IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2022] NZERA 342
3108558

BETWEEN	UNITE UNION First Applicant
AND	AILINI ATI Second Applicant
AND	THE APPLICANTS NAMED IN SCHEDULE 1 Third to Thirteenth Applicants
AND	HOSPITALITY SERVICES LIMITED Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	John Crocker, advocate for Applicants Andrew Scott-Howman, counsel for Respondent
Investigation Meeting:	11 and 12 April 2022
Submissions and further information received	12, 14 and 22 April 2022
Determination:	22 July 2022

DETERMINATION OF THE AUTHORITY

A. The 12 applicant former employees of the respondent Hospitality Services Ltd (HSL) have a personal grievance of unjustified dismissal.

B. HSL breached the duty of good faith imposed by s 4(1A) of the Employment Relations Act 2000.

C. HSL failed to consult the applicant union Unite as required by the Collective Employment Agreement covering 9 applicant employees.

D. To remedy the grievances HSL is to pay compensation to all applicant employees.

E. HSL and Unite on behalf of the applicant employees, are to confer with a view to reaching agreement on the level of compensation to be paid each employee.

F. The determination of penalties to be paid by HSL will be deferred by the Authority pending the outcome of the compensation discussions.

G. Costs are reserved.

Employment relationship problem

[1] The employment relationship problem to be resolved by the Authority is a personal grievance of each of 12 employees, and a claim by those employees and their union for penalties for breaches by the respondent employer of the Employment Relations Act 2000 (the ER Act) and a collective employment agreement (CEA).

[2] The employees ask the Authority to determine that they were unjustifiably dismissed or disadvantaged by the respondent employer Hospitality Services Ltd (HSL). To remedy the grievances, compensation is claimed.

[3] The employees and their union, Unite, ask the Authority to determine that HSL breached the ER Act and the CEA covering nine of the employment relationships.

[4] Penalties up to the maximum prescribed by the ER Act are claimed to punish 10 breaches of the CEA and 12 breaches (one per employee) of the Act.

Redundancy situation – the pandemic

[5] The employment relationship problem arose from a redundancy situation created in 2020 by the onset of the Covid pandemic and the emergency measures taken by the Government to counter the spread of disease and protect the health of all in Aotearoa New Zealand.

[6] The nature of the pandemic as a cause of the redundancy situation is not in issue, and neither is the way the Government imposed unprecedented controls nationwide, which adversely affected the ability of many parties to perform their employment relationships. Nationally, many employment agreements were terminated as a direct result of the pandemic and controls.

[7] In response to the pandemic and lockdown, and other measures taken by the Government to meet the emergency, over 900 of about 1400 positions of employment were made redundant by HSL.

[8] In dealing with the pressures placed on its business, HSL from early on advised Unite, which represented the applicant employees, that staff numbers would quickly need to be greatly reduced. Unite broadly accepted that proposition, acknowledging the redundancy situation was a real one which inevitably would lead to job loss.

[9] The employment relationship problem arises from the level of communication HSL had with Unite and its affected members, and from the level of participation HSL allowed its employees to have in the process the company followed when selecting positions for redundancy.

[10] The applicant former employees of HSL, through Unite, contend that consultation the employer purported to engage in was seriously deficient, particularly when measured against the requirements of s 4(1A) of the ER Act and clause 7.5 of the CEA.

[11] It is claimed HSL acted unlawfully and unjustifiably in breaching those requirements, giving rise to the personal grievance claims of the employees.

[12] The 12 applicant employees worked in HSL hotels located in the Bay of Islands, and at Auckland, Rotorua and Greymouth. Some had served in HSL's establishments for long periods, one employee as many as 30 years. Their positions included;

Food and Beverage Attendant	Night Porter
Receptionist	Laundry Attendant
Restaurant Assistant	Housekeeping Assistant
Room Attendant	Housekeeping Supervisor
Steward	Houseman

[13] The employees received notice of termination by letter dated either 15 April or 1 May 2020. The date of termination was 29 April in one case (14 days' notice), and either 21 June (9 weeks and 4 days' notice) or 24 June 2020 (10 weeks' notice).

[14] Termination was expressed in the letters to be by way of redundancy.

[15] The applicants contend that consultation with them by HSL was deficient for several reasons;

a. the employees did not know, and were not told, why their positions were proposed for redundancy

b. they did not know, and were not told, why they as individuals were selected for redundancy

c. they were given insufficient information to respond to the redundancy proposal in any meaningful way

d. they were given insufficient time to respond to the redundancy proposal.

[16] At an investigation meeting the Authority received evidence from the 12 employees, an official of Unite, and several senior managers and executives of HSL. The witnesses were questioned by the Authority, Mr Crocker advocate for Unite, and Mr Scott-Howman counsel for HSL. Written submissions were made by advocate and counsel and discussed with the Authority.

[17] In giving this written determination, not all the evidence heard and submissions made has been set out or referred to. The Authority has been guided by s 174E of the ER Act in that regard.

Consultation was inadequate and insufficient

[18] Consultation may be viewed as a continuum which has key components such as the provision of adequate and comprehensible information, and the allowance of sufficient time for employees to understand, consider and respond to what is being proposed by the employer regarding their jobs. The integrity of consultation depends on the key components of a composite process being present together. Inadequate information, or insufficient time, or consultation on only part of the employer's plans, will by themselves be defects tending to undermine the entire process.

[19] As dire as the crisis may have seemed to HSL, it can be seen from its actions that the company understood its employees were required to be consulted before any decisions were made to end or otherwise adversely change their jobs. HSL also understood the obligation it had to consult Unite. The employer knew that existing statutory or contractual requirements for consultation had not been waived or varied in any way by the Government, the union or any employee. HSL has not suggested to the Authority that it viewed itself as exempt from observing the requirements.

[20] HSL's understanding is reflected in its actions of embarking on consultation with employees and Unite. HSL can be taken to have thought that there was some point or purpose to consultation and that it was not just going through the motions for the sake of appearances in an exercise it believed was futile.

[21] The Authority finds that while there were moves by HSL to consult the applicant employees and their union, the action taken did not adequately or sufficiently meet the requirements of s 4(1A) of the ER Act or clause 7.5 of the CEA. Compliance with those requirements was not to an extent that was reasonable in the circumstances and having regard to the objectives and purposes of consultation. There was no substantial compliance, the Authority finds.

Section 4(1A) of the ER Act

[22] It emerged from the evidence as it was given by individual hotel managers, that a spreadsheet exercise had been carried out to assess and rank employees according to their skills, attributes and experience. The fate of their jobs appeared to hinge on this. Using the compiled information, management determined whether an individual fitted the profile of the employees HSL wanted for positions that were to be retained in the organisation.

[23] The exercise was doubly important for HSL, as it enabled the employer to plan for a time when the business might recover and require employees to be hired again.

[24] The spreadsheets have not only the applicant's names on them but those of many other employees working at HSL hotels and facilities. For example, the Grand Millennium Auckland spreadsheet has on it 88 names, giving an indication of the scale of the exercise and the potential for it to affect the lives of many.

[25] HSL management witnesses confirmed in their evidence the critical importance of the spreadsheet exercise which was documented by each hotel or facility as it was carried out.

[26] At the time of the redundancies Mr Kenneth Orr was the General Manager of the Grand Millennium Auckland. He described to the Authority "the processes used to determine which employees would stay and who would have to leave". The process was very intensive and detailed he said, and (at paragraphs 24 and 25 of his written brief);

> There was extensive consultation between myself and the department heads to understand the level of cross training of each staff member and everyone's overall competency levels.
>
> ………………………………………………….
>
> Across our group we decided to prioritise staff who had training or experience across more than one department – for example, if they had worked in housekeeping and food & beverage or in front office.

[27] With sincerity Mr Orr said that it was an emotionally wrenching and intense task "making decisions that would alter peoples' livelihoods and financial situation".

The exercise, he said, needed to be done objectively but sensitively. A week or more was needed to complete it.

[28] Given the amount of information gathered in relation to many employees, it would have been surprising if the hotel-chain-wide exercise had not been documented.

[29] Although none of the hotel management witnesses volunteered in their written evidence the fact that the exercise had been recorded on spreadsheets, when asked they each readily confirmed that fact and the documents were promptly produced to the Authority as directed.

[30] It seems that when their employment terminated, none of the employees or their union was aware that this evaluation of them had been made and written down about them.

[31] For each employee the spreadsheet recorded the date employment had commenced, the current weekly hours of work, and the most recent role. Numbers were scored according to a key given as follows;

KEY

Skills	1	Competent
	3	Outstanding
	4	Outstanding and can train others
Re-employment	2	Satisfactory
	5	Fully competent
	8	Would hire again in a heartbeat

[32] Typically, an employee might have three numbers recorded, for Re-employment and for particular functions they may have performed in their position or otherwise during employment. A final column on the spreadsheet recorded the total of the marks.

[33] As an example of the range of marks, in the spreadsheet for the Grand Millennium hotel, the total for each of 42 employees shown on one side of the page,

varied between 5 (2 employees) and 13 (1 employee), with the total for most being 7 (28 employees), and a few were 9 or 11.

[34] The evidence of hotel managers such as Mr Orr to some extent explains and reinforces the reasons why employment law places a high value on consultation. The cost to employees of potentially losing their jobs should have made it obvious that the spreadsheet information was required to be shared with any employees who had wanted to see it and comment on it.

[35] Witnesses indicated that the decision not to involve the employees in the exercise was one made centrally within HSL's organisation rather than by individual hotel managers. From the evidence it is clear that HSL had planned to act quickly. It would have been obvious to the company that if the employees were consulted, the time needed to confirm the final shape of the restructuring would lengthen considerably.

[36] Some of the consultation that occurred was unreasonable, such as in the case of Rosemaree Rathbun who did not use email. Consultation was by telephone discussion with her manager about the situation staff faced in their Greymouth hotel. A letter delivered to her letterbox would have been fairer and allowed her a chance to reflect in private on the situation, and to decide if she wanted to ask anything or say anything, or take advice from anyone.

[37] Including Good Friday in the tight timetable for consultation, was insensitive to many people who set everyday things, such as their jobs, aside to keep that day special.

[38] HSL had acknowledged to Unite from the start that shorter consultation periods would be required. In the Authority's view the periods were too short, although there is no one length to fit all circumstances. A longer period was required in any event to allow for consultation over the spreadsheet information.

[39] HSL's initial presentations made to staff at each location to show the serious situation the business was in, were planned well, and the information delivered to the employees and Unite was relevant, comprehensive and capable of being understood by people of average intelligence. That information sharing has not been criticised as inaccurate or misleading, or too dense to be fully understood. It was a big step in the right direction.

[40] HSL is also entitled to point to the wage subsidy provided by central government as ameliorating some of the harshness flowing from having to give notice to employees. While the subsidy, paid at 100% by HSL, did not save jobs, it softened the blow by giving employees more breathing space. It should be given recognition as part of the mix of circumstances operating in an unprecedented situation which evolved.

[41] HSL was naturally wary of being dictated to by others outside its business but does seem to have engaged in communications with Unite and not ignored the union, except in relation to the spreadsheet exercise which it should have disclosed from the start.

[42] It is no answer for HSL to say that compliance with s 4(1A) of the ER Act would have made no difference to the outcome of the selection process. There was nothing to make compliance impossible or even impracticable. The obstacle HSL raised was the unavailability of time to consult, but the Authority considers there was time and the means to consult, even during lockdowns. Face to face meetings could not take place once lockdowns began but there was still the availability of email, video link, or ordinary mail delivered as an essential service.

[43] The cost to HSL's business of taking more time seems to have been the factor that weighed the most against complying with the ER Act and CEA. Some of the money HSL hoped to save, could reasonably be expected to be spent on allowing reasonable time to comply. If there was a point in embarking on consultation, which HSL must be taken to have thought, there was also a point in performing the exercise properly. To do that required the employees to be consulted about the spreadsheet information HSL compiled.

[44] There are several concerns employees might have had about the spreadsheet exercise and how fairly and accurately they were able to be assessed by it. The methodology itself may be open to criticism, although ultimately the choice of system was for the employer provided the system was a fair one. An employee might consider that a spreadsheet exercise can be designed to be manipulated, or allow room for unfair bias to operate, or that it can introduce distortions, or that an unfair assessment may have been made of their skill, or that a mistake led to inaccurate information being recorded.

[45] It is understandable that some of the applicants were also fearful that their membership of Unite played a part in the decision of HSL not to retain or re-employ them. One employee had a real concern that a particular matter she had raised about her conditions of employment, may have adversely influenced management in deciding whether to retain her.

[46] The way for employees concerns or questions to be addressed was by HSL allowing them access to the spreadsheet and the scores recorded in it, if they wanted to see it. Any fears or suspicions held by employees about the spreadsheet and marks, or the presence of bias, could have been allayed to some extent by allowing the employees an opportunity to comment to their employer on information they had been given access to and had looked at.

[47] Upon viewing the information, had access been offered, the employees may or may not have been left any the less concerned about the reasons behind the decision making, but in denying the employees the chance to look for some reassurance, HSL took away a real and valuable opportunity and in doing so seriously breached its statutory obligation under s 4(1A) of the ER Act.

[48] Section 4(1A) has been favourably described as a natural justice provision intended to facilitate a real opportunity for an employee to have prior input into the decision making. It is well settled law that consultation does not require agreement to be reached before the employer may implement a redundancy proposal. HSL was not required to 'open the books' to its employees, but the employees if they wished were entitled to have a say about the spreadsheet information before the fate of their jobs was decided.

[49] HSL emphasised to the Authority several times that the company had faced 'an existential crisis' as it was termed, but the employees faced one too, as their jobs were part of their being. At a time when trust and confidence needed to be present to the highest level, with the applicant employees likely to lose their jobs, HSL did not demonstrate that it would uphold its good faith obligations to them. The relationship between the union and its members, also a good faith relationship, and the obligation of HSL under clause 7.5 of the CEA to consult the union, should have led HSL to provide that access and that opportunity required under s 4(1A) of the Act.

[50] Unite should have been consulted about the proposal to carry out the spreadsheet exercise. The union should have been given access to the spreadsheets, to at least see the information recorded against its members' names, and given an opportunity to comment, on behalf of those members.

[51] No explanation was provided to the Authority by HSL as to why the spreadsheet exercise and the information compiled in it, were not disclosed to the employees or the union.

Cash burn

[52] From HSL's evidence it was clear to the Authority that a major objective in handling the redundancy situation was the containment of 'cash-burn', as it was graphically described.

[53] As explained to the Authority, HSL's business is 'time-bound'. A night without hotel room occupancy can never be recovered. It is a night without revenue and a night requiring cash reserves to be used to pay wages and other overheads. Each night that passes with the business in that state, consumes cash and compounds the losses.

[54] The most likely reason why HSL did not consult under s 4(1A) is because embarking on that exercise had the potential to require more days and probably over a week to go by before consultation concluded.

[55] The requirements of s 4(1A) of the ER Act must be met whenever an employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of its employment of one or more employees. That was the situation HSL was in, and knew it was in. The Authority finds there was no excuse for HSL not complying with the Act.

[56] It is no excuse that HSL may not have understood the object and purpose of s 4(1A), as it seemed from some of the evidence given for the company. HSL witnesses suggested that consultation was unnecessary because the employer knew its employees as well as they knew themselves and could assess them just as well as the employees. As Mr Crocker for Unite observed, this view taken by the witness was paternalistic.

[57] Another HSL senior executive witness said that consultation would not have made any difference. He suggested that prolonging consultation turned it into a talkfest. These views held by HSL management witnesses completely missed the point of s 4(1A). The employment relationship of each employee involved two parties, not one. The law has developed to a point where an employer has wide scope to restructure its business in a redundancy situation, but at the same time the employee, who has unequal power in the relationship, has rights that must be given effect to as much as the employer's rights to restructure.

[58] It is not an answer to the requirements of s 4(1A) to say that redundancy was inevitable and therefore consultation was futile. That approach casts aside the special nature of an employment relationship, which is key to the objects of the ER Act and is the subject of the extensive provisions of s 4. HSL did not act in good faith, the Authority finds.

[59] Good faith is demonstrated when an employee is, as far as possible, treated as a party to the employment relationship and not left in the dark about the employer's decision making for the continuation or otherwise of employment.

Breach of s 4(1A) was deliberate, serious and sustained

[60] HSL employed many people, over 1400, and was suitably resourced to manage its human resources responsibilities. It must be taken to have been aware of the requirements of s 4(1A), which have long been the law. The breach of that provision is therefore found by the Authority to be deliberate. The provisions of s 4(1A) were expressly directed at a major event in the employment, the premature ending of an employment relationship. The breach was serious as it undermined the good faith relationship and had the potential to diminish or destroy the vital trust and confidence that must always exist between employer and employee during the employment.

[61] The breach was sustained. HSL resisted the requests of Unite to disclose all relevant information about the company's response to the Pandemic.

HSL liable to a penalty for breach of ER Act

[62] For the above reasons the Authority finds that under s 4A of the ER Act, HSL is liable to a penalty. Potentially there was a breach in relation to each of the 12 applicant employees.

Clause 7.5 of the collective employment agreement – requirement to consult Unite

[63] The first four paragraphs of clause 7.5 are relevant to an examination of HSL's engagement with Unite under the CEA.

> **7.5 Redundancy**
>
> At any time, the Company may implement redundancies for genuine business reasons.
>
> Prior to announcing any redundancies affecting employees covered by the Agreement, the employer will consult with the Union.
>
> Redundancy means a situation where your employment is terminated by the Company, the termination being attributable, wholly or mainly, to the fact that the position filled by you is, or will become, superfluous to the needs of the Company including in situations where the redundancy arises due to the contracting out of the business.
>
> If redundancies are required, the Employer reserves the right to select employees for redundancy on the basis that it retains employees who by reason of skills and attributes are, in the Company's opinion, necessary for continuing operations.
>
> ……………………………………………………

[64] The paragraphs should be read together to best understand what HSL and Unite intended by these provisions.

[65] Regarding the first paragraph, there is no dispute that a genuine business situation left HSL with no realistic alternative to making many staff redundant. It has not been suggested that the company should or could have kept all its employees employed, when its business had overnight almost dried up.

[66] As to the second paragraph, it is accepted by the applicants that up to a point HSL did consult Unite. The applicants contend the consultation stopped short of what was required in the circumstances, because not enough time was allowed, and not enough information was provided.

[67] The third paragraph is a standard definition of redundancy. There is no dispute that many positions became superfluous to the 'needs' of the company. HSL's need to have positions of employment diminished greatly as the pandemic impacted core business.

[68] The Authority finds that the fourth paragraph of clause 7.5 required HSL to consult Unite about the selection of employees for redundancy. To respond meaningfully to the consultation expressly required by the second paragraph, Unite should have been given information about the selection process, at least to the extent that it affected Unite members covered by the CEA. That information included the evaluation of members in the spreadsheet exercise. The existence of information in that form compiled for comparative purposes, was not revealed to Unite until its managers gave evidence at the investigation meeting. It should have been provided before HSL decided which employees would lose their jobs.

[69] The employee's union was entitled to have a say in deciding their fate, because it was acting on their behalf and in their interests, and it was directly a party to the CEA. Consultation with the employees' appointed representative was a reciprocation by the employer of trust and confidence and good faith behaviour, which the parties to the employment relationship, including Unite, were bound to promote and maintain.

HSL liable to a penalty for breach of the CEA

[70] The Authority finds that HSL acted in breach of clause 7.5 of the CEA and is liable to a penalty as claimed up to a maximum of $20,000.

[71] Nine of the applicant employees were covered by the CEA, while three others were on individual employment agreements. Therefore 10 was the number of breaches of clause 7.5, counting the union as a party to the CEA with nine employees.

Personal grievance claims

[72] In determining the employees' personal grievances, the question is whether HSL acted justifiably when it endeavoured to consult both Unite as the employees' union, and the individual employees themselves, and when it subsequently terminated the employment of the employees.

[73] The question is whether HSL satisfied the test of s 103A(2) of the ER Act;

> ..…… whether the employer's actions, and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or other action occurred.

[74] This must be determined on an objective basis. In considering justification the factors to be weighed by the Authority include the resources available to HSL when setting and implementing parameters for consultation, and any other factors considered relevant by the Authority.

[75] As to compliance with s 4(1A) of the ER Act, generally if an employer faced with a redundancy situation does not provide employees with access to relevant information or allow them an opportunity to comment on the information, the employer will act in breach of the ER Act and, in most cases, will be unable to show that it acted fairly and reasonably in all the circumstances. Accordingly, it will be unable to show it acted justifiably. The breach will be more than a mere technicality, as without sharing relevant information and giving the employees a chance to provide input, it will undermine the very basis on which the decision to terminate employment in a redundancy has been made, particularly where not all employees are to be made redundant and a selection process is to be used to decide who stays and who goes.

[76] The Authority finds that in failing to comply with s 4(1A) of the ER Act, HSL acted without justification. The 12 former employees of HSL each have a personal grievance for that reason.

[77] A union cannot have a personal grievance, but members of the union may have one arising from acts or omissions of the employer towards their union, because the union is also a party to the employment relationship and has been appointed to represent the employees.

[78] The employees had a clear and direct interest in HSL's observance of Clause 7.5 of the CEA. Those under the CEA were the intended beneficiaries of Clause 7.5 and its objectives.

[79] HSL's actions were directly related or most closely connected to the dismissal of employees rather than acting to their disadvantage. The personal grievances are therefore appropriately of the type, unjustified dismissal.

Compensation

[80] Having been found to have a personal grievance, each applicant employee is entitled to remedies available under the ER Act at s 123.

[81] Reinstatement is not sought, and neither is reimbursement of lost wages.

[82] There is no suggestion that the applicant employees did anything to contribute to the situation that gave rise to their grievance. No reduction in remedies is required on that account.

[83] Each of the 12 applicant employees is entitled to an award of compensation under s 123(1)(c)(i) of the Act for the harm personally suffered by having their employment terminated without justification.

[84] In assessing compensation within a range of awards found in case law, HSL's breaches of s 4(1A) of the ER Act and clause 7.5 of the CEA, must be tempered by the reality that jobs were going to be lost in the workplaces of the applicant's employees. The pandemic situation made that inevitable. What cannot now easily be assessed is how each individual employee may have fared in wanting to keep their jobs if they had been fully consulted.

[85] As with any 12 persons, the employees are widely diverse individuals in numerous respects including physical, psychological, financial, length of HSL service, and terms and conditions of employment, including pay and hours of work. Each employee addressed the Authority and left a lasting impression of how their lives were affected by the situation that led to the loss of a job. They spoke of the difficult adjustments to their lives they have had to make since.

[86] The Authority is satisfied that each applicant personally suffered significant distress and anxiety. The evidence given at the investigation meeting would have revived some of that upset as more information came to light. HSL acknowledged in

submissions made on its behalf, the devastation experienced by the applicant employees.

[87] Through HSL's failure to consult them as required by s 4(1A) of the ER Act, the applicant employees all suffered the same loss of the chance to have a say in the fate of their jobs. They have all been affected to a greater or lesser degree by their unjustified treatment which has caused them harm that is compensable under the ER Act.

[88] The Authority considers that although an assessment of compensation is to be made on an individual basis, a sense of unfairness and arbitrariness may be felt by some applicants when comparisons are made, as they most likely will be. Quantification of compensation is not a science and with a range of 12 individuals the inexact nature of the exercise may not do the full justice the applicants deserve. Levels of compensation agreed with them through their union is collectively likely to be a fairer and more just result than quantification by determination.

[89] The Authority perceives HSL and Unite and their advisors to be responsible organisations and individuals who can reliably be asked to engage with a view to reaching agreement about the amounts of compensation the applicants should receive individually. It is expected that Unite can be authorised to represent the applicants and that the consent of each applicant will be obtained before any agreement is made. A mediator may be available to the parties if they wish to have that assistance. In this way, in this case, justice may better be achieved.

[90] To allow the parties time to commence discussions the Authority will adjourn consideration of this determination for 14 days. Further time can be requested if required, otherwise Mr Crocker should advise the Authority when discussions have concluded.

Penalties

[91] The nature and seriousness of the breaches of the ER Act and the CEA require penalties to be imposed. The Authority is to have regard to the Employment Court judgment in *Borsboom v Preet PVT Ltd*[1] in assessing the amount. Section 133A of the ER Act is also to be applied in determining the appropriate penalty.

---

[1] [2016] NZEmpC 143

[92] By its conduct HSL did not act in good faith towards Unite or its members. Its breaches of s 4(1A) of the ER Act and clause 7.5 of the CEA were serious and affected a union and 12 employees. The Authority does not consider HSL acted with malice, but it did act deliberately and not inadvertently or negligently.

[93] The employees lost the opportunity to fully and meaningful engage with their employer when the continuation of their jobs was about to be decided. They were not shown the full respect they deserved as parties to a relationship which HSL's business was partly built up from.

[94] The breach occurred though in circumstances where an urgent response by the employer was warranted.

[95] The employees worked in a historically low-paid occupation, and they were vulnerable financially. They also lost the social contact their jobs offered through interaction with quests, colleagues and the public generally.

[96] The Authority will suspend its determination of penalties until it has been advised of the outcome of discussions between Unite and HSL, which the parties are directed to have with a view to reaching agreement as to the appropriate levels of compensation to be paid to the applicant employees to resolve their personal grievances.

[97] A failure to reach agreement, should that occur, cannot have any influence in determining penalties, but if agreement is successfully reached that ought to be viewed favourably to HSL, when fixing penalties. It is expressly a factor under s 133A of the Act when determining the penalty for breach of both the CEA and the ER Act.

Wage claim for underpaid hours

[98] The Authority has considered the possible claim at least one of the applicant employees may have arising out of the payment by HSL of the wage subsidy at a level of hours recorded in her employment agreement. That level was substantially below the actual hours she had been promised and had routinely worked since commencement.

[99] Without investigating further and determining that matter, the Authority considers it is a discrete problem sufficiently removed from the grievance and penalty claims brought by the applicants, that it should not be joined to those claims. If it is to be pursued, a new application should be made in the usual way by lodging a statement of problem.

Costs

[100] Costs are reserved for the parties to address once a final determination has been given.

Alastair Dumbleton
Member of the Employment Relations Authority

SCHEDULE 1

Second to Thirteenth Applicants

2 Ailini Ati

3 Caroline Matterson

4 Devi Aryal

5 Faata Tukia

6 Sangeeta Narayan

7 Varinder Kaur

8 Bethany Johnson

9 Alex Teiwimate – Tonihi

10 John Wilkinson

11 Igor Fracellio

12 Rosemaree Rathbun

13 Shirley Flavell