Determination Number: AA 6/07
File Number: 5038196

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Jim Hammond & Murray Youngman
AND	Bakel's Edible Oils (NZ) Ltd
REPRESENTATIVES	Tim Oldfield for applicant Peter Gaskin for respondent
MEMBER OF AUTHORITY	Janet Scott
INVESTIGATION MEETING	27 September 2006
DATE OF DETERMINATION	15 January 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicants submit they were unjustifiably disadvantaged in their employment and unjustifiably dismissed. To remedy their alleged grievances they seek lost remuneration and compensation pursuant to s. 123 (1)(c)(i).

[2] The applicants also seek a declaration that pursuant to s.161 (1)(l) of the Act their dismissals also amounted to an unlawful lockout.

[3] The respondent denies the claims and submits the applicants' employment was terminated as a consequence of genuine redundancy.

Background

[4] The company operations are divided into four distinct work areas being refinery, finishing hall, despatch and the tank farm. Until 2003 three of these areas had employees working 60 hours per week based on five 12-hour shifts over varying spans of hours[1].

[5] Prior to the termination of their employment Mr Youngman and Mr Hammond worked for the company for 18 and 15 months respectively. They were employed as tank farm operators and worked 12-hour shifts (6am-6pm, Monday to Friday). Their duties included the loading and unloading of product from trucks, pumping product in and around the farm, testing and tasks associated with operation of the effluent treatment system.

[1] Some of the company operations were and continue to operate on a 24/7 basis.

[6] It was the company's evidence that in early 2003 it became concerned with the suitability of the hours of work. This followed a review of a workplace accident, which had highlighted long hours of work as a possible factor, which contributed to the accident. As a result the company undertook a review of working hours. It became apparent during the review that the long hours of work were impacting on the company's ability to recruit and retain staff and it was causing high levels of absenteeism especially on weekends. It became apparent that the continuation of the current arrangements was not sustainable and the company decided to restructure working hours in a manner that would allow the company to recruit and retain employees and one that would provide for a better work/life balance. Accordingly, a proposal was developed whereby the three distinct work areas, which had employees working 60-hour weeks, would have their hours restructured to provide those employees with a better work/life balance and to reduce fatigue and the risk of accidents.

[7] In accordance with its proposal to reduce hours across all work groups the company facilitated a meeting with the five tank farm employees on 13 August 2003 to discuss proposed changes to working hours.

[8] By the end of 2003 the changes for the despatch and finishing hall employees had been implemented successfully. No redundancies eventuated as a result of the changes to these operations.

[9] The company then turned its attention to the changes required in the tank farm operation. Health and safety issues remained a driving factor in the company's proposal to implement changes to the hours worked by tank farm employees. In addition, however, the company had identified a client need to load and unload tankers outside the current span of hours operated by the tank farm, (6am to 6pm) and it was envisaged there would need to be an extension of hours of operation for this area of the company's business. The anticipated changes to the terms and conditions of tank farm employees were substantial and it was envisaged that employees would need to agree to the new arrangements and sign variations to their employment agreements.

[10] On 22 March 2004, the company presented copies of a proposed new shift schedule to each of the tank farm employees and requested that they provide comment and feedback by 2 April.

[11] On 8 April, the company wrote to each employee individually and requested that they attend a meeting to discuss the proposed changes to the tank farm operating hours and the proposed changes to individual working hours. Each employee was provided with a document, which explained the proposed changes. That document included a timeline by which the company intended to move through the consultation process with a view to implementing the new rosters on 31 May 2004. That time line was:

- 21 April-meeting with Tank Farm staff to present proposals.
- 30 May-staff to submit questions re changes to Brent Warner.
- 6 May-meeting between Brent Warner and tank farm staff to answer questions
- 10 May-staff commence signing employment agreement variations
- 28 May-all employment variations signed.
- 31 May-new rosters start.

[12] On 15 April, Mr Warner (Operations Manager for Bakel's) met with Christine Grant, the Service and Food Workers' Union organiser for Bakel's' site and advised her of the proposed changes to tank farm operations and the reasons behind the proposed changes. The Union had no members among the tank farm employees; however, Mr Warner felt it was important to keep the Union in the loop as to the proposed changes.

[13] On 21 April, the formal meeting with tank farm operators was held to discuss the proposal in detail. At this meeting, all the relevant information was tabled. Each staff member was given an information pack. That package included a personal statement as to the impact on the individual employee of the proposed reduction in hours worked and the company's proposal to compensate for the consequent loss in earnings by a 10% increase on average hourly rates.

[14] A PowerPoint presentation was made explaining the proposed changes. Feedback was requested from the employees by 30 April so this could be taken into account prior to the company confirming whether to proceed with the proposal as presented or whether to revise it.

[15] The impact of the proposals to restructure the hours of work for tank farm operators had the effect in respect of Mr Youngman and Mr Hammond of requiring them to work alternative shifts over a wider span of hours than they were currently working. The span of hours they worked under their current arrangements was 6am to 6pm five days a week Monday to Friday. The new proposal required these workers to work alternate shifts (week about) being 5am to 3.30pm and 10.30am to 9pm over a span of six days Monday to Saturday. Their total weekly hours, excluding breaks, would be reduced from 60 hours to 47.5. Along with other tank farm operators they were to be compensated for the reduced hours by a proposed 10% increase on their average hourly rates.

[16] The applicants' evidence was that they appreciated the need for the changes proposed by the company and looked forward to those changes. However, it would be fair to say they were disturbed to find that it was proposed to increase the span of hours/days over which they worked. Both applicants were concerned that the proposals, as they affected them individually, impacted negatively on their social and leisure time and in particular the time they had to spend with their families.

[17] The applicants submitted eight questions in relation to the proposed changes. Particularly relevant to the matter before me was a submission by Mr Hammond and Mr Youngman questioned the 20% salary increase given to finishing hall and despatch employees to compensate those employees for the loss in pay due to fewer hours which gave them ***increased*** leisure and family time against a proposal to increase tank farm operators' rates by 10% for changes that would ***reduce*** the leisure and family time available to them. The impact of these hours on the night classes taken by Mr Hammond (and his ability to continue his class) was noted, as was the possibility of an extension in the late shift to 2300 in the future, which, it was submitted, would have an even greater impact on them. They also questioned the fact that they were being offered the same salary increase as other tank farm workers who were not being asked to work these alternating shifts from Monday to Saturday.

[18] The formal response to this question raised by the applicants stated:

> *"As per other restructures and shift negotiations carried out by management the 10% pay increase offered has been based on the number of reduced working hours".*

[19] On 6 May, Mr Warner, for the company, met with the tank farm employees to table all the answers to the questions raised and at this time he informed those employees that the company would be proceeding with its changes to the tank farm hours of work effective from 31 May 2004.

[20] In early May, Mr Hammond and Mr Youngman joined the Service and Food Workers' Union and on 11 May Ms Grant met with Mr Warner to discuss issues relating to the proposed changes to tank farm operations. Ms Grant tabled three concerns on behalf of Mr Hammond and Mr Youngman.

[21] The first issue pertained to the level of the proposed increase applicable to tank farm employees who would work the afternoon shift (B shift - 10.30am to 9pm). There was a request that the increase in remuneration over and above current rates be set at 15% for this shift. The second question related to the terms under which they would attend to the loading and unloading of ships. The last question raised by Ms Grant related to Mr Hammond's concerns at being required to work on occasion in D-Vat or in the finishing hall.

[22] On 12 May, Mr Warner wrote to the applicants in response to the issues raised on their behalf by Christine Grant. In summary, the company responded as follows:

- The company offer of a 10% increase on the average hourly rate was more than fair and reasonable and was the best the company could offer.

- The company confirmed that it would require its employees to work shifts and days which varied from their normal shift pattern to meet shipping contingencies. It had always and would continue to ensure its employees were not out of pocket as a result of undertaking such work and it was confirmed they would be paid their normal salary and would be paid for any additional hours. The company would also ensure that staff have adequate breaks between shifts.

- The company confirmed it would require work to be done as necessary in D-Vat and the finishing hall and that it would not consider prescriptive conditions that reduced operational flexibility.

[23] It was the applicants' evidence that they did not receive these letters until 21 May. They tried to contact Ms Grant but were unsuccessful[2].

[24] As Mr Hammond was due to take leave they decided they needed to respond to the letter received and they wrote to Mr Warner the same day.

> "Re: Your letter of 12 May 2004
>
> *We have today received your letter dated 12 May 2004 re questions referred through Christine Grant.*
>
> *It would appear quite clear that the company and the Group 1 tank farm operators are still some distance away from agreeing to some issues raised from the new proposed employment contract changes.*
>
> *Accordingly we have consulted with the Department of Labour and their advice to us in the first instance is to request that he company consent to taking all matter under dispute to the Department of Labour Mediation Service.*
>
> *The major issues of concern are outlined in your letter of 12 May and mainly concern*
>
> 1. *The proposed new shift patterns and the remuneration for working those shifts.*

[2] Ms Grant's evidence was that she was on sick leave and unavailable on 21 May, 24 May and for a ½ day on 25 May.

2. *Working offsite allowances and conditions.*

Regards Jim Hammond & Murray Youngman"

[25] It was Mr Warner's evidence that this was the first time the company had received advice that the applicants had any concerns with the actual shift patterns and off-site working allowances. He was also critical of the fact that the applicants had not provided feedback on the proposed shift structure despite having been aware of it since 22 March 2004. I do not accept this assertion. Mr Pryce's evidence re the feedback he received from the applicants on the 22 March proposal was equivocal. On balance, I accept the applicants did, in all probability, communicate to him orally that they were unhappy with the changes to the span of hours they would be required to work. I accept, however, this was not communicated to Mr Warner by Mr Pryce. However, the concern was clearly stated in the applicants' 30 April submissions on the formal proposal, albeit it was couched in terms of questioning the proposed 10% increase in the hourly rate. Lastly, I note both issues were raised by Ms Grant in her meeting with Mr Warner on 11 May.

[26] Mr Warner spoke to Ms Grant and advised her that he had received this letter from the applicants and questioned whether the Union was acting for them. She said she would make inquiries but given that she was ill at the time Mr Warner wrote to the workers himself (24 May). It is his evidence that he gave the letters to Mr Pryce, Tank Farm Supervisor, to give to Mr Hammond and Mr Youngman.

[27] In this letter Mr Warner confirmed that the company was willing to attend mediation but that the company needed to understand the issues involved. The applicants were asked to respond with answers to a number of questions (Summarised):

- Confirmation was sought as to whether the applicants were members of SFWU and whether the Union was acting for them.

- It was stated that the fact the applicants had issues with the proposed new shift pattern had only now been advised and details as to the exact issues the applicants had with the shift patterns were sought.

- It was stated that the fact the applicants had concerns with working offsite allowances and conditions was also only now being advised and details were sought.

[28] Mr Warner concluded:

> *"At this stage we would confirm that should the company be faced with the situation whereby we have failed to reach an agreement (within the bounds of the Tank Farm shift restructure) with any tank farm employee by Friday 28 May at 5pm, the company will serve affected employees with notice of redundancy as outlined in their individual employment agreement. Finally, it is our intention to work through any issues or questions by consultation and open dialogue with employees, and at all times will ensure our best endeavours to agree conditions*".

[29] Mr Hammond, Mr Youngman and Ms Grant all deny receiving this letter. I accept their evidence on this point although I do accept the possibility that redundancy *might* be a consequence of a failure to reach agreement was probably raised in oral questions/answers at meetings with tank farm employees over the proposed restructuring.

[30] Ms Grant met with Mr Warner on 25 May to discuss the outstanding issues relating to the restructuring as it impacted on Mr Hammond and Mr Youngman. The evidence shows that

Ms Grant confirmed the Union was acting for the applicants. Mr Warner and Ms Grant discussed the issues again but no resolution was reached and the meeting concluded on the understanding that Ms Grant would consult with her members and that there would be another meeting to address the applicants' concerns.

[31] On the morning of 27 May Mr Warner met with Ms Grant, Mr Hammond and Mr Youngman. The parties have different perspectives as to the outcome of the meeting that day. It is the applicants' evidence that when the meeting concluded everything was agreed except the question of payment for the B shift. The applicants also submit that they made it clear that they would work the new shifts pending the unresolved matter regarding payment for this shift being referred to mediation. They also say that they advised they would accept a mediator's decision on the question of payment for this shift. Mr Warner, on the other hand, says that the only matter discussed on the 27th was the applicants' concern(s) regarding the terms and conditions which would apply to the unloading of ships.

[32] I do not accept the applicants' evidence that everything bar payment for working B shift was agreed by the time the meeting concluded on 27 May and I certainly do not accept they advised then or at any other time that they would work the new shift patterns pending a resolution through mediation[3]. It is my finding that the meeting concluded on the 27th with no agreement on any of the disputed issues – albeit there had in all probability been some progress on the shipping issues.

[33] On the morning of the 28th Ms Grant met with Mr Warner again in an attempt to finalise an agreement on the new shifts for Mr Hammond and Mr Youngman. The shipping issues was resolved and a letter prepared which described the arrangements reached. Discussions continued on the subject of payment for B shift and Mr Warner indicated there would be no move by the company to meet the applicants' demands for a 15% increase for working this shift. Ms Grant met with her members. She later confirmed to Mr Warner that the letter provided (addressing the shipping issues) was acceptable. She also advised Mr Warner that the applicants did not accept the increase of 10% increase on average hourly rates for working B shift and she notified that the applicants would not be signing the variations to their employment agreements.

[34] At some stage in the course of the morning Mr Warner had taken advice about options for dealing with the situation should the applicant decline to sign the variations to their employment agreements. The options arrived at were:

- To extend the deadline.
- To suspend Mr Hammond and Mr Youngman on pay.
- To suspend Mr Hammond and Mr Youngman without pay.
- To make Mr Hammond and Mr Youngman redundant.

[35] The evidence is somewhat confusing as to when these options were communicated to Ms Grant (before or after she spoke to her members that morning). The question as to whether or not the applicants confirmed their position that they would not sign the variations and work the new shifts in the knowledge that their employment might be terminated on the grounds of redundancy is unclear. On the balance of probabilities, however, I find that these options were

[3] I accept the applicants raised the issue of mediation in their letter of 21 May to Mr Warner. I accept too that he was a willing partner to the proposal. It was however subsumed by the discussions between the parties and when talks broke down the proposal was not resurrected by either party.

not set out for Ms Grant until after she had met with Mr Hammond and Mr Youngman to communicate to them that there was no change in the respondent's position regarding payment for B shift and had been advised by them that they would not sign the variations. However, it is clear that after discussions between Mr Warner and Ms Grant concluded on the morning of 28th December she did inform the applicants of the options that had been spelt out to her and the fact that Mr Warner had not decided at that point which option he would follow.

[36] There were no further communications between the parties for the remainder of the day. Towards the end of the day Mr Warner asked to meet separately with the two employees. I accept his evidence that they were each asked if they would sign the variations to their employment agreements and work the new shifts. Each employee indicated they would not do so.

[37] At that point each employee's employment was terminated on the grounds of redundancy.

Provisions of Employment Agreement

[38] The terms and conditions governing the applicants' employment with the respondent were described in Individual Employment Agreements. The hours of work clause provided for the Company to set the ordinary hours of work except as otherwise agreed and notified in a shift schedule (Clause 2 (a)). As I understand the evidence the applicants' hours were set as 12 hours worked between 6 am & 6pm over 5 days of the week (Monday to Friday).

[39] Clause 2 (c) of the applicants' agreements also provide:

> *"Once established pursuant to sub-clause (a) above, any of the hours of work provisions and/or conditions related thereto may be varied by agreement by the Company and the employee".*

[40] The applicants' agreements also address the issue of redundancy. It is addressed and defined in Clause 3 (d):

> *"The Company shall have the right to conduct its business to meet operational and commercial demands in the prevailing economic climate and if redundancies are required as a result of business needs then for the purpose of this Contract,* ***redundancy shall be a condition in which the Company has staff surplus to requirements*** *because of the reorganisation or the closing down of the whole or any part of the Company' operations due to a change in plant, methods, materials or products, economic circumstances or like cause* ***requiring a permanent reduction in the number of employees.*** *Redundancy shall not include the termination of a casual or temporary employee". (Emphasis mine).*

Legal Considerations

[41] It is well-established law that an employer may not unilaterally implement significant changes to an employees terms and conditions of employment and justify those changes on the grounds of management prerogative *Grant v Superstrike Bowling Centres Ltd* [1992] 1 ERNZ 727. The respondent in this case clearly recognised that the changes it proposed to the applicants' employment were so substantial that they could not be unilaterally imposed.

[42] However, when it could not reach agreement with the applicants on the proposed variation to tank farms operations and new terms of employment the applicants were dismissed from their employment on the grounds of redundancy. While the justification for the termination must be tested on the grounds cited i.e. redundancy, it is necessary to consider the whole of the circumstances leading to the terminations including the proposed restructuring, the justification for it, the consultative processes adopted by the respondent in implementing the changes sought.

[43] The dismissals in question occurred before the introduction of the new s.103A test of justification (effective 1 December 2004). The test to be applied in the circumstances of this case, then, is that described and modified by the Courts in *Northern Distribution Union v BP Oil* [1992] 3 383 CA and *W & H Newspapers v Oram* [2000] 2 ERNZ i.e. *"what it is open to a reasonable and fair employer to do in the circumstances"*.

[44] Other case law that has informed my determination of the applicants' claims including *GN Hale & Son Ltd v Wellington etc Caretakers etc IUOW* [1991] 1 NZLR 151; *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ]; *New Zealand Fasteners Stainless Ltd v Thwaites* [2000] 2 NZLR 565;*Coutts Cars Ltd v Baguley* [2001] ERNZ 660 (CA) *Davis v Ports of Auckland Ltd* [1991] 3 ERNZ 475; *Greenwood v Farmers Trading Co. Ltd* A149/97 Unreported and *Nee Nee & others v TLNZ* AC 13/06.

[45] Lastly, because this determination focuses on the consultative processes followed in this case I have considered the case law pertaining to this important issue. In *Communication & Energy Workers Union Inc v Telecom NZ Ltd* [1993] 2 ERNZ 429, the Court discussed the meaning of "consultation" in the context of redundancy, and listed a series of propositions extracted from the Court of Appeal's decision in *Wellington International Airport Ltd v Air NZ* [1993] 1 NZLR 671 (CA). In particular, the Court noted:

- Consultation requires more than mere prior notification and must be allowed sufficient time. It is to be a reality, not a charade. Consultation is never to be treated perfunctorily or as a mere formality.

- If consultation must precede change, a proposal must not be acted on until after consultation. Employees must know what is proposed before they can be expected to give their view.

- Sufficiently precise information must be given to enable the employees to state a view, together with a reasonable opportunity to do so. This may include an opportunity to state views in writing or orally.

- Genuine efforts must be made to accommodate the views of the employees. It follows from consultation that there should be a tendency to at least seek consensus. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done.

- The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.

Discussion

[46] These terminations for redundancy were unjustified for two reasons:

- The reason cited for the terminations was redundancy. However, the situation between the parties on 28 May did not - in contractual terms - support a conclusion that potential redundancies existed. In terms of the IEA's governing the relationship between the parties the applicants could only be described as redundant if a situation existed where the company had staff surplus to requirements (following a reorganisation etc) *requiring a permanent reduction in the number of employees.* This was not the case here. The restructuring of hours/shifts for tank farm employees had no affect on the number of employees required for the operations in question and the two tank farm operator positions remained. In the circumstances, which pertained here, there was a contractual restraint on the employer implementing redundancies that in other circumstances might come within the scope of management prerogative (*Hale* cited above).

- The terminations on the grounds of redundancy were otherwise ill conceived and the implementation of the redundancies was profoundly unfair. The applicants were not given formal notice of the potential for redundancy. They were not appropriately consulted on the proposal for redundancy in a situation where consultation would be expected. In reality they were given little effective notice that redundancy was even a formal option being considered by the company and no indication whatsoever that it was a serious option being considered in the event that the applicants did not sign the variations to their employment agreements by 5pm on 28 May.

  This failure to formally notify the applicants of the potential for redundancy and their immediate dismissal meant that none of the usual actions associated with the fair and reasonable treatment of employees in such situations were present i.e. allowing affected workers sufficient time to consider the proposal (i.e. the potential for termination on the grounds of redundancy), the opportunity to consult on the proposal - to reflect on and put up alternatives to redundancy - and the opportunity to obtain advice and representation.

  Mr Warner submitted there had been extensive consultation preceding the employees' terminations for redundancy. He was referring to the consultation process associated with the proposal to restructure tank farm working hours. I must disagree. Consultation regarding the restructuring of tank farm operations was just that. There was requirement to engage in an entirely different process of notification/consultation over the proposal that these employees might face the termination of their employment on the grounds of redundancy – a markedly different proposal having a serious potential impact on the employees in question.

[47] Essentially this failure to formally advise the applicants of the potential for redundancy and to consult with them on the proposal was an extension of a flawed consultative process followed by the company in consulting on the proposal to restructure the hours of tank farm operations. Certainly there was significant notice to tank farm employees of the need for the change to tank farm operations and a clear enunciation of the reasons for the change which were sound and adequate time for responding to the proposals was allowed. Where the process fell down was in the consideration of the responses/questions received from the affected employees.

[48] This was the last step in a restructuring which affected all the company's operations. The changes had until this point been widely accepted because the trade off between reduced hours/adjustments to take home pay was beneficial to the vast majority of the company's employees

in that their leisure/family time was improved for a modest reduction in earnings. The situation for Mr Hammond and Mr Youngman was different. Despite the significant increase to their hourly rates associated with the proposal they saw the changes to the span of hours they would be required to work on the B shift as significantly reducing their leisure/family time particularly if that shift was later extended out to 11pm. They cited this concern to the company when they responded to the proposal. Unfortunately, the question for them was reduced to an inquiry about the payment for that shift in comparison to the increases granted to Finishing Hall employees and in comparison to other tank farm employees who would not be required to work these hours.

[49] Mr Warner answered the applicants' question in a superficial manner. His evidence was that he while he noted the applicants' analysis of the proposed changes for them vis a vis finshing hall employees he disagreed with those comments. Mr Warner saw the situation differently. He viewed the objections put up by the applicants from the perspective that other parts of the operation worked over 24/7.

[50] Seen in this light the proposal as it affected the applicants did not involve markedly unsocial hours but the purpose of consultation was to hear and consider the concerns of *all* affected employees. I note in this regard one of the company's aims in restructuring the hours of work was to be an improvement the work/life balance of its employees – Mr Warner's evidence (para 8). It is extraordinary then that the negative impact of the proposals on these employees was noted but not genuinely addressed. There was no meaningful consultation on the proposals and the both parties adopted entrenched positions. The problem was compounded by the fact that the decision to make the notified change had been made and communicated by 6 May and thereafter Mr Warner had a closed mind on the issue. It was a mindset supported by his erroneous belief that the applicants had not signalled their concerns within the timeframe allowed and that it was too late to make any changes.

[51] That of course is wrong and I find that much valuable time was lost between 6 & 28 May with written communications – the receipt of which was either delayed or otherwise thwarted. During that time positional stances adopted by both parties became entrenched. Unfortunately, neither party resurrected the possibility of obtaining mediation assistance.

[52] Two final points:

- I accept that Mr Hammond and Mr Youngman probably spoke to colleagues of being redundant and that they would not be around to see the new shifts implemented. However, despite their statements to colleagues and their apparent sang-froid at the point they were terminated,, the evidence shows they did not believe it would come to that and they were genuinely shocked after the import of the respondent's actions set in[4]. In the event, their statements to colleagues do not affect my findings in the matter because I have found they were never formally advised of the possibility they would be made redundant if they did not agree to the variations proposed. They were never consulted on the question and they were not treated fairly when their employment was terminated.

- The evidence shows that Mr Youngman had particular doubts about working the new shifts because of family support issues. I find he did ask Ms Grant to explore the possibility of a redundancy package for him. That was a proposal only and I find that at the time discussions between the parties ended on 28 May the applicants had accepted the new shifts in principle. The only outstanding issue at that point was the question of payment for working the B shift.

[4] This was particularly the case for Mr Hammond

Conclusion

[53] In making these findings I am not saying employees are entitled to consider their jobs will never change. The Courts have frequently opined otherwise. In this case too the reasons for the changes proposed were sound and not challenged by the applicants per se. It is also possible that the applicants could justifiably have been made redundant notwithstanding the contractual restraints posed. However, there were many steps to be taken before the respondent could reasonably have arrived at the position that the applicants' positions could be terminated on the grounds of redundancy. It would have involved a thorough examination and consideration of the applicants' concerns regarding the proposed changes to their hours of work and meaningful steps to reach an resolution in the matter which could have embraced any numbers of solutions – variations to the proposed hours, coverage of some hours in alternative ways, a change of heart (in whole or part on the payment issue) by either party. In the event that all reasonable consultation, negotiation and persuasion failed to resolve the impasse (and this is where the Mediation Service could have provided valuable assistance) then the employer would have been justified in considering termination of the applicants' employment as the only way forward and would have then needed to adopt a fair and reasonable process in notifying, consulting and implementing such a proposal having regard to the contractual constraint posed, which in itself needed to form part of the consultative process.

[54] Unfortunately in this case, a flawed decision was made by the respondent that the applicants' employment could be justifiably terminated on the grounds of redundancy because agreement had not been reached to work the new shifts by a predetermined date.

Determination

[55] The applicants were unjustifiably dismissed from their employment and they have personal grievances against the respondent.

[56] The other causes of action are declined as being effectively encompassed in my determination above (disadvantage) or because there is a failure to meet the statutory test (unlawful lockout).

Remedies

Contribution

[57] The applicants did not contribute to the circumstances which gave rise to their dismissals.

Lost remuneration

[58] The applicants are entitled to be compensated for remuneration lost as a result of their dismissals. The appropriate period for compensation is 3 months.

<u>Mr Hammond</u>

[59] Mr Hammond was paid one months notice on termination. He did not obtain employment within three months albeit I accept he applied for a number of positions. Leaving any reduction for

failure to mitigate aside Mr Hammond is theoretically entitled to 9 weeks lost remuneration i.e. $8,901.00 gross.

[60] I am not satisfied that Mr Hammond took all the steps available to him to mitigate his loss. As a result I direct the respondent to pay to Mr Hammond six weeks pay ($5,934 gross) to compensate him for remuneration lost as a result of his grievance.

Mr Youngman

[61] Mr Youngman was fortunate to find employment soon after his employment was terminated and from 22 July he earned more than he did at Bakel's. He was paid (notice) up 25 June 2005. In the four weeks between this date and 22 July he earned $1,606.00 gross - a shortfall in earnings in comparison to the earnings he would have received for this period had he remained employed Bakel's of $2,350 gross.

[62] I direct the respondent company to pay to Mr Youngman the sum of $2,350 gross to compensate him for remuneration lost as a result of his grievance.

Compensation pursuant to s. 123 (1)(c)(i)

[63] I direct the respondent to pay to each of the applicants the sum of $6,000 net to compensate them for the hurt, humiliation and injury to feelings they suffered as a result of their dismissals.

Costs

[64] Costs are reserved.

[65] The parties should attempt to resolve the question of costs between them. If they are unable to resolve costs then they should file and serve submissions to allow costs to be determined.

Janet Scott
Member, Employment Relations Authority