04/05	0%	76%	1%	0%	1%	22%	27.3
05/06	0%	74%	1%	2%	1%	21%	28.9
06/07	1%	77%	7%	2%	0%	13%	32.5
07/08	1%	78%	7%	2%	0%	13%	33.6
08/09	1%	79%	4%	3%	0%	13%	28

Table AA31: Redundancy Notice Provision – Education

Redundancy Notice - Education							
	Under 4 Weeks	4 Weeks	5 to 8 Weeks	More than 8 Weeks	Other	Silent	Coverage (000s)
99/00	0%	23%	32%	13%	1%	31%	67.9
00/01	0%	21%	11%	13%	1%	54%	71.0
01/02*	0%	21%	9%	13%	0%	57%	74.7
02/03	0%	22%	30%	14%	0%	34%	74.8
03/04	0%	22%	28%	13%	0%	36%	75.3
04/05	0%	23%	28%	13%	0%	36%	76.8
05/06	0%	21%	32%	12%	0%	35%	78.9
06/07	0%	23%	32%	9%	0%	36%	74.9
07/08	0%	26%	30%	10%	0%	33%	77.3
08/09	0%	25%	67%	8%	0%	0%	73.6

Table AA32: Redundancy Notice Provision – Health

Redundancy Notice - Health							
	Under 4 Weeks	4 Weeks	5 to 8 Weeks	More than 8 Weeks	Other	Silent	Coverage (000s)
99/00	0%	68%	9%	1%	2%	20%	47.5
00/01	1%	69%	9%	1%	2%	18%	51.2
01/02*	1%	73%	7%	1%	2%	16%	55.2
02/03	1%	72%	4%	1%	2%	20%	52.7
03/04	1%	58%	5%	2%	2%	33%	47.0
04/05	1%	65%	4%	2%	2%	26%	48.6
05/06	1%	76%	3%	1%	0%	19%	67.7
06/07	1%	88%	5%	0%	0%	6%	48.7
07/08	1%	85%	5%	0%	0%	8%	52.8
08/09	2%	94%	3%	1%	0%	1%	42.7

Table AA33: Redundancy Notice Provision – Community Services

Redundancy Notice - Community Services							
	Under 4 Weeks	4 Weeks	5 to 8 Weeks	More than 8 Weeks	Other	Silent	Coverage (000s)
99/00	2%	85%	1%	2%	0%	10%	4.6
00/01	2%	84%	1%	3%	0%	10%	4.7
01/02*	4%	82%	2%	3%	0%	9%	5.4
02/03	6%	72%	2%	0%	1%	19%	4.8
03/04	6%	75%	2%	0%	1%	17%	4.8
04/05	3%	76%	4%	0%	1%	16%	5.3
05/06	3%	75%	4%	0%	1%	17%	4.9
06/07	3%	75%	4%	2%	0%	16%	5.3
07/08	3%	75%	4%	2%	0%	15%	5.4
08/09	3%	94%	0%	0%	0%	2%	2.3

Table AA34: Redundancy Notice Provision – Other Community Services

Redundancy Notice - Other Community Services							
	Under 4 Weeks	4 Weeks	5 to 8 Weeks	More than 8 Weeks	Other	Silent	Coverage (000s)
99/00	17%	46%	3%	5%	1%	28%	12.4
00/01	20%	49%	2%	1%	1%	27%	12.2
01/02*	4%	70%	2%	2%	2%	20%	11.3
02/03	5%	64%	2%	2%	1%	26%	9.7
03/04	4%	79%	9%	2%	0%	6%	6.0
04/05	5%	77%	10%	4%	0%	4%	6.3
05/06	5%	76%	10%	5%	0%	4%	6.3
06/07	3%	83%	8%	4%	0%	2%	8.9
07/08	4%	84%	6%	3%	0%	2%	9.0
08/09	4%	89%	5%	2%	0%	0%	12.3

Part B: Provisions Relating to Consultation

Table AB1: Union Recognition & Consultation – All Settlements

Union Recognition and Consultation (All Contracts/Agreements and Settlements*)			
	Provision Exists	No Provision Exists	Coverage (000s)
99/00	71%	29%	363.0
00/01	64%	36%	350.1
01/02*	60%	40%	352.4
02/03	76%	24%	289.9
03/04	81%	19%	269.0
04/05	81%	19%	272.9
05/06	80%	20%	297.1
06/07	77%	23%	287.4
07/08	79%	21%	312.7
08/09	70%	30%	284.7

Table AB2: Union Recognition & Consultation – Private Sector

Union Recognition and Consultation (Private Sector)			
	Provision Exists	No Provision Exists	Coverage (000s)
99/00	59%	41%	201.2
00/01	58%	42%	193.8
01/02*	50%	50%	190.4
02/03	62%	38%	133.1
03/04	70%	30%	108.9
04/05	70%	30%	110.4
05/06	68%	32%	114.5
06/07	68%	32%	121.6
07/08	73%	27%	139.7
08/09	75%	25%	130.1

Table AB3: Union Recognition & Consultation – Government Core

Union Recognition and Consultation (Government Core)			
	Provision Exists	No Provision Exists	Coverage (000s)
99/00	88%	12%	135.8
00/01	75%	25%	132.3
01/02*	75%	25%	137.6
02/03	87%	13%	137.4
03/04	88%	12%	139.5
04/05	88%	12%	141.4
05/06	87%	13%	160.4
06/07	83%	17%	143.8
07/08	82%	18%	150.4
08/09	61%	39%	135.5

Table AB4: Union Recognition & Consultation – Government Trading

Union Recognition and Consultation (Government Trading)			
	Provision Exists	No Provision Exists	Coverage (000s)
99/00	88%	12%	9.5
00/01	19%	81%	9.7
01/02*	18%	72%	9.7
02/03	96%	4%	8.9
03/04	96%	4%	9.4
04/05	92%	8%	8.5
05/06	92%	8%	8.5
06/07	93%	7%	8.2
07/08	93%	7%	8.2
08/09	98%	2%	7.7

Table AB5: Union Recognition & Consultation – Local Government Core

Union Recognition and Consultation (Local Government Core)			
	Provision Exists	No Provision Exists	Coverage (000s)
99/00	65%	35%	10.6
00/01	67%	33%	9.5
01/02*	70%	30%	10.0
02/03	85%	15%	7.4
03/04	88%	12%	8.2
04/05	88%	12%	9.0
05/06	89%	11%	9.0
06/07	86%	14%	10.4
07/08	85%	15%	10.6
08/09	90%	10%	8.7

Table AB6: Union Recognition & Consultation – Local Government Trading

Union Recognition and Consultation (Local Government Trading)			
	Provision Exists	No Provision Exists	Coverage (000s)
99/00	84%	16%	5.8
00/01	87%	13%	4.8
01/02*	86%	14%	4.7
02/03	84%	16%	3.1
03/04	85%	15%	3.0
04/05	81%	19%	3.6
05/06	86%	14%	4.6
06/07	88%	12%	3.4
07/08	94%	6%	3.7
08/09	97%	3%	2.5

Table AB7: Provision Concerning Consultation with Union or Staff over Redundancy – All Settlements

Provision Concerning Consultation With Union and/or Staff Over Redundancy (All Contracts/Agreements and Settlements*)			
	Provision Exists	No Provision Exists	Coverage (000s)
99/00	52%	48%	363.0
00/01	50%	50%	350.1
01/02*	45%	55%	352.4
02/03	61%	39%	289.9
03/04	66%	34%	269.0
04/05	76%	24%	272.9
05/06	77%	23%	297.1
06/07	71%	29%	287.4
07/08	77%	23%	312.7
08/09	73%	27%	284.7

Table AB8: Provision Concerning Consultation with Union or Staff over Redundancy – Private Sector

Provision Concerning Consultation With Union and/or Staff Over Redundancy (Private Sector)			
	Provision Exists	No Provision Exists	Coverage (000s)
99/00	26%	74%	201.2
00/01	28%	72%	193.8
01/02*	29%	71%	190.4
02/03	39%	61%	133.1
03/04	50%	50%	108.9
04/05	51%	49%	110.4
05/06	53%	47%	114.5
06/07	50%	50%	121.6
07/08	53%	47%	139.7
08/09	54%	46%	130.1

Table AB9: Provision Concerning Consultation with Union or Staff over Redundancy – Government Core

Provision Concerning Consultation With Union and/or Staff Over Redundancy (Government Core)			
	Provision Exists	No Provision Exists	Coverage (000s)
99/00	86%	14%	135.8
00/01	78%	22%	132.3
01/02*	62%	38%	137.6
02/03	78%	22%	137.4
03/04	75%	25%	139.5
04/05	93%	7%	141.4
05/06	93%	7%	160.4
06/07	89%	11%	143.8
07/08	93%	7%	150.4
08/09	89%	11%	135.5

Table AB10: Provision Concerning Consultation with Union or Staff over Redundancy – Government Trading

Provision Concerning Consultation With Union and/or Staff Over Redundancy (Government Trading)			
	Provision Exists	No Provision Exists	Coverage (000s)
99/00	85%	15%	9.5
00/01	85%	15%	9.7
01/02*	85%	15%	9.7
02/03	90%	10%	8.9
03/04	94%	6%	9.4
04/05	90%	10%	8.5
05/06	90%	10%	8.5
06/07	93%	7%	8.2
07/08	90%	10%	8.2
08/09	99%	1%	7.7

Table AB11: Provision Concerning Consultation with Union or Staff over Redundancy – Local Government Core

Provision Concerning Consultation With Union and/or Staff Over Redundancy (Local Government Core)			
	Provision Exists	No Provision Exists	Coverage (000s)
99/00	52%	48%	10.6
00/01	60%	40%	9.5
01/02*	64%	36%	10.0
02/03	79%	21%	7.4
03/04	84%	16%	8.2
04/05	86%	14%	9.0
05/06	86%	14%	9.0
06/07	67%	33%	10.4
07/08	86%	14%	10.6
08/09	71%	29%	8.7

Table AB12: Provision Concerning Consultation with Union or Staff over Redundancy – Local Government Trading

Provision Concerning Consultation With Union and/or Staff Over Redundancy (Local Government Trading)			
	Provision Exists	No Provision Exists	Coverage (000s)
99/00	66%	34%	5.8
00/01	66%	34%	4.8
01/02*	69%	31%	4.7
02/03	73%	27%	3.1
03/04	75%	25%	3.0
04/05	71%	29%	3.6
05/06	76%	24%	4.6
06/07	68%	32%	3.4
07/08	76%	24%	3.7
08/09	70%	30%	2.5

Part C: Provisions Relating to Selection & Voluntary Severance
Provisions Relation to Selection

Table AC1: Provision Outlining Selection Criteria for being made Redundant – All Settlements

Provision Outlining Selection Criteria for being made Redundant - All Settlements*					
	No Provision Exists	Last On First Off	Employer's Discretion	Other Basis	Coverage (000s)
99/00	73%	14%	2%	11%	363.0
00/01	70%	14%	3%	13%	350.1
01/02*	71%	14%	1%	14%	352.4
02/03	65%	17%	2%	16%	289.9

Table AC2: Provision Outlining Selection Criteria for being made Redundant – Private Sector

Provision Outlining Selection Criteria for being made Redundant - Private Sector					
	No Provision Exists	Last On First Off	Employer's Discretion	Other Basis	Coverage (000s)
99/00	67%	23%	2%	8%	201.2
00/01	65%	24%	3%	8%	193.8
01/02*	67%	25%	1%	7%	190.4
02/03	52%	35%	3%	10%	133.1

Table AC3: Provision Outlining Selection Criteria for being made Redundant – Government Core

Provision Outlining Selection Criteria for being made Redundant - Government Core					
	No Provision Exists	Last On First Off	Employer's Discretion	Other Basis	Coverage (000s)
99/00	83%	0%	0%	17%	135.8
00/01	82%	0%	1%	17%	132.3
01/02*	81%	0%	1%	18%	137.6
02/03	81%	0%	1%	18%	137.4

TableAC4: Provision Outlining Selection Criteria for being made Redundant – Government Trading

Provision Outlining Criteria for being made Redundant - Government Trading					
	No Provision Exists	Last On First Off	Employer's Discretion	Other Basis	Coverage (000s)
99/00	94%	1%	1%	4%	9.5
00/01	23%	1%	1%	75%	9.7
01/02*	19%	2%	0%	79%	9.7
02/03	17%	2%	0%	81%	8.9

TableAC5: Provision Outlining Selection Criteria for being made Redundant – Local Government Core

Provision Outlining Selection Criteria for being made Redundant Local Government Core					
	No Provision Exists	Last On First Off	Employer's Discretion	Other Basis	Coverage (000s)
99/00	58%	11%	15%	16%	10.6
00/01	60%	16%	11%	13%	9.5
01/02*	64%	14%	5%	17%	10.0
02/03	53%	19%	6%	22%	7.4

Table AC6: Provision Outlining Selection Criteria for being made Redundant – Local Government Trading

Provision Outlining Selection Criteria for being made Redundant Local Government Trading					
	No Provision Exists	Last On First Off	Employer's Discretion	Other Basis	Coverage (000s)
99/00	42%	34%	11%	13%	5.8
00/01	41%	25%	13%	21%	4.8
01/02*	39%	27%	11%	23%	4.7
02/03	44%	30%	5%	21%	3.1

Voluntary Severance Clauses

Table AC7: Voluntary Severance Provisions – All Settlements

Voluntary Severance Provisions By Sector All Settlements*			
	Provision Exists	No Provision Exists	Coverage (000s)
99/00	23%	77%	363.0
00/01	26%	74%	350.1
01/02*	27%	73%	352.4
02/03	22%	78%	289.9

Table AC8: Voluntary Severance Provisions – Private Sector

Voluntary Severance Provisions By Sector Private Sector			
	Provision Exists	No Provision Exists	Coverage (000s)
99/00	26%	74%	201.2
00/01	27%	73%	193.8
01/02*	27%	73%	190.4
02/03	31%	69%	133.1

Table AC9: Voluntary Severance Provisions – Government Core

Voluntary Severance Provisions By Sector Government Core			
	Provision Exists	No Provision Exists	Coverage (000s)
99/00	16%	84%	135.8
00/01	19%	81%	132.3
01/02*	21%	79%	137.6
02/03	7%	93%	137.4

Table AC10: Voluntary Severance Provisions – Government Trading

Voluntary Severance Provisions By Sector Government Trading			
	Provision Exists	No Provision Exists	Coverage (000s)
99/00	6%	94%	9.4
00/01	78%	22%	9.7
01/02*	80%	20%	9.7
02/03	84%	16%	8.9

Table AC11: Voluntary Severance Provisions – Local Government Core

Voluntary Severance Provisions By Sector Local Government Core			
	Provision Exists	No Provision Exists	Coverage (000s)
99/00	45%	55%	10.6
00/01	46%	54%	9.5
01/02*	40%	60%	10.0
02/03	47%	53%	7.4

Table AC12 Voluntary Severance Provisions – Local Government Trading

Voluntary Severance Provisions By Sector Local Government Trading			
	Provision Exists	No Provision Exists	Coverage (000s)
99/00	51%	49%	5.8
00/01	47%	53%	4.8
01/02*	50%	50%	4.7
02/03	35%	65%	3.1

Part D: Provisions Relating to Redeployment

Table AD1: Provisions Regarding Alternatives to Redundancy – All Settlements

Provisions Regarding Alternatives to Redundancy All Settlements*			
	Provision Exists	No Provision Exists	Coverage (000s)
99/00	67%	33%	363.0
00/01	71%	29%	350.1
01/02*	70%	30%	352.4
02/03	82%	18%	289.9

Table AD2: Provisions Regarding Alternatives to Redundancy – Private Sector

Provisions Regarding Alternatives to Redundancy Private Sector			
	Provision Exists	No Provision Exists	Coverage (000s)
99/00	45%	55%	201.2
00/01	51%	49%	193.8
01/02*	47%	53%	190.4
02/03	66%	34%	133.1

Table AD3: Provisions Regarding Alternatives to Redundancy – Government Core

Provisions Regarding Alternatives to Redundancy Government Core			
	Provision Exists	No Provision Exists	Coverage (000s)
99/00	99%	1%	135.8
00/01	98%	2%	132.3
01/02*	99%	1%	137.6
02/03	99%	1%	137.4

Table AD4: Provisions Regarding Alternatives to Redundancy – Government Trading

Provisions Regarding Alternatives to Redundancy Government Trading			
	Provision Exists	No Provision Exists	Coverage (000s)
99/00	95%	5%	9.5
00/01	94%	6%	9.7
01/02*	94%	6%	9.7
02/03	92%	8%	8.9

Table AD5: Provisions Regarding Alternatives to Redundancy – Local Government Core

Provisions Regarding Alternatives to Redundancy Local Government Core			
	Provision Exists	No Provision Exists	Coverage (000s)
99/00	74%	26%	10.6
00/01	76%	24%	9.5
01/02*	80%	20%	10.0
02/03	82%	18%	7.4

Table AD6: Provisions Regarding Alternatives to Redundancy – Local Government Trading

Provisions Regarding Alternatives to Redundancy Local Government Trading			
	Provision Exists	No Provision Exists	Coverage (000s)
99/00	61%	39%	5.8
00/01	53%	47%	4.8
01/02*	57%	43%	4.7
02/03	56%	44%	3.1

Part E: Provisions Relating to Outplacement Support

Table AE1: Outplacement Provision in Redundancy Clause – All Settlements

Outplacement Provision in Redundancy Clause All Settlements*			
	Provision Exists	No Provision Exists	Coverage (000s)
99/00	20%	80%	363.0
00/01	21%	79%	350.1
01/02*	11%	89%	352.4
02/03	10%	90%	289.9

Table AE2: Outplacement Provision in Redundancy Clause – Private Sector

Outplacement Provision in Redundancy Clause Private Sector			
	Provision Exists	No Provision Exists	Coverage (000s)
99/00	18%	82%	201.2
00/01	19%	81%	193.8
01/02*	12%	88%	190.4
02/03	11%	89%	133.1

Table AE3: Outplacement Provision in Redundancy Clause – Government Core

Outplacement Provision in Redundancy Clause Government Core			
	Provision Exists	No Provision Exists	Coverage (000s)
99/00	26%	74%	135.8
00/01	27%	73%	132.3
01/02*	11%	89%	137.6
02/03	10%	90%	137.4

Table AE4: Outplacement Provision in Redundancy Clause – Government Trading

Outplacement Provision in Redundancy Clause Government Trading			
	Provision Exists	No Provision Exists	Coverage (000s)
99/00	4%	96%	9.5
00/01	3%	97%	9.7
01/02*	2%	98%	9.7
02/03	1%	99%	8.9

Table AE5: Outplacement Provision in Redundancy Clause – Local Government Core

Outplacement Provision in Redundancy Clause Local Government Core			
	Provision Exists	No Provision Exists	Coverage (000s)
99/00	9%	91%	10.6
00/01	7%	93%	9.5
01/02*	13%	87%	10.0
02/03	16%	84%	7.4

Table AE6: Outplacement Provision in Redundancy Clause – Local Government Trading

Outplacement Provision in Redundancy Clause Local Government Trading			
	Provision Exists	No Provision Exists	Coverage (000s)
99/00	12%	88%	5.8
00/01	14%	86%	4.8
01/02*	9%	91%	4.7
02/03	1%	99%	3.1

Part F: Redundancy Compensation

(Note: Gaps in the data indicate years where this particular type of data was not collected)

Maximum Level Payable

Maximum Level Payable by Sector

Table AF1: Maximum Level Payable – All Settlements

Maximum Compensation Payable - All Settlements								
	No Payment	1 to 13 Weeks	14 to 39 Weeks	40 to 52 Weeks	More than 52 Weeks	Other	Silent	Coverage (000s)
Jun-99	5%	4%	26%	20%	12%	5%	28%	354.9
Jun-00	6%	4%	27%	20%	13%	5%	25%	363.0
Jun-01	8%	4%	30%	27%	9%	4%	18%	350.1
Jun-02	8%	4%	29%	28%	8%	3%	20%	352.4
Jun-03	5%	4%	33%	31%	11%	3%	13%	289.9
Jun-04	2%	4%	34%	34%	11%	5%	11%	269.0
Jun-05	3%	5%	35%	30%	11%	5%	11%	272.9
Jun-06	3%	4%	34%	34%	10%	5%	10%	297.1
Jun-07	3%	5%	38%	30%	9%	4%	10%	287.4
Jun-08	-	-	-	-	-	-	-	-
Jun-09	3%	6%	45%	23%	9%	6%	8%	269.3

Table AF2: Maximum Level Payable – Private Sector

Maximum Compensation Payable - Private Sector								
	No Payment	1 to 13 Weeks	14 to 39 Weeks	40 to 52 Weeks	More than 52 Weeks	Other	Silent	Coverage (000s)
99/00	10%	6%	18%	8%	17%	1%	40%	201.2
00/01	14%	5%	21%	13%	16%	1%	30%	193.8
01/02*	13%	6%	19%	15%	14%	1%	32%	190.4
02/03	10%	7%	21%	14%	22%	1%	25%	133.1
03/04	-	-	-	-	-	-	-	-
04/05	-	-	-	-	-	-	-	-
05/06	7%	8%	20%	17%	25%	2%	22%	114.5
06/07	7%	9%	27%	17%	21%	1%	19%	121.6
07/08	-	-	-	-	-	-	-	-
08/09	6%	11%	35%	13%	18%	2%	14%	122.4

Table AF3: Maximum Level Payable – Government Core

Maximum Compensation Payable - Government Core								
	No Payment	1 to 13 Weeks	14 to 39 Weeks	40 to 52 Weeks	More than 52 Weeks	Other	Silent	Coverage (000s)
99/00	0%	1%	42%	38%	4%	12%	3%	135.8
00/01	0%	2%	45%	40%	2%	9%	2%	132.3
01/02*	1%	2%	46%	41%	1%	7%	2%	137.6
02/03	1%	1%	47%	43%	0%	6%	2%	137.4
03/04	-	-	-	-	-	-	-	-
04/05	-	-	-	-	-	-	-	-
05/06	0%	1%	43%	47%	0%	7%	1%	160.4
06/07	0%	2%	46%	42%	1%	7%	1%	143.8
07/08	-	-	-	-	-	-	-	-
08/09	1%	2%	53%	32%	1%	10%	1%	128.2

Table AF4: Maximum Level Payable – Government Trading

Maximum Compensation Payable - Government Trading								
	No Payment	1 to 13 Weeks	14 to 39 Weeks	40 to 52 Weeks	More than 52 Weeks	Other	Silent	Coverage (000s)
99/00	0%	4%	9%	4%	76%	4%	3%	9.5
00/01	0%	4%	9%	79%	7%	1%	0%	9.7
01/02*	0%	4%	9%	79%	6%	1%	1%	9.7
02/03	0%	2%	8%	81%	7%	0%	2%	8.9
03/04	-	-	-	-	-	-	-	-
04/05	-	-	-	-	-	-	-	-
05/06	0%	2%	76%	13%	7%	0%	3%	8.5
06/07	0%	2%	80%	13%	5%	0%	0%	8.2
07/08	-	-	-	-	-	-	-	-
08/09	0%	2%	79%	17%	2%	0%	0%	7.7

Table AF5: Maximum Level Payable – Local Government Core

Maximum Compensation Payable - Local Government Core								
	No Payment	1 to 13 Weeks	14 to 39 Weeks	40 to 52 Weeks	More than 52 Weeks	Other	Silent	Coverage (000s)
99/00	0%	0%	17%	24%	0%	9%	50%	10.6
00/01	0%	1%	19%	27%	0%	6%	47%	9.5
01/02*	0%	0%	18%	41%	1%	8%	32%	10.0
02/03	1%	0%	18%	55%	0%	5%	21%	7.4
03/04	-	-	-	-	-	-	-	-
04/05	-	-	-	-	-	-	-	-
05/06	0%	10%	19%	36%	0%	7%	27%	9.0
06/07	1%	9%	23%	34%	1%	6%	27%	10.4
07/08	-	-	-	-	-	-	-	-
08/09	1%	1%	30%	33%	1%	6%	30%	8.6

Table AF6: Maximum Level Payable – Local Government Trading

Maximum Compensation Payable - Local Government Trading								
	No Payment	1 to 13 Weeks	14 to 39 Weeks	40 to 52 Weeks	More than 52 Weeks	Other	Silent	Coverage (000s)
99/00	4%	3%	13%	23%	7%	1%	49%	5.8
00/01	5%	11%	17%	22%	5%	1%	39%	4.8
01/02*	5%	10%	15%	25%	5%	1%	39%	4.7
02/03	5%	17%	16%	24%	4%	1%	33%	3.1
03/04	-	-	-	-	-	-	-	-
04/05	-	-	-	-	-	-	-	-
05/06	5%	5%	29%	28%	3%	5%	25%	4.6
06/07	4%	5%	20%	37%	5%	3%	26%	3.4
07/08	-	-	-	-	-	-	-	-
08/09	7%	5%	23%	31%	3%	5%	26%	2.4

Maximum Level Payable by Industry

Table AF7: Maximum Level Payable – Agricultural Industry

Maximum Compensation Payable - Agriculture etc								
	No Payment	1 to 13 Weeks	14 to 39 Weeks	40 to 52 Weeks	More than 52 Weeks	Other	Silent	Coverage (000s)
99/00	2%	2%	0%	5%	6%	0%	85%	0.5
00/01	2%	0%	52%	5%	4%	0%	37%	0.4
01/02*	2%	18%	39%	3%	4%	0%	34%	0.6
02/03	3%	29%	1%	6%	0%	0%	61%	0.3
03/04	-	-	-	-	-	-	-	-
04/05	-	-	-	-	-	-	-	-
05/06	2%	21%	5%	6%	0%	0%	65%	0.4
06/07	2%	28%	0%	8%	0%	0%	61%	2.5
07/08	-	-	-	-	-	-	-	-
08/09	3%	12%	4%	30%	0%	0%	51%	0.5

Table AF8: Maximum Level Payable – Mining

Maximum Compensation Payable - Mining								
	No Payment	1 to 13 Weeks	14 to 39 Weeks	40 to 52 Weeks	More than 52 Weeks	Other	Silent	Coverage (000s)
99/00	1%	0%	0%	11%	18%	0%	70%	1.2
00/01	1%	0%	0%	14%	19%	0%	66%	1.2
01/02*	1%	2%	15%	0%	11%	0%	71%	1.2
02/03	4%	13%	2%	16%	22%	0%	43%	0.8
03/04	-	-	-	-	-	-	-	-
04/05	-	-	-	-	-	-	-	-
05/06	10%	14%	4%	18%	13%	0%	42%	1.2
06/07	17%	15%	8%	29%	3%	0%	28%	0.3
07/08	-	-	-	-	-	-	-	-
08/09	28%	33%	8%	3%	1%	10%	17%	0.5

Table AF9: Maximum Level Payable – Food Manufacturing

Maximum Compensation Payable - Food Manufacturing								
	No Payment	1 to 13 Weeks	14 to 39 Weeks	40 to 52 Weeks	More than 52 Weeks	Other	Silent	Coverage (000s)
99/00	5%	2%	8%	5%	37%	2%	41%	18.5
00/01	1%	2%	8%	11%	38%	1%	39%	19.5
01/02*	1%	2%	13%	13%	35%	1%	35%	20.2
02/03	0%	1%	15%	9%	38%	4%	33%	20.0
03/04	-	-	-	-	-	-	-	-
04/05	-	-	-	-	-	-	-	-
05/06	4%	1%	7%	13%	42%	6%	26%	17.2
06/07	4%	1%	7%	17%	44%	3%	24%	0.7
07/08	-	-	-	-	-	-	-	-
08/09	1%	3%	7%	8%	59%	5%	17%	18.7

Table AF10: Maximum Level Payable – Textile Manufacturing

Maximum Compensation Payable - Textile Manufacturing								
	No Payment	1 to 13 Weeks	14 to 39 Weeks	40 to 52 Weeks	More than 52 Weeks	Other	Silent	Coverage (000s)
99/00	13%	6%	19%	6%	1%	2%	53%	8.0
00/01	14%	10%	23%	3%	1%	1%	48%	6.9
01/02*	5%	13%	23%	5%	0%	1%	53%	6.1
02/03	7%	11%	25%	8%	1%	1%	47%	3.9
03/04	-	-	-	-	-	-	-	-
04/05	-	-	-	-	-	-	-	-
05/06	5%	11%	40%	17%	0%	1%	25%	3.7
06/07	2%	10%	38%	22%	0%	0%	28%	3.5
07/08	-	-	-	-	-	-	-	-
08/09	1%	18%	51%	10%	0%	0%	20%	3.5

Table AF11: Maximum Level Payable – Wood & Paper Manufacturing

Maximum Compensation Payable - Wood & Paper Manufacturing								
	No Payment	1 to 13 Weeks	14 to 39 Weeks	40 to 52 Weeks	More than 52 Weeks	Other	Silent	Coverage (000s)
99/00	3%	0%	4%	26%	22%	0%	45%	6.3
00/01	2%	0%	8%	29%	23%	0%	38%	5.6
01/02*	1%	1%	9%	29%	23%	1%	36%	6.0
02/03	2%	2%	14%	31%	23%	1%	27%	5.9
03/04	-	-	-	-	-	-	-	-
04/05	-	-	-	-	-	-	-	-
05/06	4%	4%	12%	44%	13%	1%	22%	6.0
06/07	3%	3%	13%	47%	11%	1%	22%	5.7
07/08	-	-	-	-	-	-	-	-
08/09	4%	3%	22%	40%	3%	3%	26%	4.8

Table AF12: Maximum Level Payable – Printing

Maximum Compensation Payable - Printing								
	No Payment	1 to 13 Weeks	14 to 39 Weeks	40 to 52 Weeks	More than 52 Weeks	Other	Silent	Coverage (000s)
99/00	2%	9%	32%	10%	0%	0%	47%	6.2
00/01	2%	8%	36%	8%	1%	0%	45%	5.5
01/02*	2%	10%	34%	7%	4%	0%	43%	5.5
02/03	1%	20%	26%	9%	6%	37%	1%	3.4
03/04	-	-	-	-	-	-	-	-
04/05	-	-	-	-	-	-	-	-
05/06	0%	5%	35%	12%	1%	0%	46%	3.6
06/07	0%	7%	35%	9%	4%	0%	44%	3.5
07/08	-	-	-	-	-	-	-	-
08/09	0%	9%	29%	10%	21%	0%	31%	2.5

Table AF13: Maximum Level Payable – Chemical Manufacturing

Maximum Compensation Payable - Chemical Manufacturing								
	No Payment	1 to 13 Weeks	14 to 39 Weeks	40 to 52 Weeks	More than 52 Weeks	Other	Silent	Coverage (000s)
99/00	3%	2%	3%	11%	1%	0%	80%	11.7
00/01	0%	3%	4%	11%	1%	0%	81%	10.8
01/02*	0%	2%	3%	11%	1%	0%	83%	11.1
02/03	1%	9%	6%	26%	4%	0%	54%	3.9
03/04	-	-	-	-	-	-	-	-
04/05	-	-	-	-	-	-	-	-
05/06	6%	4%	5%	19%	3%	2%	62%	5.2
06/07	1%	12%	6%	20%	3%	1%	57%	5.4
07/08	-	-	-	-	-	-	-	-
08/09	1%	12%	5%	23%	4%	3%	52%	4.2

Table AF14: Maximum Level Payable – Mineral Manufacturing

Maximum Compensation Payable - Mineral Manufacturing								
	No Payment	1 to 13 Weeks	14 to 39 Weeks	40 to 52 Weeks	More than 52 Weeks	Other	Silent	Coverage (000s)
99/00	8%	3%	6%	17%	26%	0%	40%	1.3
00/01	9%	6%	3%	23%	21%	0%	38%	1.3
01/02*	7%	7%	12%	20%	16%	0%	38%	1.7
02/03	4%	8%	3%	46%	21%	0%	18%	1.3
03/04	-	-	-	-	-	-	-	-
04/05	-	-	-	-	-	-	-	-
05/06	8%	2%	9%	35%	14%	0%	33%	1.5
06/07	7%	5%	20%	29%	4%	0%	36%	1.5
07/08	-	-	-	-	-	-	-	-
08/09	11%	3%	30%	32%	0%	1%	23%	0.9

Table AF15: Maximum Level Payable – Metals Manufacturing

Maximum Compensation Payable - Metals Manufacturing								
	No Payment	1 to 13 Weeks	14 to 39 Weeks	40 to 52 Weeks	More than 52 Weeks	Other	Silent	Coverage (000s)
99/00	3%	2%	6%	11%	3%	0%	75%	9.4
00/01	4%	2%	5%	12%	1%	0%	76%	9.1
01/02*	4%	4%	6%	17%	3%	0%	66%	9.1
02/03	5%	6%	10%	29%	4%	0%	46%	4.5
03/04	-	-	-	-	-	-	-	-
04/05	-	-	-	-	-	-	-	-
05/06	36%	5%	4%	12%	8%	0%	35%	5.2
06/07	35%	5%	7%	19%	7%	0%	28%	5.2
07/08	-	-	-	-	-	-	-	-
08/09	51%	5%	7%	22%	7%	0%	8%	0.6

Table AF16: Maximum Level Payable – Machinery Manufacturing

Maximum Compensation Payable - Machinery Manufacturing								
	No Payment	1 to 13 Weeks	14 to 39 Weeks	40 to 52 Weeks	More than 52 Weeks	Other	Silent	Coverage (000s)
99/00	5%	4%	6%	27%	6%	1%	51%	13.3
00/01	6%	5%	6%	28%	6%	1%	48%	12.0
01/02*	7%	6%	5%	25%	17%	1%	39%	11.0
02/03	7%	8%	8%	16%	28%	0%	33%	8.3
03/04	-	-	-	-	-	-	-	-
04/05	-	-	-	-	-	-	-	-
05/06	9%	8%	8%	15%	34%	0%	26%	8.7
06/07	7%	7%	9%	13%	41%	0%	24%	9.2
07/08	-	-	-	-	-	-	-	-
08/09	7%	7%	4%	17%	47%	2%	16%	7.2

Table AF17: Maximum Level Payable – Other Manufacturing

Maximum Compensation Payable - Other Manufacturing								
	No Payment	1 to 13 Weeks	14 to 39 Weeks	40 to 52 Weeks	More than 52 Weeks	Other	Silent	Coverage (000s)
99/00	2%	5%	16%	4%	0%	0%	73%	1.7
00/01	3%	15%	2%	7%	0%	1%	72%	1.1
01/02*	5%	10%	1%	5%	30%	0%	49%	1.2
02/03	11%	2%	7%	18%	0%	0%	62%	0.5
03/04	-	-	-	-	-	-	-	-
04/05	-	-	-	-	-	-	-	-
05/06	13%	5%	13%	12%	0%	0%	56%	0.8
06/07	13%	4%	22%	8%	0%	0%	52%	0.8
07/08	-	-	-	-	-	-	-	-
08/09	3%	11%	16%	27%	3%	2%	39%	1.1

Table AF18: Maximum Level Payable – Utilities

Maximum Compensation Payable - Utilities								
	No Payment	1 to 13 Weeks	14 to 39 Weeks	40 to 52 Weeks	More than 52 Weeks	Other	Silent	Coverage (000s)
99/00	4%	3%	13%	15%	5%	1%	59%	3.6
00/01	6%	4%	20%	24%	7%	2%	37%	2.2
01/02*	6%	12%	16%	21%	6%	2%	37%	2.4
02/03	8%	19%	22%	11%	4%	0%	36%	1.5
03/04	-	-	-	-	-	-	-	-
04/05	-	-	-	-	-	-	-	-
05/06	13%	18%	14%	26%	4%	0%	25%	2.1
06/07	12%	15%	18%	26%	4%	0%	24%	2.0
07/08	-	-	-	-	-	-	-	-
08/09	10%	11%	36%	25%	2%	3%	13%	1.5

Table AF19: Maximum Level Payable – Construction

Maximum Compensation Payable - Construction								
	No Payment	1 to 13 Weeks	14 to 39 Weeks	40 to 52 Weeks	More than 52 Weeks	Other	Silent	Coverage (000s)
99/00	10%	7%	12%	39%	1%	8%	23%	5.4
00/01	10%	11%	12%	34%	1%	11%	21%	5.1
01/02*	12%	12%	17%	30%	1%	8%	20%	5.2
02/03	13%	26%	26%	13%	0%	3%	19%	3.1
03/04	-	-	-	-	-	-	-	-
04/05	-	-	-	-	-	-	-	-
05/06	11%	16%	35%	10%	0%	6%	23%	3.6
06/07	7%	22%	43%	9%	1%	2%	18%	4.9
07/08	-	-	-	-	-	-	-	-
08/09	7%	24%	37%	13%	1%	4%	14%	5.6

Table AF20: Maximum Level Payable – Wholesaling

Maximum Compensation Payable - Wholesaling								
	No Payment	1 to 13 Weeks	14 to 39 Weeks	40 to 52 Weeks	More than 52 Weeks	Other	Silent	Coverage (000s)
99/00	5%	10%	3%	3%	3%	0%	76%	2.7
00/01	6%	12%	4%	3%	3%	0%	72%	2.1
01/02*	6%	12%	4%	5%	3%	0%	70%	2.2
02/03	1%	24%	19%	12%	2%	0%	42%	0.9
03/04	-	-	-	-	-	-	-	-
04/05	-	-	-	-	-	-	-	-
05/06	1%	38%	20%	20%	2%	0%	19%	0.8
06/07	1%	31%	25%	16%	4%	0%	24%	1.0
07/08	-	-	-	-	-	-	-	-
08/09	2%	15%	20%	9%	1%	2%	50%	0.6

Table AF21: Maximum Level Payable – Food Retailing

Maximum Compensation Payable - Food Retailing								
	No Payment	1 to 13 Weeks	14 to 39 Weeks	40 to 52 Weeks	More than 52 Weeks	Other	Silent	Coverage (000s)
99/00	4%	0%	46%	0%	0%	0%	50%	19.7
00/01	3%	0%	47%	47%	0%	0%	3%	19.3
01/02*	4%	0%	47%	47%	0%	0%	2%	19.4
02/03	6%	0%	49%	37%	0%	0%	8%	8.2
03/04	-	-	-	-	-	-	-	-
04/05	-	-	-	-	-	-	-	-
05/06	7%	0%	57%	34%	0%	0%	2%	4.3
06/07	3%	0%	76%	20%	0%	0%	1%	7.8
07/08	-	-	-	-	-	-	-	-
08/09	13%	1%	86%	1%	0%	0%	1%	18.7

Table AF22: Maximum Level Payable – Other Retailing

Maximum Compensation Payable - Other Retailing								
	No Payment	1 to 13 Weeks	14 to 39 Weeks	40 to 52 Weeks	More than 52 Weeks	Other	Silent	Coverage (000s)
99/00	25%	16%	28%	3%	0%	0%	28%	11.3
00/01	34%	4%	37%	2%	0%	1%	22%	8.3
01/02*	31%	5%	35%	6%	0%	0%	23%	9.1
02/03	5%	8%	58%	7%	0%	0%	22%	5.4
03/04	-	-	-	-	-	-	-	-
04/05	-	-	-	-	-	-	-	-
05/06	0%	6%	63%	11%	0%	3%	16%	3.3
06/07	0%	8%	77%	4%	0%	1%	11%	4.2
07/08	-	-	-	-	-	-	-	-
08/09	1%	31%	57%	2%	0%	6%	3%	5.3

Table AF23: Maximum Level Payable – Accommodation & Cafes etc

Maximum Compensation Payable - Accommodation & Cafes etc								
	No Payment	1 to 13 Weeks	14 to 39 Weeks	40 to 52 Weeks	More than 52 Weeks	Other	Silent	Coverage (000s)
99/00	28%	3%	29%	3%	0%	0%	37%	12.9
00/01	26%	4%	31%	2%	0%	0%	37%	11.5
01/02*	19%	4%	34%	2%	0%	0%	41%	10.2
02/03	17%	3%	31%	2%	0%	0%	47%	8.5
03/04	-	-	-	-	-	-	-	-
04/05	-	-	-	-	-	-	-	-
05/06	3%	13%	41%	9%	0%	0%	33%	1.9
06/07	4%	18%	56%	13%	0%	0%	10%	1.4
07/08	-	-	-	-	-	-	-	-
08/09	8%	13%	57%	13%	0%	0%	9%	1

Table AF24: Maximum Level Payable – Transport

Maximum Compensation Payable - Transport								
	No Payment	1 to 13 Weeks	14 to 39 Weeks	40 to 52 Weeks	More than 52 Weeks	Other	Silent	Coverage (000s)
99/00	3%	1%	25%	7%	45%	0%	19%	19.7
00/01	3%	1%	26%	6%	43%	0%	21%	18.3
01/02*	4%	3%	13%	29%	26%	0%	25%	13.9
02/03	1%	2%	14%	28%	39%	0%	16%	14.3
03/04	-	-	-	-	-	-	-	-
04/05	-	-	-	-	-	-	-	-
05/06	3%	4%	21%	15%	44%	4%	10%	12.8
06/07	3%	6%	23%	29%	28%	3%	8%	13.6
07/08	-	-	-	-	-	-	-	-
08/09	3%	8%	27%	34%	20%	1%	7%	13.6

Table AF25: Maximum Level Payable – Storage

Maximum Compensation Payable - Storage								
	No Payment	1 to 13 Weeks	14 to 39 Weeks	40 to 52 Weeks	More than 52 Weeks	Other	Silent	Coverage (000s)
99/00	5%	0%	0%	0%	2%	0%	93%	0.3
00/01	5%	0%	0%	0%	2%	0%	93%	0.3
01/02*	5%	0%	13%	0%	3%	0%	79%	0.3
02/03	0%	0%	41%	0%	14%	0%	45%	0.1
03/04	-	-	-	-	-	-	-	-
04/05	-	-	-	-	-	-	-	-
05/06	41%	0%	11%	0%	5%	0%	44%	0.2
06/07	11%	22%	22%	0%	0%	0%	44%	0.3
07/08	-	-	-	-	-	-	-	-
08/09	0%	11%	47%	15%	9%	0%	17%	0.9

*Note that there was one agreement that had unlimited compensation for the 2008/2009 year (Not included in the table).

Table AF26: Maximum Level Payable – Communication

Maximum Compensation Payable - Communication								
	No Payment	1 to 13 Weeks	14 to 39 Weeks	40 to 52 Weeks	More than 52 Weeks	Other	Silent	Coverage (000s)
99/00	0%	0%	24%	0%	74%	0%	2%	8.7
00/01	0%	0%	22%	77%	0%	0%	1%	9.1
01/02*	0%	0%	22%	77%	0%	0%	1%	9.1
02/03	0%	0%	0%	100%	0%	0%	0%	6.5
03/04	-	-	-	-	-	-	-	-
04/05	-	-	-	-	-	-	-	-
05/06	0%	0%	89%	11%	0%	0%	0%	6.4
06/07	0%	0%	89%	11%	0%	0%	0%	6.5
07/08	-	-	-	-	-	-	-	-
08/09	0%	0%	88%	10%	0%	0%	1%	6.6

Table AF27: Maximum Level Payable – Finance

Maximum Compensation Payable - Finance								
	No Payment	1 to 13 Weeks	14 to 39 Weeks	40 to 52 Weeks	More than 52 Weeks	Other	Silent	Coverage (000s)
99/00	0%	0%	3%	1%	96%	0%	0%	15.6
00/01	1%	0%	17%	2%	80%	0%	0%	15.5
01/02*	0%	0%	3%	2%	71%	0%	24%	14.8
02/03	0%	0%	3%	2%	94%	1%	0%	13.0
03/04	-	-	-	-	-	-	-	-
04/05	-	-	-	-	-	-	-	-
05/06	0%	0%	1%	0%	97%	0%	2%	11.1
06/07	0%	0%	19%	0%	79%	0%	2%	11.0
07/08	-	-	-	-	-	-	-	-
08/09	0%	34%	0%	0%	62%	0%	3%	5.6

Table AF28: Maximum Level Payable – Insurance

Maximum Compensation Payable - Insurance								
	No Payment	1 to 13 Weeks	14 to 39 Weeks	40 to 52 Weeks	More than 52 Weeks	Other	Silent	Coverage (000s)
99/00	0%	0%	0%	17%	23%	13%	47%	5.1
00/01	0%	0%	12%	26%	2%	0%	60%	3.3
01/02*	0%	0%	26%	12%	1%	0%	61%	3.3
02/03	0%	0%	21%	35%	0%	0%	44%	2.4
03/04	-	-	-	-	-	-	-	-
04/05	-	-	-	-	-	-	-	-
05/06	0%	0%	37%	13%	0%	0%	50%	1.5
06/07	0%	0%	57%	10%	0%	0%	33%	1.9
07/08	-	-	-	-	-	-	-	-
08/09	0%	0%	86%	1%	0%	0%	12%	1.3

Table AF29: Maximum Level Payable – Business Services

Maximum Compensation Payable - Business Services								
	No Payment	1 to 13 Weeks	14 to 39 Weeks	40 to 52 Weeks	More than 52 Weeks	Other	Silent	Coverage (000s)
99/00	48%	12%	9%	14%	0%	2%	15%	14.8
00/01	57%	11%	8%	14%	1%	0%	9%	16.4
01/02*	56%	11%	8%	12%	1%	0%	12%	17.0
02/03	23%	7%	18%	33%	2%	0%	17%	6.4
03/04	-	-	-	-	-	-	-	-
04/05	-	-	-	-	-	-	-	-
05/06*	25%	7%	21%	34%	0%	0%	14%	6.3
06/07	24%	7%	21%	34%	0%	0%	14%	6.3
07/08	-	-	-	-	-	-	-	-
08/09	4%	3%	21%	60%	0%	0%	12%	2.4

Table AF30: Maximum Level Payable – Government Administration & Defence

Maximum Compensation Payable - Government Administration & Defence								
	No Payment	1 to 13 Weeks	14 to 39 Weeks	40 to 52 Weeks	More than 52 Weeks	Other	Silent	Coverage (000s)
99/00	0%	0%	13%	20%	13%	36%	18%	32.1
00/01	0%	3%	19%	31%	3%	25%	19%	26.1
01/02*	0%	0%	22%	35%	2%	27%	14%	25.2
02/03	0%	0%	19%	52%	2%	19%	8%	24.2
03/04	-	-	-	-	-	-	-	-
04/05	-	-	-	-	-	-	-	-
05/06	0%	0%	14%	45%	2%	29%	9%	28.9
06/07	0%	5%	14%	46%	2%	26%	8%	32.5
07/08	-	-	-	-	-	-	-	-
08/09	0%	7%	16%	47%	4%	16%	11%	28

Table AF31: Maximum Level Payable – Education

Maximum Compensation Payable - Education								
	No Payment	1 to 13 Weeks	14 to 39 Weeks	40 to 52 Weeks	More than 52 Weeks	Other	Silent	Coverage (000s)
99/00	0%	1%	74%	21%	1%	1%	2%	67.9
00/01	0%	1%	74%	21%	1%	1%	2%	71.0
01/02*	0%	2%	76%	19%	0%	1%	2%	74.7
02/03	0%	2%	77%	20%	0%	0%	1%	74.8
03/04	-	-	-	-	-	-	-	-
04/05	-	-	-	-	-	-	-	-
05/06	0%	2%	77%	20%	0%	0%	1%	78.9
06/07	0%	2%	81%	15%	0%	0%	1%	74.9
07/08	-	-	-	-	-	-	-	-
08/09	0%	2%	86%	10%	0%	2%	1%	73.6

Table AF32: Maximum Level Payable – Health

Maximum Compensation Payable - Health								
	No Payment	1 to 13 Weeks	14 to 39 Weeks	40 to 52 Weeks	More than 52 Weeks	Other	Silent	Coverage (000s)
99/00	1%	7%	10%	67%	0%	2%	13%	47.5
00/01	14%	4%	11%	62%	0%	1%	8%	51.2
01/02*	13%	4%	11%	64%	0%	1%	7%	55.2
02/03	14%	4%	12%	63%	0%	2%	5%	52.7
03/04	-	-	-	-	-	-	-	-
04/05	-	-	-	-	-	-	-	-
05/06	1%	4%	14%	76%	0%	1%	4%	67.7
06/07	2%	6%	14%	73%	0%	0%	5%	48.7
07/08	-	-	-	-	-	-	-	-
08/09	3%	9%	21%	54%	1%	7%	5%	42.7

Table AF33: Maximum Level Payable – Community Services

Maximum Compensation Payable - Community Services								
	No Payment	1 to 13 Weeks	14 to 39 Weeks	40 to 52 Weeks	More than 52 Weeks	Other	Silent	Coverage (000s)
99/00	3%	2%	39%	3%	0%	0%	50%	4.6
00/01	4%	6%	43%	2%	0%	3%	42%	4.7
01/02*	3%	16%	43%	18%	0%	2%	18%	5.4
02/03	3%	16%	49%	17%	0%	2%	13%	4.8
03/04	-	-	-	-	-	-	-	-
04/05	-	-	-	-	-	-	-	-
05/06	5%	31%	49%	1%	0%	2%	12%	4.9
06/07	9%	31%	49%	1%	0%	2%	10%	5.3
07/08	-	-	-	-	-	-	-	-
08/09	12%	25%	40%	0%	0%	5%	19%	2.3

Table AF34: Maximum Level Payable – Other Community Services

Maximum Compensation Payable - Other Community Services								
	No Payment	1 to 13 Weeks	14 to 39 Weeks	40 to 52 Weeks	More than 52 Weeks	Other	Silent	Coverage (000s)
99/00	4%	18%	18%	11%	2%	37%	10%	12.4
00/01	4%	19%	18%	14%	3%	36%	6%	12.2
01/02*	8%	21%	18%	16%	3%	25%	9%	11.3
02/03	6%	23%	16%	14%	4%	28%	9%	9.7
03/04	-	-	-	-	-	-	-	-
04/05	-	-	-	-	-	-	-	-
05/06*	4%	16%	10%	20%	6%	31%	12%	6.3
06/07	3%	12%	9%	34%	5%	22%	15%	8.9
07/08	-	-	-	-	-	-	-	-
08/09	3%	13%	6%	22%	3%	39%	13%	12.3

Compensation for the First Year of Service

Compensation for the First Year of Service by Sector

Table AF35: Compensation for the First Year of Service – All Settlements

Compensation for the First Year of Service - All Settlements*									
	No Payment	1 to 3 Weeks	4 to 5 Weeks	6 Weeks	7 to 10 Weeks	More than 10 Weeks	Other	Silent	Coverage (000s)
99/00	6%	3%	12%	28%	18%	9%	13%	11%	363.0
00/01	8%	3%	14%	30%	24%	5%	7%	9%	350.1
01/02*	8%	3%	14%	32%	29%	5%	1%	8%	352.4
02/03	5%	3%	13%	36%	34%	4%	2%	3%	289.9
03/04	2%	3%	12%	38%	37%	5%	2%	2%	269.0
04/05	3%	3%	13%	36%	30%	4%	8%	2%	272.9
05/06	3%	3%	12%	40%	27%	4%	7%	3%	297.1
06/07	3%	4%	15%	37%	27%	4%	7%	2%	287.4
07/08	3%	4%	14%	40%	25%	3%	8%	2%	312.7
08/09	3%	4%	16%	36%	26%	2%	11%	2%	269.3

Table AF36: Compensation for the First Year of Service – Private Sector

Compensation for the First Year of Service - Private Sector									
	No Payment	1 to 3 Weeks	4 to 5 Weeks	6 Weeks	7 to 10 Weeks	More than 10 Weeks	Other	Silent	Coverage (000s)
99/00	10%	5%	19%	16%	24%	4%	4%	18%	201.2
00/01	15%	4%	19%	18%	25%	3%	2%	14%	193.8
01/02*	14%	5%	19%	20%	24%	3%	2%	13%	190.4
02/03	10%	6%	22%	22%	30%	2%	1%	7%	133.1
03/04	5%	6%	20%	25%	35%	2%	2%	5%	108.9
04/05	6%	7%	23%	22%	33%	2%	2%	5%	110.4
05/06	7%	6%	23%	22%	32%	2%	1%	6%	114.5
06/07	7%	6%	24%	27%	29%	2%	1%	6%	121.6
07/08	6%	7%	22%	32%	25%	2%	1%	5%	139.7
08/09	7%	7%	24%	33%	22%	1%	1%	5%	122.4

Table AF37: Compensation for the First Year of Service – Government Core

Compensation for the First Year of Service - Government Core									
	No Payment	1 to 3 Weeks	4 to 5 Weeks	6 Weeks	7 to 10 Weeks	More than 10 Weeks	Other	Silent	Coverage (000s)
99/00	0%	0%	4%	45%	8%	12%	29%	2%	135.8
00/01	0%	0%	6%	47%	19%	8%	18%	2%	132.3
01/02*	1%	1%	6%	49%	33%	8%	1%	1%	137.6
02/03	0%	1%	5%	50%	36%	6%	2%	0%	137.4
03/04	1%	1%	5%	49%	36%	7%	2%	0%	139.5
04/05	0%	1%	6%	48%	24%	6%	14%	0%	141.4
05/06	0%	1%	5%	54%	21%	6%	12%	0%	160.4
06/07	0%	2%	9%	46%	23%	6%	14%	0%	143.8
07/08	0%	2%	8%	47%	22%	5%	16%	0%	150.4
08/09	1%	2%	9%	38%	25%	3%	22%	0%	128.2

Table AF38: Compensation for the First Year of Service – Government Trading

Compensation for the First Year of Service - Government Trading									
	No Payment	1 to 3 Weeks	4 to 5 Weeks	6 Weeks	7 to 10 Weeks	More than 10 Weeks	Other	Silent	Coverage (000s)
99/00	0%	2%	2%	10%	4%	77%	3%	2%	9.5
00/01	0%	2%	5%	10%	75%	8%	0%	0%	9.7
01/02*	0%	1%	6%	9%	76%	8%	0%	0%	9.7
02/03	0%	2%	11%	9%	73%	5%	0%	0%	8.9
03/04	0%	2%	3%	14%	76%	5%	0%	0%	9.4
04/05	0%	3%	3%	16%	74%	5%	0%	0%	8.5
05/06	0%	3%	3%	16%	74%	5%	0%	0%	8.5
06/07	3%	1%	15%	76%	5%	5%	0%	0%	8.2
07/08	0%	2%	2%	15%	76%	4%	0%	0%	8.2
08/09	0%	2%	3%	13%	81%	0%	1%	0%	7.7

Table AF39: Compensation for the First Year of Service – Local Government Core

Compensation for the First Year of Service - Local Government Core									
	No Payment	1 to 3 Weeks	4 to 5 Weeks	6 Weeks	7 to 10 Weeks	More than 10 Weeks	Other	Silent	Coverage (000s)
99/00	0%	1%	7%	50%	31%	0%	0%	11%	10.6
00/01	0%	1%	5%	54%	31%	1%	0%	8%	9.5
01/02*	0%	1%	4%	57%	35%	1%	0%	2%	10.0
02/03	1%	3%	7%	57%	30%	0%	0%	2%	7.4
03/04	0%	1%	16%	53%	29%	0%	1%	0%	8.2
04/05	0%	1%	16%	52%	30%	1%	1%	0%	9.0
05/06	0%	1%	16%	50%	31%	1%	0%	0%	9.0
06/07	1%	1%	14%	57%	25%	1%	0%	0%	10.4
07/08	0%	2%	14%	57%	26%	1%	0%	1%	10.6
08/09	1%	1%	4%	60%	32%	1%	0%	2%	8.6

Table AF40: Compensation for the First Year of Service – Local Government Trading

Compensation for the First Year of Service - Local Government Trading									
	No Payment	1 to 3 Weeks	4 to 5 Weeks	6 Weeks	7 to 10 Weeks	More than 10 Weeks	Other	Silent	Coverage (000s)
99/00	4%	7%	21%	17%	24%	6%	1%	20%	5.8
00/01	5%	7%	29%	17%	27%	0%	0%	15%	4.8
01/02*	4%	3%	33%	16%	28%	0%	1%	15%	4.7
02/03	5%	4%	39%	19%	14%	1%	1%	17%	3.1
03/04	5%	3%	37%	22%	26%	1%	2%	3%	3.0
04/05	9%	3%	27%	22%	22%	1%	2%	15%	3.6
05/06	7%	1%	21%	38%	19%	1%	2%	11%	4.6
06/07	4%	3%	27%	32%	28%	1%	3%	2%	3.4
07/08	4%	3%	25%	38%	25%	1%	2%	2%	3.7
08/09	7%	2%	31%	22%	29%	1%	4%	4%	2.4

Compensation for the First Year of Service by Industry

Table AF41: Compensation for the First Year of Service – Agricultural Industry

Compensation for the First Year of Service - Agriculture									
	No Payment	1 to 3 Weeks	4 to 5 Weeks	6 Weeks	7 to 10 Weeks	More than 10 Weeks	Other	Silent	Coverage (000s)
99/00	2%	0%	2%	14%	0%	0%	0%	82%	0.5
00/01	2%	0%	0%	65%	1%	0%	0%	32%	0.4
01/02*	2%	0%	21%	49%	1%	0%	0%	27%	0.6
02/03	3%	0%	34%	10%	1%	0%	0%	52%	0.3
03/04	2%	0%	20%	7%	0%	0%	0%	71%	0.5
04/05	2%	0%	23%	3%	1%	0%	0%	71%	0.5
05/06	2%	28%	29%	5%	0%	0%	0%	36%	0.4
06/07	2%	54%	32%	7%	0%	0%	0%	5%	0.3
07/08	5%	34%	22%	5%	0%	0%	0%	34%	0.4
08/09	3%	30%	3%	8%	22%	0%	14%	21%	0.5

Table AF42: Compensation for the First Year of Service – Mining

Compensation for the First Year of Service - Mining									
	No Payment	1 to 3 Weeks	4 to 5 Weeks	6 Weeks	7 to 10 Weeks	More than 10 Weeks	Other	Silent	Coverage (000s)
99/00	1%	3%	4%	27%	2%	0%	60%	3%	1.2
00/01	1%	0%	8%	29%	2%	0%	59%	1%	1.2
01/02*	1%	0%	11%	21%	3%	2%	57%	5%	1.2
02/03	4%	10%	28%	30%	5%	4%	12%	7%	0.8
03/04	4%	8%	33%	31%	4%	8%	7%	6%	0.8
04/05	3%	6%	28%	31%	3%	6%	5%	19%	1.2
05/06	13%	5%	23%	29%	3%	5%	5%	17%	1.2
06/07	22%	1%	14%	31%	0%	8%	8%	15%	0.7
07/08	11%	59%	8%	15%	0%	3%	4%	0%	1.4
08/09	37%	4%	31%	11%	1%	5%	10%	2%	0.5

Table AF43: Compensation for the First Year of Service – Food Manufacturing

Compensation for the First Year of Service - Food Manufacturing									
	No Payment	1 to 3 Weeks	4 to 5 Weeks	6 Weeks	7 to 10 Weeks	More than 10 Weeks	Other	Silent	Coverage (000s)
99/00	5%	4%	22%	21%	25%	11%	1%	11%	18.5
00/01	2%	4%	36%	22%	28%	5%	0%	3%	19.5
01/02*	1%	3%	38%	20%	29%	6%	0%	3%	20.2
02/03	1%	4%	33%	14%	37%	8%	0%	3%	20.0
03/04	1%	3%	29%	14%	41%	9%	0%	2%	18.0
04/05	3%	3%	30%	14%	39%	9%	0%	2%	18.5
05/06	3%	3%	27%	12%	43%	9%	0%	2%	17.2
06/07	2%	2%	26%	16%	39%	11%	0%	3%	18.0
07/08	2%	3%	21%	14%	48%	10%	0%	3%	22.6
08/09	1%	3%	21%	10%	55%	7%	0%	2%	18.7

Table AF44: Compensation for the First Year of Service – Textile Manufacturing

Compensation for the First Year of Service - Textile Manufacturing									
	No Payment	1 to 3 Weeks	4 to 5 Weeks	6 Weeks	7 to 10 Weeks	More than 10 Weeks	Other	Silent	Coverage (000s)
99/00	14%	17%	19%	10%	1%	0%	1%	38%	8.0
00/01	15%	22%	22%	8%	1%	0%	1%	31%	6.9
01/02*	6%	27%	25%	7%	1%	0%	1%	33%	6.1
02/03	7%	30%	33%	11%	1%	0%	2%	16%	3.9
03/04	5%	31%	34%	18%	0%	0%	2%	9%	3.4
04/05	5%	28%	35%	20%	0%	0%	3%	9%	3.5
05/06	5%	27%	39%	19%	0%	0%	2%	8%	3.7
06/07	2%	24%	44%	21%	0%	0%	3%	7%	3.5
07/08	1%	23%	47%	20%	0%	0%	1%	8%	3.8
08/09	1%	35%	43%	15%	0%	0%	0%	6%	3.5

Table AF45: Compensation for the First Year of Service – Wood & Paper Manufacturing

Compensation for the First Year of Service - Wood & Paper Manufacturing									
	No Payment	1 to 3 Weeks	4 to 5 Weeks	6 Weeks	7 to 10 Weeks	More than 10 Weeks	Other	Silent	Coverage (000s)
99/00	3%	5%	7%	37%	34%	0%	0%	14%	6.3
00/01	2%	4%	8%	43%	38%	0%	0%	5%	5.6
01/02*	1%	5%	8%	42%	35%	0%	0%	9%	6.0
02/03	3%	5%	8%	43%	39%	0%	0%	2%	5.9
03/04	4%	3%	9%	51%	32%	0%	0%	1%	5.3
04/05	4%	4%	8%	49%	33%	0%	0%	2%	5.7
05/06	5%	4%	8%	48%	34%	0%	0%	2%	6.0
06/07	4%	5%	9%	50%	33%	0%	0%	0%	5.7
07/08	3%	8%	6%	51%	31%	0%	1%	1%	5.6
08/09	4%	7%	10%	44%	33%	0%	2%	1%	4.8

Table AF46: Compensation for the First Year of Service – Printing

Compensation for the First Year of Service - Printing									
	No Payment	1 to 3 Weeks	4 to 5 Weeks	6 Weeks	7 to 10 Weeks	More than 10 Weeks	Other	Silent	Coverage (000s)
99/00	3%	8%	41%	18%	23%	0%	3%	4%	6.2
00/01	2%	7%	46%	17%	22%	0%	2%	4%	5.5
01/02*	2%	7%	43%	16%	27%	0%	1%	4%	5.5
02/03	6%	5%	40%	19%	28%	0%	0%	2%	3.4
03/04	5%	5%	34%	22%	33%	0%	0%	1%	3.6
04/05	4%	5%	39%	22%	29%	0%	0%	2%	3.6
05/06	3%	4%	39%	25%	27%	0%	0%	2%	3.6
06/07	3%	4%	41%	20%	29%	0%	0%	2%	3.5
07/08	3%	5%	38%	23%	29%	0%	0%	2%	3.6
08/09	4%	5%	34%	22%	32%	0%	0%	2%	2.5

Table AF47: Compensation for the First Year of Service – Chemical Manufacturing

Compensation for the First Year of Service - Chemical Manufacturing									
	No Payment	1 to 3 Weeks	4 to 5 Weeks	6 Weeks	7 to 10 Weeks	More than 10 Weeks	Other	Silent	Coverage (000s)
99/00	4%	1%	1%	13%	10%	8%	2%	61%	11.7
00/01	1%	2%	2%	15%	9%	5%	2%	64%	10.8
01/02*	0%	2%	3%	13%	11%	5%	2%	64%	11.1
02/03	0%	2%	5%	34%	33%	10%	10%	6%	3.9
03/04	1%	1%	3%	38%	33%	11%	10%	4%	3.6
04/05	2%	2%	7%	32%	29%	8%	8%	12%	4.1
05/06	2%	1%	5%	21%	22%	8%	6%	35%	5.2
06/07	2%	2%	18%	24%	18%	3%	0%	33%	5.4
07/08	2%	2%	13%	23%	15%	6%	8%	32%	5.4
08/09	2%	2%	9%	22%	9%	6%	10%	40%	4.2

Table AF48: Compensation for the First Year of Service – Mineral Manufacturing

Compensation for the First Year of Service - Mineral Manufacturing									
	No Payment	1 to 3 Weeks	4 to 5 Weeks	6 Weeks	7 to 10 Weeks	More than 10 Weeks	Other	Silent	Coverage (000s)
99/00	10%	17%	8%	28%	0%	0%	0%	37%	1.3
00/01	11%	17%	6%	32%	0%	0%	0%	34%	1.3
01/02*	9%	12%	12%	30%	7%	0%	0%	30%	1.7
02/03	4%	4%	24%	49%	12%	0%	0%	7%	1.3
03/04	8%	2%	19%	41%	10%	0%	0%	21%	1.6
04/05	7%	2%	18%	42%	10%	0%	0%	21%	1.6
05/06	8%	2%	17%	39%	14%	0%	0%	20%	1.5
06/07	7%	6%	21%	41%	5%	0%	0%	21%	1.5
07/08	7%	6%	18%	41%	6%	0%	0%	22%	1.5
08/09	11%	8%	18%	53%	0%	0%	0%	10%	0.9

Table AF49: Compensation for the First Year of Service – Metals Manufacturing

Compensation for the First Year of Service - Metals Manufacturing									
	No Payment	1 to 3 Weeks	4 to 5 Weeks	6 Weeks	7 to 10 Weeks	More than 10 Weeks	Other	Silent	Coverage (000s)
99/00	3%	1%	12%	19%	12%	4%	0%	49%	9.4
00/01	4%	1%	12%	18%	12%	4%	0%	49%	9.1
01/02*	4%	3%	13%	16%	14%	3%	0%	47%	9.1
02/03	5%	5%	18%	29%	25%	7%	0%	11%	4.5
03/04	6%	5%	20%	20%	28%	3%	6%	12%	3.6
04/05	10%	5%	18%	22%	27%	3%	5%	11%	4.0
05/06	36%	3%	6%	18%	21%	2%	4%	11%	5.2
06/07	35%	4%	7%	25%	21%	2%	0%	7%	5.2
07/08	37%	4%	7%	26%	21%	0%	0%	5%	5.1
08/09	51%	5%	8%	26%	5%	0%	0%	6%	3.5

Table AF50: Compensation for the First Year of Service – Machinery Manufacturing

Compensation for the First Year of Service - Machinery Manufacturing									
	No Payment	1 to 3 Weeks	4 to 5 Weeks	6 Weeks	7 to 10 Weeks	More than 10 Weeks	Other	Silent	Coverage (000s)
99/00	6%	4%	30%	12%	28%	0%	1%	19%	13.3
00/01	6%	5%	31%	13%	30%	0%	0%	15%	12.0
01/02*	7%	8%	24%	16%	27%	0%	0%	18%	11.0
02/03	7%	11%	24%	14%	40%	0%	0%	4%	8.3
03/04	7%	9%	22%	12%	45%	0%	0%	5%	8.2
04/05	7%	9%	18%	12%	47%	0%	0%	6%	8.4
05/06	9%	9%	20%	13%	43%	0%	0%	6%	8.7
06/07	7%	5%	20%	13%	49%	0%	1%	5%	9.2
07/08	7%	5%	20%	13%	48%	0%	0%	7%	9.4
08/09	8%	3%	14%	16%	50%	0%	1%	8%	7.2

Table AF51: Compensation for the First Year of Service – Other Manufacturing

Compensation for the First Year of Service - Other Manufacturing									
	No Payment	1 to 3 Weeks	4 to 5 Weeks	6 Weeks	7 to 10 Weeks	More than 10 Weeks	Other	Silent	Coverage (000s)
99/00	2%	20%	3%	27%	0%	0%	0%	48%	1.7
00/01	3%	3%	18%	18%	0%	0%	0%	58%	1.1
01/02*	5%	2%	14%	8%	30%	0%	0%	41%	1.2
02/03	11%	7%	25%	28%	0%	0%	0%	29%	0.5
03/04	14%	8%	25%	32%	0%	0%	0%	21%	0.4
04/05	17%	9%	42%	18%	0%	0%	0%	14%	0.7
05/06	13%	8%	45%	19%	2%	0%	0%	13%	0.8
06/07	13%	5%	49%	17%	4%	0%	0%	12%	0.8
07/08	16%	4%	43%	17%	4%	0%	0%	16%	0.9
08/09	6%	8%	40%	13%	11%	0%	0%	21%	1.1

Table AF52: Compensation for the First Year of Service – Utilities

Compensation for the First Year of Service - Utilities									
	No Payment	1 to 3 Weeks	4 to 5 Weeks	6 Weeks	7 to 10 Weeks	More than 10 Weeks	Other	Silent	Coverage (000s)
99/00	4%	1%	6%	25%	26%	12%	5%	21%	3.6
00/01	7%	0%	12%	28%	40%	1%	7%	5%	2.2
01/02*	6%	0%	14%	20%	44%	8%	4%	4%	2.4
02/03	9%	0%	11%	18%	43%	13%	1%	5%	1.5
03/04	8%	0%	9%	20%	46%	12%	0%	6%	1.7
04/05	14%	0%	11%	17%	45%	6%	0%	6%	1.9
05/06	16%	2%	11%	18%	44%	2%	2%	5%	2.1
06/07	12%	2%	10%	24%	43%	1%	2%	5%	2.0
07/08	14%	2%	12%	21%	43%	1%	2%	5%	2.1
08/09	10%	1%	17%	36%	29%	2%	5%	1%	1.5

Table AF53: Compensation for the First Year of Service – Construction

Compensation for the First Year of Service - Construction									
	No Payment	1 to 3 Weeks	4 to 5 Weeks	6 Weeks	7 to 10 Weeks	More than 10 Weeks	Other	Silent	Coverage (000s)
99/00	10%	7%	39%	13%	6%	0%	11%	14%	5.4
00/01	10%	7%	40%	13%	4%	0%	14%	12%	5.1
01/02*	12%	10%	38%	14%	3%	0%	11%	12%	5.2
02/03	13%	27%	25%	15%	4%	0%	3%	13%	3.1
03/04	10%	27%	28%	13%	4%	0%	3%	14%	3.0
04/05	11%	30%	25%	16%	3%	0%	2%	12%	3.8
05/06	11%	32%	35%	14%	2%	0%	3%	3%	3.6
06/07	7%	42%	29%	16%	1%	0%	2%	3%	4.9
07/08	7%	39%	26%	21%	1%	0%	2%	3%	5.5
08/09	7%	33%	32%	21%	1%	4%	0%	1%	5.6

Table AF54: Compensation for the First Year of Service – Wholesaling

Compensation for the First Year of Service - Wholesaling									
	No Payment	1 to 3 Weeks	4 to 5 Weeks	6 Weeks	7 to 10 Weeks	More than 10 Weeks	Other	Silent	Coverage (000s)
99/00	4%	5%	15%	52%	4%	0%	0%	20%	2.7
00/01	6%	5%	19%	64%	4%	0%	0%	2%	2.1
01/02*	6%	6%	18%	43%	25%	1%	0%	1%	2.2
02/03	1%	14%	14%	61%	9%	0%	1%	0%	0.9
03/04	1%	14%	21%	52%	11%	0%	1%	0%	0.8
04/05	1%	15%	19%	54%	11%	0%	1%	0%	0.8
05/06	1%	12%	19%	58%	8%	0%	1%	0%	0.8
06/07	1%	11%	16%	59%	9%	0%	0%	4%	1.0
07/08	3%	9%	16%	58%	7%	0%	0%	7%	1.2
08/09	5%	2%	23%	49%	6%	0%	4%	12%	0.6

Table AF55: Compensation for the First Year of Service – Food Retailing

Compensation for the First Year of Service - Food Retailing									
	No Payment	1 to 3 Weeks	4 to 5 Weeks	6 Weeks	7 to 10 Weeks	More than 10 Weeks	Other	Silent	Coverage (000s)
99/00	4%	1%	1%	25%	47%	0%	21%	1%	19.7
00/01	3%	0%	1%	47%	48%	0%	0%	1%	19.3
01/02*	4%	0%	1%	46%	48%	0%	0%	1%	19.4
02/03	6%	0%	4%	49%	40%	0%	0%	1%	8.2
03/04	2%	1%	0%	55%	41%	0%	0%	0%	7.3
04/05	7%	1%	0%	57%	34%	0%	0%	1%	4.3
05/06	7%	1%	0%	57%	34%	0%	0%	1%	4.3
06/07	3%	0%	1%	76%	19%	0%	0%	0%	7.8
07/08	1%	1%	1%	89%	8%	0%	0%	0%	19.8
08/09	13%	3%	1%	83%	1%	0%	0%	0%	18.7

Table AF56: Compensation for the First Year of Service – Other Retailing

Compensation for the First Year of Service - Other Retailing									
	No Payment	1 to 3 Weeks	4 to 5 Weeks	6 Weeks	7 to 10 Weeks	More than 10 Weeks	Other	Silent	Coverage (000s)
99/00	24%	5%	11%	28%	0%	0%	14%	18%	11.3
00/01	34%	6%	5%	36%	0%	0%	1%	18%	8.3
01/02*	31%	7%	16%	33%	4%	0%	1%	8%	9.1
02/03	5%	5%	25%	52%	7%	0%	0%	6%	5.4
03/04	0%	11%	16%	49%	13%	0%	0%	11%	2.9
04/05	0%	10%	24%	43%	11%	0%	0%	12%	3.3
05/06	0%	10%	23%	44%	11%	0%	0%	12%	3.3
06/07	0%	4%	29%	60%	0%	0%	0%	7%	4.2
07/08	1%	14%	36%	43%	0%	0%	0%	5%	5.9
08/09	1%	14%	34%	47%	0%	0%	3%	1%	5.3

Table AF57: Compensation for the First Year of Service – Accommodation & Cafes etc

Compensation for the First Year of Service - Accommodation & Cafes etc									
	No Payment	1 to 3 Weeks	4 to 5 Weeks	6 Weeks	7 to 10 Weeks	More than 10 Weeks	Other	Silent	Coverage (000s)
99/00	28%	3%	35%	1%	0%	0%	3%	30%	12.9
00/01	27%	2%	37%	1%	0%	0%	1%	32%	11.5
01/02*	19%	3%	41%	1%	0%	0%	1%	35%	10.2
02/03	17%	2%	39%	1%	0%	0%	0%	41%	8.5
03/04	8%	11%	65%	10%	0%	0%	0%	6%	1.3
04/05	5%	8%	53%	7%	0%	0%	0%	27%	2.0
05/06	3%	6%	50%	11%	0%	0%	0%	29%	1.9
06/07	4%	8%	67%	15%	0%	0%	0%	6%	1.4
07/08	5%	7%	67%	13%	0%	0%	1%	6%	1.4
08/09	8%	6%	66%	16%	0%	0%	0%	4%	1

Table AF58: Compensation for the First Year of Service – Transport

Compensation for the First Year of Service - Transport									
	No Payment	1 to 3 Weeks	4 to 5 Weeks	6 Weeks	7 to 10 Weeks	More than 10 Weeks	Other	Silent	Coverage (000s)
99/00	3%	11%	24%	15%	35%	4%	0%	8%	19.7
00/01	3%	8%	25%	16%	36%	4%	0%	8%	18.3
01/02*	4%	11%	15%	41%	17%	5%	1%	6%	13.9
02/03	1%	8%	12%	41%	30%	5%	1%	2%	14.3
03/04	2%	7%	11%	39%	34%	3%	1%	3%	13.5
04/05	3%	9%	16%	22%	40%	4%	5%	3%	12.1
05/06	3%	8%	17%	21%	39%	3%	4%	4%	12.8
06/07	3%	5%	18%	36%	26%	3%	5%	4%	13.6
07/08	4%	5%	18%	37%	26%	3%	4%	3%	14.5
08/09	4%	6%	18%	45%	20%	1%	3%	3%	13.6

Table AF59: Compensation for the First Year of Service – Storage

Compensation for the First Year of Service - Storage									
	No Payment	1 to 3 Weeks	4 to 5 Weeks	6 Weeks	7 to 10 Weeks	More than 10 Weeks	Other	Silent	Coverage (000s)
99/00	5%	0%	14%	9%	0%	5%	3%	64%	0.3
00/01	5%	0%	14%	9%	0%	5%	0%	67%	0.3
01/02*	5%	3%	18%	10%	4%	0%	0%	60%	0.3
02/03	0%	13%	43%	44%	0%	0%	0%	0%	0.1
03/04	34%	7%	22%	22%	0%	0%	0%	15%	0.1
04/05	46%	5%	17%	19%	0%	0%	0%	13%	0.2
05/06	41%	0%	20%	15%	0%	0%	0%	24%	0.2
06/07	11%	0%	44%	11%	1%	0%	3%	30%	0.3
07/08	10%	3%	42%	14%	0%	1%	3%	26%	0.3
08/09	0%	4%	43%	19%	22%	1%	2%	10%	0.9

Table AF60: Compensation for the First Year of Service – Communication

Compensation for the First Year of Service - Communication									
	No Payment	1 to 3 Weeks	4 to 5 Weeks	6 Weeks	7 to 10 Weeks	More than 10 Weeks	Other	Silent	Coverage (000s)
99/00	0%	0%	0%	0%	0%	99%	0%	1%	8.7
00/01	0%	0%	0%	0%	77%	22%	0%	1%	9.1
01/02*	0%	0%	0%	0%	77%	22%	0%	1%	9.1
02/03	0%	0%	0%	0%	100%	0%	0%	0%	6.5
03/04	0%	0%	0%	0%	100%	0%	0%	0%	7.2
04/05	0%	0%	2%	0%	98%	0%	0%	0%	6.4
05/06	0%	0%	2%	0%	98%	0%	0%	0%	6.4
06/07	0%	0%	3%	0%	97%	0%	0%	0%	6.5
07/08	0%	0%	2%	0%	97%	0%	0%	0%	6.5
08/09	0%	0%	3%	1%	96%	0%	0%	0%	6.6

Table AF61: Compensation for the First Year of Service – Finance

Compensation for the First Year of Service - Finance									
	No Payment	1 to 3 Weeks	4 to 5 Weeks	6 Weeks	7 to 10 Weeks	More than 10 Weeks	Other	Silent	Coverage (000s)
99/00	0%	0%	1%	0%	99%	0%	0%	0%	15.6
00/01	1%	0%	2%	0%	97%	0%	0%	0%	15.5
01/02*	0%	0%	2%	0%	98%	0%	0%	0%	14.8
02/03	0%	0%	2%	0%	98%	0%	0%	0%	13.0
03/04	0%	0%	3%	0%	97%	0%	0%	0%	11.6
04/05	0%	0%	2%	0%	97%	0%	0%	0%	11.5
05/06	0%	0%	2%	0%	97%	0%	0%	0%	11.1
06/07	0%	0%	2%	1%	97%	0%	0%	0%	11.0
07/08	0%	0%	3%	1%	95%	0%	0%	0%	7.5
08/09	0%	0%	4%	3%	93%	0%	0%	0%	5.6

Table AF62: Compensation for the First Year of Service – Insurance

Compensation for the First Year of Service - Insurance									
	No Payment	1 to 3 Weeks	4 to 5 Weeks	6 Weeks	7 to 10 Weeks	More than 10 Weeks	Other	Silent	Coverage (000s)
99/00	0%	12%	14%	1%	50%	22%	0%	1%	5.1
00/01	0%	21%	1%	2%	74%	0%	0%	2%	3.3
01/02*	0%	21%	0%	2%	75%	0%	0%	2%	3.3
02/03	0%	0%	1%	2%	97%	0%	0%	0%	2.4
03/04	0%	0%	0%	3%	97%	0%	0%	0%	2.1
04/05	0%	0%	0%	3%	96%	0%	0%	0%	1.8
05/06	0%	0%	0%	4%	95%	0%	0%	0%	1.5
06/07	0%	0%	0%	3%	96%	0%	0%	0%	1.9
07/08	0%	0%	1%	4%	95%	0%	0%	0%	1.6
08/09	0%	0%	2%	5%	89%	0%	0%	4%	1.3

Table AF63: Compensation for the First Year of Service – Business Services

Compensation for the First Year of Service - Business Services									
	No Payment	1 to 3 Weeks	4 to 5 Weeks	6 Weeks	7 to 10 Weeks	More than 10 Weeks	Other	Silent	Coverage (000s)
99/00	48%	2%	8%	21%	3%	10%	4%	4%	14.8
00/01	57%	0%	7%	19%	3%	9%	2%	3%	16.4
01/02*	56%	0%	8%	19%	3%	8%	2%	4%	17.0
02/03	23%	2%	10%	51%	5%	0%	4%	5%	6.4
03/04	26%	1%	2%	56%	6%	0%	4%	5%	6.4
04/05	25%	1%	4%	57%	6%	0%	4%	3%	6.6
05/06	25%	1%	5%	55%	6%	0%	4%	6%	6.3
06/07	24%	1%	5%	54%	5%	0%	4%	7%	6.3
07/08	25%	0%	5%	57%	5%	0%	3%	4%	6.7
08/09	4%	0%	10%	80%	2%	0%	0%	5%	2.4

Table AF64: Compensation for the First Year of Service – Government Administration & Defence

Compensation for the First Year of Service - Government Administration & Defence									
	No Payment	1 to 3 Weeks	4 to 5 Weeks	6 Weeks	7 to 10 Weeks	More than 10 Weeks	Other	Silent	Coverage (000s)
99/00	0%	0%	9%	16%	23%	44%	4%	4%	32.1
00/01	0%	1%	20%	18%	21%	34%	3%	3%	26.1
01/02*	0%	0%	21%	20%	27%	30%	1%	1%	25.2
02/03	0%	1%	16%	21%	37%	24%	0%	1%	24.2
03/04	2%	0%	12%	27%	28%	24%	7%	0%	27.2
04/05	0%	0%	14%	28%	27%	24%	6%	1%	27.3
05/06	0%	0%	13%	28%	28%	24%	6%	1%	28.9
06/07	0%	5%	17%	29%	23%	20%	6%	0%	32.5
07/08	0%	5%	16%	30%	23%	20%	6%	0%	33.6
08/09	0%	6%	16%	29%	29%	14%	6%	0%	28

Table AF65: Compensation for the First Year of Service – Education

Compensation for the First Year of Service - Education									
	No Payment	1 to 3 Weeks	4 to 5 Weeks	6 Weeks	7 to 10 Weeks	More than 10 Weeks	Other	Silent	Coverage (000s)
99/00	0%	0%	2%	37%	2%	2%	55%	2%	67.9
00/01	0%	0%	2%	37%	26%	2%	31%	2%	71.0
01/02*	0%	1%	3%	36%	55%	3%	1%	1%	74.7
02/03	0%	2%	2%	37%	55%	3%	1%	0%	74.8
03/04	0%	2%	2%	35%	57%	3%	0%	0%	75.3
04/05	0%	1%	3%	37%	34%	3%	23%	0%	76.8
05/06	0%	1%	3%	38%	33%	3%	22%	0%	78.9
06/07	0%	1%	4%	34%	34%	3%	24%	0%	74.9
07/08	0%	1%	3%	37%	33%	0%	25%	0%	77.3
08/09	0%	0%	6%	28%	38%	0%	28%	0%	73.6

Table AF66: Compensation for the First Year of Service – Health

Compensation for the First Year of Service - Health									
	No Payment	1 to 3 Weeks	4 to 5 Weeks	6 Weeks	7 to 10 Weeks	More than 10 Weeks	Other	Silent	Coverage (000s)
99/00	1%	1%	14%	74%	1%	0%	3%	6%	47.5
00/01	14%	1%	11%	68%	1%	0%	2%	3%	51.2
01/02*	13%	1%	10%	71%	0%	1%	2%	2%	55.2
02/03	14%	1%	8%	72%	0%	1%	3%	1%	52.7
03/04	2%	1%	9%	82%	2%	0%	3%	1%	47.0
04/05	2%	2%	9%	79%	4%	0%	3%	1%	48.6
05/06	1%	1%	9%	84%	3%	0%	1%	1%	67.7
06/07	2%	2%	12%	79%	4%	0%	0%	1%	48.7
07/08	2%	2%	15%	73%	3%	0%	4%	1%	52.8
08/09	3%	3%	21%	64%	0%	0%	7%	2%	42.7

Table AF67: Compensation for the First Year of Service – Community Services

Compensation for the First Year of Service - Community Services									
	No Payment	1 to 3 Weeks	4 to 5 Weeks	6 Weeks	7 to 10 Weeks	More than 10 Weeks	Other	Silent	Coverage (000s)
99/00	3%	3%	25%	22%	1%	1%	0%	42%	4.6
00/01	4%	6%	29%	22%	1%	3%	0%	35%	4.7
01/02*	3%	12%	36%	34%	1%	3%	0%	11%	5.4
02/03	3%	14%	39%	34%	0%	1%	0%	9%	4.8
03/04	4%	17%	57%	14%	0%	1%	0%	7%	4.8
04/05	5%	12%	63%	12%	0%	1%	0%	7%	5.3
05/06	5%	12%	62%	13%	0%	1%	0%	6%	4.9
06/07	9%	12%	62%	12%	0%	1%	0%	4%	5.3
07/08	9%	12%	61%	12%	0%	1%	0%	5%	5.4
08/09	12%	16%	56%	5%	1%	3%	0%	7%	2.3

Table AF68: Compensation for the First Year of Service – Other Community Services

Compensation for the First Year of Service - Other Community Services									
	No Payment	1 to 3 Weeks	4 to 5 Weeks	6 Weeks	7 to 10 Weeks	More than 10 Weeks	Other	Silent	Coverage (000s)
99/00	4%	3%	26%	23%	35%	4%	1%	4%	12.4
00/01	4%	3%	27%	25%	35%	4%	0%	2%	12.2
01/02*	8%	3%	40%	23%	18%	5%	0%	3%	11.3
02/03	6%	1%	42%	28%	6%	1%	13%	3%	9.7
03/04	4%	2%	50%	30%	10%	1%	0%	3%	6.0
04/05	4%	2%	64%	23%	12%	1%	0%	3%	6.3
05/06	4%	3%	54%	24%	12%	1%	0%	3%	6.3
06/07	3%	3%	60%	21%	9%	1%	0%	2%	8.9
07/08	3%	3%	56%	23%	10%	1%	1%	3%	9.0
08/09	3%	3%	46%	15%	5%	0%	24%	0%	12.3

Compensation for Subsequent Years of Service

Compensation for Subsequent Years of Service by Sector

Table AF69: Compensation for Subsequent Years of Service – All Settlements

Compensation for Subsequent Years of Service - All Settlements*								
	No Payment	1 Week	2 Weeks	3 to 4 Weeks	More than 4 Weeks	Other	Silent	Coverage (000s)
99/00	7%	3%	52%	7%	0%	20%	11%	363.0
00/01	10%	3%	52%	6%	1%	19%	9%	350.1
01/02*	9%	3%	54%	6%	0%	20%	8%	352.4
02/03	6%	2%	58%	7%	1%	23%	3%	289.9
03/04	3%	2%	59%	7%	0%	25%	2%	269.0
04/05	4%	2%	58%	7%	0%	26%	2%	272.9
05/06	4%	3%	61%	6%	0%	23%	3%	297.1
06/07	4%	4%	59%	6%	0%	25%	2%	287.4
07/08	-	-	-	-	-	-	-	-
08/09	4%	4%	55%	3%	0%	32%	3%	269.3

Table AF70: Compensation for Subsequent Years of Service – Private Sector

Compensation for Subsequent Years of Service - Private Sector								
	No Payment	1 Week	2 Weeks	3 to 4 Weeks	More than 4 Weeks	Other	Silent	Coverage (000s)
99/00	12%	4%	43%	11%	1%	11%	18%	201.2
00/01	17%	4%	45%	11%	0%	9%	14%	193.8
01/02*	16%	4%	47%	10%	1%	9%	13%	190.4
02/03	11%	4%	55%	11%	1%	12%	6%	133.1
03/04	6%	5%	59%	12%	0%	13%	5%	108.9
04/05	7%	5%	56%	11%	0%	16%	5%	110.4
05/06	8%	6%	56%	10%	0%	14%	6%	114.5
06/07	8%	7%	55%	9%	0%	16%	5%	121.6
07/08	-	-	-	-	-	-	-	-
08/09	8%	7%	59%	3%	0%	19%	5%	122.4

Table AF71: Compensation for Subsequent Years of Service – Government Core

Compensation for Subsequent Years of Service - Government Core								
	No Payment	1 Week	2 Weeks	3 to 4 Weeks	More than 4 Weeks	Other	Silent	Coverage (000s)
99/00	0%	1%	59%	1%	0%	37%	2%	135.8
00/01	0%	2%	57%	1%	0%	38%	2%	132.3
01/02*	1%	1%	58%	1%	0%	38%	1%	137.6
02/03	1%	1%	57%	4%	0%	37%	0%	137.4
03/04	1%	1%	55%	4%	0%	38%	0%	139.5
04/05	1%	1%	56%	4%	0%	38%	0%	141.4
05/06	1%	0%	61%	4%	0%	33%	0%	160.4
06/07	1%	2%	57%	4%	0%	37%	0%	143.8
07/08	-	-	-	-	-	-	-	-
08/09	1%	2%	45%	4%	0%	49%	0%	128.2

Table AF72: Compensation for Subsequent Years of Service – Government Trading

Compensation for Subsequent Years of Service - Government Trading								
	No Payment	1 Week	2 Weeks	3 to 4 Weeks	More than 4 Weeks	Other	Silent	Coverage (000s)
99/00	3%	1%	87%	3%	0%	4%	2%	9.5
00/01	3%	0%	93%	3%	0%	1%	0%	9.7
01/02*	3%	0%	94%	2%	0%	1%	0%	9.7
02/03	0%	0%	94%	3%	0%	3%	0%	8.9
03/04	0%	0%	95%	2%	0%	3%	0%	9.4
04/05	0%	0%	95%	2%	0%	3%	0%	8.5
05/06	0%	0%	95%	2%	0%	3%	0%	8.5
06/07	0%	0%	98%	0%	0%	2%	0%	8.2
07/08	-	-	-	-	-	-	-	-
08/09	0%	0%	97%	0%	1%	2%	0%	7.7

Table AF73: Compensation for Subsequent Years of Service – Local Government Core

Compensation for Subsequent Years of Service - Local Government Core								
	No Payment	1 Week	2 Weeks	3 to 4 Weeks	More than 4 Weeks	Other	Silent	Coverage (000s)
99/00	0%	1%	87%	1%	0%	0%	11%	10.6
00/01	0%	1%	88%	0%	1%	2%	8%	9.5
01/02*	1%	2%	93%	0%	0%	2%	2%	10.0
02/03	1%	2%	91%	0%	0%	4%	2%	7.4
03/04	10%	1%	85%	1%	0%	2%	0%	8.2
04/05	10%	1%	86%	1%	0%	2%	0%	9.0
05/06	10%	1%	86%	1%	0%	2%	0%	9.0
06/07	9%	1%	86%	1%	0%	2%	0%	10.4
07/08	-	-	-	-	-	-	-	-
08/09	1%	1%	93%	0%	0%	4%	2%	8.6

Table AF74: Compensation for Subsequent Years of Service – Local Government Trading

Compensation for Subsequent Years of Service - Local Government Trading								
	No Payment	1 Week	2 Weeks	3 to 4 Weeks	More than 4 Weeks	Other	Silent	Coverage (000s)
99/00	7%	5%	62%	4%	0%	2%	20%	5.8
00/01	8%	12%	60%	2%	0%	2%	16%	4.8
01/02*	7%	13%	60%	2%	0%	3%	15%	4.7
02/03	9%	16%	54%	2%	0%	2%	17%	3.1
03/04	10%	13%	69%	3%	0%	2%	3%	3.0
04/05	11%	6%	62%	3%	0%	4%	15%	3.6
05/06	9%	4%	70%	3%	0%	4%	11%	4.6
06/07	9%	1%	86%	1%	0%	3%	0%	3.4
07/08	-	-	-	-	-	-	-	-
08/09	9%	3%	77%	0%	0%	6%	4%	2.4

Compensation for the First Year of Service by Industry

Table AF75: Compensation for Subsequent Years of Service – Agricultural Industry

Compensation for Subsequent Years of Service - Agriculture								
	No Payment	1 Week	2 Weeks	3 to 4 Weeks	More than 4 Weeks	Other	Silent	Coverage (000s)
99/00	2%	0%	16%	0%	0%	0%	82%	0.5
00/01	2%	0%	65%	0%	0%	0%	33%	0.4
01/02*	19%	0%	54%	0%	0%	0%	27%	0.6
02/03	32%	0%	17%	0%	0%	0%	51%	0.3
03/04	13%	0%	16%	0%	0%	0%	71%	0.5
04/05	15%	0%	14%	0%	0%	0%	71%	0.5
05/06	18%	28%	19%	0%	0%	0%	36%	0.4
06/07	25%	54%	16%	0%	0%	0%	5%	0.3
07/08	-	-	-	-	-	-	-	-
08/09	3%	30%	33%	0%	0%	14%	21%	0.5

Table AF76: Compensation for Subsequent Years of Service – Mining

Compensation for Subsequent Years of Service - Mining								
	No Payment	1 Week	2 Weeks	3 to 4 Weeks	More than 4 Weeks	Other	Silent	Coverage (000s)
99/00	1%	0%	9%	25%	0%	62%	3%	1.2
00/01	1%	0%	13%	23%	0%	62%	1%	1.2
01/02*	3%	0%	14%	17%	0%	61%	5%	1.2
02/03	9%	2%	27%	26%	0%	29%	7%	0.8
03/04	12%	5%	30%	23%	0%	24%	6%	0.8
04/05	12%	4%	29%	17%	0%	20%	19%	1.2
05/06	21%	0%	27%	17%	0%	19%	17%	1.2
06/07	36%	0%	32%	4%	0%	13%	15%	0.7
07/08	-	-	-	-	-	-	-	-
08/09	72%	0%	12%	1%	0%	13%	2%	0.5

Table AF77: Compensation for Subsequent Years of Service – Food Manufacturing

Compensation for Subsequent Years of Service - Food Manufacturing								
	No Payment	1 Week	2 Weeks	3 to 4 Weeks	More than 4 Weeks	Other	Silent	Coverage (000s)
99/00	5%	4%	36%	4%	4%	36%	11%	18.5
00/01	2%	3%	48%	4%	4%	36%	3%	19.5
01/02*	1%	3%	59%	1%	4%	29%	3%	20.2
02/03	1%	3%	59%	2%	4%	28%	3%	20.0
03/04	2%	3%	57%	1%	0%	36%	2%	18.0
04/05	3%	2%	58%	1%	0%	35%	2%	18.5
05/06	3%	3%	56%	1%	0%	35%	2%	17.2
06/07	3%	2%	54%	0%	0%	38%	3%	18.0
07/08	-	-	-	-	-	-	-	-
08/09	2%	2%	38%	1%	0%	55%	2%	18.7

Table AF78: Compensation for Subsequent Years of Service – Textile Manufacturing

Compensation for Subsequent Years of Service - Textile Manufacturing								
	No Payment	1 Week	2 Weeks	3 to 4 Weeks	More than 4 Weeks	Other	Silent	Coverage (000s)
99/00	17%	15%	25%	0%	0%	5%	38%	8.0
00/01	20%	16%	25%	0%	0%	8%	31%	6.9
01/02*	11%	19%	28%	0%	0%	9%	33%	6.1
02/03	9%	19%	40%	0%	0%	16%	16%	3.9
03/04	8%	19%	40%	0%	0%	23%	9%	3.4
04/05	8%	17%	38%	0%	0%	29%	9%	3.5
05/06	8%	24%	39%	0%	0%	21%	8%	3.7
06/07	3%	23%	39%	0%	0%	28%	7%	3.5
07/08	-	-	-	-	-	-	-	-
08/09	1%	40%	38%	1%	0%	14%	6%	3.5

Table AF79: Compensation for Subsequent Years of Service – Wood & Paper Manufacturing

Compensation for Subsequent Years of Service - Wood & Paper Manufacturing								
	No Payment	1 Week	2 Weeks	3 to 4 Weeks	More than 4 Weeks	Other	Silent	Coverage (000s)
99/00	3%	2%	72%	5%	0%	4%	14%	6.3
00/01	2%	1%	84%	5%	0%	3%	5%	5.6
01/02*	2%	1%	68%	5%	0%	15%	9%	6.0
02/03	3%	2%	74%	4%	0%	15%	2%	5.9
03/04	6%	1%	80%	4%	0%	8%	1%	5.3
04/05	6%	1%	78%	4%	0%	9%	2%	5.7
05/06	6%	1%	78%	3%	0%	9%	2%	6.0
06/07	6%	1%	78%	3%	0%	11%	0%	5.7
07/08	-	-	-	-	-	-	-	-
08/09	6%	2%	78%	4%	0%	10%	1%	4.8

Table AF80: Compensation for Subsequent Years of Service – Printing

Compensation for Subsequent Years of Service - Printing								
	No Payment	1 Week	2 Weeks	3 to 4 Weeks	More than 4 Weeks	Other	Silent	Coverage (000s)
99/00	2%	9%	65%	12%	1%	7%	4%	6.2
00/01	2%	7%	67%	12%	1%	7%	4%	5.5
01/02*	2%	8%	64%	13%	0%	9%	4%	5.5
02/03	2%	5%	61%	13%	0%	17%	2%	3.4
03/04	1%	7%	59%	22%	0%	11%	1%	3.6
04/05	0%	6%	67%	21%	0%	5%	2%	3.6
05/06	0%	10%	63%	20%	0%	4%	2%	3.6
06/07	0%	10%	59%	24%	0%	4%	2%	3.5
07/08	-	-	-	-	-	-	-	-
08/09	1%	11%	55%	14%	0%	16%	2%	2.5

Table AF81: Compensation for Subsequent Years of Service – Chemical Manufacturing

Compensation for Subsequent Years of Service - Chemical Manufacturing								
	No Payment	1 Week	2 Weeks	3 to 4 Weeks	More than 4 Weeks	Other	Silent	Coverage (000s)
99/00	3%	2%	20%	11%	0%	3%	61%	11.7
00/01	0%	2%	22%	8%	0%	4%	64%	10.8
01/02*	1%	2%	22%	7%	0%	4%	64%	11.1
02/03	3%	3%	58%	14%	0%	16%	6%	3.9
03/04	1%	3%	61%	17%	1%	13%	4%	3.6
04/05	1%	2%	56%	15%	0%	13%	12%	4.1
05/06	1%	2%	40%	12%	0%	10%	35%	5.2
06/07	1%	2%	52%	10%	0%	3%	33%	5.4
07/08	-	-	-	-	-	-	-	-
08/09	1%	2%	37%	7%	0%	13%	40%	4.2

Table AF82: Compensation for Subsequent Years of Service – Mineral Manufacturing

Compensation for Subsequent Years of Service - Mineral Manufacturing								
	No Payment	1 Week	2 Weeks	3 to 4 Weeks	More than 4 Weeks	Other	Silent	Coverage (000s)
99/00	8%	1%	52%	0%	0%	2%	37%	1.3
00/01	9%	4%	51%	0%	0%	2%	34%	1.3
01/02*	7%	3%	54%	0%	0%	6%	30%	1.7
02/03	4%	4%	85%	0%	0%	0%	7%	1.3
03/04	8%	2%	67%	0%	0%	3%	21%	1.6
04/05	7%	2%	67%	0%	0%	3%	21%	1.6
05/06	8%	4%	64%	0%	2%	3%	20%	1.5
06/07	7%	8%	62%	0%	2%	1%	21%	1.5
07/08	-	-	-	-	-	-	-	-
08/09	11%	14%	64%	0%	0%	0%	10%	0.9

Table AF83: Compensation for Subsequent Years of Service – Metals Manufacturing

Compensation for Subsequent Years of Service- Metals Manufacturing								
	No Payment	1 Week	2 Weeks	3 to 4 Weeks	More than 4 Weeks	Other	Silent	Coverage (000s)
99/00	3%	1%	46%	1%	0%	0%	49%	9.4
00/01	4%	1%	45%	1%	0%	0%	49%	9.1
01/02*	4%	3%	44%	2%	0%	0%	47%	9.1
02/03	5%	5%	78%	1%	0%	0%	11%	4.5
03/04	6%	6%	69%	1%	0%	7%	12%	3.6
04/05	10%	5%	73%	0%	0%	1%	11%	4.0
05/06	36%	4%	49%	0%	0%	1%	11%	5.2
06/07	35%	4%	53%	0%	0%	1%	7%	5.2
07/08	-	-	-	-	-	-	-	-
08/09	51%	4%	37%	0%	0%	1%	6%	3.5

Table AF84: Compensation for Subsequent Years of Service – Machinery Manufacturing

Compensation for Subsequent Years of Service - Machinery Manufacturing								
	No Payment	1 Week	2 Weeks	3 to 4 Weeks	More than 4 Weeks	Other	Silent	Coverage (000s)
99/00	6%	3%	55%	13%	0%	4%	19%	13.3
00/01	7%	5%	56%	15%	0%	2%	15%	12.0
01/02*	8%	7%	50%	15%	0%	2%	18%	11.0
02/03	8%	8%	57%	1%	0%	22%	4%	8.3
03/04	8%	6%	51%	1%	0%	29%	5%	8.2
04/05	8%	7%	49%	1%	0%	28%	6%	8.4
05/06	11%	7%	47%	1%	0%	27%	6%	8.7
06/07	9%	4%	44%	1%	0%	37%	5%	9.2
07/08	-	-	-	-	-	-	-	-
08/09	10%	3%	35%	0%	0%	44%	8%	7.2

Table AF85: Compensation for Subsequent Years of Service – Other Manufacturing

Compensation for Subsequent Years of Service - Other Manufacturing								
	No Payment	1 Week	2 Weeks	3 to 4 Weeks	More than 4 Weeks	Other	Silent	Coverage (000s)
99/00	2%	6%	45%	0%	0%	0%	47%	1.7
00/01	3%	2%	37%	0%	0%	0%	58%	1.1
01/02*	5%	1%	53%	0%	0%	0%	41%	1.2
02/03	11%	2%	54%	0%	0%	4%	29%	0.5
03/04	14%	2%	63%	0%	0%	0%	21%	0.4
04/05	17%	37%	32%	0%	0%	0%	14%	0.7
05/06	13%	32%	43%	0%	0%	0%	13%	0.8
06/07	13%	26%	49%	0%	0%	0%	12%	0.8
07/08	-	-	-	-	-	-	-	-
08/09	3%	14%	48%	0%	0%	14%	21%	1.1

Table AF86: Compensation for Subsequent Years of Service – Utilities

Compensation for Subsequent Years of Service - Utilities								
	No Payment	1 Week	2 Weeks	3 to 4 Weeks	More than 4 Weeks	Other	Silent	Coverage (000s)
99/00	12%	0%	62%	3%	0%	1%	22%	3.6
00/01	19%	0%	70%	4%	0%	2%	5%	2.2
01/02*	25%	0%	64%	4%	0%	3%	4%	2.4
02/03	33%	1%	58%	3%	0%	0%	5%	1.5
03/04	31%	0%	57%	5%	0%	0%	6%	1.7
04/05	31%	1%	53%	5%	0%	4%	6%	1.9
05/06	25%	2%	55%	5%	0%	8%	5%	2.1
06/07	25%	2%	59%	4%	0%	6%	5%	2.0
07/08	-	-	-	-	-	-	-	-
08/09	16%	3%	74%	0%	1%	5%	1%	1.5

Table AF87: Compensation for Subsequent Years of Service – Construction

Compensation for Subsequent Years of Service - Construction								
	No Payment	1 Week	2 Weeks	3 to 4 Weeks	More than 4 Weeks	Other	Silent	Coverage (000s)
99/00	11%	12%	49%	0%	0%	14%	14%	5.4
00/01	10%	14%	46%	0%	0%	18%	12%	5.1
01/02*	12%	16%	46%	0%	0%	14%	12%	5.2
02/03	13%	24%	32%	0%	0%	18%	13%	3.1
03/04	11%	26%	33%	0%	0%	17%	14%	3.0
04/05	11%	21%	31%	0%	0%	24%	12%	3.8
05/06	12%	30%	31%	0%	0%	25%	3%	3.6
06/07	7%	24%	29%	0%	0%	37%	3%	4.9
07/08	-	-	-	-	-	-	-	-
08/09	7%	20%	42%	0%	1%	29%	1%	5.6

Table AF88: Compensation for Subsequent Years of Service – Wholesaling

Compensation for Subsequent Years of Service - Wholesaling								
	No Payment	1 Week	2 Weeks	3 to 4 Weeks	More than 4 Weeks	Other	Silent	Coverage (000s)
99/00	13%	5%	62%	0%	0%	0%	20%	2.7
00/01	17%	5%	76%	0%	0%	0%	2%	2.1
01/02*	16%	5%	78%	0%	0%	0%	1%	2.2
02/03	1%	1%	73%	0%	0%	25%	0%	0.9
03/04	2%	0%	67%	0%	0%	31%	0%	0.8
04/05	2%	0%	63%	0%	0%	35%	0%	0.8
05/06	2%	0%	60%	0%	0%	38%	0%	0.8
06/07	2%	4%	61%	0%	0%	29%	4%	1.0
07/08	-	-	-	-	-	-	-	-
08/09	2%	3%	68%	0%	0%	16%	12%	0.6

Table AF89: Compensation for Subsequent Years of Service – Food Retailing

Compensation for Subsequent Years of Service - Food Retailing								
	No Payment	1 Week	2 Weeks	3 to 4 Weeks	More than 4 Weeks	Other	Silent	Coverage (000s)
99/00	4%	1%	73%	0%	0%	21%	1%	19.7
00/01	0%	3%	96%	0%	0%	0%	1%	19.3
01/02*	4%	0%	95%	0%	0%	0%	1%	19.4
02/03	5%	0%	94%	0%	0%	0%	1%	8.2
03/04	2%	0%	97%	0%	0%	0%	0%	7.3
04/05	7%	0%	92%	0%	0%	0%	1%	4.3
05/06	7%	0%	92%	0%	0%	0%	1%	4.3
06/07	3%	0%	96%	0%	0%	0%	0%	7.8
07/08	-	-	-	-	-	-	-	-
08/09	13%	3%	85%	0%	0%	0%	0%	18.7

Table AF90: Compensation for Subsequent Years of Service – Other Retailing

Compensation for Subsequent Years of Service - Other Retailing								
	No Payment	1 Week	2 Weeks	3 to 4 Weeks	More than 4 Weeks	Other	Silent	Coverage (000s)
99/00	27%	8%	33%	0%	0%	14%	18%	11.3
00/01	37%	10%	34%	0%	0%	1%	18%	8.3
01/02*	34%	10%	47%	0%	0%	1%	8%	9.1
02/03	11%	10%	73%	0%	0%	0%	6%	5.4
03/04	1%	18%	70%	0%	0%	0%	11%	2.9
04/05	1%	15%	72%	0%	0%	1%	12%	3.3
05/06	1%	15%	71%	0%	0%	1%	12%	3.3
06/07	1%	9%	82%	0%	0%	2%	7%	4.2
07/08	-	-	-	-	-	-	-	-
08/09	1%	16%	79%	0%	0%	3%	1%	5.3

Table AF91: Compensation for Subsequent Years of Service – Accommodation & Cafes etc

Compensation for Subsequent Years of Service - Accommodation & Cafes etc								
	No Payment	1 Week	2 Weeks	3 to 4 Weeks	More than 4 Weeks	Other	Silent	Coverage (000s)
99/00	31%	2%	10%	0%	0%	27%	30%	12.9
00/01	29%	4%	9%	0%	0%	26%	32%	11.5
01/02*	22%	4%	11%	0%	0%	28%	35%	10.2
02/03	19%	4%	13%	0%	0%	24%	40%	8.5
03/04	19%	17%	51%	3%	0%	4%	6%	1.3
04/05	13%	15%	36%	2%	0%	7%	27%	2.0
05/06	11%	12%	38%	2%	0%	7%	29%	1.9
06/07	14%	13%	50%	3%	0%	15%	6%	1.4
07/08	-	-	-	-	-	-	-	-
08/09	8%	13%	60%	0%	0%	16%	4%	1

Table AF92: Compensation for Subsequent Years of Service – Transport

Compensation for Subsequent Years of Service - Transport								
	No Payment	1 Week	2 Weeks	3 to 4 Weeks	More than 4 Weeks	Other	Silent	Coverage (000s)
99/00	3%	2%	79%	8%	0%	0%	8%	19.7
00/01	3%	2%	80%	7%	0%	1%	7%	18.3
01/02*	5%	4%	75%	9%	0%	1%	6%	13.9
02/03	2%	2%	86%	7%	0%	1%	2%	14.3
03/04	2%	2%	86%	6%	0%	1%	3%	13.5
04/05	4%	4%	78%	7%	0%	5%	3%	12.1
05/06	4%	4%	78%	6%	0%	4%	4%	12.8
06/07	5%	20%	63%	2%	0%	7%	4%	13.6
07/08	-	-	-	-	-	-	-	-
08/09	6%	8%	78%	1%	0%	5%	3%	13.6

Table AF93: Compensation for Subsequent Years of Service – Storage

Compensation for Subsequent Years of Service - Storage								
	No Payment	1 Week	2 Weeks	3 to 4 Weeks	More than 4 Weeks	Other	Silent	Coverage (000s)
99/00	5%	14%	12%	0%	0%	5%	64%	0.3
00/01	5%	14%	12%	0%	0%	2%	67%	0.3
01/02*	5%	12%	23%	0%	0%	0%	60%	0.3
02/03	0%	16%	70%	0%	0%	14%	0%	0.1
03/04	34%	7%	36%	0%	0%	7%	15%	0.1
04/05	46%	5%	30%	0%	0%	6%	13%	0.2
05/06	41%	4%	26%	5%	0%	0%	24%	0.2
06/07	11%	3%	53%	0%	0%	3%	30%	0.3
07/08	-	-	-	-	-	-	-	-
08/09	2%	2%	85%	0%	0%	2%	10%	0.9

Table AF94: Compensation for Subsequent Years of Service – Communication

Compensation for Subsequent Years of Service - Communication								
	No Payment	1 Week	2 Weeks	3 to 4 Weeks	More than 4 Weeks	Other	Silent	Coverage (000s)
99/00	0%	0%	75%	0%	0%	24%	1%	8.7
00/01	0%	0%	77%	0%	0%	22%	1%	9.1
01/02*	0%	0%	77%	0%	0%	22%	1%	9.1
02/03	0%	0%	100%	0%	0%	0%	0%	6.5
03/04	0%	0%	100%	0%	0%	0%	0%	7.2
04/05	0%	0%	100%	0%	0%	0%	0%	6.4
05/06	0%	0%	100%	0%	0%	0%	0%	6.4
06/07	0%	0%	100%	0%	0%	0%	0%	6.4
07/08	-	-	-	-	-	-	-	-
08/09	0%	0%	99%	0%	0%	0%	0%	6.6

Table AF95: Compensation for Subsequent Years of Service – Finance

Compensation for Subsequent Years of Service - Finance								
	No Payment	1 Week	2 Weeks	3 to 4 Weeks	More than 4 Weeks	Other	Silent	Coverage (000s)
99/00	1%	0%	3%	96%	0%	0%	0%	15.6
00/01	1%	0%	3%	96%	0%	0%	0%	15.5
01/02*	1%	0%	3%	95%	0%	1%	0%	14.8
02/03	0%	0%	4%	95%	0%	1%	0%	13.0
03/04	0%	0%	4%	94%	0%	2%	0%	11.6
04/05	0%	0%	4%	80%	0%	16%	0%	11.5
05/06	0%	0%	1%	84%	0%	15%	0%	11.1
06/07	0%	0%	2%	79%	0%	20%	0%	11.0
07/08	-	-	-	-	-	-	-	-
08/09	0%	0%	5%	33%	0%	63%	0%	5.6

Table AF96: Compensation for Subsequent Years of Service – Insurance

Compensation for Subsequent Years of Service - Insurance								
	No Payment	1 Week	2 Weeks	3 to 4 Weeks	More than 4 Weeks	Other	Silent	Coverage (000s)
99/00	0%	0%	74%	25%	0%	0%	1%	5.1
00/01	0%	0%	77%	21%	0%	0%	2%	3.3
01/02*	0%	0%	77%	21%	0%	0%	2%	3.3
02/03	0%	1%	99%	0%	0%	0%	0%	2.4
03/04	0%	0%	100%	0%	0%	0%	0%	2.1
04/05	0%	0%	99%	0%	0%	0%	0%	1.8
05/06	0%	0%	99%	0%	0%	0%	0%	1.5
06/07	0%	0%	100%	0%	0%	0%	0%	1.9
07/08	-	-	-	-	-	-	-	-
08/09	0%	0%	96%	0%	0%	4%	0%	1.3

Table AF97: Compensation for Subsequent Years of Service – Business Services

Compensation for Subsequent Years of Service - Business Services								
	No Payment	1 Week	2 Weeks	3 to 4 Weeks	More than 4 Weeks	Other	Silent	Coverage (000s)
99/00	57%	3%	29%	2%	0%	5%	4%	14.8
00/01	65%	0%	26%	3%	0%	3%	3%	16.4
01/02*	65%	0%	26%	2%	0%	3%	4%	17.0
02/03	25%	2%	57%	5%	0%	6%	5%	6.4
03/04	27%	2%	57%	5%	0%	4%	5%	6.4
04/05	27%	2%	56%	7%	0%	4%	3%	6.6
05/06	27%	3%	55%	6%	0%	4%	6%	6.3
06/07	26%	3%	55%	6%	0%	4%	7%	6.3
07/08	-	-	-	-	-	-	-	-
08/09	7%	7%	76%	6%	0%	0%	5%	2.4

Table AF98: Compensation for Subsequent Years of Service – Government Administration & Defence

Compensation for Subsequent Years of Service - Govt Admin & Defence								
	No Payment	1 Week	2 Weeks	3 to 4 Weeks	More than 4 Weeks	Other	Silent	Coverage (000s)
99/00	0%	1%	66%	0%	0%	29%	4%	32.1
00/01	3%	4%	62%	1%	0%	27%	3%	26.1
01/02*	0%	4%	64%	2%	0%	29%	1%	25.2
02/03	0%	1%	58%	20%	0%	20%	1%	24.2
03/04	2%	0%	56%	16%	0%	25%	0%	27.2
04/05	1%	0%	58%	15%	0%	25%	0%	27.3
05/06	1%	0%	57%	16%	0%	25%	1%	28.9
06/07	1%	5%	61%	12%	1%	21%	0%	32.5
07/08	-	-	-	-	-	-	-	-
08/09	0%	5%	48%	14%	0%	32%	0%	28

Table AF99: Compensation for Subsequent Years of Service – Education

Compensation for Subsequent Years of Service - Education								
	No Payment	1 Week	2 Weeks	3 to 4 Weeks	More than 4 Weeks	Other	Silent	Coverage (000s)
99/00	0%	1%	38%	0%	1%	58%	2%	67.9
00/01	0%	1%	37%	0%	1%	59%	2%	71.0
01/02*	0%	1%	38%	1%	0%	59%	1%	74.7
02/03	0%	1%	38%	0%	1%	60%	0%	74.8
03/04	1%	1%	36%	0%	0%	61%	0%	75.3
04/05	1%	1%	38%	1%	0%	60%	0%	76.8
05/06	1%	1%	39%	1%	0%	57%	0%	78.9
06/07	1%	1%	36%	2%	0%	61%	0%	74.9
07/08	-	-	-	-	-	-	-	-
08/09	0%	1%	31%	1%	0%	66%	0%	73.6

Table AF100: Compensation for Subsequent Years of Service – Health

Compensation for Subsequent Years of Service - Health								
	No Payment	1 Week	2 Weeks	3 to 4 Weeks	More than 4 Weeks	Other	Silent	Coverage (000s)
99/00	1%	3%	86%	0%	0%	4%	6%	47.5
00/01	14%	3%	76%	0%	0%	4%	3%	51.2
01/02*	14%	3%	77%	0%	0%	4%	2%	55.2
02/03	15%	1%	78%	1%	0%	4%	1%	52.7
03/04	2%	1%	91%	1%	0%	4%	1%	47.0
04/05	3%	1%	90%	1%	0%	4%	1%	48.6
05/06	2%	1%	94%	1%	0%	2%	1%	67.7
06/07	3%	1%	93%	0%	0%	1%	1%	48.7
07/08	-	-	-	-	-	-	-	-
08/09	3%	1%	85%	0%	0%	9%	0%	42.7

Table AF101: Compensation for Subsequent Years of Service – Community Services

Compensation for Subsequent Years of Service - Community Services								
	No Payment	1 Week	2 Weeks	3 to 4 Weeks	More than 4 Weeks	Other	Silent	Coverage (000s)
99/00	5%	5%	45%	1%	0%	2%	42%	4.6
00/01	6%	5%	48%	2%	0%	4%	35%	4.7
01/02*	10%	8%	65%	1%	0%	5%	11%	5.4
02/03	8%	12%	69%	0%	0%	2%	9%	4.8
03/04	25%	13%	53%	0%	0%	2%	7%	4.8
04/05	24%	6%	48%	0%	0%	14%	7%	5.3
05/06	23%	8%	57%	0%	0%	5%	6%	4.9
06/07	26%	9%	57%	0%	0%	5%	4%	5.3
07/08	-	-	-	-	-	-	-	-
08/09	16%	21%	55%	0%	0%	1%	7%	2.3

Table AF102: Compensation for Subsequent Years of Service – Other Community Services

Compensation for Subsequent Years of Service - Other Community Services								
	No Payment	1 Week	2 Weeks	3 to 4 Weeks	More than 4 Weeks	Other	Silent	Coverage (000s)
99/00	21%	1%	73%	0%	0%	1%	4%	12.4
00/01	21%	1%	75%	0%	1%	0%	2%	12.2
01/02*	8%	2%	84%	1%	1%	1%	3%	11.3
02/03	8%	0%	86%	1%	0%	2%	3%	9.7
03/04	6%	1%	87%	1%	0%	2%	3%	6.0
04/05	6%	2%	83%	1%	0%	5%	3%	6.3
05/06	6%	2%	84%	1%	0%	4%	3%	6.3
06/07	5%	2%	83%	1%	0%	7%	2%	8.9
07/08	-	-	-	-	-	-	-	-
08/09	6%	4%	57%	0%	0%	28%	6%	12.3

Appendix Four: Recommendations of the Advisory Group

**Report of the Public Advisory Group on Restructuring and Redundancy
(June 2008)**

PART FOUR

RECOMMENDATIONS

Recommendation 1

That the government should consider the introduction of a statutory requirement for redundancy compensation and other entitlements incorporating the following features:

- a) notice of redundancy termination to the affected worker
- b) compensation based on length of service
- c) a maximum level of statutory compensation, and
- d) provision of redundancy support and other active labour market mechanisms to affected workers and organisations.

Recommendation 2

That the government considers the following options to implement Recommendation 1.

- a) A Code which acts as a guide to employers on notice, compensation, and other matters in respect of redundancy. Compliance with this Code will be voluntary but may form the basis of Government considerations of what constitutes a 'good employer' in the context of contracting and migration policy.
- b) A legal right to redundancy compensation with no specified formula. This could take one of two forms.
 - (i) First of all it could be a mechanism similar to that provided for 'vulnerable' employees in Part 6A of the Employment Relations Act 2000. This would mean that all workers would have the right to redundancy compensation. The quantum would be as agreed or could be referred to the Employment Relations Authority for settlement. The quantum set by the Authority or Employment Court could be subject to criteria which include firm size as well as length of service, industry practice and other matters.

- (ii) The second option could be that all workers in a collective agreement have the legal right to redundancy compensation and the formula could be as agreed or as determined in the Employment Relations Authority or Employment Court.
- c) A statutory formula for notice and compensation. There are numerous options which include:
- (i) 4 weeks notice plus redundancy compensation based on 4 weeks for the first year of service and two weeks for each subsequent year up to a maximum statutory requirement for 26 weeks pay. This option is supported by the NZCTU.
 - (ii) A formula as in (c) (i) above but excluding workers on wages or salary of \$150,000 or more per annum.
 - (iii) A formula as in (c) (i) above but excluding workers with less than one year's service from compensation but including all workers for the 4 week's notice requirement.
 - (iv) A formula as in (c) (i) above but excluding employers of a specified size – for instance 1-5 workers.
 - (v) A formula as in (c) (i) above but with a maximum statutory payment – for instance 16-20 weeks – with the ability to negotiate additional payments above that level.
 - (vi) A formula as in (c) (i) above but with a sliding scale of notice based on length of service.
 - (vii) A combination of the above variations.
 - (viii) A formula based on the Australian National Employment Standard.
- d) An insurance scheme to provide for redundancy compensation. There are several options including:
- (i) A levy based scheme similar to ACC which provides for payment only to those affected.
 - (ii) A levy based scheme with additional assistance from the Government.
 - (iii) A fund that is built up by contributions from employers, workers and possibly the Government but with 'worker accounts' rather than an insurance scheme.

- (iv) A variation to KiwiSaver where there is a portion of contributions that can be accessed in a redundancy situation.

- e) A Redundancy Support Scheme which would exist alongside a statutory formula as in (c) (i) above. This would channel support to workers and employers in the form of active labour market assistance. However, it would also provide to employers that registered with the scheme and who employ fewer than 20 workers a rebate on the cost of redundancy compensation. This could be based on a maximum rebate (e.g.) \$2000 per worker.

Recommendation 3

That if the government does introduce a statutory provision for redundancy notice and compensation it then considers ratifying ILO Convention 158.

Recommendation 4

That if the government does introduce a statutory provision for redundancy notice and compensation, it phases in such a provision with a one year delay. That in the one year period there is a major education and awareness arising campaign.

Recommendation 5

That if the government does introduce a statutory provision for redundancy notice and compensation then it ensures the Department of Labour and other relevant departments are resourced adequately to provide advice, develop calculators and other resources.

Recommendation 6

That notice of redundancy is a priority debt under the Company's Act 1993.

Recommendation 7

That redundancy compensation is non-taxable and that tax records are also used so that statistics on the incidence of redundancy can be recorded.

Recommendation 8

That the government enhance the Security in Change work programme. This should include:

- a) A major awareness raising programme on redundancy support.
- b) Developing connections with the Unified Skills Strategy so that lifelong learning is maintained throughout redundancy experiences and that Industry Training Organisations are actively involved in retraining support.
- c) Expanding the scope and level of support for workers made redundant.
- d) Widespread consultation with stakeholders on how to move an 'employment security' framework.
- e) Consideration of cost implications for Government of enhanced Security in Change.
- f) Consider the possible interface between redundancy support, income maintenance, employment security and the investment in jobs for sustainability (e.g. home insulation).

Recommendation 9

That the consultation provisions required in case law between employers and workers in restructuring and redundancy situations are codified.

Recommendation 10

That employers are encouraged to notify the Ministry of Social Development of redundancies as early as possible but taking into account relevant commercial and other legal obligations for instance Stock Exchange disclosure requirements.

Appendix Five: Minimum Entitlements Bill

Darien Fenton

**Employment Relations (Statutory Minimum Redundancy Entitlements) Amendment
Bill**

Member's Bill

Explanatory Note

This Bill amends the Employment Relations Act 2000 to insert into part 6A minimum statutory entitlements for employees in the event of dismissal for redundancy.

The provisions of this bill are based on the recommendations of the Public Advisory Group on Restructuring and Redundancy who reported to the government in 2008.

The Advisory Group assessed the adequacy of redundancy laws and provisions and recommended options for addressing gaps and issues with existing laws and policy provisions.

Their recommendations included consideration of the introduction of a statutory requirement for redundancy compensation and notice of redundancy termination to the affected employee.

Clause by clause analysis

Clause 1 is the Title provision

Clause 2 provides for New Section 69ZK of the Principle Act to come into force on the day after it receives the Royal assent; the remainder of the new sections inserted into the Principal Act come into force one year after the date.

Clause 3 amends the Principal Act.

Darien Fenton

**Employment Relations (Statutory Minimum Redundancy Entitlements) Amendment
Bill**

Member's Bill

Contents

1. Title
2. Commencement
3. Principal Act Amended

The Parliament of New Zealand enacts as follows:

1. Title

This Act is the Employment Relations (Statutory Minimum Redundancy Entitlements) Amendment Bill

2. Commencement

New Section 69ZK of the Principal Act comes into force on the day after it receives the Royal assent; the remainder of the new sections inserted into the Principal Act come into force one year after the date.

3. Principal Act Amended

The Employment Relations Act 2000 is amended by the insertion of a new part 6E, comprising new sections 69ZI to 69ZL as follows:

- (a) compensation for redundancy in the amount of four week's remuneration for the first full year of the employee's continuous employment with the employer; and
- (b) further compensation for redundancy in the amount of two weeks' remuneration for each subsequent full or partial year of the employees' continuous employment with the employer, up to a maximum entitlement of twenty six weeks' remuneration; Provided that if the applicable employment agreement contains provisions that are more favourable to the employee than those set out in this section, those provisions shall apply in place of this section.

PART 6E: Statutory Minimum Redundancy Entitlements

69ZI Interpretation

In this Part of the Act “redundancy” means the substantial disappearance of the work performed by an employee, by reason of the restructuring, downsizing, going into receivership or administration, or cessation of operations of the employer.

69ZK Application

The minimum entitlements conferred upon employees by this Part apply to an employee who has been in a continuous employment relationship with an employer for one calendar year or more.

69ZK Public Education Campaign

The Minister of Labour must, over the course of twelve months:

- i. conduct a public education campaign to inform employers and employees of the minimum entitlements conferred by this part of this Act; and
- ii. report to the House of Representatives within 6 months of the conclusion of that campaign as to its details, including an independent evaluation of its effectiveness.

69ZL Minimum Entitlements to Notice

Every employee to whom this Part applies who suffers a redundancy is entitled to receive notice of dismissal of no less than four weeks.

Appendix Six: Data on Compensation Levels

Data on Compensation Levels for Section 123 (1)(c)(i) of the ERA

The following information is taken directly from data collected and published by the Employment Relations Service of the Department of Labour between the years 2002 and 2009. Specifically the following data sources have been used to create the tables in this Appendix:

- Department of Labour, “Compensation Awards 2002 – Compensation for Humiliation etc Table” (1 January 2002 to 31 December 2002)
<<http://www.ers.dol.govt.nz/publications/ccat/compo02.html>>.
- Department of Labour, “Compensation Awards 2003 – Compensation for Humiliation etc Table” (1 January 2003 to 31 December 2003)
<<http://www.ers.dol.govt.nz/publications/ccat/compo03.html>>.
- Department of Labour, “Compensation Awards 2004 – Compensation for Humiliation etc Table” (1 January 2004 to 31 December 2004)
<<http://www.ers.dol.govt.nz/publications/ccat/compo04.html>>.
- Department of Labour, “Compensation Awards 2005 – Compensation for Humiliation etc Table” (1 January 2005 to 31 December 2005)
<<http://www.ers.dol.govt.nz/publications/ccat/compo05.html>>.
- Department of Labour, “Compensation Awards 2006 – Compensation for Humiliation etc Table” (1 January 2006 to 31 December 2006)
<<http://www.ers.dol.govt.nz/publications/ccat/compo06.html>>.
- Department of Labour, “Compensation Awards 2007 – Compensation for Humiliation etc Table” (1 January 2007 to 31 December 2007)
<<http://www.ers.dol.govt.nz/publications/ccat/compo07.html>>.
- Department of Labour, “Compensation Awards 2008 – Compensation for Humiliation etc Table” (1 January 2008 to 30 June 2008)
<<http://www.ers.dol.govt.nz/publications/ccat/compo08-1.html>>.
- Department of Labour, “Compensation Awards 2008 – Compensation for Humiliation etc Table” (1 July 2008 to 31 December 2008)
<<http://www.ers.dol.govt.nz/publications/ccat/compo08-2.html>>.
- Department of Labour, “Compensation Awards 2009 – Compensation for Humiliation etc Table” (1 January 2009 to 30 June 2009)
<<http://www.ers.dol.govt.nz/publications/ccat/compo09-1.html>>.

- Department of Labour, “Compensation Awards 2009 – Compensation for Humiliation etc Table” (1 July 2009 to 31 December 2009)
<<http://www.ers.dol.govt.nz/publications/ccat/compo09-2.html>>.
- Department of Labour, “Compensation Awards 2009 – Compensation for Humiliation etc Table” (1 July 2010 to 31 December 2010)
<<http://www.ers.dol.govt.nz/publications/ccat.comp10-1.html>>.

Limitations with the data as noted by the Employment Relations Service of the Department of Labour

- The awards noted in the tables take into account contributory conduct.
- The Employment Authority awards that have been set aside or changed by the Courts are incorporated in the tables.
- In the situation where there are two successful applicants who receive two separate awards the amounts are recorded separately within the tables.

Table AG1: Employment Authority decisions regarding compensation levels arising from awards made under section 123(1)(c)(i) of the ERA for the period 1 January 2002 to 30 June 2010.

Authority Determinations - Section 123 (1) (c) (i) ERA - Compensation for Humiliation, Distress											
\$	1 Jan 2002 - 31 Dec 2002	1 Jan 2003 - 31 Dec 2003	1 Jan 2004 - 31 Dec 2004	1 Jan 2005 - 31 Dec 2005	1 Jan 2006 - 31 Dec 2006	1 Jan 2007 - 31 Dec 2007	1 Jan 2008 - 31 Dec 2008	1 Jan 2009 - 31 Dec 2009	1 Jan 2010 - 30 June 2010	Analysis	
	164 Awards	149 Awards	152 Awards	236 Awards	141 Cases	182 Cases	189 Cases 194 Awards	179 Cases 188 Awards	97 Cases 103 Awards	Total	Percentage out of all Determinations
1 - 999	7	6	4	10	4	4	4	3	9	51	3.31
1,000 - 1,999	25	18	24	21	17	14	3	15	6	143	9.28
2,000 - 2,999	24	25	17	30	27	21	32	25	17	218	14.15
3,000 - 3,999	25	23	22	32	16	25	31	26	13	213	13.82
4,000 - 4,999	22	6	15	23	19	12	32	26	9	164	10.64
5,000 - 5,999	20	18	17	25	18	33	20	24	12	187	12.13
6,000 - 6,999	11	9	22	16	13	22	17	15	8	133	8.63
7,000 - 7,999	6	15	5	24	4	9	16	16	5	100	6.49
8,000 - 8,999	10	10	8	14	12	19	9	11	4	97	6.29
9,000 - 9,999	2		3	2	2	4	7	10	3	33	2.14
10,000 - 10,999	5	10	11	18	8	14	8	5	6	85	5.52
11,000 - 11,999	1			1		1		1	0	4	0.26
12,000 - 12,999	1	3	4	5	6	8	2	3	2	34	2.21
13,000 - 13,999	1		1	3		0			1	6	0.39
14,000 - 14,999				0		2	2		1	5	0.32
15000+	4	6	4	11	6	13	11	6	7	68	4.41

*Percentages out of all determinations have been rounded to two decimal places.

Table AG2: Employment Court decisions regarding compensation levels arising from awards made under section 123(1)(c)(i) of the ERA for the period 1 January 2002 to 30 June 2010.

Employment Court Determinations - Section 123 (1) (c) (i) ERA - Compensation for Humiliation, Distress											
\$	1 Jan 2002 - 1 Dec 2002	1 Jan 2003 - 1 Dec 2003	1 Jan 2004 - 1 Dec 2004	1 Jan 2005 - 1 Dec 2005	1 Jan 2006 - 1 Dec 2006	1 Jan 2007 - 1 Dec 2007	1 Jan 2008 - 1 Dec 2008	1 Jan 2009 - 1 Dec 2009	1 Jan 2010 - 30 June 2010	Analysis	
	6 Awards	26 Awards	12 Cases	15 Awards	18 Cases	16 Cases	8 Cases 8 Awards	7 Cases 4 Awards	5 Cases 5 Awards	Total	Percentage out of all Determinations
1 - 999			1		1					2	1.77
1,000 - 1,999		1		1						2	1.77
2,000 - 2,999	1	2		1						4	3.54
3,000 - 3,999	1	1	1	1	2			1		7	6.19
4,000 - 4,999		1	1		2	5	1			10	8.85
5,000 - 5,999	1	6	2	2	2	2				15	13.27
6,000 - 6,999	1	1			3					5	4.42
7,000 - 7,999			1	2	2	1			1	7	6.19
8,000 - 8,999		2	1		1	5	1		2	12	10.62
9,000 - 9,999	1	1					2			4	3.54
10,000 - 10,999		3	1		1	1	2	1	1	10	8.85
11,000 - 11,999				1						1	0.88
12,000 - 12,999		2	1	1	4	1				9	7.96
13,000 - 13,999										0	-
14,000 - 14,999										0	-
15000+	1	6	3	6	2	2	2	2	1	25	22.12

*Percentages out of all determinations have been rounded to two decimal places.