IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2013] NZEmpC 71
CRC 46/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	DEREK WAYNE GILBERT Plaintiff
AND	TRANSFIELD SERVICES (NEW ZEALAND) LIMITED Defendant

Hearing:	26-28 September 2011 and 1-3 February 2012 (Heard at Christchurch)
Appearances:	David Beck and David Goldwater, counsel for plaintiff Gillian Service and Anna Smith, counsel for defendant
Judgment:	29 April 2013

JUDGMENT OF CHIEF JUDGE G L COLGAN

A **The plaintiff was not discriminated against unlawfully by the defendant in his employment and in his dismissal.**

B **The plaintiff was dismissed unjustifiably by the defendant.**

C **Following any appropriate training and supervision and, if necessary, after the parties have been assisted professionally by a mediator, the plaintiff is to be reinstated to his former position with the defendant or to one no less advantageous to him.**

D **For remuneration purposes, that order for reinstatement is to take effect immediately on the delivery of this judgment and will have retrospective effect to the date of the plaintiff's dismissal.**

E **To give effect to D (above) the plaintiff is entitled to compensation for all remuneration lost by him as a result of his unjustified dismissal but less any remuneration earned by him during the period that he was dismissed.**

F The plaintiff is entitled to interest on lost wages at the relevant Judicature Act rate calculated from the date of filing of his claims in the Employment Relations Authority to the date of payment of these to him.

G The plaintiff is to have compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 in the sum of $15,000.

H The plaintiff's application for a penalty is dismissed.

I The plaintiff is entitled to costs which, if they cannot be agreed between the parties within the period of two calendar months from the date of this judgment, will be fixed after the filing of memoranda.

REASONS FOR JUDGMENT

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[1] The issues for decision on this challenge by hearing de novo to a determination[1] of the Employment Relations Authority are two:

- Whether Derek Gilbert was discriminated against unlawfully because of his union activities and, if so, the remedies for this; and
- whether Mr Gilbert was dismissed unjustifiably and, if so, the remedies (including reinstatement in employment, compensation for lost remuneration, compensation for humiliation, loss of dignity and injury to feelings, a penalty for breach of statutory good faith obligations, and costs) to which he may be entitled.

[2] Counsel's underestimate of hearing time required meant that the case took twice as long to hear as scheduled. Because of a combination of the unavailability of a courtroom as a result of the Christchurch earthquakes and the court's other business, it could not be resumed for some months. I regret the subsequent delay in issuing this judgment.

[3] The applicable law includes both s 103A (the test for unjustified dismissal) and s 125 (regarding reinstatement in employment) as they were before the amendments to both sections with effect from 1 April 2011 pursuant to the

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[1] CA5A/10, 14 May 2010.

Employment Relations Amendment Act (No 2) 2010. Although the point was not taken by the defendant, I add the following for the sake of completeness. The plaintiff's causes action arose, at the latest, in late 2009 when Mr Gilbert's employment was terminated. Although I am not aware when he filed his claims in the Employment Relations Authority, it heard these in early 2010 and delivered its determination in mid-May 2010.

[4] There is no question of the application of the statutory amendments, which only came into force on 1 April 2011, to any aspect of the Authority's determination to which this is a challenge. These proceedings were brought to the Court in mid-June 2010 and were the subject of judicial involvement before the current legislative provisions (new ss103A and 125) came into effect. There were no transitional provisions that accompanied these changes to the law of justification and reinstatement which might have addressed cases such as this. However, there can be no question in my view that the law applicable at the date of Mr Gilbert's dismissal, at the dates of hearing and determining his challenge to that in the Employment Relations Authority, and of the date of the filing of his challenge to that determination in this Court, must continue to apply. That is consistent with the judgment of this Court in *O'Connor v Ports of Auckland*[2] and indeed the relevant events in this case point even more strongly to the application of the previous law.

[5] So, in respect of whether Mr Gilbert was dismissed unjustifiably, the Court must determine what a fair and reasonable employer would have done, and how it would have done it, in all the relevant circumstances leading up to, and at the time of, dismissal. If Mr Gilbert is found to have been dismissed unjustifiably, his claims to remedies include the primary remedy of reinstatement in employment which s 125 requires the Court to grant subject only to the practicability of this remedy.

[6] The already broad scope of this judgment can be confined somewhat by recording Mr Gilbert's acceptance that the positions held by some Transfield employees would have been genuinely redundant as a result of the new contracting arrangements entered into by the company. That apart, however, Mr Gilbert challenges his own dismissal on grounds of redundancy on a number of bases.

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[2] [2011] NZEmpC 165 at [28].

[7] First, Mr Gilbert says that he was selected for redundancy, and thereby dismissed, for improper motives and, in particular, because of his union associated activities.

[8] Next, he says that the number and nature of the positions to be made redundant were determined by Transfield unfairly and in breach of the applicable collective agreement.

[9] He says that his dismissal was unjustified because the company failed or refused to comply with the minimum statutory information provision and consultation requirements in such circumstances.

[10] Finally, the plaintiff says that Transfield relied on improper, unreasonable and flawed methods and information in reaching its decision to dismiss him.

[11] Mr Gilbert says that even individually, or certainly collectively, these omissions or failures by Transfield mean that the Court cannot be satisfied that the s 103A tests of justification for his dismissal have been met by the defendant.

The Employment Relations Authority's determination

[12] This was issued on 14 May 2010 following an investigation meeting conducted by the Authority on 11 and 12 February 2010 and written submissions made in the following weeks. It was regrettable that this challenge to the Authority's determination took almost 18 months to come on for hearing in this Court. The file shows that as the matter was about to be timetabled to a hearing at a directions conference on 28 January 2011, the parties sought a reference to further mediation and this was agreed to by the Court. Mediation was scheduled for 25 February 2011 but was made impossible by the Christchurch earthquake which occurred three days before that. Further mediation eventually took place on 2 May 2011 but settlement was not able to be achieved. By then, Mr Gilbert had engaged counsel and, understandably, Mr Beck wished to amend the plaintiff's statement of claim. No one has, however, suggested that these delays have themselves made either the task of

retrying the case or, if applicable, the remedies sought (particularly including reinstatement), any more difficult or impracticable.

[13] The plaintiff now has counsel, as opposed to the lay advocate who represented him in the Authority, and his case has undoubtedly benefited from that and other refinements. That may be the reason why, I have to say with respect, the Authority's written determination does not really engage with the difficult issues thrown up by a downsizing redundancy dismissal and by a claim to union activity discrimination. After a bare recitation of the uncontroversial facts, the Authority accepted uncritically, without explanation, and without much, if any analysis, the employer's claims of justification. For example, under the heading "Discrimination" the Authority concluded at [49]:

> There is simply no evidence put before the Authority that this [discrimination by conduct which had the effect of treating a person or group of persons differently in a situation where such treatment could be unlawful under the Human Rights Act 1993] was the case and that Mr Gilbert's union affiliations weighed in the balance at all when it came to a decision regarding his retention.

[14] Other important parts of Mr Gilbert's claim were disposed of with similar brevity. As will be seen, the case now raises significant issues relating to justification for dismissal by reason of redundancy. The plaintiff's unlawful discrimination grievance is sufficiently unusual and raises issues of law and the role of background events of such concern, to also warrant more than brief treatment.

Factual background

[15] Some of the relevant facts have been agreed between the parties and I will incorporate them into the following background. Now aged 59 years, Mr Gilbert has worked in electronic communications literally since leaving school. Taking account of the changes in the nature and ownership of the business, this was realistically in the same developing job for almost 40 years. He began work for the New Zealand Post Office in 1970 as a trainee telecommunications Inside Plant Technician. Commensurate with the changes in technology over this period, Mr Gilbert maintained and advanced his relevant qualifications and skills. Despite those significant changes over a long period, it is interesting to note that the term "Inside

Plant" is still used in the industry and by Telecom and the companies that contract to it, including Transfield. This refers to "plant" (equipment) that was traditionally located "inside" (a building or other housing structure) although these days such plant is significantly miniaturised and located more extensively across cities and the countryside. It is now only "inside" in the sense that it is housed in small cabinets or other protective coverings rather than, as formerly, inside buildings such as telephone exchanges.

[16] Although remaining effectively in the same developing and changing job, Mr Gilbert was first engaged by Transfield (as the successor employer in the business) from 19 July 2004. He was a member of the New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc (EPMU) and the terms and conditions of his employment at the time of its cessation were, in part, contained in the 2008-2009 collective agreement between the EPMU and Transfield.

[17] Looking back over the last 5½ years of his employment which was with Transfield and entities which it took over and/or became, Mr Gilbert's annual work appraisals, referred to as Work Development Reviews or WDRs, showed him to be a conscientious and competent employee. Nor is there anything to suggest that his own categorisation of himself as a loyal employee was inaccurate. His manager's assessments were that he consistently met, and at times exceeded, the required standards of work performance and, in respect of health, safety and quality issues, he exceeded consistently the required standards.

[18] Throughout his employment Mr Gilbert was an active union member, more latterly with the EPMU. Although his particular interests and dedication lay in health and safety that is important in this field of work, Mr Gilbert was also a union delegate generally, in early times with Transfield the only union delegate in a workforce of more than 100. He took a leading union role in negotiating and eventually settling the first collective agreement for Transfield telecommunications employees. Persuading Transfield to become a party to a collective agreement and settling its terms was, by Mr Gilbert's description, "a bitter struggle". His union delegate role brought Mr Gilbert into sometimes tense and confrontational contact

with a range of Transfield's managerial executives including a number who were to play significant roles in his subsequent dismissal.

[19] The initial bargaining for a Transfield collective agreement took from December 2005 until September 2007 and involved significant additional work for Mr Gilbert which he described as both collaborative and adversarial. Immediately after the settlement of that first collective agreement, Mr Gilbert took over the union representative role for health and safety with Transfield and continued to spend significant periods away from his usual work, although this was approved by, or otherwise on notice from the union to, and acquiesced in by, Transfield.

[20] The frequency, intensity and duration of his union activity, both in relation to collective bargaining and health and safety issues by Mr Gilbert on behalf of his work colleagues, could not have failed to continue to come to Transfield's notice. Despite some suggestions to the contrary from the defendant, I find that Mr Gilbert's union activity in these areas was well-known to his managers and others in the company.

[21] For about the last two years of his employment, Mr Gilbert was engaged principally in what were known as Network Maintenance Routines (NMR) duties in the Canterbury region. This was proactive maintenance, testing Inside Plant equipment, including remotely located radio equipment, with a view to preventing, or at least minimising, future failures. This NMR work was to continue under Transfield's new contractual arrangements with an entity known as "Chorus" (then a division of Telecom) although Mr Gilbert was also skilled and experienced in other telecommunications technician roles. From time to time Mr Gilbert was assisted in his NMR work by other colleagues but Transfield planned to have this work undertaken principally, if not exclusively, by one dedicated employee in the Canterbury region. At times Mr Gilbert's skills and experience in NMR work were used to assist others performing similar work elsewhere in New Zealand. In addition to his NMR work Mr Gilbert was occasionally allocated to other difficult specialist work including with what was known as the Broadcast Operation Centre (BOC).

[22] Because of the impending expiry of the first EPMU collective agreement with Transfield covering Mr Gilbert and his work colleagues, from about mid-February 2009 he became involved in pre-bargaining strategy work for the union. By then, he had resigned as its delegate and did not attend the actual collective agreement negotiations. Mr Gilbert did, however, assist in the formulation of claims with a bargaining committee, and participated in and led feedback sessions with groups of employees during negotiations. This, too, was known to Transfield and relevant managers.

[23] By mid-2009 union members at Transfield were engaged in a major industrial dispute about the renewal of the collective agreement. Mr Gilbert organised and was involved in a number of difficult strategies including ballots, strikes, pickets at the Papanui depot, and an overtime ban. These events took place over about a month from late July 2009. Again I find that Mr Gilbert's very public and active participation in these confrontational events was known to Transfield management.

[24] Coincident with this industrial action associated with difficult collective bargaining, the proposed restructuring of Transfield's relevant operations which had first begun in late 2008 recommenced in August 2009. The restructuring was a consequence of revised contractual arrangements between Transfield and Chorus which, although they were postponed by an interim agreement between Telecom and Transfield reached in December 2008, were always going to involve an element of so-called downsizing affecting Transfield's workforce.

[25] Mr Gilbert was also an active union representative during the course of the 2009 restructuring including organising and running union meetings, engaging on behalf of union members with senior managers (again including those who were to be significant participants in the decision to dismiss him a couple of months later), and generally attempting to protect the employment of existing and especially long-term permanent Transfield employees who were potentially at the risk of job loss. Mr Gilbert's interactions with management about these issues included dealings particularly with Ian Webb, Transfield's National Operations Manager, and Glyn Evans, its Canterbury Area Manager. Difficult and intense interactions with these two managers had also taken place over collective bargaining and other union

activities from 2005 at which time Mr Webb was the Canterbury Area Manager and Mr Evans the Inside Plant Manager to whom Mr Gilbert reported directly.

[26] There were other union activities for which Mr Gilbert also came to Transfield's notice. In mid-July 2007 he was accused by the company's Executive General Manager, Ross Lockwood, of intimidating a new migrant employee of the company. By Mr Gilbert's uncontradicted account, however, this Philippino employee made inquiries about joining the union and Mr Gilbert's questions of him about his salary, in the course of a discussion about rates of remuneration, were overheard and reported to the company's management. In any event, the allegation of intimidation went no further and on the evidence presented to the Court could not justifiably have done so. However, the investigation of it caused Mr Gilbert additional stress and distress at the time he was engaged in collective bargaining on behalf of the union.

[27] Second, following settlement and during ratification of the first collective agreement, Mr Gilbert complained that he was "micro-managed", subjected to unwarranted and excessive criticism, and had his training opportunities reduced by Mr Webb who then reported to Mr Evans. Further Mr Gilbert complained that his wife was harassed by telephone calls purporting to check up on his whereabouts when he was at work. Upon his return from a period of medically-sanctioned stress leave, the authenticity of a medical certificate was challenged by Mr Evans resulting in an unsavoury incident with another union delegate assisting Mr Gilbert. That delegate was threatened with dismissal.

[28] On 30 June 2009 Transfield secured a new 10 year contract with what was then a subsidiary or divisional business of Telecom New Zealand Limited known as "Chorus". This new contract was to begin on the following day, 1 July 2009. Chorus was a telecommunications utility provider building and maintaining a network of local telephone exchanges, cabinets and telecommunications (copper and fibre optic) cables. At the same time as securing this new contract, however, Transfield lost its previous contractual rights to provide services to Chorus in Auckland and Wellington. In these circumstances Transfield concluded that it would need to both reduce its costs and increase its productivity and efficiency. The new

contract with Chorus was to operate on a different business model than previous similar contracts. Transfield needed to reduce its costs to meet Chorus's requirements and considered, also, that it needed to increase the productivity and efficiency of its workforce.

[29] Coincidentally, on 21 July 2009 Mr Webb commenced a New Ventures (NV) group within Transfield to focus on work for customers other than Chorus/Telecom. This was also referred to as a business development group. It was intended to diversify Transfield's commercial commitments and to attempt to insulate it from the significant disruptions consequent upon renewals or non-renewals of contracts with a single large customer. Employees, including some who were Mr Gilbert's equivalents, were assigned to this group and thus avoided potential inclusion in the pool of other staff (including Mr Gilbert) subsequently at risk of redundancy.

[30] This change was announced to employees generally at that time as the proposed restructuring although by that time one of the NV's major projects (relating to the establishment of the 2 Degrees cellular network) was in fact winding down, as was the commensurate need for Inside Plant Technicians' involvement in it. Some of the technical positions with the NV group had been taken by temporary or casual workers, some of whom were temporary migrants to New Zealand whose work permits expired during or at about the time of the restructuring. At least one temporary employee was offered permanent employment with Transfield and given inside plant training to enable him to undertake Chorus work. Another temporary employee, who was also a migrant on a temporary work visa, was transferred to an inside plant technician position with Transfield.

[31] In these circumstances, Transfield's National Operations Manager (Mr Webb) prepared a restructuring proposal (approved by Mr Lockwood) following which the company initiated a process of consultation with staff. This consultation process began with the sending of an automated SMS (text) message to all employees' mobile telephones on 17 August 2009 inviting them to attend consultation meetings. Mr Gilbert was among those invited to attend a presentation in the Canterbury region. This took place on 18 August 2009 and was presented by Transfield's Canterbury Area Manager for Telecommunications (Mr Evans). About 120 staff,

including Mr Gilbert, attended this meeting. It included a proposal that would make some staff positions redundant and set out the intended process for this and the timetable for consultation. In Canterbury, the proposal involved the disestablishment of some 10 "field staff" positions out of 123 potentially affected across the country. The meeting concluded with employees (including Mr Gilbert) receiving an information sheet and a feedback form which they were asked to complete by 26 August 2009.

[32] On 1 September 2009 an official of the EPMU (Joe Gallagher) approached Transfield's Executive Manager, Talent Acquisition and Management (Monica Chung – known as Monica Leon) asking her to address EPMU workplace delegates in Auckland about the restructuring proposals. Ms Leon subsequently attended a meeting of six or seven union delegates answering questions about the proposed criteria for selection of redundant positions and other process issues. One issue raised with Ms Leon at that meeting was that the proposed redundancy selection criteria did not include technical skills. She did not address directly the point but explained that the restructuring process was to be in three phases and that no decisions would be made until all three phases or steps had been completed. Ms Leon explained that at the final stage of the process, interviews of relevant staff would be conducted by company managers and would focus on the factors of adaptability, planning and organising, establishing relationships with others, and "Transfield service values".

[33] As Ms Leon explained it, the first of the three stages was a selection process which would place a proportion of all potentially affected employees into a "review pool" based on a "business view" of all area "field staff". In Canterbury, this would involve a review of all field staff/technicians. The second stage of the process was to have those employees in the review pool complete an online personality or psychometric assessment. The third stage was for all affected employees to be assessed at an interview.

[34] On 4 September 2009 there was an EPMU report back meeting about the restructuring proposals. As a result of this, Mr Gilbert and another delegate compiled a list of 16 questions seeking to clarify which positions were superfluous

amongst the Inside and Outside Plant functions and how many positions of each function were affected, together with other issues raised by union members at that meeting. Shortly afterwards, the union officials, including Mr Gilbert, met with Mr Webb and provided him with a copy of the 16 questions although the latter was only able to answer two of them at the time. Mr Webb emphasised that Transfield would not agree to negotiate redundancy compensation payments and none was provided for in the current collective agreement. Mr Webb referred the union delegates to Mr Evans with whom they met subsequently and he agreed to pass on their questions to Transfield's Human Resources department.

[35] There was a second consultation meeting on 4 September 2009 which included the distribution of "Frequently Asked Questions" (FAQs)[3] to employees. This marked the end of consultation on the proposed business structure and the beginning of consultation on the proposed three step selection process and criteria.

[36] There was a further presentation to staff on 11 September 2009 at which Mr Evans confirmed the previously announced selection criteria and the process for restructuring including timeframes.

[37] On 22 September 2009 letters were given to 17 Canterbury technicians informing them that they had been selected to be in the review pool. The letter outlined the timetable for the selection process providing dates for computerised online psychometric assessments and interviews and the date on which a final outcome would be announced. The letter also provided affected employees with an opportunity to comment on their selection and allocation to the review pool. Mr Gilbert was one of those 17 who received this letter on 22 September 2009. On the same day he received feedback on the questions that he had asked of Mr Evans after the 4 September 2009 meeting.

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[3] As is now common in such exercises, these were not literally "Frequently Asked Questions" but questions posed rhetorically by the employer to which the attached answers were intended to convey the employer's plan in a positive light. These FAQs were devised before the issue was put to employees and as part of the strategy of doing so. They cannot, therefore, have been literally "Frequently Asked". The real questions asked by employees in this case were not (at least all) so amenable to positive response and they were not included within the so-called FAQs.

[38] Two days later, on 24 September 2009, Mr Gilbert met with Mr Evans to discuss his selection for the review pool. Mr Evans provided Mr Gilbert with a copy of the criteria from which Transfield's Contracts Manager New Ventures South Island (Kerry Gardiner) worked to select employees for the review pool and Mr Gilbert's scores for each of the criteria were explained to him. During the course of this meeting Mr Evans reminded Mr Gilbert that this was the first step in a three stage process, with the online assessment and interview stages still to be conducted.

[39] Mr Gilbert completed his online assessment on 25 September 2009 and was then interviewed by Christopher Beach, Transfield's Apprentice and Training Coordinator, and Christopher Langley, Transfield's then National Manager Service Delivery Centre. This interview took place on 28 September 2009.

[40] Transfield used an assessment scheme known as the Development Dimensions International Technique (DDIT) in the administration of which Messrs Beach and Langley had been trained. Although Mr Gilbert did not report directly to either of his interviewers so that, in that sense, they had a degree of independence from him, as already noted, each had featured in his previous fraught dealings with the company as a union representative.

[41] On 1 October 2009 the outcome of the selection process was communicated to affected employees, including Mr Gilbert, who was handed a letter by Mr Evans personally telling him that his position was to be made redundant and that he was to be dismissed for that reason. This occurred, and the plaintiff's personal grievance was raised challenging the justification for it.

Discrimination – the statutory scheme and case law

[42] Because this is alleged as a principal part of Mr Gilbert's claim, I deal with it first and separately from the dismissal grievance. Several sections of the Act govern this part of the plaintiff's claim. They include, first, s 103(1)(c) which defines "personal grievance" as meaning, among other things, any grievance that an employee may have against the employee's employer or former employer because of

a claim that the employee has been discriminated against in the employee's employment.

[43] Section 104 defines discrimination in terms of s 103(1)(c) as follows. Again, the italics are mine for emphasis.

> (1) For the purposes of section 103(1)(c), *an employee is discriminated against in that employee's employment if the employee's employer or a representative of that employer, by reason directly or indirectly of any of the prohibited grounds of discrimination specified in section 105*, or by reason directly or indirectly of that employee's [refusal to do work under section 28A of the Health and Safety in Employment Act 1992, *or involvement in the activities of a union in terms of section 107*,—
>
> (a) refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances; or
>
> (b) *dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; or*
>
> (c) retires that employee, or requires or causes that employee to retire or resign.
>
> (2) For the purposes of this section, detriment includes anything that has a detrimental effect on the employee's employment, job performance, or job satisfaction.
>
> (3) This section is subject to the exceptions set out in section 106.

[44] Just what is meant in s 104(1)(c) by "retiring an employee" or "requiring or causing an employee to retire or resign" is enigmatic, at least at first glance. How retiring an employee or requiring or causing an employee to retire or resign differs from a dismissal of that employee, is unclear. It is well established that the act of an employee resigning can, in appropriate circumstances, amount to a dismissal of that employee, commonly known as a constructive dismissal. That might arguably extend to a 'retirement' to the extent that this concept may differ from a resignation. Fortunately perhaps, the issue does not arise for determination in this case because Mr Gilbert's claim really turns solely on subs (1)(b). Those interesting questions are for another case on another day.

[45] Next is s 107 which defines "involvement in the activities of a union" for the purpose of s 104 as follows: (italics for emphasis are mine)

> (1) For the purposes of section 104, *involvement in the activities of a union means that, within 12 months before the action complained of, the employee*—
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> (a) was an officer of a union or part of a union, or was a member of the committee of management of a union or part of a union, or *was* otherwise *an official or representative of a union or part of a union*; or
>
> (b) *had acted as a negotiator or representative of employees in collective bargaining*; or
>
> (ba) *had participated in a strike lawfully*; or
>
> (c) was involved in the formation or the proposed formation of a union; or
>
> (d) had made or caused to be made a claim for some benefit of an employment agreement either for that employee or any other employee, or had supported any such claim, whether by giving evidence or otherwise; or
>
> (e) had submitted another personal grievance to that employee's employer; or
>
> (f) had been allocated, had applied to take, or had taken any employment relations education leave under this Act; or
>
> (g) *was a delegate of other employees in dealing with the employer on matters relating to the employment of those employees*.
>
> (2) *An employee who is representing employees under the Health and Safety in Employment Act 1992, whether as a health and safety representative (as the term is defined in that Act) or otherwise, is to be treated as if he or she were a delegate of other employees for the purposes of subsection (1)(g).*

[46] It is important to note that union membership alone does not constitute "involvement in the activities of a union" as defined in s 107. Although an employee meeting any one of those eight or nine definitions will probably be, or have been, a member of the union, each involves an additional element of activity. So it is not unlawfully discriminatory to do or omit to do any of the things set out in s 104(1) merely because the employee is or was a union member.

[47] Section 107 contains another important qualifying feature in that the eight or nine specified activities must have been engaged in by the employee within the period of 12 months before the action alleged to amount to unlawful discrimination is taken. Specified involvement in union activities which took place before that 12-month period cannot amount in law to involvement in union activities for the purpose of s104. In Mr Gilbert's case, any relevant union activities (as defined)

must have occurred after 22 September 2008, that is 12 months before Mr Gilbert was included in the review pool and which is the earliest date on which he alleges that Transfield took unlawfully discriminatory action against him.

[48] Although it is necessary for the plaintiff to establish a case of current or prima facie union activity discrimination taking place no more than 12 months after relevant union activity, earlier relevant events may nevertheless be taken into account in assessing the probabilities of the occurrence of union activity discrimination based on events within that 12 month period. The Court must, however, take care to ensure that such events beyond the 12-month limitation period do not form the basis of substantive findings of unlawful discrimination by the employer.

[49] Finally, s 119 creates a conditional statutory presumption in discrimination cases as follows:

> (1) Subsection (2) applies if, in any matter before the Authority or the Court,—
>
> (a) the employee establishes that the employer or the employer's representative took any action or omitted any action as described in any of paragraphs (a) to (c) of section 104(1) in relation to that employee; and
>
> (b) if it is a case where the employee alleges that the discrimination was by reason directly or indirectly of the employee's involvement in the activities of a union, the employee establishes that he or she was a person described in section 107.
>
> (2) If this subsection applies, there is a rebuttable presumption that the employer or representative of the employer discriminated against the employee on the grounds, or for the reason, specified in section 104(1) and alleged by the employee.

[50] Case law contains some guidance about how to approach claims to unjustified discrimination on the grounds of union membership or union activity. In *New Zealand Workers IUOW v Sarita Farm Partnership*[4] the Labour Court confirmed, under an earlier but similar statutory regime, that it had to be satisfied that the disadvantageous action affecting, or dismissal of, the employee was not "by reason of" one of the prohibited grounds including union activity discrimination. The Court applied a "but for" test to establish such causal connection. In that case

[4] [1991] 1 ERNZ 510.

there was no satisfactory explanation of the grounds for an employee's dismissal. The Court considered that where there was union involvement by the employee and evidence of discrimination, it could infer that the former caused the latter in the absence of a satisfactory explanation of the latter by the employer. The onus of establishing a satisfactory explanation by the employer was to be on the employer. The Court also emphasised the need to exercise caution to guard against an over-sensitive grievant attributing to unlawful discrimination a consequence which would have flowed in any event.

[51] More recently, authoritatively, and dealing with the current relevant discrimination provisions, the Supreme Court has provided guidance in this area in its judgments in *McAlister v Air New Zealand Ltd.*[5] *Sarita* must now be seen as wrongly decided on these issues.

[52] *McAlister* was a case about age discrimination in employment which has a number of special characteristics not applicable to a union activities discrimination case such as this. Principles that are relevant to the decision of this case emerged in the separate judgment of Tipping J in *McAlister* who was in the majority and whose judgment explains the reasoning of that majority and, in these respects, was not contradicted by them. At [48] and following, Tipping J addressed the meaning of the phrase "by reason of" in s 104(1). He wrote:

> [49] The correct question raised by the phrase "by reason of" is whether the prohibited ground was a material ingredient in the making of the decision to treat the complainant in the way he or she was treated. …

[53] Tipping J agreed that the different phrase "material factor" in the combined judgment of the Chief Justice, Blanchard and Wilson JJ was in effect the same as his "material ingredient".

[54] Next, addressing what he described as "The comparator issue", Tipping J wrote this at [51]:

> In general terms discrimination by reason of a prohibited ground involves one person being treated differently from someone else in comparable circumstances. The approach of the Court to the comparator issue should be

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[5] [2010] 1 NZLR 153; [2009] ERNZ 410 (SC) at [49].

> guided by the underlying purpose of anti-discrimination laws and the context in which the issue arises. Anti-discrimination laws are designed, as I have said, to prohibit employment and other relevant decisions from being influenced by any feature which amounts to a prohibited ground of discrimination. Exceptions [dealing with discrimination by reason of age] allow what would otherwise be a discriminatory feature to be taken into account if there is good cause for doing so. A comparator is not appropriate if it artificially rules out discrimination at an early stage of the inquiry. By artificially I mean that the comparator chosen fails to reflect the policy of the legislation, which is to take a purposive and untechnical approach to whether there is what I will call prima facie discrimination, while allowing the alleged discriminator to justify that prima facie discrimination if the case comes within an exception.

[55] After addressing the position under s 104(1A) in which Parliament has specified, at least in part, the comparator group, Tipping J went on to write at [52]:

> Subject to any applicable statutory provision, the most natural and appropriate comparator is likely to be a person in exactly the same circumstances as the complainant but without the feature which is said to have been the prohibited ground. That feature must be eliminated from the comparator employee in order to make sense of the comparative exercise.

[56] The comparator group in this exercise is other employees who had not been involved in union activities as Mr Gilbert had, but whose circumstances were otherwise materially the same as, or similar to, his relevant circumstances.

[57] For completeness I note also that union activity discrimination has been the subject of another recent judgment of this Court, *Bourne v Real Journeys Ltd.*[6] In that case, the only affected employee was unable to prove that his treatment fell within s 104(1)(b) because he could not establish that other employees were not subject to the same detriment as he. In that case, also a redundancy from a pool situation, all of the other employees performing the same work were in the selection pool. In these circumstances the Court concluded that the s 119 presumption was inapplicable. It also found that the employer had not included the grievant in the selection pool by reason of his union activity. Even if the statutory presumption had applied in that case, the Court found that it would have been rebutted by the company.

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[6] [2011] NZEmpC 120.

[58] I make the following observations about this sort of alleged discrimination generally. They do not relate necessarily to the facts of this case. Claims of unlawful discrimination in employment on grounds of union activity are not only rare, but are notoriously difficult to establish by direct and persuasive evidence. In some cases that is because, despite a genuinely held suspicion, an employer's dismissal or other conduct that is detrimental to an employee, is not so motivated.

[59] But experience of employment relations also establishes that union activities by individual employees can be, and sometimes are, perceived by employers and their senior managers to be irritating, counter-productive, and even destructive. It is a natural human trait to try to avoid the consequences of the union activity by curtailing or even eliminating their sources. It is also true that in the knowledge of the unlawfulness of such motivations, a downsizing of a workforce or other potential redundancy situation can provide a fortuitous opportunity to achieve that outcome surreptitiously. In such circumstances, it is very unlikely that a paper, electronic or other record trail, consistent with that unlawful motivation, will be created or retained.

[60] That is not to say that the Court makes assumptions about such motivations. Rather, they are the reason for a very careful approach by a specialist court to the evidence and a realistic assessment of inferences that may be drawn.

Union activity discrimination – the employer's case

[61] Addressing Mr Gilbert's unlawful discrimination claims, Ms Service submitted that if the s 119 rebuttable presumption is to apply, Mr Gilbert must establish two things: first, that, by reason of his union activities, he was dismissed or disadvantaged when his comparator peers were not; and, second, that he meets the s 107 criteria. I agree with that analysis and synthesis of ss 104, 107 and 119.

[62] Transfield accepts the second test for compliance with s 107 has been made out. It disagrees, however, that Mr Gilbert has established that his redundancy was by reason of unlawful discrimination on the grounds of union membership in that comparable employees were not dismissed. Counsel relies on the judgment of the

Supreme Court in *McAlister* in which the following was said of the causational link between the alleged grounds for dismissal and the alleged discrimination in s 104:

> The correct question raised by the phrase "by reason of" is whether the prohibited ground was *a material ingredient* in the making of the decision to treat the complainant in the way he or she was treated. In this case the question is whether Mr McAlister's age was a material ingredient in Air New Zealand's decision to demote him. (Emphasis added)

[63] Ms Service submitted that the judgment of the Supreme Court in *McAlister* changed the law that had been previously stated by the Labour Court in *Sarita* which adopted a "but for" test. Now, counsel submitted, the discriminatory ground need not be the sole reason for the unfavourable treatment but it must have been a material one. I agree. On this issue, *McAlister* has tilted the balance more in favour of grievants than it was previously under *Sarita*.

[64] Transfield's case, in answer to the first question (whether Mr Gilbert was discriminated against in his employment), is that the evidence does not support a conclusion that the employer, by reason (directly or indirectly) of Mr Gilbert's involvement in union activities, dismissed him in circumstances in which other employees were not dismissed. Ms Service submitted that Mr Gilbert was one of nine employees from the review pool who were made redundant out of an initial group of 17 potentially at risk of redundancy by their placement in that pool.

[65] Counsel pointed to a document which showed the "union affiliation" of the relevant employees. She submitted that if the criteria applied by Transfield to determine whether each employee would have been retained or made redundant were directly or indirectly discriminatory in nature, it was more likely than not that there would have been a greater number of union members made redundant than others.

[66] This, however, applies the wrong test of union membership alone as I have identified at [46]. Union membership, in Mr Gilbert's case at least, was not an issue here. It was his union activity, high profile, controversial, divisive, and in conflict with Transfield at times, that was relevant, not his membership of the union. So it is not decisive that before the restructuring, 21 per cent of the relevant workforce were union members as compared to 24 per cent after the restructuring. Even if union

membership figures alone were relevant, Ms Service accepted that there may have been a number of other explanations for these bare percentages.

[67] The defendant's alternative case is that if the Court finds that the plaintiff has established the necessary causal link described by the Supreme Court in *McAlister*, Transfield nevertheless presented comprehensive and compelling evidence rebutting that. In these circumstances, Transfield accepted the obligation of establishing on the balance of probabilities that it or its representative(s) did not take any action or omit any action described in s 104(1)(a)-(c) in relation to Mr Gilbert.

[68] Transfield's case is that it consulted with its entire telecommunications workforce before confirming the composition of the review pool and at no stage of this consultation process did either Mr Gilbert or his union raise concerns that union members were being targeted by the nature of the process.

[69] Counsel submitted that, as one of 17 field staff at risk of redundancy, Mr Gilbert performed better in the final interview step than others. She said that if any of the other eight employees in the review pool who were retained had performed more poorly in their interviews, Mr Gilbert would not have been dismissed. So the company's case is that Mr Gilbert's lack of complaint about the process until the final interview, and his relative success in that last step, mean that he cannot have been discriminated against unlawfully.

Union activity discrimination - decision

[70] I approach the determination of the unlawful discrimination grievance by setting out the relevant requirements of each of the sections in the Act and apply the relevant facts to them.

[71] I deal first with s 107 which requires (for the purposes of s 104(1)) that Mr Gilbert was an employee involved in the activities of a union within 12 months before the action complained of by him. That action complained of was his dismissal which occurred on 1 October 2009. Even if, contrary to this conclusion, it might be said that the first action complained of by Mr Gilbert was his inclusion in

the first stage pool from which redundant employees were selected, this event took place on 22 September 2009. So, at its most favourable for Mr Gilbert, the period of 12 months under s 107 commenced at the earliest on 22 September 2008 or, at the latest, on 1 October 2008. As it happens, which of these dates is used is not crucial because the events that I find fell within and without each of the 12-month periods (which differ only by about eight days in their duration) occurred before or during both.

[72] Mr Gilbert's recent employment history included a number of the statutory requirements for "involvement in the activities of the union … within 12 months before the action complained of …" under s 107 of the Act. I find that in those 12-month periods Mr Gilbert:

- was a representative of his union (s 107(1)(a));
- had acted as a representative of employees in collective bargaining (s 107(1)(b));
- had participated in a strike lawfully (s 107(1)(ba)); and
- was a delegate of other employees in dealing with the employer on matters relating to the employment of those employees (s 107(1)(g)).

[73] Specifically, falling within the definition of involvement in the activities of a union were Mr Gilbert's role in ballots, strikes, pickets and an overtime ban undertaken between the period from late July 2009 to late August 2009 and his activities running union meetings and engaging on behalf of union members with management with a view to employee job protection.

[74] However, the following involvement in union activities must be excluded because of the 12-month time limit in s 104(1):

- the mid-2007 accusation of intimidation of a new employee;
- the "micro-management" and harassment of Mr Gilbert's wife before ratification of the 2007 collective agreement; and
- the medical certificate authenticity challenge.

[75] However, those events about, or associated with, Mr Gilbert's union activity which pre-date the 12 month limitation period, strengthen his case for union activity (as defined) within the 12 month period.

[76] Next, and more problematically for the plaintiff, has Mr Gilbert established that his dismissal from, or other disadvantagement in, his employment was in circumstances in which other employees of Transfield on work of the same description were not dismissed or subjected to the same detriment? Not only was the plaintiff's case on this point tenuous at best, but the defendant's goes much of the way to establishing that this was not the case.

[77] Transfield denies that Mr Gilbert's involvement in union activities was, in any way, a material ingredient in its decision to select him for the pool of potential redundant employees, to declare him redundant and to dismiss him. It is difficult for an employer to prove a negative such as this. A cynic might say rhetorically of a witness making such a denial (and to use a phrase coined in another context), "He would say that wouldn't he?". So the decision of this issue comes down to an acceptance or a rejection of the evidence of those witnesses for the defendant in the context of other relevant evidence pointing the Court one way or the other.

[78] What happened to other employees who were not declared to be redundant (the comparator group) is a material, indeed a vital, consideration in deciding whether the s 104 (1)(b) constituents exist to engage the statutory (but rebuttable) presumption of unlawful discrimination in s 119. There is no, or at least insufficient, evidence of any other employee having had a comparable type or intensity of involvement in union activities over the previous 12 months in comparison with Mr

Gilbert, who was or was not made redundant as he was. Although there is uncontroverted evidence from the defendant that more non-union employees were dismissed for reasons of redundancy than were unionised employees, as I have already noted, the discrimination test is, of course, not one of union membership. But it is true that it is so unlikely that an employee who was not a union member could maintain a claim as Mr Gilbert makes, to make such a proposition discountable in reality. This is, therefore, both relevant and an element which assists Transfield to establish that its dismissal of Mr Gilbert was not unlawfully discriminatory, that is, it was not motivated by anti-union sentiment.

[79] Also in Transfield's favour in determining this question is its case that it consulted with both its entire relevant workforce and the EPMU about the process it proposed to undertake. Neither Mr Gilbert nor the EPMU raised any concern during that consultative process that it would be unfair to union members, let alone union activists such as Mr Gilbert.

[80] So, too, is it in favour of Transfield that at the most significant and subjective stage of the redundancy selection process (the final interview), Mr Gilbert performed better than others and was scored accordingly. This subjective stage was conducted by managers said by Mr Gilbert to be antagonistic towards him and his union activities.

[81] Against those factors favouring the company's position, is its adoption for the redundancy process of criteria for selection emphasising cooperation with, and loyalty to, the company and its values and objectives. This was bound almost inevitably to come into conflict with the values and objectives of those promoting the benefit to employees collectively of improved terms and conditions of employment. That was so especially when these encounters resulted, as they did, in acts such as strikes, pickets, and bans which appeared antithetical to cooperation with, and loyalty to, company values and objectives.

[82] Although not comprehensively, I am satisfied that, on balance, Mr Gilbert's involvement in union activities was not a material ingredient in his selection for redundancy and consequent dismissal. The s119 rebuttable presumption is not

engaged. His treatment by Transfield was not unlawfully discriminatory and this personal grievance cause of action therefore fails.

[83] Because it was not argued in this way, I simply observe (but do not conclude) that one of the employer's criteria for determining the identities of employees to be dismissed by reason of redundancy may have risked a conclusion of unlawful discrimination by reason of age. That criterion was that longstanding employees such as Mr Gilbert were incapable of adaptation to what Transfield considered had to be its new employment environment and, in particular, were incapable of upskilling and adopting new technology.[7]

[84] Quite apart from the inaccuracy in Mr Gilbert's case of this stereotypical analysis, Transfield's reference to employees of such long standing as Mr Gilbert (who had been in the job for almost 40 years) was necessarily a reference to their age. One could not have been employed in the positions of Mr Gilbert and his colleagues for such extensive periods (and Mr Gilbert was by no means the only employee of such long standing) without being in at least his or her mid-50s. Because of the legislation's inclusion of indirect discrimination by reason of age, a dismissal in reliance on this criterion may have been unlawfully discriminatory.

[85] As already mentioned, however, because the plaintiff has not relied on this ground and its establishment is not uncomplicated as the judgments of the Supreme Court in *McAlister* illustrate, I simply leave this as a cautionary observation for the future benefit of Transfield or other employers in similar circumstances.

Relevant rules for redundancy dismissal situations

[86] Section 103A states that the Court must determine whether what the employer did (the dismissal) and how, were what a fair and reasonable employer would have done in all the relevant circumstances at the time.

[87] The first port of call in all cases of dismissal, and no less when it is on the grounds of redundancy, is the applicable employment agreement. In Mr Gilbert's

[7] I deal with this issue in that part of the judgment addressing the claim to unjustified dismissal.

case, the relevant express terms and conditions were contained in the Transfield Services (New Zealand) Limited Telecommunication Services Collective Agreement 2008-2009.

[88] Redundancy was addressed at paragraph 46 of the collective agreement and, as it relates to the issues in this case, provided as follows (the emphases in italics being mine):

> 46.1 Redundancy means a situation where an Employee's employment is terminated by the Company, the termination being attributable, wholly or mainly to the fact that *the position* filled by the Employee is, or will become superfluous to the requirements of the Company in accordance with the Employment Relations Act 2003.
>
> …
>
> 46.5 The Union shall be notified of any impending redundancy prior to the Company issuing notice to the Employee(s) affected. Such information shall remain private and confidential.
>
> 46.6 The Company reserves the right to select Employees for redundancy on the basis that it retains Employees who by reason of *skills and attributes* are, in the Company's opinion, necessary for continuing operations.
>
> 46.7 Unless otherwise specified in the Employee's personal letter, if the Employee's employment ends by way of redundancy, the Employee will be given four (4) weeks notice in writing or up to four (4) weeks ordinary payment in lieu of notice by mutual agreement.
>
> …
>
> 46.10 There is no entitlement to any compensation payment for redundancy.

[89] I have highlighted two phrases in cl 46 (above) on which decision of the case will turn and about which the parties disagree. The first is the phrase "the position" in cl 46.1. In essence, Mr Gilbert's case is that his position was an indoor plant technician based in Christchurch. The company's interpretation of the phrase is that Mr Gilbert's position was as a member of a large Canterbury field staff family. The distinction is important because it determines the justification for Transfield determining that a certain number of field staff positions generically were, or would become, surplus to its requirements.

[90] The second contentious phrase is set out in cl 46.6 and relates to the attributes for retention of employees for the company's continuing operations. Again in essence, Mr Gilbert's case is that technical skills particular to the employee were

included, whereas Transfield says that the technical skills of employees in the field staff category were generic and, therefore, of little or no importance, and that the broad "attributes" of its employees in promoting the company's future direction were what was necessary for its continuing operations.

[91] Also relevant are the applicable statutory good faith provisions in s 4 of the Act. Because the defendant accepts that these applied to the circumstances of Mr Gilbert and Transfield leading up to his dismissal, there is no need to set out the qualifying subsections. Particularly relevant is s 4(1A)-(1C) in which I have emphasised the pertinent passages by italics as follows:

> (1A) *The duty of good faith in subsection (1)—*
> (a) is wider in scope than the implied mutual obligations of trust and confidence; and
> *(b) 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.*
>
> (1B) Subsection (1A)(c) does not require an employer to provide access to confidential information if there is good reason to maintain the confidentiality of the information.
>
> (1C) For the purpose of subsection (1B), good reason includes—
> (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.

[92] It is common ground that s 4(1A)(c) was engaged because at relevant times Transfield was proposing to make a decision that would or was likely to have an adverse effect on the continuation of Mr Gilbert's employment. This triggered the statutory requirement to provide to him access to information about the decision relevant to the continuation of his employment and an opportunity to comment to Transfield on the information before its decision was made.

[93] Finally, elements going to the justification of dismissals for redundancy include that an employer selecting employees from a pool for redundancy will take account of relevant factors and exclude from its consideration irrelevant factors relating to the employee and to the business.[8] Because, as in this case, the employer may be called upon to justify the dismissal of an employee by redundancy, the grounds for doing so must be verifiable objectively and rationally. A fair and reasonable employer will act on such grounds and not otherwise.

The defendant's case for dismissal justification generally

[94] The fact of dismissal and a prima facie case of absence of justification having been established by the plaintiff, the onus of justification now moves to the employer. At the heart of Transfield's case in justification for its dismissal of Mr Gilbert is the commercial rationale for its restructuring including its large-scale and the numbers of people affected. Ms Service submitted that these elements are relevant to the process that led to Mr Gilbert's dismissal, given his acceptance (as recorded at the start of this judgment) of Transfield's justification for declaring some redundancies amongst its workforce.

[95] Ms Service emphasised that by mid-July 2009, Transfield was acutely aware of the need for cost reductions and the adoption of a "new national model". This was to reflect the very recent (and apparently quite sudden)[9] new contractual obligations to Chorus. Transfield was losing not insignificant amounts of money by continuing to have its previous workforce and arrangements in place to deal with the new environment with Chorus.

[96] Transfield also wished to adopt the use of new technologies in the field and to have relevant employees "cross-trained" in all specialties to increase the productivity and efficiency improvements it assessed it needed. This meant, necessarily, redundancies among staff. Ms Service also emphasised that Mr Gilbert was only one of about 150 people across New Zealand who was made redundant, including one of

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[8] *NZ Building Trades Union v Hawke's Bay Area Health Board* [1992] 2 ERNZ 897 at 913; *Priest v Fletcher Challenge Steel Ltd* [1999] 2 ERNZ 395 at 407.

[9] See [28] where it is recorded that the new contract between Transfield and Chorus came into operation the day after it was secured.

105 field staff. The company's case emphasises that all 105 field staff who were made redundant went through the same process and were assessed against the same criteria as Mr Gilbert. There were, however, some exceptions in the case of staff in Rotorua where the first phase of pool placement involved a performance review programme.

[97] Ms Service identified the difference between the parties' cases on the meaning of the phrase "skills and attributes" in cl 46.6 of the collective agreement. She submitted that Mr Gilbert's interpretation is a narrow one, focusing on technical skills, whereas Transfield took a broader view.

[98] Turning to the second controversial phrase in cl 46.1 of the collective agreement, Transfield's case is that the word "position" accords with what it describes as "the more generic work families" that the company used to categorise the roles of staff. Its case is that they could be divided into three groups in the business: field managers, designers, and field staff, at least for the purpose of restructuring and reduction of numbers of roles. Ms Leon said in evidence that there were about 15 or 16 "classifications" of employees represented in the review pool which I understood to mean that number of what Mr Gilbert terms "positions" including his of Inside Plant Technician. On the defendant's case, however, all were holders of the position of "field staff".

Interpretation and application of cl 46 of the collective employment agreement

[99] The redundancy definition in cl 46.1 of the collective agreement is a longstanding one. It was settled before Transfield, in 2009, redefined more generally the roles of its employees as set out above. It was, therefore, not open to the company to change unilaterally the meaning of a word or phrase in the collective agreement to suit its preferred approach to a restructuring and redundancies.

[100] Clause 46.1 refers to "the position filled by the employee" and not to positions filled by a range of employees as it the company's case. Mr Gilbert's position was specified in his employment agreement and, until classified by Transfield in 2009 as "field staff" had not previously been so categorised.

[101] I find in favour of the plaintiff's argument that the "position" filled by the employee in Mr Gilbert's case was that of Inside Plant Technician and was not, as the company says, "field staff". It follows that, categorising incorrectly the roles of employees in the way that Transfield went about determining whether positions would be superfluous to the requirements of the company, flawed fundamentally and from the outset the manner in which it created an initial pool and assigned people to it.

[102] The company's case in respect of the "skills and attributes" criteria in cl 46.6 of the collective agreement is similar. It says that technical skills were not a differentiating factor for "field staff" on the basis that Mr Webb considered that there were sufficient technical skills in the field staff population to service the new Chorus contract. The company's case was that "other skills" needed to be assessed in order to determine the makeup of the best workforce. It says that Mr Gilbert is disappointed that his previous performance reports were not used as a selection tool, but that is not the way cl 46.6 is to be interpreted.

[103] I conclude as a matter of interpretation that the collective agreement's reference to "skills and attributes" included employees' technical skills. Again, it was not open to the company to re-interpret this document unilaterally and decide that such skills would play no, or even a lesser, part in the assessment of employees for redundancy purposes. It is not to the point that Ms Leon and other managers may have considered that their review pool criteria were more "robust" than the company's WDRs which measured technical skills among other attributes. It is not, as the company says, that Mr Gilbert has sought to place weight and value on his WDR because he was rated more highly there than in the review pool scoring process. I conclude that Transfield was bound to do so and Mr Gilbert is not to be deprived of any benefits to him of that analysis.

Non-compliance with s 4(1A)?

[104] This also affects the justification for Mr Gilbert's dismissal in the sense that compliance with the section is how a fair and reasonable employer would have gone about redundancy selections.

[105] I have concluded that the defendant not only failed to comply with the statutory requirement to inform Mr Gilbert of its adverse conclusions about his future prospects, but adopted deliberately a strategy which refused to do so.

[106] Section 4(1A)(c)(i) and (ii) of the Act require an employer in the circumstances of Transfield in this case to share information with potentially affected employees before making any decision about their future and to provide employees with an opportunity to comment on that information before such decisions are made. The relevant disclosure obligations are set out more fully in the judgment of the full Court in *Vice-Chancellor of Massey University v Wrigley.*[10] Transfield's failures to adhere to s 4(1A) in the redundancy process, included:

- failure or refusal to disclose the company's instructions to relevant managers responsible for devising initial pool scores;

- failure to disclose Mr Gardiner's notes affecting the plaintiff, compiled in the selection of employees to go into the pool;

- non-disclosure of documentation about Mr Gardiner's scoring of the applicant;

- non-disclosure of Mr Evans's abandonment of the proposal to use AWMS (Automated Work Management System) productivity statistics;

- non-disclosure of the Previsor (online psychometric) test results for the plaintiff's own position and others for which he applied;

- inadequate written response to the plaintiff's questions about the selection process and criteria;

[10] [2011] NZEmpC 37.

- non-disclosure of the interview records of Chris Beach and Chris Langley (managers from a different work group) in the final selection process;

- non-disclosure of the ratings spreadsheet prepared by Mr Beach including details of the Previsor scores to assess all candidates;

- non-disclosure of records of meetings between Mr Evans, Mr Gilchrist and other company managers involved in the final selection decision;

- non-disclosure of the summary spreadsheet of all 17 technicians including the final outcome identifying those selected for dismissal and those retained; and

- non-disclosure of the reasons of Mr Beach (effectively the final decision maker) for the plaintiff's selection for redundancy dismissal during the meeting between Mr Evans and the plaintiff on 1 October 2009.

[107] Also relevant is s 4(1)(b) of the Act which required the employer not to directly or indirectly engage in conduct that misled or deceived the plaintiff or was likely to do so. I accept the plaintiff's assertion that Transfield's non-disclosure of selection material in a timely manner and, in particular, its withholding of the identities and designations of employees placed in the Technicians Review Pool and those finally retained in employment, was a breach of the statutory requirement. It denied Mr Gilbert the opportunity to have meaningful input into the decision to select him for redundancy. In particular, because of what was subsequently discovered to be the placement of non-technical staff in the pool, the plaintiff was prevented from taking up with the employer, in a timely and potentially effective manner, any issues on which he has been successful in this litigation but after long delay and great expense.

[108] I accept, also, the plaintiff's case that it was misleading of Transfield to have included in its FAQs of 23 September 2009 (document 72) that it was positions and not people that were the focus of the restructuring. As the evidence now discloses, that was not so, at least in Mr Gilbert's case.

[109] Also misleading was Ms Leon's letter to Mr Johnston (document 85) stating that only field staff (technicians) had been placed in the pool and, in particular, implying that past performance appraisals over the previous 24 months had been used in the selection process as objective data, when in fact no such retrospective assessment had taken place.

[110] After Mr Gilbert was included in the first pool of staff (the first step in the redundancy process), he was misled by advice that available productivity statistics (AWMS) had been used an assessment tool when they had not. This became more significant when it came to the final assessment which determined that Mr Gilbert should be dismissed for redundancy: Mr Beach concluded that a key reason for not retaining the plaintiff was what I have concluded was a subjective and erroneous suggestion of his low productivity.

[111] Transfield's refusal to disclose the actual Previsor test scores, combined with its inability to have access to the proprietorial intellectual property of the testing organisation, including questions asked and the actual answers given, is not consistent with the requirements of the Act for information sharing, disclosure, and objective rationality. Not only was this information not available to Mr Gilbert but it was apparently not available to Transfield. That is one illustration of the dubious value of using a psychometric testing tool, designed for recruitment and managerial promotion, to determine which of a number of existing employees should be made redundant. Although the owners of the testing system may have had good reason to keep its ingredients and even results secret, that illustrates the inappropriateness of its use in a process that requires openness and information exchange. Employers proposing to use testing procedures that they do not fully understand, and are not permitted to know about, will have difficulties when challenged by employees such as the plaintiff to justify the consequence of dismissal effected in reliance on the products of such systems.

[112] That is further illustrated by the defendant's inability to explain how another employee (whom I will call K) who had a 94 per cent psychometric test score and scored equally on the interviews with Mr Gilbert (9), was not retained in his employment while another employee (E) with a lower psychometric test score and an equal interview score of 9, was retained. The inability of the company to explain such apparent discrepancies rationally also illustrates the flawed methodology employed by it in this exercise.

[113] Transfield's decision to employ an assessment tool that was incapable of meaningful explanation made it impossible to comply with the requirements in s 4(1A) of the Act to provide access to employees (including Mr Gilbert) to information about the psychometric test. It thereby deprived them of an opportunity to comment on the results of the test upon which the employer relied in the course of determining that Mr Gilbert was redundant and dismissing him. As well as the psychometric test for recruitment purposes being of dubious value to the very different exercise of selection for redundancy, Transfield created an additional problem for itself by purchasing and using an assessment tool which it could not and did not understand or explain to affected employees or indeed to the Court at the hearing.

Relevant/irrelevant criteria in redundancy decision making?

[114] The need for an employer to take account of relevant and, conversely, to exclude from consideration irrelevant criteria in redundancy decision making, is established in the case law as already noted.

[115] Transfield was required to assess Mr Gilbert's "skills" by cl 46.6 of the collective agreement. To justify its extraordinary decision to ignore completely what it knew about Mr Gilbert's performance of his job, the defendant was driven to say that its long established and indeed still current employee performance assessment mechanisms are of limited, if any, value. That beggars belief. If it were really so, one might well wonder why they continue to be used for ongoing performance assessments of employees including for remuneration reviews. It will be clear that I do not accept the defendant's excuse now about why it did not use those obvious and

relevant tools that it had at hand and as it bound itself to do in the collective agreement.

[116] This is an example of an employer not only ignoring relevant criteria (skills and experience) but also of taking into account irrelevant criteria (psychometric and personality type testing designed for potential new employees where none was in that position). For these reasons also, the steps taken by Transfield leading to its decision to dismiss Mr Gilbert by reason of redundancy, were not what a fair and reasonable employer would have done in all the circumstances and were not how a fair and reasonable employer would have gone about that.

[117] Although an assessment of these was both relevant and purportedly undertaken, Transfield's recourse to stereotypical assumption was not only the antithesis of how a fair and reasonable employer would have gone about those assessments in all the circumstances. Further, its conclusion was also plainly wrong in Mr Gilbert's case. Contrary to the assumption that Transfield representatives made about longstanding employees in the sorts of roles held by Mr Gilbert, he had in fact kept his skills and knowledge up to date. Again, Transfield's assessment of Mr Gilbert which led to his low scoring was unjustified in the sense that it was not what a fair and reasonable employer would have done in all the circumstances.

[118] I accept, also, Mr Beck's submission that whilst Transfield's scoring methodology and approach may have been sound logically, this was negated in Mr Gilbert's case by a sweeping negative assumption having been made from a single disclosed incident. Whereas the plaintiff's WDR customer focus rating of 80 per cent (assessed by Mr Gardiner) ought to have been considered, this was reduced to 40 per cent (a score of 2 out of 5) by Mr Gardiner by reference to a single incident recorded in the latter's diary. Mr Gardiner conceded in cross-examination that this incident was, however, resolved to his satisfaction at the time and so I conclude, logically, ought not to have brought about that score halving.

[119] When he was placed in the Technicians Review Pool for further interviewing, Mr Gilbert was subjected to the same sweeping and erroneous assumption approach by Messrs Beach and Langley. They made assessments about him that were very

subjective and based partly on information that was assessed, consciously or subconsciously, in light of their views of his union activities.

[120] Another example of such perverse conclusions drawn by Messrs Langley and Beach during the interview process related to an incident which Mr Gilbert described of mediating inter-employee conflict. Instead of assessing this as a positive employee attribute, the managers regarded it as a negative attribute for ongoing employment. He was perceived to be a busybody meddling in events that were the province of Transfield rather than a colleague trying to nip a problem with fellow colleagues in the bud before it escalated to a human resources issue for Transfield. No reasonable employer would have so assessed this incident and, thereby, held it against Mr Gilbert.

[121] Whilst it is surprising that health and safety skill and knowledge were removed from the initial pool selection criteria, the discounting of employee technical skills (which was acknowledged by Mr Evans and Ms Leon) was contrary to cl 46.6 of the collective agreement. Although Ms Leon may or may not have been correct when she asserted that "Employees can always be trained in technical skills and therefore this was no longer a differentiator between employees", the collective agreement did not permit Transfield to simply ignore its requirements in this way and, I have to say, for less than impressive reasons.

[122] I agree with Mr Beck's assessment that the defendant became increasingly fixated on its "ideal" person specifications and the plaintiff's alleged personal shortcomings at the expense of relevant, required and commonsense criteria. Had Transfield used a balanced approach of objective and subjective measures to assess all employees' skills, experience and capabilities, as initially advocated in August 2009 and as had been employed by the company previously, its favoured subjective factors would have been balanced or moderated by such objective factors such as assessment of technical skills and the use of past performance appraisal and productivity measures. The defendant's case certainly gives the impression that Transfield embarked on devising and putting in place radically different and largely subjective criteria and selection processes that were difficult to verify objectively, although which appeared impressive in the promotion of flexibility and client focus.

Health and safety activism

[123] This is a topic that crosses his two grievances in the sense that it is both an aspect of Mr Gilbert's union activity and is said to have been a factor wrongly discounted in his selection for dismissal for redundancy. Mr Gilbert says that his commitment to the promotion of workplace health and safety both brought him into conflict with Transfield and that this was a cause of his selection for redundancy. He says that this was an element of his union activity so that Transfield was motivated improperly in selecting him for redundancy by seeking to eliminate thereby the inconvenience and cost to it of that activism.

[124] The evidence establishes, however, that not only was health and safety an element taken into account by the company in assessing the appropriateness of field employees for retention in the business in the sense of advantaging employees with good knowledge and application of safe working practices, but also that Mr Gilbert scored highly in this element of his assessment.

[125] Although the plaintiff believes genuinely that his passion for workplace health and safety was regarded negatively by Transfield and that it took the opportunity to deal with this by making him redundant, the evidence not only shows that this was not so but that, to its credit, Transfield did include health and safety knowledge and practice as a criterion and assessed and scored Mr Gilbert appropriately highly for that. This ground of the plaintiff's case does not succeed.

Unjustified dismissal - decision

[126] The Court must determine what the parties (union and employer) intended the phrase to mean in their collective agreement and not what the employer (or Mr Gilbert) would now like it to mean. It is significant, however, in my view, that the phrase used is "skills and attributes" and not simply either, or the second, of the two words. Although "attributes" connotes a broader assessment as the company contends for, I do not accept that "skills" excludes technical skills and indeed find that these are at least the predominant skills referred to. Ms Service for Transfield also submitted that Mr Gilbert's case relies on an examination by the Court of issues

that it cannot lawfully or properly consider. That is said to be because the Court does not subject the employer's actions to minute or pedantic scrutiny: *Jinkinson v Oceana Gold (NZ) Ltd (No2)*[11] and other cases. Whilst that is so in respect of the process used, it is equally true that the Court will expect compliance with contractual obligations into which an employer has entered.

[127] That is important because dismissal for reasons of redundancy is not attributable to employee fault or misconduct. Critical examination of, and compliance by an employer with, its obligations is also an important safeguard where the parties' contractual arrangements make no provision at all for redundancy compensation, even for employees of (employment) lifelong standing. That is especially so where, as here, the employer resists resolutely agreeing to any element of redundancy compensation for such employees irrespective of the consequences to them of the loss of their employment.

[128] The test to be applied by the Court is whether what the employer did (dismissal for the reason of redundancy) was what a fair and reasonable employer would have done in all the circumstances at the time. Section 103A requires the Court to examine carefully the employer's actions, and how it went about these, in determining the justification for the dismissal.

[129] That is not to say that what the company did, may not have been warranted as a business strategy by its view of the business. It was not, however, open to the company to change unilaterally what had been agreed in the collective agreement upon which Mr Gilbert was entitled to rely. The solution for Transfield was to have sought agreement to change those provisions or, in the absence of that, to have complied with them even if this may have been perceived to be inconvenient to Transfield. It is no answer to say, as it does, that it made it clear in the consultation documents that it circulated before the redundancy exercise, that "positions" would not be categorised as such but, rather, by what it described as "field staff". Transfield was in charge of the process and although it consulted about it, it did not negotiate or bargain about it and ultimately could not impose a process that contradicted the collective agreement.

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[11] [2010] NZEmpC 102.

[130] Nor is it an answer to Mr Gilbert's case (as Ms Service submitted) that he ought to have been aware of Transfield's strategy. The plaintiff did challenge its correctness during the consultation process, but Mr Evans was not able to be persuaded. It is not simply, as counsel described it, a "disconnect" (I assume a disconnection) between the parties' understandings of the position. Transfield was bound to assess Mr Gilbert's "position" as Indoor Plant Technician (not as the more general "field staff") and, therefore, to assess its (the position's) superfluity to the company. Transfield's process was flawed, being in breach of the collective agreement in this regard.

[131] What was the consequence of Transfield's interpretation and application of the phrase "the position" in cl 46.1 of the collective agreement to include erroneously a range of positions which it categorised collectively as "field staff", one of three large "families" of employees of the business? So preliminary and fundamental was this error and its application in the redundancy process that it is difficult to say what would have been the outcome of the redundancy process for Mr Gilbert had Transfield identified his "position" as being an Inside Plant Technician or even an Inside Plant Technician engaged principally on NMR duties. If Transfield had applied cl 46.1 correctly, it would have had to have assessed whether that position (as just defined) was or would become superfluous to the company's requirements. It did not do so, whether at the time or subsequently in evidence, because of its misplaced confidence in the correctness of its original stance. The onus of justifying the dismissal being on it, Transfield has not established that the outcome would probably have been the same had it considered properly Mr Gilbert's "position".

[132] Transfield adopted a fundamentally different approach by equating the positions of more than 100 diverse staff including unskilled labourers. The evidence did not establish that, if it had assessed whether one or more Inside Plant Technicians in Canterbury was/were or might have been superfluous to the employer's requirements, Mr Gilbert would have been declared redundant. Indeed, it tends to indicate that this would not have been so. That is for two reasons.

[133] The first is the evidence of the company's intention to have one employee undertake network maintenance routines in Canterbury and that this had, over the past two years or so, been Mr Gilbert. Second is the evidence that even after he had been dismissed for redundancy, Transfield advertised for one or more Inside Plant Technicians in Canterbury. So it is more probable than not, in my assessment, that, had cl 46.1 been interpreted and applied correctly, Mr Gilbert's position of Inside Plant Technician (including with particular responsibility for NMR duties in Canterbury) could not and would not have been, actually or prospectively, surplus to the company's requirements.

[134] I accept Ms Service's submission that there were a number of variables taken into account which resulted in Mr Gilbert's selection for redundancy other than his skills and previous work performance. However, these latter ones were such relevant, significant, and required criteria, that their exclusion from the process affected its validity significantly in Mr Gilbert's case.

[135] I do not accept the defendant's case that Transfield had an absolute right under cl 46.6 to select the skills and attributes that it considered would be necessary for its future operations and to design the redundancy selection criteria around these. Rather it was obliged to take into account skills and attributes which included technical work performance skills and attributes, but did not do so and refused to do so when so requested.

[136] So there are two separate and significant errors of interpretation and application of the collective agreement's redundancy provisions that together cause Mr Gilbert's assessment for redundancy and his associated dismissal on that ground to be unjustified. A fair and reasonable employer in all the circumstances would not have dismissed Mr Gilbert as Transfield did had it interpreted and applied correctly the provisions of cls 46.1 and 46.6 of the operative collective agreement governing the plaintiff's employment.

[137] Although the Court will not substitute its decision for that of the employer, it is nevertheless required by the statute to find what the employer did, and assess the justification for this, against the standard of what a fair and reasonable employer in

the same circumstances would have done. Compliance with the provisions of a collective agreement, even if they may later appear to be inconvenient to the employer, is an important part of that test.

[138] Given Mr Gilbert's acceptance that it was justified in dismissing some employees for redundancy, Transfield's case focuses substantially (but not completely) on what it says was the fairness, reasonableness, and statutory compliance with, the redundancy selection process it used. The greatest strength of Mr Gilbert's case is, however, not in that area of process but in the absence of justification for the substantive result, that is his contention that a fair and reasonable employer in the circumstances would not have dismissed him by reason of redundancy. Mr Gilbert accepts, properly in my view, that a number of elements of Transfield's consultative process cannot be criticised justifiably. The way it went about selecting Mr Gilbert for redundancy and his resulting dismissal cannot, however, be so immune to criticism.

[139] There is another important disagreement between the parties, this one about the interpretation of the word "position" in cl 46.1 of the collective agreement defining redundancy. That is said to mean a "situation where an employee's termination is attributable wholly or mainly to the fact that the position filled by the employee is or will become superfluous to the company's requirements in accordance with the Employment Relations Act 2003." Mr Gilbert's argument is that his "position" was that of Inside Plant Technician. He says that what he described as "field technicians" carried out both Inside Plant and Outside Plant work,

[140] Ms Service is right to submit that the issue before the Court is to decide whether what Transfield did was fair and reasonable in all the relevant circumstances. I have concluded that its approach to the redundancy selection process and its implementation of it was so flawed that it was not fair and reasonable.

[141] It is only now that the Court must assess what would probably have been the result if Transfield had done it properly. It is not simply, as counsel put it, that it is not for the Court to speculate on what could have happened if something different

had been done. Assessment of the probabilities on the counterfactual of fair, reasonable and collective agreement-compliant decision making, is a matter of remedies which the Court must address, having found that dismissal was unjustified.

[142] Again, Ms Service is right in principle that subjective assessments in such an exercise of redundancy selection have a place. This Court so found in *Bourne v Real Journeys Ltd.*[12] But neither did the collective agreement permit, nor can a redundancy selection process be a fair and reasonable one, if it is based entirely on the subjective assessments of the managers who designed and operated it. Objectively assessable and provable criteria were also a part of the process. So, too, were the consideration of relevant, and the rejection of irrelevant, criteria in that assessment.

[143] Nor does it change the position, as was Transfield's case, that the EPMU may have either agreed with the Transfield process in this case or at least acquiesced in it. Mr Gilbert had vested rights in his employer's compliance with the collective agreement that the union of which he was a member was not entitled to compromise in consultation with the employer. It could not be right to say that Mr Gilbert cannot succeed in his claim because of his union's apparent acquiescence in the employer's proposals. This is Mr Gilbert's *personal* grievance that must be judged by the s 103A test of assessing the situation between the individual employee and his employer.

[144] As a matter of interpretation of the collective agreement, I conclude that, although cl 46.6 gave the employer broad rights to select for redundancy using its own assessments (as opposed, for example, to any formula such as last on, first off), the contractual expectation was that the company would do so assessing the "skills and attributes" of the employees from whom it would select those necessary or appropriate for its continuing operations.

[145] "Skills and attributes" included, but were not necessarily limited to, technical skills and attributes in the performance of employees' roles including particularly in relation to skills, experience, qualifications, and similar objectively ascertainable

[12] [2011] NZEmpC 120.

criteria. Mr Gilbert, therefore, had a legitimate expectation of a skills' and attributes' assessment by the company in a redundancy selection. That is not unusual and, indeed, a matter of common sense, but it did not permit the company to select by ignoring or even minimising the skills and attributes of employees. Ultimately, however, the assessment and the decision about retaining employees with those necessary skills and attributes lay with Transfield.

[146] Ultimately, and even if the Court had accepted Transfield's case, Mr Gilbert's dismissal was a fine run thing: he was on the cusp of being retained and another or others dismissed. His dismissal came about as a result of some very adverse assessments made about his work performance following an interview by managers who were largely unfamiliar with this and at least one of whom made general assumptions about employees such as Mr Gilbert which, in his case, proved erroneous. In this sense, the defendant did not take into account relevant considerations, and took into account irrelevant ones. These were stereotypical conclusions which, however true they may or may not have been generally or in respect of others, were not so in Mr Gilbert's case.

[147] The most egregious example of this stereotyping was Mr Banks's conclusions that long-term technical employees (such as Mr Gilbert) were unprepared to update, and had not updated, their skills. In the case of Mr Gilbert at least, that was not true. But the defendant assumed that he fitted the stereotype and this contributed to the marks allocated to him which, in turn, resulted in his failure by a fine margin to retain his position.

[148] A fair and reasonable employer would not only not have adopted generalised and stereotypical assumptions about its employees, but would have raised questions of upskilling with employees such as Mr Gilbert and would have discussed with them their preparedness to do so. Had a fair and proper assessment been made of this relevant factor, the evidence persuades me that Mr Gilbert would have received additional points which would, in turn, have carried him over the cut-off line for dismissal.

[149] Although it is possible that the same defects were perpetuated in the cases of other employees who were dismissed, there is no evidence about this and the Court can only assume that in the absence of challenge by those other employees to the justifications for their dismissal, they were not in the same situation as Mr Gilbert. It is, therefore, safe to assume, on the balance of probabilities, that if his work performance had been scored objectively and reasonably, Mr Gilbert would not have lost his life-long job as he did.

[150] Mr Gilbert was dismissed unjustifiably. Dismissal was not what a fair and reasonable employer would have done in all the circumstances, and how Transfield did it was not the way in which a fair and reasonable employer would have done so.

[151] That is not to say that the defendant did not go to considerable trouble and expense to establish a process to determine which employees would be dismissed, nor to say that in some respects it did not meet the statutory test. But adopting complex, lengthy and expensive processes is no substitute for doing, and getting, it right when it comes to redundancy dismissals. Transfield did not do so.

Probability of continued employment?

[152] Before remedies for unjustified dismissal can be considered, I must decide a further issue. If Mr Gilbert had not been dismissed unjustifiably by Transfield, for how long would he probably have continued in his position? The answer to this question affects the extent of his remedies.

[153] Mr Gilbert's very long service in the same role would tend to indicate both a substantial stability of employment and an intention on his part not to move to other employment as might a younger person with an eye to career advancement or other change. In addition to Mr Gilbert's progressive updating of his skills and qualifications commensurate with the technological changes of the position, I consider that he would not have been at risk of the loss of his position on these grounds. Nor would he have been likely to have resigned willingly to pursue other career options.

[154] The fact that other employees were retained and, indeed, Transfield took on further indoor plant technicians after Mr Gilbert's dismissal, indicates an ongoing need for such employees by the defendant. There was no suggestion in the evidence that subsequent restructurings may have put Mr Gilbert's position at risk.

[155] For all these reasons I conclude that, if the plaintiff had not been dismissed unjustifiably as he was, he would have continued in his role with Transfield to at least the dates of hearing of this case. That, in turn, means that there is no argument that there would have been no work for him to perform. It sets up a case for recovery of all remuneration lost by him from the date of his dismissal to the date of his reinstatement but less the sum of any alternative remuneration received from other employment or business engagement during that period. First, however, I must deal with his primary claimed remedy.

Reinstatement

[156] Under the law applicable at the time affecting this case, Mr Gilbert is entitled to an order for reinstatement unless that is not practicable. He has a strong claim to this primary remedy. Mr Gilbert's work performance had not been the subject of adverse criticism. The Court would have expected it to have appeared in his annual performance assessments if he had been other than a satisfactory employee. As a consequence of his age, his long experience with Transfield and its predecessors, and the dynamic nature of the industry, Mr Gilbert has struggled to obtain any replacement work, certainly of an equivalent status and remuneration when compared to his time at Transfield.

[157] Transfield opposes reinstatement. The defendant accepts that it bears the onus of establishing that reinstatement will not be practicable and that this is not the same as mere possibility. It also accepts that the well established case law confirms that the interests of the parties and the justice of the case are to be balanced with regard not only to the past but more particularly to the future. Practicality involves considering whether the employment relationship can be reimposed successfully on the parties. The Court will take a broad approach in assessing whether this might be

so and may consider matters which may not have formed the reasons for dismissal but which are nonetheless germane.

[158] First, Transfield says that there are business and operational reasons why Mr Gilbert should not be reinstated. There have been changes to the work of field staff since the 2009 restructuring with a current emphasis on what was described as "micromanagement" through the use of daily electronic time reporting and tracking of technicians' progress through GPS systems. Daily productivity is now monitored continuously so that, in Mr Webb's words, every hour is earned and every hour is recovered. These management tools are said to be necessary to ensure that the business meets the performance standards established in the Chorus contract. The company considers that Mr Gilbert would have difficulty in coming back to this very different working environment.

[159] Ms Service submitted that at several stages in the proceedings Mr Gilbert evinced what counsel described as an intense dislike for micromanagement and said that it caused him stress when he was subjected to it. The company says this attitude would make it difficult to maintain a successful ongoing working relationship between the parties.

[160] Transfield says that Mr Gilbert's technical skills are in a niche area and it would be difficult for him to fit into the business as it currently stands, particularly as there is a declining requirement for the maintenance and repair of old technology. The emphasis is now said to be on replacing old technology with "plug and play" hardware and software requiring a lower level of technical knowledge but a greater preparedness to change with the needs of the business and to carry out whatever tasks are required. Counsel pointed to Mr Gilbert's lack of success in multiple job applications with Transfield since the restructuring and says that the same skills and attributes that the company decided in 2009 were necessary for its continuing business operations, are those applied when recruiting current staff.

[161] Turning to what she described as "relationship reasons" opposing reinstatement, Ms Service submitted that Mr Gilbert's evidence about the actions, personalities, and abilities of Transfield staff involved in the restructure, not to

mention his allegations of collusion in his selection for redundancy, mean that it would not be practicable to have him reinstated to work alongside those people he necessarily criticised in evidence. Those criticisms are said to have gone "to the core of those individuals' professional integrity", making the success of a future employment relationship highly unlikely if it is reimposed. Mr Webb, in particular, gave evidence that he would be unable to work with Mr Gilbert because of the nature of the allegations made against him in these proceedings. Their interpersonal conflicts have gone back as far as union negotiations, which Mr Gilbert described as protracted and bitter, and the plaintiff claimed that the working environment improved once Mr Webb was replaced by Mr Lockwood. Mr Webb's evidence was that whilst he regarded Mr Gilbert's redundancy as a "business decision", his reinstatement would be "a personal matter" as a result of the evidence given about him.

[162] There have been changes in the company since Mr Gilbert's departure. Mr Evans resigned and was not replaced and Mr Webb took on Mr Evans's former area manager function. At the least at the time of hearing, Mr Gilbert would have reported to Brent Roberts who then reported to Mr Webb who was the Area Manager for Christchurch as well as holding his existing General Manager role. That was said by Ms Service to be significant because Mr Gilbert could not be isolated from Mr Webb and would have significant contact with him about any employment issues.

[163] The evidence of the managers who opposed his reinstatement (and who still remained with the company at the time of the hearing) must be weighed against the factors favouring the remedy in assessing the practicability of reinstatement. The thrust of this evidence was that they would be uncomfortable having Mr Gilbert back at Transfield in view of this litigation and the allegedly polarising effects of evidence given in the Employment Relations Authority and in this Court.

[164] However, these managers would not be in a direct supervisory position if Mr Gilbert were to be reinstated. Having seen and heard at length all of those persons giving evidence, I am confident that the criticisms necessarily inherent in giving evidence about justification for a dismissal can, should, and will be put behind all concerned. This is not a case of dismissal for performance or misconduct reasons in

which there might arise a question of trust and confidence in the employee. Had the correct criteria for redundancy selection been used and employment law obeyed, Mr Gilbert would have retained his job.

[165] Reinstatement is a practicable remedy for Mr Gilbert although, due to the time that he has been away from the job as a result of this litigation, it would not be surprising if his re-introduction needs to be planned, subject to some training and supervision, and perhaps even, if there are personality issues, assisted professionally by recourse to a mediator. These should be allowed to take place, reasonably, before the plaintiff goes back on the job as I now direct he should.

Statutory limitations on remuneration recovery?

[166] It is necessary to refer to two sections of the Act. The first is s 124 which requires the Court to consider the extent, if any, to which Mr Gilbert's actions contributed to the situation that gave rise to his personal grievance. In only one sense might this be said to have arisen in this case. That is that Mr Gilbert's union activities were a catalyst for the detrimental treatment received by him from Transfield. Section 124 is not, however, engaged because those union activities were lawful and reasonable. There was nothing reprehensible or blameworthy about Mr Gilbert's conduct which invokes s 124.

[167] The other provision that must be considered is s 128 of the Act in relation to reimbursement of lost income. The Court being satisfied that Mr Gilbert was dismissed unjustifiably and has lost remuneration as a result of that, the plaintiff must be compensated for at least the lesser of his lost remuneration or three months' ordinary time remuneration. That is the starting point of remuneration loss compensation. Thereafter, under s 128(3), the Court has a discretion to increase that compensation for loss although to no more than the grievant's actual loss, taking into account those losses he mitigated reasonably (or about to have done) by alternative employment.

[168] This uplift may be as much as the full extent of an employee's loss (taking into account both the common law obligation to mitigate and the amounts of any

substitute earnings) or it may be less. In these circumstances the Court is required to engage in a counter-factual analysis to determine the probabilities of what would have happened to the employment relationship had it not been ended unjustifiably by the employer. At [152] to [155] above, I have concluded that if he had not been dismissed unjustifiably, Mr Gilbert would still have been working for Transfield.

Remuneration compensation

[169] For the unusual but nevertheless compelling reasons set out above, I conclude that this is a proper case in which to exercise the Court's discretion to compensate Mr Gilbert fully for his remuneration losses.

[170] Although evidence was given about Mr Gilbert's mitigation of his losses to the date of hearing, time has passed since then and it is at least possible that the plaintiff has obtained some further employment and, therefore, remuneration over that period.

[171] I invite the parties to attempt to settle remuneration loss for Mr Gilbert, taking into account what he would have earned from the date of his dismissal to the date of his reinstatement had he not been dismissed unjustifiably, but deducting from that all earnings received from other relevant sources during that period. If that cannot be agreed, leave is reserved to apply to the Court to fix those losses.

[172] On the subject of Mr Gilbert's claim for compensation for lost wages, Transfield submits that no sum should be awarded because Mr Gilbert's dismissal was for genuine commercial reasons. That submission assumes, however, that he would have been dismissed even if Transfield had acted correctly in deciding to dismiss him. For reasons set out earlier, I do not accept that submission.

[173] Even if that is not so, Transfield says that any compensation for lost earnings should be reduced due to Mr Gilbert's failure to adequately mitigate his loss. Counsel submitted that he did not apply for jobs immediately after his dismissal and did not take up the company's out-placement support opportunities. Mr Gilbert

acted reasonably upon being dismissed in all the circumstances and I do not accept that any deduction in compensation for remuneration loss is warranted.

[174] In respect of remuneration, Mr Gilbert is to be reinstated on Transfield's payroll in his former position, or one no less advantageous to him, immediately on the delivery of this judgment and with retrospective effect to the date of his dismissal. That will mean that Mr Gilbert is entitled to all of the remuneration lost by him as a result of his unjustified dismissal. As already noted, that must, of course, take into account his post-dismissal earnings which must be deducted from that notional amount.

[175] If Transfield had applied the correct criteria fairly and reasonably to the task of determining which staff should be dismissed for redundancy, Mr Gilbert would have survived. There is nothing in the evidence to suggest that in these circumstances his dismissal would have come about between that time and now, for any other reasons. As the evidence discloses, Transfield has advertised on a number of occasions for new employees in just such a position as Mr Gilbert held. That would tend strongly to indicate that it has subsequently expanded its workforce rather than contracted it further, at least in the field in which the plaintiff operated.

[176] As already noted, Mr Gilbert must account for the remuneration that he has received from employment subsequently so that he receives no more than the sum that he would have earned with Transfield had he not been dismissed by it. His employment is to be regarded as continuous so that benefits calculated by reference to service are not affected. Leave is reserved to apply to have this compensation quantified precisely if necessary. Mr Gilbert is entitled to interest on lost wages at the relevant Judicature Act rate calculated from the date of filing of his claims in the Employment Relations Authority to the date of payment of these to him.

Section 123(1)(c)(i) compensation

[177] As for compensation under s 123(1)(c)(i) of the Act, the defendant says that this should be limited to a modest amount because its process was fair and

reasonable and could not be responsible for any of those statutory consequences for which compensation might be awarded.

[178] Although for reasons of redundancy, which are generally and inherently less stigmatising than dismissals for alleged but unproven misconduct, the evidence establishes that Mr Gilbert nevertheless was affected significantly by his unwarranted dismissal following a fair and reasonable expectation by him that he would not be dismissed in these circumstances. Those losses were exacerbated by his very lengthy service, his apparently satisfactory performance assessments, and his awareness that his skills and other attributes had been ignored by his employer. In this case the distress and similar consequences to Mr Gilbert were also exacerbated by his genuine but erroneous belief that he had been both targeted for dismissal because of his union activities. In all the circumstances I assess him to be entitled to compensation under s 123(1)(c)(i) in the sum of $15,000 payable by the defendant to the plaintiff.

Claim for penalty

[179] This is brought under s 4A of the Act which requires, in the context of this case, either that the defendant's failure to comply with the s 4(1) duty of good faith was deliberate, serious and sustained, or that the failure was intended to undermine either an individual employment agreement or a collective agreement or the parties' employment relationship.

[180] On the question of penalties, Transfield denies statutory breaches including cls 46.1 and 46.6. In any event, the company says that there was no malice or conspiracy on its part and this is not an appropriate case for a penalty. Similar arguments apply for claims to penalties in breach of s 4. The company says that if there was any breach it was not intended and that company representatives tried to be as fair and reasonable as possible. Ms Service submitted that Ms Leon attempted to get the process right and took legal advice during its design phase.

[181] Although, under s 4A(a), the defendant's failure to comply with its duty of good faith was deliberate and serious, it was not sustained for the first alternative to

be made out. Absent a finding of unlawful discrimination, I do not consider that the plaintiff has made out his case for a penalty under the sub-alternatives of the second alternative grounds for a penalty. The defendant's failure was not intended to undermine Mr Gilbert's individual employment agreement with Transfield, the collective agreement to which he was subject, and the parties' employment relationship, despite dismissal having been unjustified pursuant to s 103A of the Act.

[182] Had I concluded that Mr Gilbert was dismissed for an ulterior motive (union activity involvement), this may well have constituted an undermining both of the employment relationship and the parties' individual employment agreement. To impose a penalty under s 4A of the Act, the Court must be satisfied of onerous criteria to an appropriately high standard and Mr Gilbert's treatment leading up to, and his dismissal, although unjustified under s 103A, does not meet that higher statutory standard for the imposition of a penalty payable to the Crown.

[183] That reasoning aside, Mr Gilbert having been found to have been treated unjustifiably and awarded significant personal remedies against Transfield, it would not be in the interests of justice to penalise the company for acts or omissions that were not so egregiously unlawful that such a sanction should be imposed in addition to Mr Gilbert's own remedies. The plaintiff's application for penalties under s 4(A1) is therefore dismissed.

Costs

[184] The plaintiff has been substantially, although not universally, successful. Mr Gilbert is entitled to an order for contribution by the defendant to his costs of legal representation in both the Employment Relations Authority and in this Court on the challenge. I propose inviting the parties to confer and attempt to agree on an award although, if this cannot be achieved, the plaintiff may have the period of two calendar months from the date of this judgment to apply to the Court by

memorandum for costs to be fixed, with the defendant having the period of one calendar month to reply by memorandum.

GL Colgan
Chief Judge

Judgment signed at 11.30 am on Monday 29 April 2013