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LEGAL FORUM

Full Circle? The continuing saga of redundancy legislation

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After increasing levels of judicial activism with regards to compensation for redundancy dismissals, the recent Court of Appeal ruling in Aoraki *has been heralded both by the court itself and by commentators as an end to the uncertainty and the activism, suggesting a return to the situation in mid 1980s. This paper argues that while* Aoraki *will be influential, we have not come full circle and the situation, while changed, is still very different to that in the mid 1980s.*

Introduction

Over the past few years, this journal has published a number of papers which, amongst other matters, have indicated the ever-changing nature of New Zealand redundancy legislation as portrayed by court decisions (Geare, 1992; Ferguson, 1992; Grantham, 1996). These papers illustrated how the law changed markedly from the early period of the 1970s to mid 1980s, to the activist period of the "*Hale* Cases" (1990-1) reinforced by *Brighouse v Bilderbeck* (1993-4).

In the 1970s to mid 1980s the attitude of the courts in general was that, in the absence of a redundancy agreement, and so long as the common law notice was given, then if the redundancy was genuine (and not a subterfuge to get rid of a troublesome or unproductive employee) the dismissal would be deemed justified and no compensation would be payable. Even in a case *(New Zealand Retail Employees - Decision [1978] ACJ 53 at 54)* where the:

> employer's failure to recognise the proper steps in the grievance procedure was contemptuous and deserves censure,

the then Chief Judge ruled that:

> The Court has no power to award any form of payment . . . unless it finds she was unjustifiably dismissed, and this we cannot do.

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This was the attitude at the time with the major case authorities being *Fabiola* in the Arbitration Court and *City Taxies* in the Court of Appeal.

The "Judicial Activism" of the 1990s was foreshadowed to an extent during this time, in that Disputes Committees (forerunners to the Employment Tribunal), and the courts were occasionally called in to arbitrate on what may be considered "part-way" redundancy agreements or clauses. These were agreements found in the collective employment contract equivalents (awards and collective agreements) and specified to the effect that:

> where a worker becomes redundant . . . the employer shall make a redundancy payment to the worker . . . such payment shall be by agreement between the union and the employer . . .

Where the union and the employer failed to reach agreement, the dispute would go to a disputes committee and possibly to the Arbitration Court, to be settled by the arbitral body on what it felt was a fair and reasonable level. In fact, research (Geare, 1983) shows that only a very small percentage of documents had clauses "agreeing to later agree". (In 1976 it was 0.7 percent, 1978 1.3 percent and 1980, 0.9 percent of all collective arrangements.) Notwithstanding the infrequency, the fact that it occurred at all incurred the displeasure of the Employers Federation and the National Government so this practice was explicitly excluded by the Employment Contracts Act 1991 in s.46(3). This states in part that:

> where a provision in any contract deals with the issue of redundancy but does not specify either the level of redundancy compensation payable or a formula for fixing that compensation, neither the Tribunal nor the Court shall have the jurisdiction to fix that compensation or specify a formula for fixing that compensation.

In the late 1980s courts began to require employers to demonstrate the genuineness of alleged redundancy situations rather than simply accepting their word. Dismissals purporting to be for redundancy were found to be unjustified in the *MacLeod* case because the court stated:

> we saw no facts or figures whatever to support or confirm any downturn in business or its extent . . .

A similar finding was made in the *Trilogy* case.

A major change, and an example of significant judicial activism in this area, came about with the *Hale* cases, later endorsed by the Court of Appeal (in a split 3:2 decision) in *Brighouse v Bilderbeck*. The end result was that if an employee was dismissed for genuine redundancy, the dismissal would be deemed unjustified if:

a) compensation was not paid when it was deemed that a fair and reasonable employer would have paid compensation.
b) there had been no consultation with the employee.
c) other factors such as provision of counselling, and a sensitive approach to the matter were missing.

It should be noted that it has always been the stated legal position that:

> There is no general right to compensation for redundancy.

(See the Chief Judge in Hale (1) at 97,709). This view was reinforced by two of the concurring Justices on the Court of Appeal in *Brighouse*. Carey J. stated (at 95,657) that:

> It cannot be said the stage has been reached where an obligation to pay redundancy can be implied as a matter of course in all employment contracts.

Sir Gordon Bisson (at 95, 665) quoted with approval the Chief Judge's view that:

> Not every redundant employee is entitled to compensation.

The outcome from Brighouse was that in practically every case, if an employee was dismissed for redundancy then compensation would have to be paid. However this was *not:* "compensation for redundancy" which, as discussed above, was accepted as *not* being a general entitlement, but rather was "compensation to make the dismissal for redundancy justifiable". Managers without legal training may not appreciate such niceties and indeed may find such argument bordering on sophistry.

Given that the Court of Appeal ruling in *Brighouse* was made by a bare majority and that of the three majority judges, one (the President) had been granted a peerage and was thus leaving the Court of Appeal and another was near retirement, while one of the dissenting judges had been elevated to President of the Court, it was likely the issue would be revisited. Certainly there was little certainty about the long term legal situation.

In 1998 the case *Aoraki Corporation Ltd v McGavin* went to the Court of Appeal. The situation was similar to *Brighouse* in that the redundancy was deemed genuine, but the redundancy compensation (approximately equivalent to a week's pay per year of service) was deemed inadequate and there were deemed procedural inadequacies.

The appeal was heard before all *seven* permanent judges, given that they:

> were being asked to review the decision of a five judge court in *Brighouse* (95,775).

All seven upheld the appeal, with six delivering a single opinion with Thomas J. giving a separate but concurring opinion.

The *Brighouse* decision which was being reviewed by the Court of Appeal was stated (at 45,775) to be that the dismissal for redundancy was unjustifiable because of a failure:

a) to pay . . . adequate compensation where there was no existing agreement to pay redundancy compensation; and
b) to communicate, consult or negotiate . . . in respect of any alternatives to redundancy . . .

This judgement was "over-ruled", with the decision emphasising in a number of places where the majority had "erred in law".

The Court of Appeal in *Aoraki* made a number of significant arguments and statements. One was to clarify that compensation for a grievance is for that specific grievance alone. Thus it was pointed out (at 95,783) that:

> In a genuine redundancy the remedies for procedurally flawed dismissal are compensation for the resulting hurt and loss of benefit. They are necessarily limited to the effects of the procedural deficiencies - . . . there can be no compensation for the *loss of the job* (my insert).

Reinforcing the significance of overruling *Brighouse,* the Court of Appeal stated (at 95,782) that:

> except where the employment contract requires payment of compensation . . . the statute does not empower the Tribunal or the Court to require any such payment.

and (at 95,781) that:

> It cannot be mandatory for the employer to consult with all potentially affected employees in making any redundancy discussion.

At first glance, *Aoraki* may appear to have brought us full circle, where an employer in the case of genuine redundancy can dismiss an employee and not pay compensation. At first glance, *Aoraki* may have actually achieved what it was trying to do when the decision stated (at 95, 780) that:

> redundancy is an important area of the law affecting large numbers of New Zealanders every year. It is imperative that employers and employees be able to plan with confidence and determine what their respective rights and obligations are.

And, at first glance, one can sympathise with commentators who claim the decision "marked a sharp break with the Court's activist approach to redundancy in the *Brighouse* decision", (Harbridge and Kiely, p.160), or that "benefits employees have not bargained for and remedies that do not relate to the actual wrongs have met their Waterloo in *Aoraki v McGavin"* (Hogg, p.23). However, if one examines the decision carefully, and considers the skill with which the Employment Court has selected those parts of earlier Court of Appeal decisions which suits its viewpoint, then this paper suggests strongly that one will accept that the situation facing an employer at the Employment Court will be much closer to what it was after *Brighouse* than it was in the mid 1980s.

Certainly *Aoraki* will cause a change in approach, both by advocates and by the Employment Court. Results in real terms to employers will be much the same as it was after *Brighouse*. Indeed, it is somewhat ironic that *Aoraki* is touted as being so momentous when one considers that in *Brighouse* the employees were genuinely redundant, had no agreement, were offered one week's pay per year's service, and ended up being granted

an additional $1,500 to $2,000. In *Aoraki* the employee was genuinely redundant, had no agreement, was offered a sum equivalent to around one week's pay per year's service, and ended up being granted an additional $15,000. Certainly the Court of Appeal dramatically reduced what the Employment Court had granted - but the final awards in the two cases are somewhat surprising.

However, the major reason why it is claimed that *Aoraki* is not so momentous is because the decision left far too many opportunities for the Employment Court to continue its current policies. Bear in mind that it was simply the statement by the Court of Appeal in the *Hale* case that:

> Fairness, however, *may* (my insert) well require the employer to consult with the union and any workers . . . (97,990).

which led to the situation where any failure to consult seemed to render a redundancy dismissal unjustified. Similarly, it was the statement:

> whether a dismissal for redundancy amounts to an unjustifiable dismissal or not turns on the question whether the circumstances call for compensation . . .

which led to the situation where any failure to pay compensation seemed to render a redundancy dismissal unjustified.

While the decision in *Aoraki* may seem to overturn *Brighouse,* the decision also included statements such as (at 95,781):

> In some circumstances an absence of consultation where consultation could reasonably be expected may cast doubt on the genuineness of the alleged redundancy . . .
> So too may a failure to consider any redeployment possibilities.
>
> As well, fair treatment may call for counselling, career and financial advice and retraining and related financial support . . .

So, while *Aoraki* has ended the argument that the employer should have paid compensation to make the redundancy dismissal justified, it has certainly not, and will not, end the *fact* that employers will still be required to *pay* even where there has been no redundancy agreement. They will pay, because the employee was humiliated by the procedure - as indeed occurred with McGavin himself.

The arguments that will be used, backed by the statements already quoted from *Aoraki,* are that in the particular case before the Employment Court at the time, one or more of the following occurred:

a) there would/should have been consultation (in *this* case!) - but there wasn't
b) there could/should have been counselling etc (in *this* case!) - but there wasn't
or
c) the notice given (*in this case*!) was inadequate

The Employment Court, or the advocate for the employee, will then argue that these procedural deficiencies (not the loss of the job!) caused distress and humiliation to the employee and compensation will have to be paid for that.

It is suggested that the degree of notice will become more of a critical issue. Certainly the Court of Appeal in *Aoraki* was not unaware of this issue, and stated (at 95,784) that for those covered by collective employment contracts (in effect, shop floor workers) there was:

> no support for fixing the period of notice, in the absence of a contractual stipulation, at much in excess of one month.

In the case of McGavin, a manager on a salary of $113,000, the Court of Appeal deemed three months notice sufficient.

However, times are changing. The general principle that a chief executive is entitled to one year's notice has been severely shaken by grants of eighteen months. Indeed, a recent well publicised case of a chief executive of a very poorly performing investment company whose share price had suffered abysmally, being given *three* years salary will certainly provide argument for longer notice periods becoming the norm.

Is this cynical and pessimistic? No, it is realistic and is already occurring, as evidenced by *Rolls v Wellington Gas Co.* The Employment Tribunal considered that Mr Rolls had been justifiably dismissed for genuine redundancy reasons. His title was originally Commercial Sales Engineer, it later changed to Commercial Sales Manager. However he was the only person in the department and his duties appeared to be sales. When he was made redundant, he was paid compensation according to the company's formula and given "the required notice". Nowhere in the decision of the Tribunal does it appear that Mr Rolls or his advocate ever claimed there was anything wrong with the notice period. Their case was that there was no real redundancy and that the company was determined to do away with him because of his performance and stress-related illnesses.

When the case went to the Employment Court, the Chief Judge determined that:

> an appropriate period of notice in the appellant's position was 3 months or 13 weeks.

and then ruled that:

> It was of course distressing and humiliating for the appellant to be dismissed without being given his contractual period of notice . . .

And granted a further $5,000, in compensation.

It should be noted there was no *written* contract granting any period of notice. The Employment Court deemed that three month's notice was *inferred* in the contract. Mr

McGavin on a salary of $113,000 and total package of $125,000, was deemed by the Court of Appeal to be entitled to three month's notice. Mr Rolls on a salary of $65,000 was deemed by the Employment Court to be entitled to the same period.

If employers want a reasonable degree of certainty with regards to redundancy situations they should ensure that employees have written contracts detailing:

a) compensation (if any) for redundancy;
b) procedures to be undertaken if redundancy occurs including notice, whether or not consolation will occur, what services if any will be provided;

and they should adhere to the agreement.

Those without agreements should have as little confidence now as to what the Employment Court may rule, as they have had at any time in the 1990s. Sadly, *Aoraki* will *not* enable employers and employees to plan with confidence and determine their respective rights and obligations.

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