

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Graeme Anderson and 14 others (see appendix A attached)  
(Applicant)

**AND** The Christchurch Press, a division of Fairfax New Zealand Limited  
t/a The Christchurch Press (Respondent)

**REPRESENTATIVES** Jills Angus Burney, Counsel for Applicant  
Jenny Gibbs, Counsel for Respondent

**MEMBER OF AUTHORITY** Helen Doyle

**INVESTIGATION MEETING** 13 and 14 April 2005  
11 and 12 May 2005 (including site visit)

**SUBMISSIONS RECEIVED** 1 July 2005  
20 July 2005  
21 July 2005

**DATE OF DETERMINATION** 25 August 2005

DETERMINATION OF THE AUTHORITY

[1] The applicants were all employed at the material time in 2002 in the pre-press production department (“the Design Centre”) of the respondent. They were long serving employees with between 11 and 38 years service.

[2] There was no objection to the applicants’ grievances which arose out of the same factual background being investigated together. I heard evidence from each applicant.

[3] The respondent, The Christchurch Press, is a division of Fairfax New Zealand Limited t/a The Christchurch Press (“the Press”).

[4] The applicants work was covered by The Christchurch Press Company Limited Production Collective Agreement 3 December 2001 – 31 March 2003 (“the collective agreement”). The agreement was between The Christchurch Press Company Limited, its successors and assigns and The New Zealand Amalgamated Engineering, Printing and Manufacturing Union (Inc) (“the union”).

[5] From early 2002 Peter O’Hara held overall responsibility as general manager of operations of the Press. Since July 2003 he has been the chief operating officer and editor in chief of Fairfax New Zealand Limited and prior to that he held a similar position for about eight months with Independent Newspapers Limited.

[6] The work carried out by the applicants within the Design Centre in 2002 fell into three areas or departments. Their positions and the duties within the positions were broadly described in the first schedule of the agreement. I use the term *broadly* because the applicants expanded on the duties described in schedule one of the collective agreement in their evidence. There was some overlap between duties across the three areas because the applicants on occasion worked cooperatively to get tasks completed.

[7] Graeme Anderson, Bill Calder, Gary Dix, Colin Griffiths, David Miller, David Newman, Gina Nuth, and Ian Sale worked in Ad Makeup. These applicants referred to their positions as Area Display Operator or Display Advertising Makeup Compositor. They would create advertisements using a computerised typesetting programme designed for the production of advertisements known as the Harris System. They would size the ads for placement in the columns of the newspaper and retrieve and position photos and artwork including logos.

[8] Ron Carter, Rob Baker, Ken Dunn, Mark Brydon, Stuart Patterson and Darryn Candy worked in the area of platemaking and photolithography/scanning where they made plates for the press and scanned photos and copy for illustrations and ad makeup.

[9] Teresa Hyde's work was best described as advertising production assistant in the first schedule of the agreement although she referred to her role as an advertising administrative clerk. Ms Hyde processed incoming hardcopy advertisements, tracked booked advertisements, ensured customers were aware of deadlines and processed advertisements delivered in digital form.

[10] A restructuring of the Design Centre took place in June and July 2002.

[11] There was a proposal and then a decision that all 43 positions within the Design Centre were to be disestablished including the 15 positions of the applicants. 15 positions were to be established. Nine of the established roles were to be known as Digital Delivery Technician and there was one role known as Digital Delivery Team Leader. Four of the established roles were known as Creative Consultant and one role known as Creative Consultant Team Leader.

[12] These roles were to be multi skilled across the three departments and accordingly included additional functions, accountabilities and competencies with a customer focus. The Press did not think that the existing roles undertaken by the applicants had this flexibility or customer focus as it considered the existing roles to be specialist in nature. The work undertaken by those in ad makeup using the Harris system was to be outsourced. The new roles to be established were to be salaried positions with terms and conditions in individual employment agreements.

[13] Six of the applicants unsuccessfully applied and underwent an interview process for one or more of these roles; Graeme Anderson, Ian Sale, Mark Brydon, Darryn Candy, Teresa Hyde and Ken Dunn. Mr Patterson initially applied for a position as a digital delivery technician but withdrew his application because he said amongst other matters that he was dismayed that the applicants were required to undergo a personality test and that he felt the positions were so much the same that he *wasn't prepared to accept undermining my present role at the Press*.

[14] 19 employees in total applied for one of the 15 positions. 11 existing employees were successfully appointed to one of the positions including one employee, Tony Angel who was previously covered by the collective agreement. Four of the positions were filled by external applicants who were interviewed after it was decided that the other internal applicants for the positions did not meet the standard required.

[15] On 25 June 2002 the Press issued notices of disestablishment of position and terminated the employment of Graeme Anderson, Colin Griffiths, Gina Nuth, Bill Calder and David Newman with one month's notice.

[16] On 9 July 2002 the Press issued a notice of disestablishment of position and terminated the employment of Gary Dix with one month's notice.

[17] On 5 August 2002 the respondent issued a notice of disestablishment of position and terminated with one month's notice the employment of Robert Baker, Mark Brydon, Ron Carter, Ken Dunn, Darryn Candy, Stuart Patterson, David Miller, Teresa Hyde and Ian Sale.

[18] The applicants' employment was terminated at the different times set out above by agreement and/or in accordance with the operational requirements of the company. The applicants were paid redundancy in accordance with the agreement.

[19] This employment relationship problem is about the restructuring and the resulting redundancies of the applicants. The applicants say that they were unjustifiably dismissed as a result of the restructuring.

[20] The applicants accept in submissions that their workplace after Christmas 2001 was *a context of a workplace rife for restructuring* and in the applicants' submission in reply *the applicants' are not contending that there wasn't going to be change...*

[21] The applicants do not concede that any proposal for restructuring would have resulted in each of their redundancies or that their positions should have been disestablished. They do not believe that their redundancies were genuine. The applicants also claim that the Press failed to deal with the union in good faith throughout the process and failed to comply with the provisions of the collective agreement. The applicants say that there was predetermination with respect to the decision to outsource and disestablish positions.

[22] The applicants maintain that a comparison of the *new* positions of digital delivery technician and creative consultant with their existing positions in ad makeup, plate making and photolitho/scanning and advertising production assistant show that the new positions are the same or very similar to the positions they held at the Press. They say that with some training they could have all filled the positions.

[23] The Press say that there were genuine commercial reasons for the redundancies and that it complied with its obligations under the collective agreement. It does not accept that there was predetermination with respect to the decision to outsource or disestablish the positions. The Press further says the redundancies were carried out in a fair and reasonable manner and that the roles of digital delivery technician and creative consultant are significantly different to the roles performed by the applicants.

[24] The applicants seek lost wages, compensation and costs. The combined amounts claimed by the applicants are in excess of one million dollars.

[25] The following issues arise from this case.

- Was the review of the Design Centre based on genuine commercial reasons?

- Was advertising work intentionally directed away or *farmed out* from the Design Centre before the announcement of the review of the Design Centre on 13 May 2002?
- Was there a relationship between the Press and the company The Zoom Room Limited to whom the work was outsourced prior to the announcement of the review and the subsequent restructuring?
- Was the disestablishment of all the positions in the Design Centre within the redundancy situation defined in clause 23 of the collective agreement?
- If the answer to that question is yes then were the roles of Digital Delivery Technician and Creative Consultant substantially similar roles to the old roles performed by the applicants or were they significantly different so that all 43 positions in the Design Centre were genuinely surplus enabling the Press to disestablish all the positions in the Design Centre?
- Were the redundancies carried out in a procedurally fair manner?
  - Was there predetermination with respect to outsourcing and disestablishment of positions in the Design Centre before 13 May 2002?
  - Was there adequate consultation from 13 May 2002?
  - Was there compliance by the Press with the obligations in the collective agreement with respect to selection of staff to be made redundant?

**Was the review of the Design Centre based on genuine commercial reasons?**

[26] Mr O'Hara said in his evidence by way of summary that the Design Centre was no longer a viable unit and gave evidence about the main business drivers that prompted the review and restructure as below:

- Volume of business passing through the area had declined significantly.
- Advertisers had changed their methods of preparing and delivering advertisements. Advertisements were increasingly delivered by electronic means such as email with already prepared advertisements attached which did not requiring advertising makeup functions to be performed on them.
- There were issues as to whether the skill base and infrastructure in the department was appropriate to meet the changing nature of the business.
- There were high wage costs in the department while work was declining and issues as to whether in these circumstances the Press should invest in new equipment.
- There was the need to consider whether the function performed by the Design Centre was core business and whether it could be more efficiently and economically managed by outsourcing.
- Following successful implementation of changes in other departments there was a focus on improving the Press culture to one of performance and accountability.
- The number of advertising credits the department received in terms of delivery of satisfactory levels of service and quality of work. Credits are issued to customers against their invoices when they complain about their work not being carried out to a satisfactory standard.

[27] Most of these issues had previously been the subject of discussion at staff meetings on 11 and 12 March 2002 when the then advertising production manager, Ross Wortelboer held meetings with staff from the Design Centre.

[28] The issue of credits was discussed at the staff meetings on 11 and 12 March 2002. Mr Wortelboer said that in early 2002 the credits were at a very high level at approximately \$1 million dollars. He clarified that was not all attributable to the Design Centre and was business wide. He felt that to say about 10% of that amount was attributable to the Design Centre was somewhat on the *light side* but was not able to advise me of an exact percentage.

[29] There was also discussion during those staff meetings about the wage costs for the Design Centre. Graphs were presented to show the decline in advertising and the increase in advertisements coming into the Design Centre in electronic form.

[30] Slides were also presented to staff at the March meetings. The slides had three options with the first option being outsourcing, either partial or complete. The second option was an improved ad makeup service and the third option was to preserve the status quo and invest about \$300,000.00 to replace the Harris system. Mr Wortelboer also stated that he wanted to introduce better performance management. Some questions were put to staff at the meeting for their comment and feedback about the situation in the Design Centre.

[31] Ron Angel who was the union organiser was not involved in those meetings although the union delegates would have attended. Mr Angel did become aware in late March 2002 that there was a downturn of work in the Design Centre when an issue arose about some staff in the Centre working over the Easter period (document 50).

[32] Discussions took place during early 2002, not only with staff but also between the management team about the concerns with respect to the Design Centre. It was decided that there should be a review of the Design Centre in or about late April or early May 2002. A review team was then formed which consisted of Mr O'Hara, Brian Ashton who was at the material time business and technology manager at the Press and prior to that was operations manager at the Press, Mr Wortelboer and Mark McGinn who is the managing director of CM Select Limited which is a human resource consulting service.

[33] I am satisfied that the review of the Design Centre was based on genuine commercial reasons as outlined by Mr O'Hara.

***Was advertising work intentionally directed away or farmed out from the Design Centre before the announcement of the review of the Design Centre on 13 May 2002?***

[34] There was a suggestion by some of the applicants that work in advertising was being *farmed out* to external agencies prior to the review and restructuring. In other words it was alleged there was deliberate manipulation of the work flows to decrease volumes through the Design Centre.

[35] Mr Ashton disputed that there was *farming out of work*. He provided analysis that supported that the Christchurch Mail was only a small component of work in the Design Centre. He said that prior to the review in 2002 the ad makeup operators did not have enough work to do and there was no reason to send work out to anyone. I conclude that such deliberate farming out of work would be highly improbable in the circumstances and that there is insufficient evidence to establish that was occurring.

***Was there a relationship between the company Zoom Room Limited to whom work was outsourced prior to the announcement of the review and subsequent restructuring?***

[36] Mr Anderson said that the Zoom Room was created by Press management long before the draft report came out and Mr Newman said that in his view the Press was involved with the Zoom Room and that it was clearly a deal to set up the Zoom Room agency.

[37] Mr Ashton and Mr O'Hara both denied involvement with Zoom Room Limited in a way other than a supplier/client relationship. Mr O'Hara said that there was no ownership by the Press of the Zoom Room. Mr Ashton did accept that someone maintaining the Macintosh computers at the Press was involved with the Zoom Room Limited which was incorporated under the Companies Act 1993 on 24 June 2002. He said that management was only aware of this once the contract had been entered into with the Zoom Room. He further explained that although the Zoom Room was a newly incorporated company without a *track record* there was no one making the volume of advertising the Press required and that the Press managed the risks including having a small ad-hoc relationship with another ad setting company.

[38] There is no evidence for me to conclude that the Press was involved with the Zoom Room in a different way than a supplier/client relationship. I accept the evidence of Mr Ashton and Mr O'Hara on this matter.

***Was the disestablishment of all the positions in the Design Centre within the redundancy situation as defined in clause 23 of the collective agreement?***

[39] The Press has the right to manage its own business and to reorganise and restructure its business as it requires. That right is clearly put by the then Chief Judge Goddard in *McCulloch v NZ Fire Service Commission* [1998] 3 ERNZ 378 when he said at p 390

*The defendant had the same right as every other employer to decide on commercial grounds that it could cope with a smaller number of employees, subject to complying with contractual duties as to consultation or otherwise by which it may have limited its own freedom of action. Subject thereto, after adopting a fair process of selection, it was open to it to have terminated the employment contracts of the surplus staff on such terms as the contracts provide for in such situations or, of course, on such terms more favourable to employees as it might see fit to adopt.*

[40] There are similarities between this case and *McCulloch* because in *McCulloch* a decision was also made to declare all positions surplus following a review. A contractual regime was explained in *McCulloch* which is common in the public service. This is where employees displaced by a declaration that their positions are surplus to requirements are either reconfirmed into new corresponding positions or reassigned or redeployed or failing all that paid voluntary severance or some other option. Under that system it was noted in *McCulloch* there was no need for the jobs to actually disappear before a declaration that they are surplus and commonly, some will not have. A review is all that is required.

[41] The Chief Judge went on to say in *McCulloch* that *Where that contractual system is not in operation, the mere fact of a review is not enough to justify the disestablishment of existing positions and the usual rule applies and it must be shown that the work being done by the holders of the positions is no longer needed by the employer.*

[42] Many of the applicants expressed in their evidence surprise at the use of the term *disestablishment* during the restructuring process and they spoke about the collective agreement providing protection for them in a redundancy. Mr Baker said in his written evidence; *there was no mention in our agreement of “disestablishment”*. *That was as unthinkable as perhaps a transfer of ownership would have been*. The applicants said that other restructurings they had been involved in or had knowledge of had not involved disestablishment of an entire department.

[43] I have considered whether disestablishment of all positions in a department is prevented under the collective agreement.

[44] Clause 23.1 of the collective agreement is at the heart of this matter as it provides a definition and application of redundancy.

### *23.1 Definition and application*

*Redundancy is a situation where an employee’s employment is terminated by the employer, the termination being attributable, wholly or mainly, to the fact that the employer has staff surplus to requirements because of the closing down of the whole or any part of the employer’s operations due to a change in plant, methods, materials or products or re-organisation, or like cause requiring a permanent reduction in the number of permanent employees who have not reached the Employer’s age of retirement.*

[45] Clause 23.1 should not be considered in isolation from the rest of clause 23. Sub clauses, 23.1.2, 23.1.3 and 23.1.4 provide for situations where the Press will not be liable for redundancy compensation.

[46] Clause 23.2 provides the rights of redundant employees essentially with respect to notice in the event of redundancy and payment of redundancy compensation and other entitlements.

[47] Clause 23.3 provides for the criteria for selection of redundant employees as below:

### *23.3 Criteria for selection of redundant employees*

*23.3.1 It is recognised that the Employer’s needs to maintain an efficient workforce and an efficient operation must be taken into consideration in the selection of employees to be made redundant.*

*23.3.2 The Employer will identify the work areas affected and call for volunteers who may be accepted at the Employer’s discretion.*

*23.3.3 All things being equal the Company will wherever possible observe the last on first off principle in selecting employees to be made redundant.*

[48] The Press wanted to disestablish all the roles in the Design Centre. It felt that simply to reduce staff numbers in accordance with the proposal and then decide to outsource and retain some staff in their old positions would not necessarily have meant that it would have staff with the appropriate skill set for what it says were new roles rendering the old roles surplus to requirements. The roles were to have a multi skill focus and the Press said that they were entitled to disestablish as the new roles were significantly different.

[49] I am of the view that clause 23.1 does not prevent disestablishment of all positions in a department if there is a decision to outsource some work resulting in 28 surplus positions and then a

decision to reorganise the remaining positions on the basis that the work being done by the holders of those positions is no longer needed or required. Those circumstances are capable of falling within re-organisation – *United Food and Chemical Workers Union of NZ v Wattie Frozen Foods Ltd* [1991] 2 ERNZ 810.

[50] The issue then becomes whether or not the 15 positions are significantly different to the positions previously held by the applicants so as to conclude that the employees are genuinely superfluous to requirements. The work done by the holders of those 15 positions must no longer be needed or required to break the continuity of employment.

[51] There is no structured methodology under clause 23 of the collective agreement for employees whose positions are to be disestablished that may be found in other collective agreements such as reassignment, redeployment or retraining.

[52] In other parts of the collective agreement though, change to job content or skill requirement is clearly recognised in that there is structured provision when new technology is introduced for alternative employment and retraining and voluntary termination. The new technology provisions did not apply in this case.

[53] Clause 1.14 of the collective agreement also supports the need for flexibility and interchangeability between individuals and within departments and it provides:

***INTERCHANGE OF DUTIES***

*The parties to this agreement recognise and accept the need for flexibility and interchangeability between individuals and within departments. Accordingly it is accepted that no restriction shall be placed on the Employer's ability to allocate work and arrange for the performance of work in the manner which is most productive and best suits the Employer's requirements.*

***Were the roles of Digital Delivery Technician and Creative Consultant substantially similar or significantly different roles to those previously undertaken by the applicants?***

[54] The test to be applied in considering this question was set out in *Carter Holt Harvey Limited v Wallis* [1998] 3 ERNZ 984 p 995 where an employee was required to transfer from working in a mine to working in a production plant. The Court said:

*It was necessary to ask whether a reasonable person would consider there to be a sufficient difference between the two positions to break the continuity of employment, having regard to the characteristics of both the positions and the employee. It was an acceptable practice to consider the personal characteristics of the person in question in assessing whether there was substantial similarity between the two positions.*

[55] It is not an easy matter assessing the degree of similarity or difference between positions. On one hand it would be unusual for any employee to expect to do a job for any length of time without any change at all to its content, particularly in the industry the applicants were employed in. On the other hand there needs to be consideration as to whether what is being offered is a significantly different job requiring different skills and competencies. It is a matter of balance.

[56] It appeared clear from the evidence of the applicants that because of the environment in which they worked and change in technology their jobs did change over the time they were employed by the Press.

[57] I heard evidence from Murray Hall who is very experienced in the field of job design, developing job descriptions and the remuneration area. His considerable experience is apparent from his curriculum vitae. Mr Hall was asked to give evidence at the investigation meeting by the respondent and concluded that the new roles in the Design Centre are significantly different from the old roles and in his opinion this would represent in excess of a 30% change overall.

[58] I gave Ms Angus Burney an opportunity to obtain some expert evidence if she wished to. Ms Angus Burney said that the applicants would present evidence about the similarities or differences as would Tony Angel who was the only successful employee whose work was covered by the collective agreement to be appointed to one of the new positions.

[59] A fair overall summary of the applicants' evidence is that whilst they may have required some familiarisation or training with respect to some responsibilities in the new positions most felt they had the skills to perform the roles and that the work they were performing was still required.

[60] For example Mr Miller as an ad make up operator said of the new role that *he thought it was essentially what he was doing already*. Mr Patterson who worked in photolitho *did not see a great deal of difference but some areas of upskilling would be required*. Ms Hyde in her role as advertising administrative clerk felt that the changes in the new roles were well within her ability and that she already did components of the digital delivery technician role and had the ability to upskill for the other elements of the new roles.

[61] Tony Angel gave evidence that when he was appointed to one of the new roles as a digital delivery technician his duties were exactly the same duties that he performed before his position was disestablished in scanning/photolitho. I shall refer to him as Tony Angel to distinguish him from his brother Ron Angel who was the union organiser. Tony Angel said that he was in fact doing his old job. He said that the competencies and performance accountabilities referred to in the new role descriptions have never been implemented as far as he is aware.

[62] In this case there was an implementation of the decision to disestablish all 43 positions and the creation of the 15 new salaried roles with individual terms and conditions of employment. I have had the benefit of the evidence from that implementation against which to assess the old and new roles including the evidence from Tony Angel and the applicants as well as the expert evidence of Mr Hall. I also visited with both counsel the Design Centre during the course of the investigation meeting. I can more easily conclude from the evidence the realities of differences or similarities in the roles than is sometimes the case.

[63] I start firstly with the difference in remuneration between the positions. The Press wanted the new positions to be salaried positions. Mr McGinn's view is that the staff knew they were very well paid for what they had previously been doing and that it was no surprise for them to see salaries reduced for the new roles. To deal with the perception of being assessed as competent for the new role but being paid several thousand dollars less Mr McGinn introduced a partial salary equalization which mitigated the effect of the pay cut meaning staff appointed would move to the new salary over time.

[64] On that basis I do not place the same reliance on the difference in remuneration in assessing similarities or difference as I may have if the positions had continued to be covered by the collective agreement. Mr Hall's comparison of the remuneration levels in any event do not reflect accurately the total remuneration the applicants were receiving at the time. This is because he has taken the minimum rate from the collective agreement for ad make up operators, scanners and

photolithographers and advertising assistant and compared that rate with the minimum rate of the new salaried roles.

[65] The minimum rates bear no resemblance to the actual total remuneration received by the applicants for 2001 – 2002. The minimum rate for an ad make up operator in the collective agreement was \$32,382. I take as an example one applicant, Ms Nuth. Her total remuneration for 2001-2002 was \$47,768 as an ad make up operator. The salary for the new digital delivery technician was between \$35,000-\$40,000.00 and the creative consultant role between \$33,000-\$36,000.

[66] Tony Angel was offered \$36,000 for the new role as Delivery Digital Technician compared to \$50,000.00 he received the previous year for his old role in photolithography and plate making (document 40 and 41).

[67] There is no change in location as I observed by my visit to the Design Centre during the investigation meeting.

[68] Mr Hall put the change in the structure of the Design Centre at somewhere around a 30% to 40% change with the introduction of the Team Leader roles. He said that there was significant change for staff reporting into different managers and the delineation of responsibilities.

[69] If the applicants had management or leadership roles then the additional tier of reporting and managing staff may well have had a significant difference. In the applicants' situation I am not satisfied that the introduction of team leaders would be sufficient to break the essential continuity of their employment. I am likewise not satisfied that the change in staff reporting lines, meaning closer supervision and control of work practices, would have been sufficient to break the continuity of employment.

[70] Mr Hall also examined the difference in job sizes. He relied on the old and new position descriptions and the collective agreement. He spoke to Mr Wortelboer and Mr McGinn. He also spoke to Greg Millane and Pat Roy who are both senior employees at the Press although they did not give evidence at the investigation meeting. Mr Hall did not speak to the applicants. It did occur to me that if the previous incumbent of the position is not spoken to then it must be difficult to assess accurately what proportion of time is spent on any one duty and there is a possibility of missing out duties altogether.

[71] Mr Hall had not referred to one of the responsibilities under the old job description for ad make up operator/graphic artist – *liaise or brief the clients/ reps to determine the advertising or marketing needs*. Mr Miller gave evidence that he would occasionally have direct telephone contact with Harcourts although his contact about the advertising needs of this large client would more often be through the sales representative. Mr Sale gave evidence of meeting on occasion the client with the sale representative to determine the advertising needs. I should clarify that I am not being critical at all of Mr Hall in making this observation. Mr Hall was placed in the difficult position of comparing the roles almost three years after the restructuring and had to be guided in his assessment by the Press.

[72] Mr Hall concluded that the new jobs were considerably different (greater) in size using the Hay job sizing methodology. The job descriptions with respect to the old roles contained key functions and the applicants accepted under questioning that they performed most of the tasks although there was no evidence that these position descriptions had been updated at the time of the restructuring. The new roles as described required increased flexibility, required multi skilling and enhanced performance accountability. The change in size may have been greater for some of the

applicants than others. Mr Hall put the difference between the old role of photolithographer/scanner operator and the new role of digital delivery technician at 52% and 15% difference between the ad make up role and that of creative consultant.

[73] I have to weigh Mr Hall's evidence of the 52% size difference between the old role of photolithographer/scanner and the new role of digital delivery technician with Tony Angel's evidence. Tony Angel said that he essentially undertook the same tasks he was performing before the disestablishment of his previous position in photolithography. Tony Angel is clearly very skilled in his role which has to be taken into account because I am not of the view that all of the applicants would have the same skill level he possesses or be as flexible. I found Tony Angel to be an honest and straightforward witness. Ms Gibbs submitted that his answers were aggressive and defensive. At times I thought his answers were flippant but I would not have said aggressive or defensive. Put simply Tony Angel thought the new role descriptions were simply window dressing and did not reflect the real situation in his experience. This is also clear from his written evidence where he says *I was actually sacked, then rehired: on lesser pay and conditions*. He is still employed with the Press within the Design Centre although now in a different role but still called a digital delivery technician. I consider it unlikely that Mr Angel would be untruthful giving his evidence as he had to at the investigation meeting in front of Mr O'Hara and Mr Ashton.

[74] Tony Angel says that before his disestablishment he spent 60 to 80 % of his time on scanning duties, 20 to 40% on making up plates for the press and 10 % on what he called *odds and sods*. Following his appointment as a digital delivery technician he made plates for 80 to 90% of the time, scanned for 10% and spent 5% of time on odds and sods. I accept that these percentages may not be exact but it is the nature of the work which was the same but differently apportioned that is important. Tony Angel indicated that everyone else more or less did the same things they did in their original roles.

[75] Mr Wortelboer said in his evidence that it was incorrect that everyone had carried on doing their original jobs. He also said that Mr Angel had failed to mention the part of his work that is now pagination and output to film that he was not required to do prior to restructure. Tony Angel said, and I accept his evidence on this point, that he did not learn to do pagination which is outputting finished pages to film until he was promoted to a position on the Editorial Control Desk after he was appointed to a digital delivery technician role. Mr Ashton said that he thought Tony Angel's role had changed significantly in that he made plates most of the time. It is not enough to say that Tony Angel's role is substantially different because he is doing more plate making. That is simply doing more of a type of work which he had previously been performing.

[76] Mr Hall said that there was change to the job content of the new roles and he set out the key changes in the new roles. These changes included the introduction of detailed skills/competencies with performance indicators and the introduction of multi tasking. He said that the digital delivery technician roles incorporated plate making and technical support of hardware, system support and multi tasking and that the creative consultant roles have a higher profile with customers and clients and revenue responsibilities. Team Leader roles also reflect additional responsibilities. He put the change at around 30 – 40%.

[77] Many of the applicants gave evidence that they did carry out work on occasion over and above that described in the collective agreement. Most applicants agreed that there were functions in the new positions that they would need familiarisation with. There is no evidence that prior to the disestablishment the Press carried out a skill analysis in the Design Centre to ascertain what skills were in the Design Centre before disestablishing all the positions. Some of the responses received during the consultation period for the review suggest that would have been, if not essential, at the very least helpful – see document 54a, b and c.

[78] Ms Gibbs submits that if any applicants carried out work to assist other staff outside their specialist area they did so voluntarily and were not paid for it. I balance that however with the fact that the collective agreement contemplated flexibility and interchangeability between departments. The applicants evidence was that their own roles had changed over the years with the introduction of technology and other changes. I consider that is significant because this is not a case where any of the applicants had just performed the same duties without any change or obtaining new skills.

[79] I find having carefully weighed the evidence that it is difficult for me in these circumstances to put with any degree of accuracy a percentage on the changes to the positions. I cannot simply accept Mr Hall's expert evidence that there is an overall difference in excess of 30% between the old and new roles. Tony Angel says that there is no difference at all and he was appointed to one of the new positions. In those circumstances he would have to have a better appreciation of the reality of the changes than Mr Hall. I am of the view that the true answer as to the degree of change is probably somewhere in between. There would have been some additional functions required of the applicants in the Design Centre but also some of the same work remained as part of the job content that the applicants were already doing.

[80] Most of the applicants would require training in some areas but that is contemplated within the collective agreement in clause 1.18 which provides amongst other matters:

*The parties to this Agreement are committed to the encouragement of vocational training to enable employees to become more skilled and productive to the mutual benefit of both Employer and employee.*

[81] There was, as in *McCulloch*, no basis for the employer to conclude that the applicants were not willing or were incapable of acquiring the new job skills and accountabilities. The Press has sought to rely on the assessment carried out when the applicants applied for the new roles after a decision had been made to disestablish their positions. That is not sufficient. I do not accept Ms Gibb's submission that the Press had a sound basis for saying that the applicants were either unwilling or incapable of acquiring the new job skills and competencies before they made the decision to disestablish the positions.

[82] The Press also has to take responsibility for what training was available or offered to the applicants during their employment. It was clear that Coreldraw and Quark files were received from time to time before the restructuring but there was no evidence training had been offered to employees with respect to this software prior to restructuring. It was however a requirement of the new role of digital delivery technician *to produce and output work using a variety of software packages, including Photoshop, Quark, Coreldraw, Pagemaker*. Quite a few of the applicants were deterred from applying for one of the positions because of that requirement.

[83] There was an intention to make the roles more accountable with performance measurement and competencies. Mr Wortelboer said to staff in March 2002 well before the review commenced that there would be performance management targets introduced to the Design Centre that would place emphasis on specific areas. Document 53 uses the words – *performance management of a defined skill set and competency will contribute to performance management and responsibility, initiative and co-operation for me personally are key components*. I conclude that Mr Wortelboer made these statements on the basis that he knew at that time that it was within the rights of the Press to introduce such measures without the need for disestablishment of positions. Tony Angel said that to the best of his knowledge there had not been any performance assessments carried out since he was appointed to his new role. That evidence only goes as far as Tony Angel's situation. I place more reliance on what Mr Wortelboer said to staff about performance measurement.

[84] I have along with consideration of the positions from the perspective of a reasonable person also considered briefly the personal characteristics of each of the applicants.

[85] Mr Anderson applied for all of the new roles. He was in the ad make up department. He had been employed at the Press for 13 years. He said in evidence that the only function he had not performed in the new roles was plate production and that he was capable of learning that. Indeed Mr McGinn does say in his evidence that he had heard plate making is a skill easily taught and learnt. Document 58 suggests that the reason Mr Anderson was not appointed to one of the new roles was because of lack of customer service and performance in the interview. Mr Anderson says that he had provided some references from satisfied previous clients with his application for the new role. I am not satisfied that the new roles constituted a sufficient difference to Mr Anderson's previous role to break the essential continuity of employment. I also find that the new functions could under the collective agreement have fallen within work that the Press could require Mr Anderson to perform with training and upskilling as required.

[86] Mr Baker had been employed at the Press for more than 17 years as a photolithographer plate maker. He said that he had done a lot of upskilling over the period of his employment and said that he felt his job at the Press changed 30% on a yearly basis and he would upskill accordingly. He said that he felt that the digital delivery technician was the same type of work as that which he did. He said that he did components of ad makeup and scanning and felt that everyone in scanning was multi skilled. I am not satisfied that the new roles constituted a sufficient difference to Mr Baker's previous role to break the essential continuity of employment. I also find that the new functions could under the collective agreement have fallen within work that the Press could require Mr Baker to perform with training and upskilling as required.

[87] Mr Brydon said that he felt the new roles and the old roles were very similar and that he would apply 70% of the skills on a regular basis. He said that whilst he had ad make up skills his primary skills were scanning and platemaking. Mr Brydon had computer file and graphic arts programme experience and said that for the more than 17 years he had been at the Press he was regularly selected for training and advancement in skills. He could not understand why he had not been successful in his application for the new role as digital delivery technician. Tony Angel said in his evidence that he felt Mr Brydon was as skilled as he was. I am not satisfied that the new roles constituted a sufficient difference to Mr Baker's previous role to break the essential continuity of employment. I also find that the new functions required could under the collective agreement have fallen within work that the Press could require Mr Brydon to perform with training and upskilling as required.

[88] Mr Calder had been employed at the Press for 11 years. He felt that the work he was doing in ad make up was still being done by the creative consultants. He did not do scanning or platemaking. Mr Calder said that every year something new would come in requiring him to adapt to a new system. I am not satisfied that the new roles constituted a sufficient difference to Mr Calder's previous role to break the essential continuity of employment. I also find that the new functions required could under the collective agreement have fallen within work that the Press could require Mr Calder to perform with training and upskilling as required.

[89] Mr Candy was employed at the Press for over 12 years in the photolitho department. He felt that he was able to perform most of the functions of the digital delivery technician role but said that he required some upskilling with Quark and Coreldraw software packages. He also said that he would require some training about communicating better about ideas and views. Mr Candy said that he was required before he left to train the new people in photolitho skills and that some of the new people did not have scanning skills. I am not satisfied that the new roles constituted a

sufficient difference to Mr Candy's previous role to break the essential continuity of employment. I also find that the new functions required could under the collective agreement have fallen within work that the Press could require Mr Candy to perform with training and upskilling as required.

[90] Mr Carter was employed at the Press for 15 years in the photolitho department. He said that he felt that the digital delivery technician role was *basically what he did*. He said he had to *leap into the breach if required*. Mr Carter said of that he was aware of the new culture required but felt that it was there already. Mr Carter was also involved in training those appointed to the new roles. I am not satisfied that the new roles constituted a sufficient difference to Mr Carter's previous role to break the essential continuity of employment. I also find that the new functions required could under the collective agreement have fallen within work that the Press could require Mr Carter to perform with training and upskilling as required.

[91] Mr Dix was employed at the Press for nearly 28 years. His role in the Design Centre was in the ad make up team. He felt that he had the skills for the digital delivery technician role but did not apply because *he felt that the company was taking away my job and giving it to someone else*. He said that he would have to be upskilled on plate making and said in the past he had demonstrated his ability and willingness to retrain and to acquire new skills. Mr Dix also said that he felt the positions descriptions were over prescribed and designed to mislead. I am not satisfied that the new roles constituted a sufficient difference to Mr Dix's previous role to break the essential continuity of employment. I also find that the new functions required could under the collective agreement have fallen within work that the Press could require Mr Dix to perform with training and upskilling as required.

[92] Mr Dunn was employed in the photolitho department of the Press for 24 years. He mainly did platemaking and scanning and applied for a position as digital delivery technician. He said that he could fulfil some of the functions for the delivery digital technician with training and was already doing the other functions. I am not satisfied that the new roles constituted a sufficient difference to Mr Dix's previous role to break the essential continuity of employment. I also find that the new functions required could under the collective agreement have fallen within work that the Press could require Mr Dix to perform with training and upskilling as required.

[93] Mr Griffith was employed by the Press for over 11 years. His role in the Design Centre as area display operator was to build advertisements. Mr Griffith said that when he started with the Press after 15 years with another Christchurch paper he was specifically trained on the Harris system. He said that he would have thought about applying for the digital delivery technician role but he did not feel experienced in photoshop, Quark and Coreldraw software programmes. He felt that some of the people who were successfully appointed to the new roles were not familiar with the packages either. Mr Griffith said that the Press *had failed to undertake an efficient retraining programme as software and other technical efficiencies developed*. Mr Griffith would have clearly required some training in the software packages but the new functions could have under the collective agreement fallen within work that the Press could require Mr Griffith to perform with training and upskilling as required which would have meant that there was insufficient difference to Mr Griffith's previous role to break the essential continuity of employment.

[94] Ms Hyde was employed at the Press for 16 years. She was initially a general hand but then retrained to become a compositor and then retrained for the position as advertising administration clerk in the Design Centre. Ms Hyde had some experience in software packages but did not do scanning or platemaking. She felt that she would have been capable of learning any new skills required and felt that the new role of digital delivery technician *encompassed what she did*. Ms Hyde would have required some upskilling but had been successfully retrained twice prior to the restructure of the Design Centre. I am satisfied that the new functions could have under the

collective agreement fallen within work that the Press could require Ms Hyde to perform with training and upskilling as required which would have meant that there was insufficient difference to Ms Hyde's previous role to break the essential continuity of employment.

[95] Mr Miller was employed at the Press for 12 years. He was in the ad make up department and spent about 90% of his time doing work for a major client. He thought the digital delivery technician position was essentially what he was doing but did not apply for a position because of the thought of being interviewed and doing an intelligence test. He thought he could do most of the functions in the new role with some upskilling in two of the software packages and technical support. I am not satisfied that the new roles constituted a sufficient difference to Mr Miller's previous role to break the essential continuity of employment. I also find that the new functions required could under the collective agreement have fallen within work that the Press could require Mr Miller to perform with training and upskilling as required.

[96] Mr Newman had worked at the Press for 37 years having performed a variety of jobs. In the Design Centre Mr Newman composed and created display advertising. Mr Newman felt that he did not have the skill for the new roles largely I conclude because of his lack of familiarity with Coreldraw and Quark software packages. He had previously done a photoshop and freehand course and had been reimbursed for the cost of the course by the Press. Mr Newman had not previously made plates or provided technical support of hardware. Mr Newman also said in his brief of evidence that he did not apply because of the way he was treated. I find that the new functions required could under the collective agreement have fallen within work that the Press could require Mr Newman to perform with training and upskilling as required. I am not satisfied that the new roles constituted a sufficient difference to Mr Newman's previous role to break the essential continuity of employment.

[97] Ms Nuth had worked at the Press for 16 years continuously and had also undertaken her four and a half year apprenticeship during late 1970 at the Press at the same time as Mr Dix. Ms Nuth said that parts of the new role were the same as she was doing but there was a broader base recognising the roles were multi skilled. Ms Nuth said that to some degree she did multi task and that work remained that she had done in her position. Ms Nuth felt that there should have been a discussion about training and an opportunity to train. I find that the new functions required could under the collective agreement have fallen within work that the Press could require Ms Nuth to perform with training and upskilling as required. I am not satisfied that the new roles constituted a sufficient difference to Ms Nuth's previous role to break the essential continuity of employment.

[98] Mr Patterson had been employed at the Press for 13 years in the photolitho department. He worked principally on plate making production and periodically doing scanning work for the Design Centre and the illustrations department. Mr Patterson applied for one of the digital delivery technician roles which he thought was very similar to the work he did. He withdrew his application when he discovered that people outside the Press were to be interviewed for the positions. To be clear the Press only interviewed external applicants after they had completed the internal selection process. Mr Patterson said that he did not see a great deal of difference in the new role but would have to be upskilled on system support and technical support. Mr Patterson felt that 30% overall change in the roles as stated by Mr Hall was *over the top*. Mr Patterson said that his position at the Press had changed over time. Mr Patterson was asked to help some of the new people before he left the Press. He was not happy to do so because he was frustrated with them doing the same work he had done. Mr Patterson was approached before he left but after he was made redundant by Mr Wortelboer and asked if he would be interested in doing further work *contract scanning* for the Press. Mr Patterson turned the offer down. Mr Wortelboer says that the offer was only a short term extension of a month for operational reasons. Mr Wortelboer confirmed that some of the applicants jobs such as scanning and plate making continued to exist after the restructure but the positions did

not. I find that the new functions required could under the collective agreement have fallen within work that the Press could require Mr Patterson to perform with training and upskilling as required. I am not satisfied that the new roles constituted a sufficient difference to Mr Patterson's previous role to break the essential continuity of employment.

[99] Mr Sale was employed at the Press for 11 years. He initially worked with the cyber graphic system when he started at the Press but then upgraded to the Harris system. New hardware and software was integrated in the Harris System with the ability to *call up* photos and illustrations, size them and use colour to complete them. When the Art Department and Cold Type amalgamated and became the Design Centre some employees got the chance to become familiar with the Apple Macintosh programmes. Mr Sale was not one of them. Mr Sale mainly did car advertisements in ad makeup although every three or four weeks he would make plates for the Sunday Star Times with someone usually from the photolithograph department overseeing his work. Mr Sale would also go out with a sales representative on occasions to see one of the car dealers and talk about requirements. Mr Sale applied for the digital delivery technician positions and felt that he only needed a general familiarisation period or software training. I find that the new functions required could under the collective agreement have fallen within work that the Press could require Mr Sale to perform with training and upskilling as required. I am not satisfied that the new roles constituted a sufficient difference to Mr Sale's previous role to break the essential continuity of employment.

[100] I have considered the characteristics of the old and new roles. I am not satisfied in considering the matter generally from the perspective of a reasonable person and considering the characteristics personal to each individual applicant, that there is a significant difference between the two roles so as to break the continuity of employment for each of the applicants.

[101] Some of the work required would have been different from that which the applicants were doing but the collective agreement in clause 1.14 provided that no restriction shall be placed on the Press's ability to allocate and arrange for performance of work in the manner which is most productive and best suits the requirements of the Press. There was no suggestion that there was any resistance to this flexibility from the applicants or in the correspondence from the union during the review/restructuring process.

[102] The Press could reorganise and apportion its remaining work in the Design Centre differently and require skill levels to be increased in certain areas. The Chief Judge in *McCulloch* at p 391 said *the mix of activities making up the job content may alter but if the work is still there and needs to be done, it cannot be said that the incumbents are redundant*. I am of the view that the job content has altered but the work that the applicants were performing is still there. Most of the applicants were already doing a degree of multi skilling.

[103] Mr Ashton said that he thought the Press had to disestablish all the positions because accountability and change in culture was too broad to do anything less. I am not satisfied that what the additional competencies and performance accountabilities translate to in reality is sufficient to break the continuity of employment and entitle the Press to disestablish all positions in the Design Centre.

[104] The new roles I find are not significantly different to the work being performed in the old roles by the applicants, rather I am of the view they are similar and any difference in skill level was capable of being met by upskilling and training.

[105] I am not satisfied that all 43 positions at the Design Centre of the Press were genuinely surplus to requirements within the definition of the redundancy situation defined in clause 23.1 and it follows that I find the Press was not entitled to disestablish all of the roles in the Design Centre.

[106] To the extent that there was a reduction required in the numbers of staff in the Design Centre as a result of the decision to outsource, the Press should have followed the process in clause 23.3 of the collective agreement for selection of redundant employees. Clause 23 recognises the Press needs to maintain an efficient workforce and an efficient operation and that must be taken into consideration in the selection of employees to be made redundant. The Press should have been in a position to identify what it required from the staff to perform the work that remained in the Design Centre. That would have involved an assessment of staff skills and competencies. A skills analysis undertaken of the employees in the Design Centre would have identified any gaps between the requirements and skills within the Design Centre.

[107] There should have been identification of the work areas affected. It may have been the whole Design Centre affected or a certain number from each area therein. Volunteers should then have been called for and they could be accepted at the Press's discretion. There should then have been a fair process undertaken to select who stayed and who went in terms of the collective agreement including consideration of clause 23.3.

[108] In conclusion the respondent was not entitled to disestablish all of the positions in the Design Centre. Not all 43 positions were genuinely superfluous. The Press did not to the extent that it wanted to reduce staff select the number of staff to be made redundant in accordance with clause 23.3. The Press instead proposed and then decided to disestablish all the positions in the Design Centre and create 15 new positions. The new positions had a lower rate of pay and individual terms and conditions of employment and were not I have found significantly different to the roles previously undertaken by the applicants. All 43 employees were then invited to apply for one of the new positions if they wished which required the applicants to undergo an intelligence test and interview process.

[109] If all the positions in the Design Centre had not been disestablished and the procedure under clause 23.3 complied with then the applicants may not have been selected for redundancy and they may have been amongst the 15 employees who remained.

[110] On that basis I find that each of the applicants has a personal grievance that they were unjustifiably dismissed as a result of the restructuring and the resulting redundancies. I shall now consider some of the matters with respect to the procedural fairness.

***What were the obligations of the Press with respect to consultation and did the Press comply with these obligations?***

[111] The obligations of the Press with respect to consultation are found in the collective agreement and in operating under the provisions of the collective agreement the duties of good faith in the Employment Relations Act 2000 section 4 .

[112] Clause 24 of the collective agreement provides the following with respect to consultation with the union:

*Prior to the announcement of a restructuring that may result in the sale, or contracting out of the business or part thereof, which may affect members of the Union covered by this agreement, the Union shall be consulted.*

[113] Consultation was therefore required before there was an announcement of a restructuring that may result amongst other matters in the contracting out of the business.

[114] The applicants in their final submissions say that between November 2001 and 13 May 2002 a plan to restructure was drafted, financial savings were specified and the number of staff to be reduced discussed, a preferred contractor was investigated and the management gave final approval for the plan on the afternoon of 13 May 2002.

[115] The applicants also say that there was no consultation with it before the draft report into the review of the Design Centre was released to staff and included a proposal to disestablish all jobs within the Design Centre and that thereafter there was no meaningful consultation.

***Was there predetermination?***

[116] The respondent's evidence is that the proposal for the review was drafted and not signed off until just prior to the consultation on 13 May 2002 and that there was no predetermination.

[117] There is insufficient evidence to suggest to me prior to 13 March 2002 that the concept of outsourcing had shifted from discussion to a planning stage. I am supported in that view by document 53 dated 15 March 2002 which was provided to staff as a follow up to the meetings at which outsourcing was put up as an option. Document 53 refers to *replacement of the Harris system is high on the agenda* and the introduction of *performance management of a defined skill set and competency will be introduced across the company*. I also note that under department performance there is a note that *whilst further assessment has supported the downward trend in the volume of ads produced, the trend specifically for February 2002 has not been as dramatic as first thought*.

[118] Fred Kelly who was the night supervisor of the pre-production department of the Press also gave evidence and said that Mr Wortelboer talked to him about redundancies in the Design Centre in March 2002. His evidence was that *Ross said things were desperate/tried to fluff the answer about redundancies- Mr Kelly told him to give him an answer and Mr Wortelboer said that there would be redundancies*. He said that he was told by Mr Wortelboer to keep this from staff. Mr Kelly was never asked for his view of the staff he supervised during the review and restructure. He felt all the applicants had the skills to perform the new job.

[119] I do not disregard Mr Kelly's evidence in its entirety as suggested by Ms Gibbs in her submissions but do treat it with some caution. Mr Kelly did not think highly of Mr Wortelboer. I am also mindful of the likely context that the comment was made in. Mr Kelly is a forceful and plain speaking man. He was demanding an answer from Mr Wortelboer. It was at a time in March 2002 when the volumes of advertising work had fallen off. Mr Kelly said that work had fallen off and staff had come to him to talk about this. Document 53 shows in terms of trends for volumes of advertising through the Design Centre, March 2000 (3608), March 2001 (3259) and a projection for 20 March 2002 (1343). I consider that it was more probable than not that against this background a comment about there being redundancies in the department was made by Mr Wortelboer.

[120] I am not satisfied though that Mr Kelly's evidence is sufficient for me to conclude that there was a plan to restructure which the union should have been consulted about and/or that there should have been an earlier announcement of a restructuring. I have also considered whether such behaviour was deceptive or misleading conduct.

[121] An employer should be truthful with its staff and advise them when their positions may be in jeopardy. I am not satisfied though that given the nature of Mr Wortelboer's conversation with Mr Kelly it is capable of amounting to deceptive or misleading conduct.

[122] Ms Angus Burney said that the Press had ample opportunity to disclose the restructuring plans in March 2002 to the union when it met for bargaining and when there was an issue about Easter time rostering. She makes this submission on the basis that such failure to discuss this with Mr Angel was misleading and deceptive conduct on the part of the Press. There were issues with the workflows in the Design Centre. Mr Wortelboer did advise Mr Angel about the work flow issue in the context of rostering over Easter. Mr Wortelboer did advise Mr Angel that there had been recent staff meetings in his letter of 28 March 2002. The work flow issue was overtaken, perhaps understandably, by the issues with rostering but I do not find an obligation to consult with the union at that point about a restructuring in term of the collective agreement or good faith obligations.

[123] Ms Angus Burney also referred to staff meetings on 1 May 2002 to which the union was not invited. This was explained as an error by Ms Gibbs in her submission in reply and she says the reference in the statement in reply should be 13 May 2002. The source of the confusion I believe is found in document 13 of the bundle which is a letter from Mr Wortelboer to Mr Angel. It also refers to meeting on 1 May 2002 with staff. Although I heard from all the applicants they did not refer to a meeting on 1 May 2002. I therefore accept Ms Gibbs submission that the reference to the meetings was more likely than not a mistake.

[124] I do not find that prior to 13 May 2002 the Press breached its obligations of good faith or its obligations to consult under clause 24 of the collective agreement. The evidence does not satisfy me that prior to 13 May there was predetermination of the decision to outsource or disestablish.

#### ***Consultation from 13 May 2002***

[125] Meetings were held with staff in the Design Centre for the night and day shifts on 13 May 2002. Mr Angel was present at the meetings which Mr O'Hara led on behalf of the review team and explained to staff that there was to be a review carried out of the Design Centre. The terms of reference set out the process to be followed.

#### **4. Process**

<b>What</b>	<b>Who</b>	<b>When</b>
Staff Meetings and Distribution of the terms of reference.	Peter O'Hara, Ross Wortelboer, Brian Ashton, Mark McGinn	May 13
Meet with Design Centre staff (day and night).  Meet with internal users of the Design Centre.	Brian Ashton, Mark McGinn, Ross Wortelboer	May 14 – May 22 Tues → Wed
Meet with a sample of External users of the services	Brian Ashton, Ross Wortelboer, Mark McGinn	May 14 – May 22 Tues → Wed
Consider all relevant information, complete and release draft report.	Brian Ashton, Ross Wortelboer, Mark McGinn	By May 27 Monday
Seek feedback from those involved.	Brian Ashton, Ross	By June 3

	Wortelboer, McGinn	Mark	Monday
Consideration of feedback and any changes made to the draft report.	Brian Ashton, Wortelboer, McGinn	Ross Mark	By June 5 Wed
Final report released and implications discussed.	Brian Ashton, Wortelboer, McGinn	Ross Mark	By June 7 Friday

[126] Attached to the back of the terms of reference was a form that enabled submission to be made by employees about the matters that were the subject of review. Although the time frames were quite tight for this part of the process I am not satisfied that the procedure for this part of the process was unfair.

[127] A draft report was then provided to each employee on 27 May and meetings were held on 27 and 29 May 2002 to discuss the draft reports. On Monday 27 May Mr Wortelboer tried on two occasions by telephone to contact Mr Angel to advise him that he could attend the meetings if he wanted. Mr Angel was in fact on sick leave and did not attend the meetings on 27 or 29 May.

[128] The draft report contained far reaching proposals to disestablish all positions, establish an outsourced ad makeup partner and create 15 new positions. It provided that voluntary redundancy would not be proposed if the draft report was implemented. There was also a time line for distribution of the final report on 7 June 2002 together with dates for applications to close off for the new positions and a date for the transition to the outsourced partner.

[129] In those circumstances and particularly given the proposal to disestablish all positions I am of the view that the attempt to contact Mr Angel was inadequate. It meant that the union members were required to attend meetings without the benefit of a representative. Not only that but the Press did not forward to Mr Angel at any time a copy of the draft report and he only received a copy from a delegate some days later. That was unfair. Consideration should have been given to delaying the meeting with staff by a day or so to enable discussion with the union about the draft report.

[130] Mr Angel wrote to the Press expressing his concerns on 31 May 2002 and claimed that the Press had failed to adequately consult. The Press agreed to have a further meeting with the union and a meeting took place on 5 June 2002. There was also an agreement to put on hold the release of the final report until 12 June 2002. There was discussion about outsourcing, disestablishment and selection at that meeting. Mr Angel put forward at that meeting *voluntary* [redundancy] *and look at skill mix left over and make decisions*.

[131] On 7 June 2002 Mr Angel wrote making some submissions to Mr Wortelboer questioning the draft review and stating that the employees *are prepared to discuss ways to meet the needs of the company in producing high quality advertising for customers* and he also referred to the variation clause in the collective agreement and the selection process under clause 23.2 of the collective agreement. He suggested a moratorium on disestablishing positions until some of the matters in the letter had been addressed. Mr Wortelboer responded to Mr Angel's letter of 7 June on 10 June and made it clear that he did not think a moratorium should be initiated. He also made it clear that it was not accepted that the jobs currently being performed would continue in the proposed structure. He said about the needs of the company:

*...as previously stated there are substantial outstanding issues, including, a significant decline around hours of work and work function, excessive operating costs, impending high capital costs, support and training costs, quality control, ad design standards, high credit levels, customer relationship management and core business activities.*

[132] A meeting then took place on 11 June 2002 (document 14). Mr Angel put forward at that meeting more flexible hours in terms of Mr Wortelboer's concern about penal rates and Mr Wortelboer is recorded in Mr Angel's notes as responding *flexibility? Thought that it may work at first but comes back to reinventing on a smaller scale and where we end up in 12 – 18 months.* Mr Wortelboer provided some information about costs generally to Mr Angel.

[133] Mr Angel then wrote again to Mr Wortelboer on 12 June 2002 acknowledging that there were surplus staff to requirements which would mean redundancies. Mr Angel said that the union was prepared to actively find solutions around hours of work and work function to try and meet the business needs of the Press whilst retaining the work in house and suggested a working party. I am of the view that there was inadequate disclosure to the union about issues with respect to the high levels of remuneration for what, certainly Mr McGinn at least, considered were low levels of required skill for those who worked at the Design Centre. This led to Mr McGinn's conclusion that the wages paid had got out of kilter with the labour market and contributed to the decision by the Press to offer salaried positions on individual employment contracts. Mr Angel's notes and letters written at this time confirm that he did not appreciate this as an issue. If Mr Angel was unaware about this then he could not usefully put forward any solutions.

[134] Mr Wortelboer responded by letter dated 13 June 2002 and said that the contents of Mr Angel's letter reflected topics discussed previously at the meeting on 11 June and given that it would be *inappropriate for the Company to further delay the distribution of the Design Centre Final Report.* He did not agree to a working party.

[135] A letter was also sent by Tony Wilton General Counsel for the union on 12 June 2002 to Mr Wortelboer advising that it was not accepted that the Press was entitled to disestablish positions *where there remains work to be done and the staff concerned are able or could reasonably become able to perform that work.* Mr Wilton drew attention in that letter to the Employment Court decision in *McCulloch*.

[136] I am not satisfied that the Press during the consultation between 31 May and 13 June retained an open mind about whether there could be flexibility around the internal operating costs such as hours of work and work functions and they did not disclose adequately the nature of their concerns so as to enable Mr Angel to put forward solutions if they existed.

[137] Although consultation could not go on forever Mr Angel should at least have been given an opportunity to present some information about the solutions he put forward in his letter of 12 June 2002. He was not given that opportunity and I do not find that fair or reasonable. I also find that the evidence indicates a fixed approach to the issue of disestablishment of all the positions within the Design Centre which is not in accordance with the consultation requirements in a restructuring or in accordance with good faith behaviour. This leads me to conclude that there was a fixed and closed approach to disestablish all the positions in the Design Centre at least from the time the draft report was presented to staff on 27 May 2002.

[138] The final report was then distributed to staff on 13 June 2002 without any changes made to the draft report. The process for dealing with the applications for positions of digital delivery technician then took place. Having reached findings that all positions should not have been

disestablished I do not need to consider the selection process undertaken by the Press. The process under clause 23.3 given my findings was not complied with and had it been then there may have been a different result.

[139] The Press did offer support mechanisms by way of assistance with preparation of curriculum vitae, assistance with interview techniques, an offer of the employee assistance programme and access to the in house occupational nurse.

[140] I do not find in conclusion, for the reasons I have set out above, that consultation from 13 May 2002 was approached with an open mind. The evidence supported a fixed and closed approach on the part of the Press to disestablish all positions in the Design Centre for reasons that I find were not fully disclosed to the union. The Press in light of my earlier findings did not comply with its obligations under the collective agreement with respect to selection of employees for redundancies.

### ***Conclusion***

[141] I find that the dismissal of each of the 15 applicants from their employment with the respondent was unjustified in that the applicants' redundancies were not genuine and the procedure adopted was not fair and reasonable. Consultation was not approached with an open mind about whether there could be solutions to the high cost of working hours and there was inadequate disclosure by the Press of concerns about wage costs being out of kilter with the labour market. Further the evidence supported a fixed view with respect to disestablishment of all positions in the Design Centre from at least 27 May 2002. The process adopted was not in accordance with clause 23 of the collective agreement. The applicants have personal grievances and are entitled to remedies.

### ***Remedies***

#### ***Lost Remuneration***

[142] I have assessed the loss of remuneration for each of the applicants on the basis of the loss of a chance that they may not have been selected for compulsory redundancy and may have remained in employment with the Press. In the absence of any evidence to assist me about the likelihood of the effect of employees taking voluntary redundancy I have assessed that lost chance at 28.66%. There were 43 positions in the Design Centre and 15 positions remained.

[143] Section 128 of the Employment Relations Act 2000 provides that where an employee has lost remuneration as a result of a personal grievance the Authority must, whether or not it provides for any other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary remuneration.

[144] The amounts claimed by the applicants for lost remuneration are substantial and range from \$111,407.33 to \$46,761.83. None of the applicants when they eventually obtained employment received wages comparable to that which they were paid at the Press.

[145] Ms Gibbs submits in response to the claim that if I find that the redundancies are not genuine then the quantum of awards of lost remuneration cannot be upheld. She submits this on the basis that the applicants failed to mitigate their loss, delayed for no good reason prosecuting their claims and that they should not be awarded lost wages beyond the extent of their redundancy entitlements.

[146] With respect to the first matter, the applicants did give some oral evidence of attempts to mitigate their loss and Mr Candy and Ms Hyde produced applications made for positions. I am not satisfied that on this basis alone the applicants failure to mitigate would be a disqualifying matter.

[147] With respect to the second matter, the applicants did not lodge their statement of problem with the Authority until May 2004. The employment relationship problem proceeded to mediation in November 2004 and was investigated in April and May 2005 by the Authority. The consequence of that delay is that the Press is now liable for a very substantial claim of lost remuneration which it would not have faced if the claim had been dealt with expeditiously. There is merit in Ms Gibb's submission that the Press should not bear the consequences of that delay.

[148] I am of the view that there should be an award for lost remuneration to each of the applicants. They lost a chance to retain their employment which I have assessed at 28.66%. If the matter had been lodged without delay an award of five months lost remuneration to each of the applicants would have been reasonable and fair. Assessed on the basis of a lost chance therefore the applicants are each entitled to 28.66% of their lost remuneration for a period of five months.

[149] I leave it to counsel on this occasion to calculate what sum is owing to each applicant on the basis set out above for lost remuneration. I reserve leave for either party to come back to the Authority if there are difficulties with this.

### ***Compensation***

[150] Each of the applicants claimed \$7000.00 compensation for distress and humiliation under s123(c)(i) of the Employment Relations Act 2000. Such a claim is well within the range of awards in similar cases and sits comfortably with the award made by the Court of Appeal in *Coutts Car Limited v Baguley* [2001] ERNZ 660 under s 123(c)(i) of \$5000.00 where there was a possibility the Mr Baguley would have been ranked last whatever opportunities he had been given. I have found that the applicants lost a chance that they may not have been selected for redundancy and may have remained in employment.

[151] An award of compensation must be made on an individual basis assessing the degree of distress each applicant has suffered and taking their circumstances into account. There was significant evidence from each of the applicants about the distress and humiliation they suffered as a result of the process and the dismissals to justify such an award of \$7000.00.

[152] Graeme Anderson felt the restructuring process was wrong and that the Press rejected any alternative solution to disestablishment. Mr Anderson said that the frustration of the *whole thing* made him ill to the point of seeking medical help. Mr Anderson also found the interview process upsetting. He struggled financially with the loss of his position and supporting his family. I am satisfied Mr Anderson was hurt and humiliated by both the unfair process and the unjustified dismissal. I am of the view that \$7000.00 for Mr Anderson is a fair and reasonable award.

[153] I order The Christchurch Press, a division of Fairfax New Zealand Limited to pay to Graeme Anderson the sum of \$7000.00 without deduction under section 123(c)(i) of the Employment Relations Act 2000.

[154] Rob Baker was, I am satisfied, hurt and humiliated by the unfair process and the unjustified dismissal. He was hurt that the positions were disestablished as he felt the new positions were the same and hurt that the process had not been followed under the collective agreement. I am of the view that \$7000.00 for Mr Baker is a fair and reasonable award.

[155] I order The Christchurch Press, a division of Fairfax New Zealand Limited to pay to Rob Baker the sum of \$7000.00 without deduction under section 123(c)(i) of the Employment Relations Act 2000.

[156] Mark Brydon could not understand why he had been dismissed and still felt upset after the passage of several years by the *company's behaviour*. I am satisfied he suffered hurt and humiliation as a result of the unfair process adopted and the unjustified dismissal. I am of the view that \$7000.00 for Mr Brydon is a fair and reasonable award.

[157] I order The Christchurch Press, a division of Fairfax New Zealand Limited to pay to Mark Brydon the sum of \$7000.00 without deduction under section 123(c)(i) of the Employment Relations Act 2000.

[158] William Calder said that he found the period of his life during the restructuring quite humiliating because he felt that the Press did not want him although he had given his best and that the job he did is still being done but under a different name. Mr Calder I am satisfied was hurt and humiliated as a result of the unfair process adopted and the unjustified dismissal. I am of the view that \$7000.00 for Mr Calder is a fair and reasonable award.

[159] I order The Christchurch Press, a division of Fairfax New Zealand Limited to pay to William Calder the sum of \$7000.00 without deduction under section 123(c)(i) of the Employment Relations Act 2000.

[160] Darryn Candy was, I am satisfied, hurt and humiliated by the unfair process and the unjustified dismissal. He was upset by the disestablishment of the positions. Mr Candy said that he was humiliated by meeting the successful employees who he felt had taken his job and angry and humiliated at being asked to train the new people to do what he had been doing. Mr Candy also said that he suffered financial hardship as a result of the dismissal. I am of the view that \$7000.00 for Mr Candy is a fair and reasonable award.

[161] I order The Christchurch Press, a division of Fairfax New Zealand Limited to pay to Darryn Candy the sum of \$7000.00 without deduction under section 123(c)(i) of the Employment Relations Act 2000.

[162] Ronald Carter felt loyal to the Press and thought he would work there for many years. He thought the process should have been that under the collective agreement and that. The work in the new positions was what he had already been doing. Ronald Carter was, I am satisfied, hurt and humiliated by the unfair process and the unjustified dismissal. I am of the view that \$7000.00 for Mr Carter is a fair and reasonable award.

[163] I order The Christchurch Press, a division of Fairfax New Zealand Limited to pay to Ronald Carter the sum of \$7000.00 without deduction under section 123(c)(i) of the Employment Relations Act 2000.

[164] Gary Dix felt that there was never room for the *wholesale disestablishment of the Design Centre* and that he was humiliated that his job was being given to someone else. Mr Dix had worked at the Press for 28 years and felt that he had demonstrated his ability and willingness to retrain and acquire new skills. He said that he was committed to a career with the Press. I am satisfied Mr Dix was hurt and humiliated by the unfair process and the unjustified dismissal. I am of the view that \$7000.00 for Mr Dix is a fair and reasonable award.

[165] I order The Christchurch Press, a division of Fairfax New Zealand Limited to pay to Gary Dix the sum of \$7000.00 without deduction under section 123(c)(i) of the Employment Relations Act 2000.

[166] Ken Dunn found the interview process for one of the new positions traumatic. He felt that there had been predetermination of the process. He was under strain after his dismissal with his income halved and had to use superannuation to pay for some bills. I am satisfied that Mr Dunn was hurt and humiliated by both the process and the dismissal. I am of the view that \$7000.00 for Mr Dunn is a fair and reasonable award.

[167] I order The Christchurch Press, a division of Fairfax New Zealand Limited to pay to Ken Dunn the sum of \$7000.00 without deduction under section 123(c)(i) of the Employment Relations Act 2000.

[168] Colin Griffith said that he was very loyal to the Press during his employment. He felt that when it suited the Press they would retrain people but not during this process. He said that he had been under considerable strain financially as a result of the dismissal. I am satisfied that Mr Griffith was hurt and humiliated by both the process and the dismissal. I am of the view that \$7000.00 for Mr Griffith is a fair and reasonable award.

[169] I order The Christchurch Press, a division of Fairfax New Zealand Limited to pay to Colin Griffith the sum of \$7000.00 without deduction under section 123(c)(i) of the Employment Relations Act 2000.

[170] Teresa Hyde said that she felt that there were different ways of doing the process. She gave evidence about her distress following advice that she had been unsuccessful for one of the positions established and she vomited. Ms Hyde said that she was unwell after her dismissal with a lung infection and she gave evidence about how her personal situation made the process and dismissal more difficult. I will not set out that evidence as it is of a confidential nature. I am of the view that \$7000.00 for Ms Hyde is a fair and reasonable award.

[171] I order The Christchurch Press, a division of Fairfax New Zealand Limited to pay to Teresa Hyde the sum of \$7000.00 without deduction under section 123(c)(i) of the Employment Relations Act 2000.

[172] David Miller felt that having to go through an interview and do an intelligence test was an insult. He felt that the process was a lot of window dressing and that he did not want to go through a humiliating process of applying for one of the positions. Mr Miller said that on his last day of work he went looking for Mr Wortelboer because he had not received his final pay slip and Mr Wortelboer was not there. Mr Miller felt hurt some months later when he tried to track the slip down that it was suggested through the pay office Mr Wortelboer had said Mr Miller must have left early. The pay slip turned out to be on Mr Wortelboer's desk. Mr Miller found it hard when he was dismissed because his wife had also had to give up employment. He thought he would continue employment until he retired as he was over 55 years of age. I am of the view that \$7000.00 for Mr Miller is a fair and reasonable award for the hurt and humiliation he suffered.

[173] I order The Christchurch Press, a division of Fairfax New Zealand Limited to pay to David Miller the sum of \$7000.00 without deduction under section 123(c)(i) of the Employment Relations Act 2000.

[174] David Newman had worked for the Press for 37 years. He felt *it was a bad ending with a lifetime with the company down the tubes*. Mr Newman said that there should have been a longer

time during the process to solve any problems. He did say in his evidence that he felt the Press *probably did the process correctly*. He acknowledged that was not a common view. He also said that when he first left work he felt gutted and hollow. I accept that the process was difficult for Mr Newman. However his view of the process would have meant that he did not have quite the same degree of hurt and humiliation that the other applicants did during the process when they felt the company had not followed the process in the collective agreement. I am of the view that in those circumstances \$6000.00 would be a fair and reasonable award for Mr Newman.

[175] I order The Christchurch Press, a division of Fairfax New Zealand Limited to pay to David Newman the sum of \$6000.00 without deduction under section 123(c)(i) of the Employment Relations Act 2000.

[176] Gina Nuth said that she was made to feel as a result of the process that she did not measure up and that as a result of the process and dismissal she suffered humiliation and a drop in self esteem. She also felt that management did not consult fully with the union and that at some meeting there was no union to represent her. She described being *wiped out* by the action to disestablish positions and felt that it was wrong not to call for voluntary redundancies. She felt the collective agreement had been breached and not in accordance with previous change that had taken place at the Press. I am of the view that in the circumstances a fair and reasonable award to Ms Nuth would be \$7000.00.

[177] I order The Christchurch Press, a division of Fairfax New Zealand Limited to pay to Gina Nuth the sum of \$7000.00 without deduction under section 123(c)(i) of the Employment Relations Act 2000.

[178] Stuart Patterson felt that the process around disestablishment was a *sham*. He said that it was humiliating applying for the same work with different term including a lower salary. He said that the final month at the Press was the worst he had ever experienced there and he said his thoughts were *constantly on the disestablishment and how insulting it was to be replaced with people with obviously less skills and who I felt had no commitment to 'the paper'*. I am of the view that in the circumstances a fair and reasonable award to Mr Patterson would be \$7000.00.

[179] I order The Christchurch Press, a division of Fairfax New Zealand Limited to pay to Stuart Patterson the sum of \$7000.00 without deduction under section 123(c)(i) of the Employment Relations Act 2000.

[180] Ian Sale felt throughout the process that the collective agreement had been breached and the Press just changed the conditions and gave the established positions a new name. He thought the process was too fast. He said that he felt under strain when he was dismissed. I am of the view that in the circumstances a fair and reasonable award to Mr Sale would be \$7000.00.

[181] I order The Christchurch Press, a division of Fairfax New Zealand Limited to pay to Ian Sale the sum of \$7000.00 without deduction under section 123(c)(i) of the Employment Relations Act 2000.

***Costs***

[182] I reserve the issue of costs. In the first instance I would encourage the parties to attempt to reach agreement. Issues with respect to mediation may be relevant. If agreement cannot be reached then the applicants have 28 days after the date of this determination to make submissions to the Authority about costs and the respondent has a further 14 days to respond.

Helen Doyle  
Member of Employment Relations Authority

**APPENDIX A****List of Applicants**

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ANDERSON, Graeme

BAKER, Rob

BRYDON, Mark

CALDER, William

CANDY, Darryn

CARTER, Ronald

DIX, Gary

DUNN, Ken

GRIFFITH, Colin

HYDE, Teresa

MILLER, David

NEWMAN, David William

NUTH, Gina

PATTERSON, Stuart

SALE, Ian