IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 268
5342658

	BETWEEN	NICOLA FLEURY Applicant
	A N D	ASHBURTON PASTURES LTD INCORPORATING HELLABY MEATS (SI) LTD t/a RAEWARD FRESH Respondent

Member of Authority:	Helen Doyle
Representatives:	Janie Kilkelly, Counsel for Applicant Penny Shaw, Counsel for Respondent
Investigation Meeting:	17 May 2012 at Dunedin
Submissions:	24 May and 6 June 2012 from Applicant 31 May 2012 from Respondent
Date of Determination:	6 December 2012

DETERMINATION OF THE AUTHORITY

A. Ashburton Pastures Ltd is ordered to pay to Nicola Fleury the sum of $16,770.98 gross together with interest from 20 September 2011 at 5% until the date of payment.

B. Ashburton Pastures Ltd is ordered to pay to Nicola Fleury the sum of $1,103.47 being clothing purchases made by her on behalf of other staff together with interest from 20 September 2011 on that sum at 5% until the date of payment.

C. The two personal grievances were not raised within 90 day and have been dismissed.

D. Costs are reserved and a timetable has been set for an exchange of submissions.

Employment relationship problem

[1] Nicola Fleury was employed by Ashburton Pastures Limited incorporating Hellaby Meats (SI) Limited trading as Raeward Fresh, (Ashburton Pastures) at the material time as a Manager.

[2] Ms Fleury was given notice on 18 February 2011 that the plant was going to close and therefore her position was redundant. Ms Fleury's last day of work was 10 March 2011.

[3] Ms Fleury has two employment relationship problems that she wants the Authority to resolve.

[4] The first problem is that Ms Fleury says she is entitled to a payment in the event of her redundancy calculated in accordance with the employment contract she signed on 23 December 1996. Ms Fleury claims the sum of $16,770.98 should have been paid to her at the time her employment terminated. Ms Fleury seeks interest on that amount and also reimbursement of an amount that she paid for clothing purchases for staff in the sum of $1,103.47.

[5] The second problem is that Ms Fleury says that she has two personal grievances that she was disadvantaged in her employed by the unjustified actions of her employer. The first concerns the process in the restructuring that led to her redundancy. In particular she refers to a decision not to advise her at an earlier opportunity of the possibility that the plant would close and that there was no real consultation about any alternatives before the plant closed.

[6] The second personal grievance alleged arose out of a discussion that took place on 10 March 2011 between Ms Fleury and the human resource manager, Liz Dunlop. Ms Fleury says she was subject to some abusive comments from Ms Dunlop

and ordered to leave immediately although it had been agreed her employment was not to be terminated until the following day.

[7] Ms Fleury seeks by way of remedy:

- A determination that she has been subject to unjustified actions that disadvantaged her in her employment and that she receive the amount of $10,000 compensation.
- Redundancy payments that should have been paid together with long service leave pro rated and unused sick leave in the combined sums of $16,770.98 together with interest on those amounts.
- Reimbursement for clothing purchases made for staff which was promised of $1,103.47.
- Costs.

[8] Ashburton Pastures say that the December 1996 contract was not genuine, or if the Authority finds it was genuine, then it was superseded when a new employment agreement was entered into between Ashburton Pastures and Ms Fleury in May 2010. It does not accept there is anything further owing to Ms Fleury. Further, it says that the personal grievances were not raised within 90 days, and the Authority is not therefore able to determine them. It says that even if the Authority was to find they were raised within 90 days then it does not accept that there was conduct on the part of Ashburton Pastures that was unjustified and/or disadvantaged Ms Fleury.

Issues

[9] The issues for the Authority to determine are as follows:

- Was the 1996 employment contract a genuine document?
- If it was a genuine document, then was it superseded by a 2010 employment agreement?
- If the 1996 employment contract was a genuine document and it was not superseded by a 2010 employment agreement, then what is Ms Fleury owed?

- Did the applicant raise her two personal grievances within 90 days?

- If the two personal grievances were raised within 90 days, then was Ms Fleury subject to unjustified actions or omissions that disadvantaged her in her employment and what remedy is she entitled to?

Was the 1996 employment contract a genuine document

[10] Ms Fleury was initially employed by the respondent from 1976 to 1983. She was then employed for a further period from 25 November 1996 to 10 March 2011.

[11] Ms Fleury provided with her statement of problem a copy of what she says was the employment agreement she entered into on 23 December 1996 when she commenced employment for the second period of time as a shop assistant in the Dunedin shop. The document is headed Hellaby Meats (SI) Ltd Employee's Agreement and describes the parties to the employment contract under the Employment Contracts Act 1991 as Hellaby Meats (SI) Ltd (Hellaby Meats) and Nicola Fleury.

[12] The significance of the 1996 employment contract in this case is that Ms Fleury says it governed her terms and conditions of employment at the time of her dismissal and that redundancy compensation should have been paid in accordance with clause 17 of the agreement.

[13] A copy of the employment contract was annexed to the affidavit of Barry Charles Blackmore dated 16 February 2012. Mr Blackmore was the financial controller at Hellaby Meats from May 1986 to January 2005. The signature on the employment contract is that of Mr Blackmore on behalf of Hellaby Meats.

[14] A copy of a letter of confirmation of appointment sent to Ms Fleury dated 11 November 1996 is exhibited to the affidavit of Mr Blackmore as annexure 1. This was also signed by Mr Blackmore.

[15] Mr Blackmore, as well as providing an affidavit, gave evidence at the Authority investigation meeting. He accepted that it was his signature on both the letter and the contract. He could not though recall the employment contract. That in itself is perhaps not surprising given the passage of time. Mr Blackmore also said it was unusual for him to be involved with Dunedin employment matters.

[16] The Authority also heard from Duncan Clark who was the general manager of Hellaby Meats from September 1982 until his retirement in February 2010. In that position, Mr Clark explained to the Authority, he had the oversight of both Dunedin and Christchurch. Mr Clark explained in evidence that it was usual practice to offer employees who were not members of the Union written individual employment contracts with much the same terms and conditions as those in the collective contract. He said in his evidence that he was aware that Ms Fleury had an employment contract but he could not recall anything about it. He said it was strange that Mr Blackmore signed the contract. He thought he would have done so.

[17] The original employment contract could not be found. A copy only was provided to the Authority and to Ashburton Pastures. Ms Shaw in her final submissions emphasised this fact. She submitted that it was possible signatures could have been added recently to the document.

[18] I accept Ms Shaw's concerns are valid in circumstances where there is only a copy of the employment contract before the Authority. The Authority must proceed with a degree of caution when reaching any conclusions about the genuineness of such a document.

[19] I have placed some weight in this matter on the letter of offer made to Ms Fleury and signed by Mr Blackmore. The letter of offer provides that Ms Fleury's appointment to the Dunedin office in a clerical/shop serving capacity commenced on Monday 25 November 1996. There was no dispute from Ashburton Pastures that Ms Fleury's employment commenced in November 1996. The letter refers to a one month trial period being discussed and that the wage rate during the trial period would be $11.50 per hour but would after a one month trial be increased to $12 per hour. The hours of work were set out in the letter as from 8am - 5pm Monday to Friday. There is no mention in the letter of offer of any employment contract.

[20] There is some consistency I find between the letter containing the offer with the trial period and elements of the employment contract *deemed to have come into force on 23 December 1996.* The date that the employment contract came into force is a Monday which is exactly one month (four weeks) after the commencement date of employment on 25 November 1996. That is consistent with the end of the four week trial period and a decision to continue the employment arrangement which again is not in dispute. The hourly rate in the employment agreement is recorded as $12 per

hour which is consistent with the increase that was to take place after the one month trial period if employment was to continue. The hours of work in the employment contract are also consistent with those in the letter of offer. Objectively assessed it would have been quite difficult to have achieved that consistency and had it withstand scrutiny if the employment contract was not authentic.

[21] The 1996 contract provided it would continue until 22 December 1997. Aside from the disputed events of 2010 which I will shortly address, there is no evidence of the existence of any other contract or agreement entered into between Ashburton Pastures and Ms Fleury.

[22] I was not satisfied, and I will expand on this when looking at the events of 2010 that Ms Fleury clearly advised Ashburton Pastures about the 1996 contract until she sent her letter advising of a personal grievance and dispute on 9 March 2011. This was notwithstanding negotiations for a new employment agreement in 2010. There were several occasions when it would have been expected that she would have referred to it or provided a copy of it to others at Ashburton Pastures but did not do so. Ms Shaw submits this casts significant doubt on the validity or genuiness of the employment contract.

[23] I find having considered the evidence that whilst it would seem unusual to those who deal day in and day out with employment issues it was not altogether unusual for Ms Fleury. I formed the view that Ms Fleury was very loyal to Ashburton Pastures and simply put her energies into undertaking her day to day duties. Matters such as an earlier employment contract that others would see as a priority to immediately draw to the attention of the appropriate person at Ashburton Pastures did not receive the same level of importance. I was surprised for example by the evidence that Ms Fleury bought new uniforms for staff at Dunedin out of her own pocket in late 2010 in the sum of $1103.47. Receipts were provided for these. She did not push for any reimbursement until after matters came to a head in March 2011.

[24] I cannot rule out the possibility that Ms Fleury thought Ashburton Pastures knew about the earlier agreement either from what she had said or independently of that. I accept Ms Shaw's submission that the failure by Ms Fleury to bring the 1996 contract clearly to the attention of Ashburton Pastures at an earlier time was unusual but I do not conclude the employment contract was not genuine because of that failure.

[25] In conclusion the evidence of Mr Blackmore, Mr Clark and Ms Fleury together with the consistency in the documentary evidence between the letter of offer and the employment contract satisfy me that the 1996 contract is a genuine document.

If it was a genuine document, then was it superseded by a 2010 employment agreement?

[26] In or about March 2010 Ms Fleury was appointed as a temporary manager. Some time after that temporary appointment there were discussions and Ms Fleury and another employee, Grant were both appointed to positions as joint managers of the Dunedin business.

[27] Ms Fleury's appointment was confirmed in April 2010 and her salary of $50,000 was to be effective from 26 April 2010. Ms Fleury's discussions about these appointments both temporary and permanent took place with the then Chief Executive Officer of Hellaby Meats (SI) Limited, Michael Barnett. Mr Barnett was also Chief Executive Officer of the related companies including Ashburton Pastures. He held that position from January 2010 until January 2012. There was a dispute in the evidence about whether Mr Barnett mentioned a possibility of the Dunedin shop closing. Ms Fleury said that there was reference to this but Mr Barnett did not accept in his evidence that there was any mention of this. I accept that whatever was said and it may have only been a passing comment Ms Fleury concluded that closure of the business was a possibility.

[28] Mr Barnett was unaware of any earlier written employment contract that Ms Fleury may have had. He left the matter of preparing an employment agreement for Ms Fleury in her role as joint manager to human resource manager, Elizabeth Dunlop. Ms Dunlop is currently employed as operations manager for the companies operating under the Raeward Fresh Group. Ms Dunlop said that when she first commenced in her human resource role she did not have much to do with the Dunedin business. Mr Clark at that time was the general manager and he dealt with any issues arising in the Dunedin business together with the site manager, Graeme Brown.

[29] Ms Dunlop did become more involved with the Dunedin business after Mr Brown left in March 2010. That coincided of course with Ms Fleury's promotion to the role of manager. Ms Dunlop gave evidence that she went through the files in the Dunedin office with Ms Fleury at or about that time and no employment

agreements for current staff could be found and records were sparse. Ms Dunlop said that Ms Fleury did not advise her at that time that she had a written employment agreement. Ms Dunlop said that had that been the case she would have imagined that would have been the appropriate time for such a discussion to be had. Ms Fleury said that she believed her employment agreement was held in Christchurch although I am not satisfied that she advised Ms Dunlop of this at that time.

[30] There was a dispute in the evidence about when or how Ms Fleury came into possession of the proposed new individual employment agreement together with staff policies and job description documents.

[31] Having considered the evidence, I prefer Ms Dunlop's evidence that she brought the pack containing a letter dated 28 April 2010, policies manual, employment agreement and job description with her to a meeting with Ms Fleury on 30 April 2010. The letter dated 28 April 2010 congratulated Ms Fleury on her appointment and stated that the employment agreement was dated 19 March 2010 which is the day Ms Fleury was appointed as manager. The letter further provided that the remuneration in the contract came into effect from 26 April 2010 and Ms Fleury was advised that prior to signing the employment agreement she was entitled to seek independent advice and would be given time to do so. The letter advised Ms Fleury to initial the bottom of each page of both documents and sign the bottom of the declaration page – page 11 and schedule A.

[32] At the meeting on 30 April Ms Fleury recalled having little difficulty with the staff policies and job description but said that she was concerned about elements of the individual employment agreement. There was an issue discussed on the day about the need for a salary review date and there was also a discussion about a vehicle. A *post it note* was placed by Ms Dunlop on the individual employment agreement about the start date of the increased salary 26 April 2010 and to the effect that she would look at a salary review date in September.

[33] Aside from discussion about those matters I think it likely that after the 30 April 2010 meeting Ms Fleury took the agreement home and discussed it with her husband, Peter. Mr Fleury is a book binder/print finisher and has been for many years a trade union delegate. Mr Fleury said that he was concerned about the fact there was no redundancy payment in the employment agreement. Mr Fleury could not recall any issue around long service leave but I accept that was an issue for Ms Fleury

because Ms Dunlop recalls a subsequent telephone call from her during which she mentioned long service leave.

[34] Ms Fleury provided to the Authority a copy of the individual employment agreement that she says she was provided with. It has some writing on it that she says was hers. The first matter beside which Ms Fleury has written is with respect to her name. Ms Fleury was referred to in the individual employment agreement as Nick Fleury and Ms Fleury has written beside her name, Nicola Fleury. The second area of the agreement where there is some handwriting is in clause 6.2 where Ms Fleury has written to the effect that a remuneration review shall be conducted by the employer in September 2010. The next part where Ms Fleury has written is just above clause 8 which refers to annual leave and she has stated that this should include long service leave entitlement at the completion of 10 years 2 weeks, 15 years 3 weeks and 20 years 5 weeks. The final note by Ms Fleury is under clause 14.1.4 which provides that if the agreement is terminated as a result of the employee's position becoming surplus to requirements, there will be no compensation paid. Ms Fleury has written beside that *no, will not agree, 1996 has clause, Union also has agreement*.

[35] When Ms Fleury initially gave her evidence she thought that a copy of the individual employment agreement with those marked changes had been taken away by Ms Dunlop for her to consider. On reflection she accepted that she must have retained that copy.

[36] One of the areas in dispute is whether at the meeting on 30 April 2010 Ms Fleury raised the issue of redundancy. Ms Dunlop says that it was never raised at the meeting on 30 April 2010 or indeed subsequent to that. Ms Fleury said that there was a conversation on 30 April 2010 about redundancy and that Ms Dunlop advised her that the company do not pay redundancy and that at that point Ms Fleury said that her current contract had redundancy provisions and she would not give it up. I accept that Ms Dunlop was not advised about the earlier contract on 30 April. On 30 April there only a brief discussion and Ms Fleury took the draft agreement home with her. Therefore it is less likely I find that there was a discussion about redundancy at that time.

[37] Ms Dunlop said that between 30 April and 6 May 2010 she received a telephone call from Ms Fleury to the effect that Ms Fleury wanted long service leave

included in her individual employment agreement. Ms Dunlop said that there was no problem with adding this to the contract.

[38] On 6 May 2010 Ms Dunlop sent Ms Fleury a copy of an amendment to her contract. The amendment to the contract was set out as a letter attachment and provided for a salary review in September 2010 and there was a clause for special leave. Because this is in part relied on together with Ms Fleury's response, I shall set the amendment to the contract out in full:

> *Amendment to contract*
>
> *Nick Fleury*
> *Hellaby Meats (SI) Ltd*
> *Dunedin*
>
> *Thursday, 6 May 2010*
>
> *As per agreement you will have a salary review In September 2010*
>
> *Addition – the following clause was missing from your contract.*
>
> ***8.4 Special leave***
> *One special holiday of two weeks after the completion of 10 years and before the completion of 15 years continuous service with us.*
> *One special holiday of three weeks after the completion of 15 years and before the completion of 20 years continuous service with us.*
> *One special holiday of five weeks after the completion of 20 years continuous service with us.*
>
> *Kind regards*
>
> *Liz Dunlop*
> *HR Manager*

[39] That email was sent at 1.56pm. At 4.37pm on 6 May Ms Fleury sent an email to Ms Dunlop in which she dealt with a number of matters. The only reference to the contract amendment was found in the second sentence of that email and that provided:

> *Thanks for the contract amendment. Are you going to send it back down? You did take the copy I had scribbled over back with you?*

[40] Ms Dunlop said that she understood from that email that there was agreement between them as to the individual employment agreement. Ms Dunlop did not follow up on it as she believed agreement had been reached and an amended individual employment agreement was never sent to Ms Fleury. Ms Dunlop said she had changed the things that Ms Fleury had wanted and there were no further issues raised by her after Ms Fleury received the amendments. Ms Dunlop said that as a result they

operated under the new agreement and a salary review was completed with an increase on 27 September 2010.

[41] Ms Shaw submits that the evidence supports there was agreement to the 2010 individual employment agreement notwithstanding it was not signed. She submits that the agreed changes were recorded and emailed to Ms Fleury on 6 May 2010 and that Ms Fleury duly accepted the agreement by the following:

- Asking if another agreement could be sent.
- Continuing to work in the new position and accepting payment for that.
- By not making any protest about the agreement and not responding further.
- By continuing on for nine months without further comment.

[42] Ms Kilkelly submits that a careful analysis of the email dated 6 May and attachment and the response by Ms Fleury do not support Ms Fleury agreed to the amendments or the individual employment agreement. Ms Kilkelly submits that the new salary was paid to Ms Fleury from 26 April 2010 before Ashburton Pastures say agreement was reached and that the new position was in place from 19 March 2010. These matters therefore Ms Kilkelly submits could not have been seen as performance of the new individual employment agreement. Ms Kilkelly also relies on the fact that it was the usual practice of Ms Dunlop to have all employment agreements signed and I accept the evidence supports that.

[43] The unsigned individual employment agreement presented to Ms Fleury on 30 April 2010 provided in clause 1.1 that it would commence on the day it is signed.

[44] Ms Shaw refers to a number of Authority determinations that confirm that an agreement in writing does not have to be signed to be binding. One is *Yeates v Jetstick Ltd* AA 320/08 10 September 2008 (Member Dumbleton). That was a case about whether Mr Yeates employment ended by operation of a fixed term of engagement in his unsigned employment agreement. Member Dumbleton said at para.12:

> *I do not consider that an agreement in writing, as there is required to be for every employment relationship under the Employment Relations Act 2000 must also be signed by the parties to it before it become binding on them. An employee who deliberately evades signing the*

> *agreement or who, for whatever reason omits to do so, cannot later take advantage of his or her failure to execute the document if, as a matter of evidence the parties had intended to be bound by its terms including a fixed term.*

[45] I accept that the fact the agreement between Ms Fleury and Ashburton Pastures is not signed does not prevent me finding it is nevertheless binding if that was what the parties intended. In *Yeates* the Member was satisfied that when entering into the employment at the very beginning there was agreement that the employment would be for a fixed term – para.38.

[46] In this case Ms Fleury had been undertaking her new role from March 2010 and the pay increase was implemented before 6 May 2010, the date Ashburton Pastures say agreement was reached, from 26 April 2010. There was agreement reached to a pay review for September and long service leave and issues around a vehicle. Ms Fleury said that redundancy was not agreed to and was still to be the subject of negotiation. Ms Fleury's handwritten note on her copy of the employment agreement, the copy she believed was with Ms Dunlop as at 6 May 2010, has a note beside the redundancy clause. Ms Fleury was concerned about at least the possibility of the Dunedin plant closure and her husband had drawn clause 14.1.4 of the proposed agreement to her attention that provided there was no compensation payable in the event of redundancy.

[47] I am not satisfied in this case that on a careful reading of the two 6 May 2010 exchanges they amount to agreement being reached. Ms Shaw is quite correct that an employee who omits to sign an agreement cannot later take advantage of that. This can arise where an agreement is provided before commencement of employment and no issue is taken with it but it is never signed – *Decom Limited v Tane Francis Cleaver* CA 2A/09 Member Cheyne.

[48] The Authority must be satisfied that the parties intended to be bound by the terms of the agreement. On 6 May 2010 I accept that Ms Dunlop believed she had addressed all the matters that were in dispute and therefore there was binding agreement between Ashburton Pastures and Ms Fleury. Ms Fleury's response though is not clear about that. She asks Ms Dunlop if the amendment is to be sent and whether Ms Dunlop had Ms Fleury's copy of the agreement that Ms Fleury had scribbled over. I do not find that that response and those questions enable me to be satisfied a binding employment agreement was entered into. Ms Fleury was expecting

an individual employment agreement with the changes incorporated. There was reference to the scribbled copy that she thought Ms Dunlop held onto.

[49] Ms Shaw is on stronger grounds with her submission that Ms Fleury acquiesced to the agreement. The Authority made a finding in *Whyte v Creative Force Media Ltd* AA 23/01 Member Monaghan that Creative Force acquiesced in the arrangement contained in Ms Whyte's counter offer when it failed to respond and made no further comment for five months.

[50] Nothing happened for a considerable period of time between 6 May 2010 and 9 March 2011 when Ms Fleury sent a letter advising of an employment relationship problem. Ms Shaw says that Ms Fleury acquiesced in the agreement by saying nothing more about it for nine months and that she has now changed her mind because she has realised she would obtain more money that way. Ms Shaw places emphasis on the words used in the letter of 9 March 2011 when the early contract is referred to. Ms Shaw submits that the applicant does not say that she did not agree to the new employment agreement but that she had not received the contract back with the inclusions. There is also reference in the letter to the fact that the company may have misled and deceived her which Ms Shaw submits is only relevant if agreement has been reached. Ms Fleury said that she had written the letter herself. It is not the careful wording that it may have been if her representative had written it. It is clear from the letter that Ms Fleury still maintains that the earlier contract is the one that applies to her.

[51] I have found that the 1996 contract was a genuine document. For a period of fourteen years Ms Fleury had a contractual right in the event of redundancy to compensation. I have considered whether Ms Fleury by delay and inaction acquiesced or affirmed agreement to the new terms that provided there was no redundancy compensation payable.

[52] I find on the balance of probabilities Ms Fleury was waiting for an agreement to be provided to her to consider and sign. Her email of 9 May 2011 is to that effect. In the *Whyte* case the employer had a proposed employment agreement at or about the time of the commencement of Ms Whyte's employment. The employer simply put the agreement away and did not look at it until five months later when an issue arose.

[53] I find that this matter is distinguishable. Ms Fleury was never provided with an individual employment agreement incorporating the changes to be signed. Had she been provided with an agreement incorporating the changes as she had requested and she had not responded about her concerns with respect to the redundancy clause but simply left it unsigned then I would have had little difficulty in finding that she acquiesced in the agreement. That was not what happened and in the circumstances of this case I do not find acquiescence.

[54] In conclusion then I find the terms and conditions of employment of Ms Fleury at the time of her redundancy were those contained in her 1996 employment contract and they were not superseded by the 2010 agreement.

What is Ms Fleury owed?

[55] I find that Ms Fleury is owed under clause 17 of the 1996 contract on the basis of her salary at the time of termination of $980.76 gross per week the sum of $16,770.98 calculated as follows:

a. 13 weeks redundancy compensation $12,749.88

b. Long service leave prorated for each completed year of service after six years 2.5 weeks pay $2,451.90

c. Unused sick leave being 8 days at $196.15 per day which is $1,569.20.

[56] Interest is claimed on those amounts. Ms Fleury did not bring this earlier contract clearly to her employer's attention. For whatever reason it was not found in the Dunedin or Christchurch office. Not only then did Ms Fleury not clearly advise about it she did not even at the time she wrote her 11 March 2011 letter provide a copy. This delayed any sensible resolution of this matter. I find that interest should be payable on the amount I have found is owing under clause 17 of the 1996 agreement but only from the time the statement of problem was lodged being 20 September 2011.

[57] I order Ashburton Pastures Limited to pay to Nicola Fleury the sum of $16,770.98 together with interest on that sum from 20 September 2011 until the date of payment at the rate prescribed under s. 87(3) of the Judicature Act 1908 of 5%. I

also order payment to reimburse Ms Fleury for the clothes she purchased in the sum of $1103.47 and interest is payable on that sum at 5% from 20 September 2011.

Were the personal grievances raised within 90 days?

The redundancy grievance

[58] The Board made a decision in or about January 2011 to close the Dunedin site. Some discussion took place about how to handle that. A union organiser was involved in that discussion and he asked to be able to speak in private to his on-site representative before the rest of the staff both union and non-union were told. This was agreed to. There was some discussion as to whether it was appropriate to talk to Ms Fleury and Grant before the meeting that was to be held with all staff on February 18th. It was agreed that as both of them had family working with them at the plant it put them in a precarious position and the decision was made to tell them on the same day as other staff.

[59] On 18 February 2011, Ms Dunlop, Mr Barnett and David Thomas, a director of Ashburton Pastures, Hellaby Meats and a number of related companies travelled to Dunedin to advise staff that the plant was to be shut down. An advocate Mike Kyne was also present to advise the company. A discussion initially took place with Ms Fleury and Grant before an all-up staff discussion.

[60] Ms Fleury was given a letter that outlined the payments that were to be made to her when her employment ended. Mr Barnett, when he handed over the envelopes to Ms Fleury and the other staff, said that although there was no obligation on the company to pay any redundancy compensation it was included to recognise their loyalty and contribution to the business. Mr Barnett said that at this stage there was no mention by Ms Fleury that she had an entitlement to redundancy in her employment contract.

[61] There was a dispute as to whether Ms Fleury was given a choice of working to close the plant or leaving and being paid notice. I think it likely that there was an element of choice although Ms Fleury may have felt bound to continue to work on and close the plant. There was some ongoing support arranged from WINZ and Ms Dunlop maintained a presence at the plant. I accept that for Ms Dunlop there was then an issue as on 22 February 2011, just three days after the announcement was

made, the earthquake occurred in Christchurch. This impacted understandably on Ms Dunlop's ongoing contact and involvement for a period.

[62] Ms Kilkelly submits that a grievance about the redundancy was raised on 9 March 2011. Ms Fleury wrote a letter in which she says she raised a personal grievance for the first time. Ms Fleury's evidence is that she advised Ashburton Pastures that when she read the redundancy calculation in the letter of 18 February the redundancy compensation was not correct. She said that at this time she advised Ms Dunlop of the miscalculation and was shocked she said to be told by Ms Dunlop that she was only getting what was offered as a concession as she wasn't entitled to any redundancy pay. This is in sharp contrast to Ms Dunlop's recollection that there was nothing said at any time by Ms Fleury of this nature. I prefer Ms Dunlop's evidence that nothing was said.

[63] Ms Fleury said that as a result of her discussions about her entitlements going nowhere she sent the letter to Ms Dunlop dated 9 March. Ms Fleury said that she followed the requirements for raising a personal grievance. She set out that she had been made redundant against her wishes and that as discussed on 18 February with Ms Dunlop and Ashburton Pastures representative Mike Kyne, she disputed her redundancy and had been offered a compensatory payment of approximately $7,000. Ms Fleury then set out the facts that gave rise to her problem and these were concentrated on her receipt of her employment agreement and issues that she had with it. Ms Fleury said that when the redundancy notice was served she had not received her contract back with any changes and therefore her previous contract had validity over the later one. Ms Fleury said she had been severely disadvantaged financially in her employment and that she was not willing to sign off something only to suffer financial loss four months later. She stated in her letter the company had not acted in good faith and may have misled or deceived her. What she wanted was, in essence, payment to be made in accordance with her 1996 contract together with a certificate of employment and for individuals to act as willing referees.

[64] Ms Dunlop said in her evidence that that letter was the first notice she had received that Ms Fleury had an earlier employment contract. She said that the letter came as quite a shock to her as a result and she telephoned Ms Fleury and arranged to be down the following day so that they could discuss the matter. Ms Dunlop said that she understood from the letter that Ms Fleury was only concerned about not being

paid redundancy compensation and that she had no idea until the statement of problem was lodged in September 2011 that there may have been concerns about the closing down of the plant or any of the processes surrounding that.

[65] There was a formal response to that letter from Ms Dunlop on 15 March 2011 and that concentrated on the negotiations for the 2010 contract and the entitlements for payment on redundancy. It could fairly be said it was a firm response. The previous compensation offer was withdrawn and there was a threat of a counter claim.

[66] Section 114 of the Employment Relations Act 2000 provides that a personal grievance should be raised with an employer within 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee whichever is the latter. Unless the employer consents to the personal grievance being raised after the expiry of that period, application must be made for leave to raise it after the expiry of the 90 days. I am not satisfied in this case that Ashburton Pastures consented to either personal grievance being raised outside of the 90 day period. There is no application for leave to raise the grievances outside of the 90 day period.

[67] I accept Ms Shaw's submission that the letter of 9 March 2011 does not raise a personal grievance about the redundancy process and a failure to consult. On a proper assessment of the letter the issues it raises relate solely to the negotiation for the 2010 employment agreement and the 1996 contract and payment of compensation for redundancy under that contract. I do not find that the 9 May 2011 letter or emails sent subsequently by Ms Kilkelly meet the tests set out in cases such as *Creedy v Commissioner of Police* [2006] ERNZ 517. It was held in *Creedy* that it was insufficient and not a raising of a grievance to advise an employer that the employee simply considers he or she has a personal grievance or even the type of personal grievance. The employer must know what to address so that it is able to respond as the Act mandates. I am not satisfied that it was known by the employer that there were issues with the process leading to the plant closure. The personal grievance about the redundancy process was not raised I find until the statement of problem was lodged on 20 September 2011 outside of the 90 day period.

The 10 March 2011 discussion grievance

[68] There is a significant difference in the evidence as to what happened during the 10 March 2011 meeting. I do not propose to set it out because ultimately I simply could not be satisfied that a personal grievance about this matter was raised within 90 days. The best evidence the Authority had about this was an email from Ms Kilkelly to Ms Fleury about what Ms Kilkelly had pointed out to Mr Kyne. That is not sufficient. I will say that I preferred Ms Fleury's evidence that the conversation was not a pleasant one.

[69] In conclusion therefore I am not satisfied that there was reliable evidence to find either grievance was raised in time within 90 days. There is no application to extend time and I dismiss both those claims.

Costs

[70] I reserve the issue of costs. Both parties have had some success but ultimately the main issue was about the redundancy compensation. Ms Kilkelly is to lodge and serve submissions before she breaks for Christmas and Ms Shaw can have until 24 January 2013 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority