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Redundancy Post Employment Contracts Act 1991

An analysis of the effect of the Employment Relations Act 2000 on redundancy law.

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I INTRODUCTION

The Employment Relations Act 2000 (ERA) has been heralded as a major shift to the political Left for New Zealand industrial law. This shift has been met with optimism and derision, the latter largely by employers. What follows is a comparison of substantive and procedural redundancy law under the former legislation, namely the Employment Contracts Act 1991 (ECA) and the current ERA position. This paper does not seek to compare the whole of both acts, so is intentionally limited to a discrete (although important) area of industrial law. What will become apparent however, is that although the overall shift in policy has been great, the end result for redundancy as a discrete area of the law is not as radically different as many employers would believe.

II REDUNDANCY UNDER THE ECA

A What was "Redundancy" under the ECA?

The ECA did not set out to define redundancy. In fact, no substantive mention of it was made at all, anywhere in the Act. A useful definition of redundancy is given in *G N Hale & Son Ltd v Wellington etc, Caretakers, etc IUW* per Somers J:¹

It would be difficult to improve upon the definition of 'redundancy' contained in s 184(5) of the Labour Relations Act 1987, namely, a termination of employment 'attributable, wholly or mainly, to the fact that the position filled by the worker is, or will become, superfluous to the needs of the employer.' While that definition is expressed to be for the purposes of s 184 it accurately conveys the ordinary understanding of redundancy.

This definition has also been accepted by other commentators, as relevant for the purposes of the ECA: "In the absence of a definition in the EC Act, the above can be regarded as being close to a currently accepted definition of redundancy."² Although the definition has been said to "fail to convey the spectrum of redundancy... in particular that redundancies tend to fall into two broad categories."³ The relevant category for the purposes of this paper is the second mentioned: "where the employer alters or purports

¹ *G N Hale & Son Ltd v Wellington, etc, Caretakers, etc, IUW* [1991] 1 NZLR 151, 158 (CA).

² Stephen Gibbs (ed) *Butterworths Employment Law Guide* (3 ed, Butterworths, Wellington, 1997) 951.

to alter the job description... the question whether... a redundancy exists becomes one of degree."⁴

B The ECA and Redundancy

1 Introduction

The long title of the ECA stated it is an Act to promote an efficient labour market by (inter alia) providing for freedom of association and allowing parties to employment contracts to negotiate individual or collective agreements. Section 9 stated the parties: (a) may conduct negotiations on their behalf; and (b) appropriate arrangements to govern the employment relationship and the type of contract and its contents are a matter for negotiation. Thus the ECA involves an underlying theme promoting freedom of contract.

Section 27(1) defines what constitutes a personal grievance, including in section 27(1)(a) unjustified dismissal. Section 32 states every employment contract shall contain an effective procedure for settling any personal grievance, which must not be inconsistent with the Act. Section 40 concerns the remedies available for a personal grievance, once found. Section 40(1)(a) states reimbursement of lost wages or other money is an available remedy; while section 40(1)(b) states reinstatement is also available. Section 46(3) states the Court cannot specify the level (or a formula to calculate it) of a redundancy payment, if the contract is silent as to this. Finally, section 104(3) states the Court cannot, in the exercise of its equity and good conscience jurisdiction, make decisions contrary to the ECA or any applicable employment contract. These sections indicate that the ECA focuses the Court's role on unfairness or other irregularity and prevents it from changing or reinterpreting a contract in a manner otherwise than the parties intended.

³ *Butterworths Employment Law Guide*, above, 951.

⁴ *Butterworths Employment Law Guide*, above, 951.

Aoraki Corporation Ltd v McGavin is arguably the leading case for promoting strict adherence to the ECA's underlying policy of contractual freedom. It states that the ECA:⁵

Represents a substantial departure from the collectivist principles of previous industrial relations legislation in favour of a model of free contractual bargaining. The Act departs from the common law of contract in setting the yardstick of unjustified dismissal... in specifying procedures and remedies, and in other respects... the context in which [personal grievances] operate is sharply changed by the emphasis in the [ECA] on contractual freedom.

The *Aoraki*-ECA approach had a considerable impact on the previous law regarding redundancy. Before discussing this however, it is helpful to outline what that previous legal position was; as before this case the Courts had arguably given the ECA's underlying contractual freedom policy (as construed by *Aoraki*) less effect.

2 Previous decisions under the ECA

The leading ECA redundancy case prior to *Aoraki* was *Brighouse Ltd v Bilderbeck*. In this case, the Court of Appeal upheld the earlier reasoning of *G N Hale & Son Ltd v Wellington, etc, Caretakers, etc, IUW*, which outlined the then current position in relation to redundancy. *Hale* held that in order to justify dismissal on redundancy grounds, it was not necessary to show that dismissal was unavoidable, or necessary to ensure the survival of the employer's business.⁶ It further held that the genuineness of an employer's commercial reasons for redundancy may be examined by the Court, but the adequacy of those reasons was a matter for the employer's judgment: "It is the good faith of that basis and the fairness of the procedure followed that may fall to be examined on a complaint of unjustified dismissal... but the Court [is] not sitting on appeal as to how the employer should run the business."⁷ Cooke P further stated (obiter) that he "had no doubt that a dismissal for redundancy must be carried out by a fair procedure."⁸

⁵ *Aoraki Corporation Ltd v McGavin* [1998] 3 NZLR 276, 286 (CA).

⁶ *G N Hale & Son Ltd v Wellington, etc, Caretakers, etc, IUW (Hale)* [1991] 1 NZLR 151, 158 (CA).

⁷ *Hale*, above, 155.

⁸ *Hale*, above, 156.

Hale therefore sets the Court's role in redundancy cases, as ensuring that "the broad principle... [of] what is open to a reasonable and fair employer to do in the circumstances,"⁹ is satisfied, in terms of the employer's actions. This involves a two-step test: firstly, that the redundancy decision itself is genuine, in terms of its justifiability by the employer and secondly, that a fair procedure in implementing the decision is used. This case broke new ground by holding the adequacy of any commercial reasons that led to a decision could not be examined by the Court. Prior to *Hale*, many cases involved a detailed investigation into the commercial nature of the decision.¹⁰ After *Hale*, redundancy hearings were limited to this two-step test, with the primary focus being on procedural fairness.

In terms of the genuineness requirement, Richardson J held that the Court could "scrutinise with care claims that dismissals were for redundancy reasons and to expect an adequate commercial explanation from the employer for the course adopted."¹¹ But Cooke P held, "the existence of remedies for unjustified dismissal, should not be treated as derogating from the rights of employers to make management decisions genuinely on [business grounds]."¹² Genuineness under *Hale* is therefore a question of justification by the employer, but not regarding the adequacy of its business decisions to make employees redundant.

Hale procedural fairness involves a number of considerations, "[which] on the facts of particular cases... will extend to the manner of selecting the worker... [to be] declared... redundant and giving [them] a fair opportunity to make representations on the possibility of redeployment."¹³ The focus since *Hale* has been on the overall fairness of the procedure used in implementing the decision to dismiss for redundancy,¹⁴ rather than on the actual business decision of the employer. No set of absolute requirements was given, only that the procedure used was fair *on the facts of particular cases*.

⁹ *Hale*, above, 156.

¹⁰ Stephen Gibbs (ed) *Butterworths Employment Law Guide* (3 ed, Butterworths, Wellington, 1997) 956.

¹¹ *G N Hale & Son Ltd v Wellington, etc, Caretakers, etc, IUW (Hale)* [1991] 1 NZLR 151, 158 (CA).

¹² *Hale*, above, 155.

¹³ *Hale*, above, 156.

¹⁴ Stephen Gibbs (ed) *Butterworths Employment Law Guide* (3 ed, Butterworths, Wellington, 1997) 956.

At this point, it is convenient to briefly depart from *Hale* to discuss other decisions concerning the main procedural fairness aspects raised by this case: selection criteria and consultation. In relation to selection criteria for redundancy, *Dunn v Methanex NZ Ltd* held that under the parties' employment contract, it was for the employer to choose the criteria to be used when selecting employees to be made redundant, on efficiency grounds. This was qualified by the requirement that the criteria adopted were relevant:¹⁵

The respondent [employer] was entitled to choose the criteria which it would use... provided only that it confined itself to relevant special skills or attributes.

Chief Judge Goddard then summarised the requirements necessary for the Court to interfere with an employer's chosen criteria:¹⁶

[Where]:

- 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
- 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.

Dunn therefore states it is for the employer to choose the selection criteria in a redundancy procedure, if this is intended by the employment contract. But in terms of procedural fairness, the criteria must be chosen in good faith and must also be relevant to the task of selecting employees with the requisite skills or attributes for any restructured positions.

Although *Phipps v New Zealand Fishing Industry Board* was decided after *Brighouse*, it is useful to consider it here. In the Employment Court, Chief Judge

¹⁵ *Dunn v Methanex NZ Ltd (Dunn)* [1996] 2 ERNZ 222, 230 (EC).

¹⁶ *Dunn*, above, 231.

Goddard held consulting employees prior to a redundancy decision was mandatory for an employer.¹⁷

No genuine reasons can be formed about... redundancy... in the absence of input from the employee concerned, or at least a reasonable opportunity in which to contribute it... A failure to inquire or consult is fatal to justification.

Interestingly, Chief Judge Goddard held that the correct inquiry under an ECA redundancy case was whether an employer had, "answered the [employee's] grievance that she had been unjustifiably dismissed by showing that the admitted dismissal was... justifiable."¹⁸ This would only be shown if, "the action taken by the respondent was such as a fair and reasonable employer would have taken, or could have with a clear conscience."¹⁹ Therefore, *Phipps* did not apply a separate two-stage test to the question of a redundancy's justifiability, but rather a general inquiry into its *fairness and reasonableness*. This difference is arguably not of great importance as with respect, it falls as an issue of semantics.

As mentioned above, *Brighouse* adopted the two-step *Hale* approach. All five judges accepted that procedural fairness was relevant and that in cases of a failure to observe it, compensation was payable.²⁰ Cooke P held: "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 can be no sharp dividing line."²¹ Cooke P further held, in relation to procedural fairness requirements.²²

As indicated in *Hale* [the Courts] are entitled to take account of such aspects as whether... counselling or payment for it [is given], possibilities of redeployment have been adequately explored [but that the Court] would be going beyond [its] province if [it] held the [lower courts] could not have regard to such aspects... as they [thought] fit.

¹⁷ *Phipps v New Zealand Fishing Industry Board (Phipps)* [1996] 1 ERNZ 195, 208 (EC).

¹⁸ *Phipps*, above, 208.

¹⁹ *Phipps*, above, 208.

²⁰ Stephen Gibbs (ed) *Butterworths Employment Law Guide* (3 ed, Butterworths, Wellington, 1997) 956.

²¹ *Brighouse Ltd v Bilderbeck (Brighouse)* [1995] 1 NZLR 158, 166 (CA).

²² *Brighouse*, above, 167.

This indicates Cooke P did not consider the procedural fairness category closed, but that, per Richardson J, "the content of procedural fairness [to be considered] depend[ed] on the class of case, [but did not include] the operational requirements of the employer."²³

The following summary of compensation for redundancy under *Hale* was accepted in the Court of Appeal by Sir Gordon Bisson in *Brighouse*:²⁴

- (1) Not every redundant employee is entitled to compensation.
- (2) In considering the overall duty of fair treatment [incumbent] on every employer, the Court may inquire whether the case calls for compensation.
- (3) In the absence of a prior agreement to pay compensation... the answer to... whether the duty of fairness calls for such a payment depends on circumstances such as:
 - The reason for redundancy;
 - The [employee's] length of service;
 - The period of notice of the dismissal;
 - The means of the employer to pay.
- (4) Circumstances calling for a compensatory payment as part of the overall duty... may arise in the absence of prior agreement where, for example, an employer has voluntarily decided on redundancy... and can reasonably afford to pay.

But *Brighouse* also broke new ground in terms of its interpretation of the ECA regarding redundancy compensation. Cooke P stated, regarding the ECA's approach to personal grievances, that they had not been limited to prevent discretionary compensation:²⁵

The Act did not in general curtail the personal grievance provisions which in one form or another have been part of New Zealand statute since 1970... The remedies under ss 40 and 41 are wide and flexible... A notable feature of the [ECA] is its extension of personal grievance jurisdiction by making personal grievance procedure available under every employment contract... The availability of discretionary personal grievance remedies in redundancy cases had been demonstrated in [*Hale*]... If Parliament had intended to prevent such a result in future, it is surprising that the [ECA] did not so provide.

²³ *Brighouse*, above, 170.

²⁴ *Brighouse*, above, 188.

²⁵ *Brighouse Ltd v Bilderbeck (Brighouse)* [1995] 1 NZLR 158, 163-164 (CA).

Cooke P further stated, regarding the Court's role:²⁶

It is clear... this Court would not be entitled to impose fetters on the exercise of a statutory jurisdiction which Parliament has chosen to confer in very wide terms. Still less would we be entitled to say that compensation for redundancy need only be given where there is an express agreement to that effect... It is not for us to try and render certain that which the legislation has left flexible.

Cooke P then held that there was no general right to redundancy compensation, but:²⁷

Where no express [contractual redundancy compensation] provision applies, the ordinary personal grievance procedure will be available and there will be jurisdiction to award compensation for any benefit, whether or not of a monetary kind, which the worker might reasonably have been expected to obtain if the personal grievance had not arisen.

Casey J agreed with Cooke P, stating:²⁸

Whether that obligation [of trust and confidence] can extend to payment of redundancy compensation when none has been provided for in the employment contract is more difficult... [but] there will... be many cases where employees simply do not have the ability to procure satisfactory redundancy deals as part of their contracts. The personal grievance procedure affords a way of redressing the balance in those situations... The present case provides an example.

Similarly, Sir Gordon Bisson held that the Court may impose obligations on employers to pay redundancy compensation where the employment contract is silent.²⁹

Brighouse therefore confirmed under the ECA, the Court's jurisdiction to award compensation to redundant employees if their contracts did not specify any redundancy payment, if in the circumstances compensation was considered necessary. These circumstances were to be based upon the principles and the employer's implied duty of fairness, as outlined in *Hale*. However, it is necessary to state Cooke P also held that if the employment contract specifically stated no redundancy compensation was to be paid, it would normally not be awarded.³⁰

²⁶ *Brighouse*, above, 167.

²⁷ *Brighouse*, above, 167.

²⁸ *Brighouse*, above, 179.

²⁹ *Brighouse Ltd v Bilderbeck (Brighouse)* [1995] 1 NZLR 158, 188 (CA).

³⁰ *Brighouse*, above, 167.

Therefore, pre-*Aoraki* the Courts held that redundancy involved a two-step investigation: firstly, whether the redundancy was in fact genuine - but not involving the employer's commercial or economic justification for their decision. Secondly, whether the process used to effect the redundancy was procedurally fair; involving a number of independent factors. Procedural unfairness aside, compensation was payable without the need for expressly including it in an employment contract, as long as the Court considered it necessary.

Arguably, the ECA had been interpreted to ensure an equitable outcome for a redundant employee was possible; notwithstanding the emphasis in the Act on contractual freedom and therefore, the requirement that parties to employment contracts needed to include redundancy provisions expressly, to make them a part of their agreement.³¹ This interpretation need not be considered as solely *judicial activism* however, as the reader must bear in mind the words of Cooke P, where *Hale*-type discretionary personal grievance remedies, prior to the ECA, were discussed:³²

If Parliament had intended to prevent such a result in future, it is surprising that the [ECA] did not so provide. There is nothing in the Act to indicate any such intention. It may well be that the question was not even considered.

3 *The Aoraki approach*

(a) Introduction

Aoraki Corporation Ltd v McGavin overruled *Brighouse* in favour of a stricter approach, which was intended to more closely mirror the underlying contractual freedom policy of the ECA. It is important to remember however, that *Aoraki* still required a genuine redundancy and a procedurally fair process (as will be seen); it therefore did not totally overrule the preceding cases outlined above.

³¹ See for example section 104(3) of the ECA; as outlined below.

³² *Brighouse*, above, 164.

On the facts, *Aoraki* involved a genuine redundancy situation, resulting in many employees losing their jobs. The focus of the decision was therefore on the procedural fairness aspects of the redundancy in question and the compensation payable as a result. As mentioned above, the approach of the Court of Appeal to the ECA was based on a strict application of the principle the Court held was fundamental to the Act: free contractual bargaining.³³ The Court held that under the long title of the ECA, "employment issues are a matter of contract where the types of contract and the content are essentially for the parties freely to negotiate."³⁴

(b) Implied terms and interpretation

Regarding implied employment contract terms (such as redundancy compensation) the Court held that sections 9 and 43 were "particularly relevant in considering the scope for implying terms in employment contracts under the Act."³⁵ The Court stated that section 9 was relevant because:³⁶

In terms of s9(b) the object of Part II relating to bargaining is to establish that appropriate arrangements to govern the employment relationship may be made by employment contracts with 'the contents of the contract being... a matter for negotiation.'

In relation to section 43, the Court stated, "in terms of s 43(a) the object of Part IV relating to enforcement is to establish that 'Employment contracts create enforceable rights and obligations.'"³⁷ Therefore anything else, not expressly part of the agreement itself, should arguably have no effect.

This did not however, mean that an employment contract did not contain an implied duty requiring mutual obligations of confidence, trust and fair dealing. This duty was held to exist, but not to affect what was capable of being implied into a contract.³⁸

³³ *Aoraki Corporation Ltd v McGavin (Aoraki)* [1998] 3 NZLR 276, 286 (CA).

³⁴ *Aoraki*, above, 284.

³⁵ *Aoraki*, above, 284.

³⁶ *Aoraki*, above, 284.

³⁷ *Aoraki Corporation Ltd v McGavin (Aoraki)* [1998] 3 NZLR 276, 284-285 (CA).

³⁸ *Aoraki*, above, 285.

Underlying the concept of unjustifiability, which is the yardstick by which personal grievances apply to claims of unjustifiable dismissal and unjustifiable action under s27(1)(a) and (b), are the mutual obligations of confidence, trust and fair dealing which employers and employees owe to each other... But it is well settled... that that mutual obligation does not warrant the application of any different principles to the implication of terms in... employment contracts than are applicable to other contracts.

Employment contracts were therefore, to be interpreted in the same way as any other contract.

(c) Equity and good conscience jurisdiction

The Employment Court's equity and good conscience jurisdiction was held to be limited by section 104(3), where the Court said:³⁹

The important qualification expressed in s104(3) is that the exercise of the [Court's equity and good conscience] jurisdiction cannot be inconsistent with the [ECA] or any other Act or with any applicable... employment contract. Thus it does not allow the Employment Court when determining a personal grievance to depart from the proper interpretation of "unjustifiably dismissed" within the meaning of s27(1)(a). It cannot frustrate the policy of the legislation. Likewise, it does not allow the Employment Court to substitute for the employment contract actually entered into a contract which the parties could have entered into.

This followed *Principal of Auckland College of Education v Hagg*, which held that "it would be inconsistent with the ECA for the Employment Court to invoke the equity and good conscience jurisdiction to justify not giving effect to the applicable provisions of the... [employment] contract."⁴⁰ The ECA therefore:⁴¹

Departs from the common law of contract in setting the yardstick of unjustifiable dismissal... [and] in specifying procedures and remedies... [and although] the personal grievance provisions themselves [could] be traced back to [the 1970s]... the context in which they operate is sharply changed by the emphasis in the [ECA] on contractual freedom. The remedies, too, are narrowed by the scheme and language of the whole statute.

³⁹ *Aoraki*, above, 286.

⁴⁰ *Principal of Auckland College of Education v Hagg* [1997] 2 NZLR 537, 545 (CA).

⁴¹ *Aoraki Corporation Ltd v McGavin (Aoraki)* [1998] 3 NZLR 276, 286-287 (CA).

This argument was also made by Richardson J in *Brighouse*.

Section 46(3) of the ECA relates to redundancy compensation payable. The Court held that this section also constrained the Employment Court. If the employment contract dealt with redundancy, but did not specify the level payable (or a formula to calculate it), the Courts did not have the jurisdiction to fix such compensation.⁴²

The Court further stated that although this purely contractual approach could create tension with social and economic concerns, the responsibility on the Courts was to give effect to the intent of Parliament, as expressed by the ECA.⁴³

(d) Redundancy under *Aoraki*

As outlined above, *Brighouse* held that there was no general right to redundancy compensation, but it was nonetheless payable on redundancy, if it was considered necessary by the Court. In *Aoraki*, the Court held that this approach was incorrect and went against the underlying policy of contractual freedom in the ECA. The Court held that unless there was express mention of redundancy compensation in the employment contract, then procedural unfairness aside, no compensation was payable for the loss of the job itself. To allow *Brighouse* to remain good law, would be to “[leave] the Employment Court with considerable flexibility to develop a concept of unjustifiable dismissal [beyond the principles of the ECA].”⁴⁴

The Court then went on to state the law regarding redundancy, taken from “[a] straightforward application of the 1991 Act.”⁴⁵ Firstly, the justifiability of a redundancy is directed at considerations of moral justice and is not tied to common law rights. Conduct is unjustifiable if the employer cannot show it was just in all the circumstances. This requires a balancing of the employer’s and the employee’s rights.⁴⁶

⁴² *Aoraki*, above, 286.

⁴³ *Aoraki*, above, 287.

⁴⁴ *Aoraki*, above, 292.

⁴⁵ *Aoraki Corporation Ltd v McGavin (Aoraki)* [1998] 3 NZLR 276, 293 (CA).

⁴⁶ *Aoraki*, above, 293.

Secondly, the redundancy must be considered to see whether it was substantively unjustified, or in other words, whether the redundancy was genuine. In relation to this, it is for the employer to decide the strategy for restructuring as a matter of business judgment. It is not mandatory for the employer to consult with all affected employees, or consider redeployment, as this would be inconsistent with the employer's right to run their business as they choose. But in some circumstances, absence of consultation or consideration of redeployment, may cast doubt on the genuineness of the redundancy (or its timing).⁴⁷ *Aoraki* thus modifies *Phipps*, which held consultation was always mandatory (see above). *Aoraki* also fits within the *Dunn* selection criteria test (see above). Selection criteria remain a matter for the employer to decide, as long as they are relevant. In relation to criteria already negotiated in an employment contract, *Priest and Ross v Fletcher Challenge Steel Ltd* held that there was no further requirement on an employer to consult, regarding new selection criteria which were consistent with existing criteria, but only for extraneous criteria.⁴⁸

Thirdly, if there is a genuine redundancy, the Court must consider whether the steps taken by the employer were unjust. This is the procedural fairness limb of the test. Remedies are available for a genuine redundancy that was nonetheless carried out in a procedurally unfair way. An employer is subject to obligations of good faith and fair dealing; and should therefore implement the redundancy in a fair and sensitive way.⁴⁹ In terms of notice, if the employment contract is silent, one month is reasonable. Fair treatment may call for: counselling, career and financial advice and retraining, relevant financial support and possibly other considerations relevant in particular circumstances.⁵⁰

Fourthly, section 40(1) lists the remedies available for settling grievances. The Court held procedural unfairness remedies were only for "the wrong done to the employee... [and that] the form of remedy must be directed to the particular wrong... [therefore] the Employment Court [must] focus on the nature and scope of the personal grievance,

⁴⁷ *Aoraki*, above, 293-294.

⁴⁸ *Priest and Ross v Fletcher Challenge Steel Ltd* (1999) (14 October 1999) Employment Court Auckland AC81/99, 3 <<http://www.lexis.com/research/retrieve>> (last accessed 11 April 2001).

⁴⁹ *Aoraki Corporation Ltd v McGavin (Aoraki)* [1998] 3 NZLR 276, 294 (CA).

⁵⁰ *Aoraki*, above, 294.

[including any trauma and stress caused].”⁵¹ Section 40(1) remedies are also affected by the reason for the purported termination. For section 40(1) to apply, employment must be terminated in one of three ways: for cause, redundancy (insolvency, closure or restructuring) or on notice.⁵² Under the ECA, there are just and unjust terminations; only an unjust termination warrants personal grievance remedies.⁵³ This prevents a *Brighouse*-type compensation payment where the employee was properly made redundant but nonetheless seeks compensation solely for the loss of their job. In other words, there is no power under the ECA to award compensation for the loss of a job itself, if the employment contract does not include it.⁵⁴ Such extra-contractual redundancy payments would be contrary to the intention of the ECA: to promote contractual freedom.⁵⁵

In relation to humiliation or distress payments, the Court held that section 40(1)(c)(i) required it to focus on the actual procedural unfairness, not the effects the loss of employment itself may have had.⁵⁶ On the issue of quantum, the Court held that the amount payable depended on the factors involved in a particular case and how far short of the just employer standard the particular employer had been.⁵⁷ On the facts, because consultation was not required (as restructuring was company-wide) and insufficient counselling was offered, as well the inducement of a false sense of job security by Aoraki Corporation, the Court ordered \$15,000 in damages for the personal grievance.⁵⁸ Quantum is therefore restricted by the need for provable breaches of the standard required of employers and would usually be lower than previous decisions, because of the less stringent duties imposed by the contractual freedom approach.

(e) Thomas J

In his separate, but concurring judgment, Thomas J endorsed the Court’s general approach. Thomas J further held that *Aoraki* did not weaken the implied duty of fair

⁵¹ *Aoraki*, above, 293.

⁵² *Aoraki*, above, 293.

⁵³ *Aoraki Corporation Ltd v McGavin (Aoraki)* [1998] 3 NZLR 276, 293 (CA).

⁵⁴ *Aoraki*, above, 295.

⁵⁵ *Aoraki*, above, 295.

⁵⁶ *Aoraki*, above, 295.

⁵⁷ *Aoraki Corporation Ltd v McGavin (Aoraki)* [1998] 3 NZLR 276, 300 (CA).

⁵⁸ *Aoraki*, above, 300.

dealing between employer and employee,⁵⁹ but it was nonetheless correct for the Court to hold that it did not allow the expansion of Parliamentary intent to include redundancy compensation where the contract was silent.⁶⁰ On the issue of procedural fairness, Thomas J held that a redundancy was not genuine, if adherence to a fair procedure would not have resulted in the position being made redundant; holding compensation would be available for such a redundancy.⁶¹ But, if the procedural unfairness was inconsequential to the decision, then the redundancy would not be an unjustifiable dismissal.⁶²

(f) Summary

Aoraki therefore involves an approach to redundancy, which strictly adheres to the ECA's underlying policy of contractual freedom. The Court held that under the ECA, the justifiability of a redundancy was to be based on considerations of moral justice (not pre-existing common law rights). A personal grievance had to be directed at an actual wrong, as defined by the ECA, to warrant a remedy under the Act.

Employment contracts fell to be interpreted in the same way as other contracts. The Employment Court was not able to imply provisions into a contract to grant compensation (or anything else), if the contract was silent. These implications would be in contravention of the ECA's underlying contractual freedom policy; as well as being outside the jurisdiction of the Employment Court under the Act. The ECA itself departed from the common law in relation to the employment contract: defining unjustifiability, actionable grievances, remedies and requirements on the parties. These definitions had to be used by the Employment Court, so that the ECA was given proper effect.

The Court did in general however, maintain the two-step test adopted by the earlier judgments outlined above: requiring a genuine redundancy (with modifications regarding required consultation and other matters) and a process which was

⁵⁹ *Aoraki*, above, 304.

⁶⁰ *Aoraki*, above, 306.

⁶¹ *Aoraki Corporation Ltd v McGavin (Aoraki)* [1998] 3 NZLR 276, 306 (CA).

⁶² *Aoraki*, above, 306.

procedurally fair (the material elements of procedural fairness being largely dependent on the parties' mutual obligations of good faith and fair dealing, as well as the parties' particular circumstances).

4 *Later ECA redundancy cases*

Following *Aoraki* the Courts, in general, truthfully applied the approach of that case. In *New Zealand Fasteners Stainless Ltd v Thwaites*, the Court of Appeal applied *Aoraki* after the decision became available. The court below did not reach the same decision as the appellate court, because its decision was based on the earlier *Brighouse* line, as described above.

Thwaites clarifies some points that were misapplied by the Court of Appeal in *McKechnie Pacific (NZ) Ltd v Clemow*. *McKechnie* held that the genuineness of a redundancy was vitiated by the employer's failure to offer a different, but suitable position.⁶⁴ *Thwaites* held that this was incorrect; *Aoraki* did not go this far. Instead, it held:⁶⁵

In a situation of genuine redundancy... in the absence of a contractual provision to that effect, it cannot constitute unjustified dismissal not to offer the employee a different position. The relationship between employer and employee applies in respect of the position and work the employee is contracted to provide... 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.

Thus *Thwaites* confirms the (possibly unclear) point in *Aoraki* that failure to offer redeployment is not fatal, when the employment contract is silent as to this. In other words, the redundancy should be related to the *position*, not the *person*. The Court in *Thwaites* stated the genuineness of a redundancy of one position once established, cannot be negated by a failure to offer a different position. It must be remembered, however, that *Aoraki* does mention the possibility that failure to consider redeployment might in particular circumstances indicate an absence of genuineness – even though

⁶³ *Aoraki*, above, 307.

⁶⁴ *McKechnie Pacific (NZ) Ltd v Clemow* [1998] 3 ERNZ 245, 251 (CA).

⁶⁵ *New Zealand Fasteners Stainless Ltd v Thwaites (Thwaites)* [2000] 2 NZLR 565, 572 (CA).

redeployment (along with consultation) was held not to be mandatory, but instead a decision for the employer.

Thwaites further states that a genuine redundancy can nonetheless be procedurally unfair in certain respects, resulting in a breach of the employer's duty of fair treatment.⁶⁶

Except in cases where failure to consult and consider redeployment, taken in the whole context of circumstances, constitute evidence of lack of genuineness in the decision to declare a position redundant, such failure, where it falls below the conduct of a reasonable employer acting fairly, may entitle the employee to a remedy but not to an order that the dismissal was not for redundancy.

Thus *Thwaites* states it is possible for procedural fairness breaches to occur and warrant remedies, but the position is still redundant. This could be seen as blurring the distinction between genuineness and procedural fairness, but is not arguably of importance in relation to the whole exercise of determining whether an employer has acted fairly.

On the issue of genuineness, *Thwaites* held that if a new, restructured position involved substantially the same responsibilities as a purportedly redundant one, this did not mean the old position was not redundant. Instead, the Court held:⁶⁷

While some positions might become surplus to requirements abruptly, as on a restructuring... many will diminish over time to a point when it is recognised they should be declared... redundant... 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 penalise employers for retaining employees longer than is necessary... It must be open for the employer to assess the requirements of the business with respect to positions.

Carter Holt Harvey v Wallis held the test to be used when determining whether two positions were substantially similar was objective. It was necessary to ask whether a reasonable person would consider there to be a sufficient difference between the two positions to break the continuity of employment, having regard to the characteristics of

⁶⁶ *Thwaites*, above, 573.

both positions and the employee.⁶⁸ If the positions were substantially similar, it would not be a genuine redundancy. *Howard v NZ Pastoral Agricultural Research Institute* adopted a similar test, based on the positions' significant differences not being great enough to establish the old position's genuine redundancy.⁶⁹

These decisions run counter to the *Thwaites* argument. *Thwaites* does specifically reject the *substantially similar responsibilities* test used⁷⁰ and is the later authority. But, *Thwaites* does not completely override this test however, as the decision can be seen as a modification to the rule for factual circumstances involving a gradual decline in a position's duties, as opposed to an abrupt redundancy. The test using substantial similarity of positions to vitiate a genuine redundancy therefore remains good law,⁷¹ but as modified by *Thwaites*.

In his partially dissenting judgment, Thomas J held that although the Court of Appeal had frequently reiterated that damages awarded for wrongful dismissal claims should be restrained, this resulted in inadequate compensation and therefore the remedy provided under the ECA was largely ineffective. The need for an employer to be fair was enhanced where the employee was essentially blameless.⁷² It is therefore evident, that quantum under the ECA, while modest, was beginning to be seen by some members of the judiciary as too low. What would have happened without Parliamentary intervention via the ERA however, is outside the scope of this paper.

5 *Summary of redundancy under the ECA*

Thwaites succinctly summarises the post-*Aoraki* ECA approach as follows:⁷³

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

⁶⁷ *Thwaites*, above, 572-573.

⁶⁸ *Carter Holt Harvey v Wallis* [1998] 3 ERNZ 984, 985 (EC).

⁶⁹ *Howard v NZ Pastoral Agricultural Research Institute Ltd* [1999] 2 ERNZ 479, 481 (EC).

⁷⁰ *New Zealand Fasteners Stainless Ltd v Thwaites (Thwaites)* [2000] 2 NZLR 565, 572 (CA).

⁷¹ See *The Laws of New Zealand* (Butterworths, Wellington, 2000) vol 11A Employment, para 43.

⁷² *Thwaites*, above, 577.

⁷³ *Thwaites*, above, 571-572.

in good faith could have reached it may be impeached. In any review it may be relevant that the employer did not consult with affected employees or consider whether the redundancy could have been avoided by redeployment or otherwise. Absence of such steps might in particular circumstances indicate absence of genuineness in the determination. Where there is a genuine redundancy that will justify termination of the employment of the person in the position. 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. Any failure to discharge that obligation that in itself is unjustifiable may result in remedies appropriate to the breach.

Savage v Unlimited Architecture Ltd confirms the onus as being on the employer regarding justification, once the employee had established the dismissal and that it was attended with some unfair treatment.⁷⁴ The employer had to show they had acted reasonably in treating redundancy as a sufficient reason for dismissing *the* employee.⁷⁵ Chief Judge Goddard stated this approach "readily [fitted]... a system in which the concern is with the question whether a dismissal is justifiable or not."⁷⁶ This position can be contrasted with *Thwaites*, in which the Court held that the sole focus must be on the position, not the individual, when considering the genuineness of the redundancy (see above). The difference of opinion is perhaps resolved by stating that the Court in *Thwaites* was discussing redeployment only; not the employer's duty to explain how the overall redundancy was justified for the particular employee, in relation to the criteria used in selection and so on.

As to the applicability of the *Aoraki* approach, Chief Judge Goddard stated that the case was a judgment given upon a particular fact situation and that it was not legislation. It was not to be applied to all situations, regardless of the differences capable of distinguishing the case; for instance where only singular or small group redundancies were involved.⁷⁷

Chief Judge Goddard further stated that the underlying assumption in *Aoraki* was that the condition required for a genuine redundancy was that the position itself, had disappeared. If this was not the case, an employer would not be entitled to a finding

⁷⁴ *Savage v Unlimited Architecture Ltd (Savage)* [1999] 2 ERNZ 40, 52 (EC).

⁷⁵ *Savage*, above, 50.

⁷⁶ *Savage*, above, 50-51.

⁷⁷ *Savage*, above, 50.

that the termination was substantially justified, under *Aoraki*.⁷⁸ This was because the integrity of a redundancy decision could also be compromised in part, by its application to particular individuals for reasons other than that their jobs had gone. A third compensation-founding category (after non-genuine and procedurally unfair redundancies) was therefore identified: a genuine redundancy, which was nonetheless procedurally unfair. Chief Judge Goddard stated that *Aoraki* treated this situation as “all or nothing... going to the genuineness of the redundancy [only].”⁷⁹ However, it can be argued this position was recognised adequately by *Aoraki*, because a procedurally unfair process was still grounds for a remedy under the ECA. The fact that it went to genuineness is not overly important – it was still a remedy.

The warning sounded by Chief Judge Goddard in *Savage*, does not seem to have been much listened to. Most of the cases following *Aoraki* (as mentioned above) have faithfully applied its approach, or attempted to. Thus the weight which is given to Chief Judge Goddard’s comments regarding *Aoraki* must be treated with some caution. Of course his Honour is correct, regarding the doctrine of precedent's requirement to apply precedents to *like* situations. But the cases which have followed *Aoraki* and which fell to be decided under the ECA, have nonetheless largely confirmed its position.

In summary, the ECA has restricted the former common law redundancy position. Although redundancy itself is not mentioned in the Act, the Courts have held that it sets the limits of what qualifies as a personal grievance, the remedies available for personal grievances and the duties on the parties in an employment contract. The main effect being that the ECA’s underlying policy of contractual freedom has prevented the Courts from interfering with what the parties themselves, have included in their agreements. The next part of this paper will examine the impact of the Employment Relations Act 2000 on redundancy law.

⁷⁸ *Savage v Unlimited Architecture Ltd (Savage)* [1999] 2 ERNZ 40, 50 (EC).

⁷⁹ *Savage*, above, 49.

III REDUNDANCY UNDER THE ERA

A Good Faith

1 The Act

The Employment Relations Act 2000 establishes a different approach to employment relations than that of its predecessor. Section 3(a) states the object of the Act as building productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment and of the employment relationship. Section 3(a)(i) states this is to be achieved by recognising that employment relationships must be built on good faith behaviour and in section 3(a)(ii), by acknowledging and addressing the inherent inequality of bargaining power in employment relationships. Section 4(1)(a) states parties to employment relationships must deal with each other in good faith. Section 4(4) states this duty applies to (inter alia) (c) consultation between employers and employees, including the effect on employees of changes to the employer's business; (d) contracting out work; and (e) making employees redundant.

Thus, it is evident that the ERA creates a statutory duty of good faith, which is required to be adhered to by an employer, including in the area of redundancy. This duty is stricter than under the ECA, where it does exist but because it is implied into an employment contract, it is not able to trump the ECA's contractual freedom policy by imposing extra-judicial requirements on an agreement, which the parties did not contemplate. As outlined above, this was considered contrary to the object of the ECA.

2 Judicial approach

The leading case concerning redundancy under the ERA is *Baguley v Courtts Cars Limited*. This case involved an allegation of unjustified dismissal related to a redundancy at a car grooming company. The Employment Court sat as a full bench and

unanimously ruled in favour of the appellant employee. On the issue of ECA case law, the Court stated:⁸⁰

The passing of the [ERA] is a proper and necessary occasion... to revisit first principles and to determine how the law has been modified by the new legislation. The [ECA] has been repealed. A markedly different regime has been established in its place. It is therefore not satisfactory to make decisions in reliance on cases decided while the [ECA] was in force unless they state principles of general application as opposed to principles peculiarly arising out of the [ECA].

The Court stated that *Aoraki* was "a case very much in point [and] as the Court of Appeal made plain [in *Aoraki*], that decision was tied very much to the [ECA]."⁸¹

The Court then held that the ERA abolishes or reverses the *Aoraki*-ECA approach to redundancy in its key provisions: section 3 (particularly paragraphs (a)(i) and (ii)) in outlining the object of the Act as the advancement of good faith and the promotion of International Labour Organisation (ILO) conventions related to collective bargaining (described below); and section 4, in creating a statutory duty of good faith.⁸²

In relation to *Aoraki*, the Court held that the following principles from that case would no longer apply: firstly, the ECA was no longer the source of law regarding unjustified dismissal; secondly, the ECA's purely contractual approach was also not applicable. It no longer mattered that a contract was silent regarding an employer's obligations; thirdly (although obiter) the Court held ILO conventions could no longer be disregarded.⁸³

Section 189(1) of the ERA states the Court can use its equity and good conscience jurisdiction expressly for the purpose of supporting successful employment relationships. The Court held that this indicated that behaviours that were previously

⁸⁰ *Baguley v Coutts Cars Limited (Baguley)* (2001) (3 April 2001) Employment Court Auckland ARC 2/00, 13 Goddard CJ.

⁸¹ *Baguley*, above, 13.

⁸² *Baguley*, above, 15.

⁸³ *Baguley*, above, 16.

sanctioned, merely because they were not prohibited by an employment agreement, may not be able to be relied on any longer.⁸⁴

Thus under the ERA, employers must give effect to their duty of good faith to the point where formerly they would not have had to, because the employment contract was silent regarding a particular issue. In other words, the duty of good faith under the ERA is superimposed upon an employment agreement,⁸⁵ irrespective of the wishes of the employer.⁸⁶ This is in stark contrast to the ECA position, where contractual freedom reigned supreme and the equity and good conscience jurisdiction could not be used if it conflicted with the Act itself. Although the ERA also states this,⁸⁷ the purpose of use just described follows the ERA's underlying policy. Furthermore, the duty of good faith expressly applies when consultations are in progress (including where an employer undertakes voluntary consultation) and also if a proposal is being made that could possibly impact on their employees.⁸⁸

Baguley approved of two Canadian authorities regarding their common sense approach to the duty of good faith.⁸⁹ *Carrick v Cooper Canada Ltd* concerned an action for mental distress caused by a dismissal. The Ontario Supreme Court held that because the employer was in a fiduciary relationship with their employee, it owed the employee a duty to treat him with concern and common decency.⁹⁰ *Bernadin v Alitalia Air Lines* involved an action of wrongful dismissal based on inadequate notice being given. The Quebec Superior Court allowed the action in part, stating that:⁹¹

While an employer is entitled to put an end to the contract of employment... it is nevertheless incumbent upon the employer to do so in a manner which will not cause undue stress, anxiety or grief.

⁸⁴ *Baguley v Coutts Cars Limited (Baguley)* (2001) (3 April 2001) Employment Court Auckland ARC 2/00, 16 Goddard CJ.

⁸⁵ Sections 3, 4.

⁸⁶ Arguably, most employees would consider this beneficial.

⁸⁷ Section 189.

⁸⁸ *Baguley*, above, 16.

⁸⁹ *Baguley*, above, 20.

⁹⁰ *Carrick v Cooper Canada Ltd* [1983] 2 CCEL 87, para 100.

⁹¹ *Bernadin v Alitalia Air Lines* (1993) 50 CCEL 156, para 17.

These cases reflect the New Zealand approach as outlined by the Courts. In summary therefore, parties to employment agreements under the ERA owe each other duties of good faith, which should be applied in a common sense, not overly legalistic, way. However, this duty goes beyond mere direct and honest dealings between the parties: it is all-pervasive; not least because of its statutory source, as opposed to the duty of fair dealing implied by common law when the ECA was in force.⁹²

3 *ILO conventions*

The ERA heralds a return to collectivist principles of previous legislation and involves some discarding of free contractual bargaining.⁹³ This is replaced by doctrines of good faith and the principles underlying ILO convention 87 on freedom of association and convention 98 on the right to organise/bargain collectively. Convention 87 provides (inter alia) that workers have the right to establish and join organisations of their own choice without governmental interference and also to draw up their own rules. Convention 98 provides (inter alia) that workers must be protected against discrimination on the grounds of union membership; it also protects collective bargaining through the autonomy of the parties and voluntary nature of negotiations.⁹⁴ What the ERA therefore achieves, is the establishment of New Zealand law based on fundamental ILO concepts of worker's rights. This is in contrast to the ECA where, as discussed above, the Court of Appeal explicitly stated that this Act was not based on the ILO, but was rather a unique entity unto itself.

⁹² Christine French "Employers and Good Faith" in *Employment Law Conference (NZ Law Society) Wellington 23-24 November 2000* (Butterworths, Wellington, 2000) 13, 15.

⁹³ *Baguley v Coutts Cars Limited (Baguley)* (2001) (3 April 2001) Employment Court Auckland ARC 2/00, 16 Goddard CJ.

⁹⁴ Paul Roth "The Employment Relations Act and International Labour Organisation Conventions 87 and 98" in *Employment Law Conference (NZ Law Society) Wellington 23-24 November 2000* (Butterworths, Wellington, 2000) 79, 81.

B *Personal Grievances under the ERA*

1 *The Act*

Section 102 of the ERA states an employee may pursue a perceived personal grievance under the Act. Section 103(1) defines a personal grievance as any grievance against an employer because of the reasons listed, including in section 103(1)(a) unjustified dismissal claims. Section 113(1) states the personal grievance provisions of the ERA are the only means available to an employee to challenge a dismissal.

In relation to personal grievances, the Court in *Baguley* firstly considered *Auckland City Council v Hennessey*, where Somers J stated, "good industrial relations depend upon management not only acting fairly but being manifestly seen to act fairly."⁹⁵ It held that the ERA went further than this.⁹⁶

[The ERA's] object is to build productive employment relationships through the promotion of mutual trust and confidence... In relation to personal grievances, the Act says [in section 101] 'The object of this part is (a) to recognise that, in resolving employment relationship problems, access to both information and mediation services is more important than adherence to rigid formal procedures.'

2 *Dismissal not the substantive issue*

The Court stated that a personal grievance was brought in *Baguley* because of the unjustified dismissal. However, this was only the superficial issue.⁹⁷

It is timely to recall that, from the earliest days of this jurisdiction under s117 of the Industrial Relations Act 1973 it has been held that it is... not... a process aimed at producing cut and dried answers to allegations... [but] the settlement of personal grievances... The wider issue of the worker's grievance is the direct issue for assessment and resolution rather than the underlying complaint of dismissal... The focus on the settlement of personal grievances remains - see s123 of the [ERA].

⁹⁵ *Auckland City Council v Hennessey* [1982] ACJ 699, 703 (CA).

⁹⁶ *Baguley*, above, 17.

⁹⁷ *Baguley v Coutts Cars Limited (Baguley)* (2001) (3 April 2001) Employment Court Auckland ARC 2/00, 4 Goddard CJ.

Therefore, the Court's role is to settle the underlying cause of the complaint and not the more procedural, rather than substantive, *label* given to the personal grievance. While the focus is on unjustified dismissal, the grievance is about the way the employer treated the employee; the action being unjustified precisely because it was wanting in good faith.⁹⁸

3 *Main components*

The Court stated that a personal grievance for unjustified dismissal was a well-established remedy, describing it as follows:⁹⁹

It is against the law for an employer to dismiss an employee unjustifiably. A dismissal will be justifiable only if the employer can show that a fair and reasonable employer would have dismissed at the time and in the circumstances. Genuine redundancy can justify a dismissal provided the proper notice of termination is given and a proper payment made of any compensation provided for as a term of the bargain... Today, we accept also that a redundancy may be genuine though avoidable and though the result of initiative on the part of the employer.

Thus it is evident that the genuineness of a redundancy remains part of the test for a justifiable dismissal for redundancy. In relation to procedural fairness, the Court held:¹⁰⁰

Selection of employees for redundancy, where there is a choice, must be fair. A fair procedure must be followed. The situation must be handled sensitively. Although a dismissal for redundancy can be a justified dismissal, it too must pass the test of fairness and reasonableness... What is fair and reasonable now depends on the facts and circumstances of each case. It also depends on the current law. The jurisprudence developed under the [ECA] focused on the presence or absence of an obligation to consult as a term of the employment contract. Now that the spotlight is on the employment relationship, it is not necessary or permissible to speak in terms of consultation being mandatory in all cases or of never being required. Usually it will be. The [ERA] strongly suggests so... [for example] section 101... highlights the importance of access to information.

⁹⁸ *Baguley*, above, 17.

⁹⁹ *Baguley*, above, 17.

¹⁰⁰ *Baguley*, above, 17-18.

The Court held that the ERA requires a new approach to the question whether the employer acted as a fair and reasonable employer would. This is still a question of fact and degree, but is informed by Parliament's intention to reform the nature of the employment relationship.¹⁰¹ A common sense assessment of the situation is required, bearing the following factors in mind:

(i) The employer's business requirements... These could be postponed for a short time, or long enough to accommodate the other factors;¹⁰²

(ii) The employee's right to relevant information or dialogue consultation... This will usually require some real dialogue with the employee, starting with the provision in good faith, of accurate information. Also, the employer finding out what would cause the employee the most havoc, so as to avoid it; as well as what will injure them the least in order to try and achieve it. Redeployment is also relevant, as well as selecting employees for redundancy if there is a choice. The commercial decision remains the employer's, however the timely provision of useful information will often be decisive of the justness of the employer's actions;¹⁰³

(iii) The employer's ability to mitigate the blow to the employee. Consultation with affected employees may help the employer here;¹⁰⁴

(iv) The nature of the employment relationship as one calling for good faith. This involves recognising the employee's worth as a human being even if no longer valued or required as an employee.¹⁰⁵

4 *Other procedural fairness issues*

Regarding selection criteria for redundancy, the *Baguley* upheld the *Dunn v Methanex* test (as outlined above) but stated "[while] employers are entitled to considerable latitude when redundancies are looming in deciding upon the [selection] criteria to use [and] to exercise discretion in applying the criteria... they must do so

¹⁰¹ *Baguley v Coutts Cars Limited (Baguley)* (2001) (3 April 2001) Employment Court Auckland ARC 2/00, 18 Goddard CJ.

¹⁰² *Baguley*, above, 18.

¹⁰³ *Baguley*, above, 18-19.

¹⁰⁴ *Baguley*, above, 19.

¹⁰⁵ *Baguley v Coutts Cars Limited (Baguley)* (2001) (3 April 2001) Employment Court Auckland ARC 2/00, 19 Goddard CJ.

honestly and openly.”¹⁰⁶ The Court also approved of *Murfitt v Centrepoint Ltd*, where Shaw J held:¹⁰⁷

The adoption of a fair process in relation to affected employees should not derogate from the employer's ultimate prerogative. However the prerogative does not give the employer carte blanche to select individual employees on irrelevant grounds or without proper inquiry as to the employee's suitability or not.

Therefore, what is required under the ERA regarding selection criteria is that an employer selects appropriate criteria based on relevant grounds and applies them to relevant employees honestly and openly after proper inquiry. This would also involve informing the employees affected of what the criteria are, as a duty of good faith requirement.

In terms of notice to be given, the Court held that all non-fixed term contracts could be terminated on notice, but this would not always be a justified dismissal. The proper notice period was that given in the employment agreement and if this was silent, then the period had to be a reasonable one; which in turn, was a question of fact.¹⁰⁸ On the facts, the appellant had worked in a junior position for two years. The Court held that one month's notice was reasonable, because of the relatively short service period and the level of the position held.¹⁰⁹

5 Remedies under the ERA

Section 123 of the ERA states the remedies available for a personal grievance. Section 125 states reinstatement under section 123(1)(a) is the primary remedy; which also includes (b) reimbursement of lost wages or other money; and (c) compensation, including for (i) humiliation, loss of dignity and injury to feelings.

Baguley states damages may be recoverable (in an appropriate case) for a breach of section 4 good faith. On the facts, this was not possible here because the action was a

¹⁰⁶ *Baguley*, above, 19.

¹⁰⁷ *Murfitt v Centrepoint Ltd* [1999] 2 ERNZ 955, 967 (EC).

¹⁰⁸ *Baguley*, above, 19.

personal grievance for which the ERA prescribes the available remedies under section 123.¹¹⁰ Remedies may also be affected by the nature of the employer's conduct, if this has been such as to inflame the injury caused to the employee.¹¹¹

Baguley further held that remedies should only be discussed after the employer's behaviour has been found to be unjustifiable. This is because the proper vehicle for punishing a wrong employer is an action for a penalty or properly formulated action for damages under the Act.¹¹² Section 125 of the ERA states reinstatement is the primary remedy unless impracticable. *Baguley* affirms this and further states that reimbursement of lost wages and compensation for non-exhaustive, specified injuries are also still available. The underlying philosophy of the personal grievance jurisdiction is that the appellant employee is made whole again.¹¹³

In deciding on a remedy the Court, under section 192(1) of the ERA, cannot vary or cancel a clause of a collective employment agreement. It can however, suspend an aspect of an agreement and order the parties to reopen bargaining regarding that aspect. This restriction supports the concept that the Court's role is in identifying the rights of the parties and their problems and not fixing their chosen terms or conditions of employment.¹¹⁴ Similarly, section 189 of the ERA states that the exercise of equity and good conscience jurisdiction cannot be contrary to the parties' employment agreement. This is one aspect of similarity with the old act.¹¹⁵

As mentioned above, the Court held that principles derived from ECA case law could only remain under the ERA if they involved general points. *Baguley* adopted several such relevant factors in relation to determining remedies or compensation levels, from *Aoraki* as follows:¹¹⁶

¹⁰⁹ *Baguley v Coutts Cars Limited (Baguley)* (2001) (3 April 2001) Employment Court Auckland ARC 2/00, 24 Goddard CJ.

¹¹⁰ *Baguley*, above, 21.

¹¹¹ *Baguley*, above, 21.

¹¹² *Baguley*, above, 21.

¹¹³ *Baguley v Coutts Cars Limited (Baguley)* (2001) (3 April 2001) Employment Court Auckland ARC 2/00, 21 Goddard CJ.

¹¹⁴ *The Laws of New Zealand* (Butterworths, Wellington, 2000) vol 11A Employment, para 35.

¹¹⁵ Section 104(3).

¹¹⁶ *Baguley*, above, 24.

- The circumstances surrounding notification of redundancy,
- The abruptness of the dismissal meeting,
- The failure to give adequate reasons,
- The absence or inadequacy of prior warning,
- Inducing a false sense of security in the employee, which increases the blow,
- The nature of counselling offered and what was actually given.

The foregoing is a non-exhaustive list of possibly relevant factors to consider, when weighing the decisions taken by the employer and their subsequent actions, in relation to any remedy allowed the employee.

In relation to quantum of damages, the Court held that \$10,000 was a modest amount to award for hurt and humiliation under section 123(c)(i). The appellant was also awarded \$5,700 for loss of benefits under section 123(c)(ii) of the Act.¹¹⁷ Therefore, under the ERA, an aggrieved employee is likely to receive a higher monetary award than under the ECA, where (as described above) the quantum received was restricted to quite low amounts.

C Summary of ERA Redundancy

Redundancy compensation in a given case is still a question of what the employment agreement states as a record of the parties' intentions. However, the whole approach to the employment relationship of the parties has been altered to reflect the emphasis in the ERA on fair dealing and good faith. What an employer has to show in order to be justified in making employees redundant still involves the concept of a genuine redundancy implemented in a procedurally fair way, but the legal benchmarks that must be reached in order to satisfy these tests have been raised by the new Act. Remedies are also different, with the emphasis on reinstatement, where practicable.

The duty of good faith on employers remains in force, despite what is written in an employment agreement. Thus, it is not possible to rely on the silence of an agreement (as under the ECA) in order to state a certain requirement is not necessary. Consultation is a prime example. Under the ECA, the Courts held that this was not always required.

Under the ERA however, the statute's emphasis on good faith means an employer would seldom be able to avoid consultation with their employees regarding possible redundancies. The ERA therefore, practically restores the position under *Phipps* where consultation was held mandatory (see above). This suggests the requirement may also prevent an employer from proceeding with restructuring plans before proper dialogue, beginning with the provision of accurate information in good faith, had been entered into with affected employees.¹¹⁸

As stated above, the ERA departs from the ECA's emphasis on contractual freedom in favour of a return to more collectivist principles and the realisation that almost total freedom of contract can often result in the employee being in a substantially weaker position than they otherwise could be. This inevitably means employers will feel pressured, but arguably helps to ensure employees are not left at the mercy of their "rights to contract freely" as under the ECA. It has been argued however, that the ERA's statute based good faith approach still allows a Court to improvise terms in an employment agreement in a *Brighouse*-type way.¹¹⁹ The Act itself supports this idea; see for example section 192.

Because *Baguley* is the only ERA redundancy decision to date, some speculation is required as to what the Court of Appeal would decide on an appeal of this case. In this regard, it is important to remember that *Baguley* held ECA case law was only to be considered if it offered general points not arising peculiarly from the Act itself. What are perhaps more pertinent to consider, are decisions predating the *Aoraki*-ECA approach. These decisions are more likely to discuss general redundancy principles, as well as to more closely approximate the ERA's object of promoting productive employment relationships based on good faith, because their focus extends beyond contractual freedom. What must also be remembered is that although the ERA changes much of the ECA position, the ERA is still a forward-looking act. It does not seek to

¹¹⁷ *Baguley*, above, 24-25.

¹¹⁸ See Peter Cullen "Employment Matters: Landmark case sets job relations on new course" (11 April 2001) *The Dominion* Wellington 29.

¹¹⁹ Christine French "Employers and Good Faith" in *Employment Law Conference (NZ Law Society) Wellington 23-24 November 2000* (Butterworths, Wellington, 2000) 13, 15.

return completely to the era of pre-ECA industrial law.¹²⁰ Rather, the ERA attempts to redress an imbalance towards favouring the employer in the employment relationship.

Bearing this in mind, it is arguable that the Court of Appeal would uphold the decision of the Employment Court. Under a *Brighouse*-type argument, Michael Baguley was unjustifiably dismissed and not treated fairly by his employer. On the facts, a genuine reason for the redundancy was present, but the manner in which it was carried out was procedurally unfair. Similarly, under *Phipps* the test of whether a fair and reasonable employer (see above) would have treated him in that way is also not met.

The Court of Appeal in *W&H Newspapers Ltd v Oram* recently used a *fair and reasonable employer* test in relation to an employer's decision to dismiss a journalist for serious misconduct. The Court held that it was not an unfair dismissal if the employer could show that their decision to dismiss was one a fair and reasonable employer could have made.¹²¹ *Oram* has however been criticised, because this test was seen as subjective and in favour of the employer, instead of the more balanced test involving a relatively abstract and reasonable employer as applied previously.¹²² *Oram* may also indicate that the Employment Court should not attempt to set objective and impartial standards of fairness when considering the actions of an employer regarding dismissal.¹²³ What impact this judgment would have on a *Baguley* Court of Appeal is unclear. Nevertheless, it endorses the broad type of test used in this context: one in a similar vein to *Phipps* (above). It must also be remembered that this case was not related to redundancy and was decided under the ECA. Therefore it is unlikely that the Court of Appeal, faced with a statutory recognition of the inherent inequality in employment relationships (absent under *Oram*) in a redundancy situation, would impose a test of fairness which favoured the already dominant party in the employment relationship.

The problem with this analysis however, is that on these facts, the case would probably have been resolved the same way under the *Aoraki*-ECA approach. The issue of procedural unfairness would still have been present. But the quantum awarded would

¹²⁰ Gordon Anderson, Associate Professor (Victoria University Industrial Law Lecture, Wellington, 18 July 2001).

¹²¹ *W&H Newspapers Ltd v Oram* (3 May 2001) Court of Appeal CA 140/00, para 31 Gault J.

¹²² *Employment Law Bulletin* (Butterworths, Wellington, 2001 Issue 4) 73, 77.

also arguably be less under the *Aoraki*-ECA approach. Nevertheless, the statutory requirement of good faith under the ERA provides another way for the applicant to challenge his employer's conduct.

IV CONCLUSION

The main distinction in the approach to redundancy under the ECA and the ERA relates to the underlying policy difference between these acts. The ECA involved an underlying policy of contractual freedom. This meant that employers and employees were largely free to draft their own agreements without the need for perceived undue legislative interference. In terms of redundancy law, this manifested itself in the *Aoraki* decision, which began a line of cases that in promoting the policy of the Act prevented an employee from succeeding in a personal grievance where their employment contract did not include reference to redundancy compensation. The implied duty of good faith held to exist in an employment relationship could not protect an employee in a redundancy situation from a lack of consultation or other procedural fairness aspects, which were often optional for an employer.

In contrast, the ERA has a fundamentally altered object. The Act replaces contractual freedom with the promotion of productive employment relationships and the promotion of an enhanced, statutory requirement for mutual good faith. It also recognises the inherent inequality of bargaining power, which results where parties are free to contract as they wish. An employer cannot rely on their agreement being silent to avoid consulting with their employees if a redundancy situation arises. Furthermore, procedural fairness requirements are enhanced under the ERA by the good faith requirement. In relation to redundancy compensation however, the employment agreement's terms still prevail, as long as they reflect good faith and fair dealing. What an employer must show to justify a dismissal for redundancy, while still based on a genuine redundancy and a procedurally fair implementation, has been made more demanding. In retaining this framework, although the change in policy under the ERA has been fundamental, the impact on redundancy as a discrete area of the law has not.

¹²³ *Employment Law Bulletin*, above, 78.

V RESOURCES

A Legislation

Employment Contracts Act 1991, No. 22

Employment Relations Act 2000, No. 24

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1 ECA section

Aoraki Corporation v McGavin [1998] 3 NZLR 276

Auckland Regional Council v Sanson [1999] 2 ERNZ 597

Brighouse Ltd v Bilderbeck [1995] 1 NZLR 158

Carter Holt Harvey v Pirie [1997] ERNZ 648

Carter Holt Harvey v Wallis [1998] 3 ERNZ 984

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EDS (New Zealand) Limited v Inglis (2000) (13 November 2000) Court of Appeal CA 228/99 Keith J

G N Hale & Son Ltd v Wellington, etc, Caretakers, etc, IUW [1991] 1 NZLR 151

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