IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2011] NZEmpC 120
CRC 27/09

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	DAVID BOURNE First Plaintiff
AND	JOHN STEPHEN CONRAD Second Plaintiff
AND	JAMES KING TURNER Third Plaintiff
AND	NEW ZEALAND MERCHANT SERVICE GUILD INDUSTRIAL UNION OF WORKERS INCORPORATED Fourth Plaintiff
AND	REAL JOURNEYS LIMITED Defendant

Hearing:	10-12 February 2010 (3 days) further submissions received 26 May 2011 (Heard at Invercargill)
Appearances:	Paul McBride, counsel for the plaintiffs Peter Churchman and Janet Copeland, counsel for the defendant
Judgment:	28 September 2011

JUDGMENT OF JUDGE A A COUCH

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[1] This judgment decides a challenge by the plaintiffs to some aspects of a determination of the Employment Relations Authority. As that challenge was not to the whole of the determination, the case also raises issues about the nature and scope of what is commonly known as a non de novo challenge.

[2] The first, second and third plaintiffs were employed by the defendant as launch masters, principally in command of tourist excursion vessels on Milford Sound. They were all members of the fourth plaintiff (the Guild) which is a union representing employees in the maritime industry.

[3] In early 2009, the defendant proposed a restructuring of its business on Milford Sound. This involved the possibility that one or more of its launch master positions might become redundant and staff dismissed as a result. Changes to terms of employment of remaining staff were also proposed. After a consultation process which occupied more than three months, the defendant decided to proceed with a revised restructuring plan. The plaintiffs objected on several grounds, including discrimination, unfair process and an alleged breach of an applicable collective agreement between the Guild and the defendant which covered the work of the first, second and third plaintiffs.

[4] This led to proceedings before the Authority initiated by the plaintiffs. In a determination dated 5 June 2009,[1] the Authority issued an interim injunction restraining the defendant from proceeding with the restructuring until the claims made by the plaintiffs had been substantively determined.

[5] The Authority held its substantive investigation meeting later in June 2009 and issued its final determination on 5 October 2009.[2] That dealt with the claims initially made by the plaintiffs and also with counterclaims made by the defendant that the plaintiffs had breached obligations of good faith and fair dealing imposed by s 4 of the Employment Relations Act 2000 (the Act) and by provisions of the collective agreement. The Authority very largely dismissed the plaintiffs' claims and upheld the defendant's counterclaim. The plaintiffs challenge is to some aspects of that final determination.

[6] The Authority's substantive determination effectively ended the interim restraint on the defendant completing the restructuring it had begun in May 2009. Shortly after the determination was given, the defendant dismissed the second and

[1] CA 74/09.
[2] CA 74A/09.

third plaintiffs from their permanent positions but immediately re-engaged them on fixed term agreements for a period of months over the summer. Notwithstanding these developments, the plaintiffs elected only to have the Court hear selected aspects of the matter which had been before the Authority.

Nature and extent of the hearing

[7] Originally, the plaintiffs sought urgency and this was granted to an extent by the Chief Judge on 6 November 2009 when he directed that a hearing of the matter begin on 10 February 2010. Unfortunately, the nature and extent of that hearing were unclear and unsatisfactory when it began. The statement of claim failed to include the particulars required by subsections (3) and (4) of s 179 of the Act:[3]

> **179 Challenges to determinations of the Authority**
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> ...
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> (3) The election must—
>
> (a) specify the determination, or the part of the determination, to which the election relates; and
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> (b) state whether or not the party making the election is seeking a full hearing of the entire matter (in this Part referred to as a hearing de novo).
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> (4) If the party making the election is not seeking a hearing de novo, the election must specify, in addition to the matters specified in subsection (3),—
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> (a) any error of law or fact alleged by that party; and
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> (b) any question of law or fact to be resolved; and
>
> (c) the grounds on which the election is made, which grounds are to be specified with such reasonable particularity as to give full advice to both the court and the other parties of the issues involved; and
>
> (d) the relief sought.

[8] Although the statement of claim specified the parts of the determination the plaintiffs had elected to challenge, it did not state whether they were seeking a hearing do novo. The fact that only parts of the determination were challenged

[3] The same particulars are also required by regulation 11(1)(g) of the Employment Court Regulations 2000. Regulation 21 also applies to cases where a de novo hearing is not sought. It allows a statement of defence to include an indication of the defendant's view of the appropriate nature and extent of the hearing. That was not done in this case but, as the regulation is permissive rather than mandatory, no criticism is made of the defendant in this regard.

suggested very strongly that the plaintiffs were not seeking a full hearing of the entire matter and this was confirmed by Mr McBride in his opening. That being so, the plaintiffs were required to comply with s 179(4). The statement of claim described the relief sought but did not allege any specific errors of fact or law, state any questions of law or fact to be resolved or give sufficient particulars to enable the Court to fully appreciate what the issues were.

[9] When a hearing de novo is not sought, s 182(3)(b) of the Act applies:

> **182 Hearings**
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> ...
>
> (3) Where—
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> (a) ...
>
> (b) the election states that the person seeking the election is not seeking a hearing de novo,—
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> the court must direct, in relation to the issues involved in the matter, the nature and extent of the hearing.

[10] Possibly because the particulars required by s 179(3)(b) and (4) were not included in the statement of claim, the Chief Judge was not alerted to the fact that s 182(3) applied and no directions were given as to the nature and extent of the hearing.

[11] There was also an issue whether all of the relief sought by the plaintiffs was potentially available to them in relation to causes of action they could properly pursue in a non de novo challenge. I sought and received submissions from counsel on this issue. They also supplied me with copies of some documents which were before the Authority. I refer to those when I deal with specific issues later in this judgment.

[12] The fundamental scheme of the Act regarding challenges to determinations of the Authority is clear. Any party who is dissatisfied with a determination may elect a judicial hearing by the Court. Two types of judicial hearing are provided for. By far the most common is a hearing de novo in which the Court conducts a full hearing of the entire matter. As an alternative, the Act also allows a party to elect a judicial hearing relating to only part of a determination.

[13] The nature and scope of de novo hearings was dealt with authoritatively by a full Court in *Abernethy v Dynea New Zealand (No 1)*[4] The statutory focus is on the "matter" which was before the Authority. The "entire matter" referred to in s 179(3)(b) includes any aspect of the employment relationship problem between the parties investigated by the Authority. Thus, in a de novo hearing, the Court may hear and decide matters which were not actually determined by the Authority, provided they were part of the Authority's investigation.

[14] Where a de novo hearing is not sought, the statutory focus is on the Authority's determination, rather than the entire matter which was before the Authority. This is clear from the requirement in s 179(3)(a) to "specify the determination, or part of the determination, to which the election relates" and is reinforced by the nature of the particulars required to be specified by s 179(4). Consistent with this analysis, the full Court in *Abernethy* said:[5]

> We agree with Ms Ironside that it is only on a non de novo challenge, where the Act requires the issues to be defined, that the Court is limited to hearing a challenge to the issues that were actually decided by the Authority.

[15] It follows that, in a non de novo hearing, the Court has no jurisdiction to hear and decide issues which were not determined between the parties by the Authority.

[16] Within that limited jurisdiction, the Act provides in s 182(3)(b) that the Court must direct the "nature and extent" of the non de novo hearing "in relation to the issues involved in the matter". This is a procedural provision rather than a jurisdictional one. What the Court must do is to direct the manner in which the issues which are properly within the Court's jurisdiction under s 179(3) are to be put before the Court. Thus, for example, the Court may direct that uncontentious evidence be given by affidavit or that submissions be made by memorandum. In appropriate cases, it may direct that the matter be decided on the papers without a hearing.

[17] What then are the effects on this case of the parties' and the Court's failure to comply with the statutory and regulatory requirements? Section 179(4) is effectively

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[4] [2007] ERNZ 271.
[5] At [43].

a statutory requirement to provide a properly particularised statement of claim. In that sense, it reinforces the general requirement that a statement of claim should fully, fairly and clearly inform the Court and the defendant of the nature and details of the claim, the relief sought and the grounds upon which it is sought.[6] While proper pleadings play a very important part in ensuring that proceedings are decided fairly and economically, they do not affect the Court's jurisdiction. The same may be said of directions under s 182(3). As the hearing of this case amply demonstrated, failure to comply with these statutory requirements can lead to a confusing and inefficient hearing. These are aspects of the case which may be reflected in costs but I note that, prior to the hearing, there was no complaint by the defendant that the statement of claim was deficient or that directions ought to have been given.

Plaintiffs' claims

[18] The allegations in the statement of claim are set out under a series of headings. Each of the last four of these headings purports to describe a "cause of action" under which remedies are sought:

(a) "Dispute – nature of employment" - It is alleged that the defendant's selection of launch masters to be dismissed on grounds of redundancy was made from too small a group. It was made from the six launch masters employed principally operating scenic day cruises at Milford Sound. The plaintiffs allege the selection should have been made from the wider group of launch masters employed by the defendant throughout Fiordland.

(b) "No redundancy" – The plaintiffs allege that the defendant's conclusion in October 2009 that it had a surplus of launch master positions either at Milford or in Fiordland generally was not sustainable on the facts.

(c) "Flawed selection" - To the extent that there was a surplus of launch master positions, the plaintiffs allege that the selection criteria used by

[6] Reg 11(2).

the defendant were inappropriate. In particular, they say that the criteria were subjective, inconsistent with provisions of the applicable collective agreement and applied in a manner which discriminated against the first, second and third plaintiffs by reason of union membership.

(d) "No breach of good faith" – The plaintiffs challenge the Authority's determination that, in the course of the restructuring process, the fourth plaintiff acted in breach of its statutory duty of good faith and in breach of the collective agreement.

[19] The only clearly discernible causes of action in these parts of the statement of claim are the allegation of discrimination in (c) and the denial of any breach of good faith in (d). Otherwise, they largely describe issues of fact or mixed fact and law without linking them to any particular cause of action.

[20] For example, under the heading "flawed selection", six allegations are made about aspects of the defendant's conduct followed by the general allegation that the defendant "acted in breach of the Plaintiffs' rights under the collective agreement and law". The remedies sought are a "declaration that the Defendant's selection process was flawed" and "[s]uch further or alternative remedies (including personal grievance remedies) as in the opinion of the Court is just". While it appears that one of the allegations relates to a dispute about the interpretation and application of the collective agreement and another could only relate to a personal grievance, it is unclear what cause of action the other allegations are intended to support.

[21] The nature and extent of the plaintiffs' claims was further confused by the recitation at the beginning of each so-called "cause of action" that the plaintiffs repeated the allegations contained in all previous paragraphs of the statement of claim. Thus, the plaintiffs purported to rely on allegations relating to interpretation of the collective agreement for their challenge to the Authority's conclusion that they had breached their statutory duty of good faith.

[22] Such matters are important. If an allegation is part of a personal grievance, the Court must evaluate the employer's conduct under the test in s 103A of the Act based on the standard of a "fair and reasonable employer". If, on the other hand, the allegation relates to a dispute about the meaning and application of a collective agreement, that standard is not applicable. Alternatively, where a penalty is involved, the proceeding is of a quasi-criminal nature and the conduct of the defendant must be viewed in that light.

[23] A further difficulty which became clear at an early stage of the hearing is that the statement of claim and affidavits had been prepared with little regard to the limitations on the Court's jurisdiction where a de novo hearing is not sought. In particular, the plaintiffs relied on events which occurred after the Authority's investigation meeting concluded on 25 June 2009. When this was raised with Mr McBride in the course of his opening, he confirmed that no evidence of these later events was provided to the Authority. While evidence of such events might shed light on the intentions of the parties in relation to earlier events which were considered by the Authority, it cannot be said that the Authority decided anything in relation to those later events. Accordingly, it is not open to the plaintiffs to seek remedies in respect of those later events. On behalf of the plaintiffs, Mr McBride accepted that.

[24] Following extensive discussion with counsel in the course of the hearing, the best summary I can make of the claims the plaintiffs seek to have decided by the Court is:

(a) A claim by all four plaintiffs that the defendant breached clause 15.2 of the applicable collective agreement by adopting redundancy selection criteria other than the ability of the candidates to "perform tasks to the standards required".

(b) In the context of personal grievances by the first three plaintiffs that they were disadvantaged in their employment by the way the defendant conducted the process of selection for redundancy, claims that:

(i) the defendant ought to have made its selection from a group comprising all launch masters employed by it in Fiordland rather than only the six launch masters engaged in Milford Sound scenic day cruises.

(ii) the defendant discriminated against the first three plaintiffs by reason of their involvement in union activities in its choice of the group of launch masters from whom selection for redundancy would be made and in its choice of employees for redundancy.

(iii) the defendant breached its duty of good faith in the course of the restructuring process by failing to give the first three plaintiffs access to all information relevant to the continuation of their employment and an opportunity to comment on that information.

(iv) the selection criteria adopted by the defendant were inappropriate.

(v) the defendant predetermined the nature of restructuring it would undertake and that, as a result, its consultation with the plaintiffs was not in good faith.

(c) A challenge by the plaintiffs to the Authority's conclusion that they had breached their statutory duty of good faith and were in breach of the collective agreement by failing to respond to a settlement proposal by the defendant on 1 May 2009 and lodging proceedings in the Authority instead.

Roles of the plaintiffs

[25] Both in the Authority's determination and in the statement of claim, there was insufficient differentiation made between the four plaintiffs. It is particularly

important to distinguish between the three employee plaintiffs on the one hand and the Guild on the other. All four plaintiffs have standing to pursue the claim in (a) above. The claims in (b) are in the context of personal grievances and therefore cannot be made by the Guild. The Authority's conclusion which is challenged in (c) was expressed alternatively as being that the Guild had breached its obligations and that the plaintiffs generally had breached their obligations. It is clear from the evidence that all of the conduct relied on by the company for its counter claim in the Authority was the conduct of the Guild rather than its members. While the Guild undoubtedly represented its members' interests, it was the Guild which decided how those interests were to be advanced. Any liability must lie solely with the Guild.

[26] Although I have referred to all three of the employee plaintiffs in the summary above, Mr Bourne did not give evidence and Mr McBride conceded that the alleged consequences of any unjustifiable action by the defendant were limited to Mr Conrad and Mr King-Turner.

Summary of facts and events

[27] The defendant is a substantial company operating principally in the leisure travel industry. Its operations include scenic excursions and day trips by launch on Milford Sound. The company also offers overnight cruises and nature cruises from Milford Sound and voyages of varying types from Manapouri, Doubtful Sound and Te Anau. The company's other operations include sightseeing flights, coach tours, farm visits, restaurants, accommodation, rental cars and retail outlets.

[28] Over many years, the Milford Sound scenic cruises were one of the defendant's most popular and profitable operations. At all times, the service was provided using specific vessels operating to a fixed timetable, regardless of passenger numbers. As the demand for such cruises is seasonal, the number of vessels and frequency of sailings changed at times throughout each year but was always determined well in advance.

[29] The defendant's other cruises worked on a more flexible basis. A basic level of service was scheduled with additional sailings arranged at short notice to cater for any greater demand.

[30] Virtually all of the customers who purchased these cruises were tourists, some from within New Zealand but mostly from other countries. This part of the defendant's business was therefore exposed to changes in the tourism market such as those generated by the world economic downturn which began in 2008. The Milford Sound scenic cruises were particularly sensitive to such changes because they were principally sold on a wholesale basis to tour groups.

[31] In 2008, the Milford Sound scenic cruises were provided using four vessels. During the summer high season from October to April, all four vessels were used. During the winter low season from May to September, two vessels were used.

[32] To command its vessels, the defendant employed a number of launch masters. Each was qualified to operate one or more of the defendant's vessels. Six launch masters operated the vessels used to provide scenic cruises on Milford Sound. Some of those were permanent employees based at Milford. Others worked at Milford in the summer and at the defendant's workshops in Te Anau or Bluff in the winter.

[33] Mr Bourne, Mr Conrad and Mr King-Turner were all permanently employed as launch masters based at Milford. They worked according to a roster of nine days on and five days off in the summer and ten days on and four days off in the winter. During the summer, the launch masters were fully engaged in sailing. In winter, those not engaged in sailing were encouraged to take holidays and were otherwise provided with maintenance work at Milford.

[34] Of the six launch masters routinely operating the Milford Sound scenic cruise vessels in 2008, four were members of the Guild. They were Mr Bourne, Mr Conrad, Mr King-Turner and Denis Lilley. The work of those launch masters was covered by a collective agreement between the Guild and the defendant (the collective agreement).

[35] The Guild is a relatively small union with limited resources. Until 2008, its only organiser was the general secretary, Helen McAra. In late 2008, Sarah Dench was also engaged as an organiser. Those paid organisers were assisted in their work by members of the union.

[36] During the latter part of 2008, the defendant became increasingly concerned about the impact on its operations of the economic downturn affecting much of the world. In particular, management of the company was concerned that reduced international tourism was affecting the financial performance of its scenic cruise operations. In December 2008, management of the defendant mentioned these concerns informally to Ms Dench and Mr Conrad in the course of a meeting about other matters.

[37] At the beginning of 2009, the defendant developed a proposal to address the perceived downturn in the company's business. This was recorded in a detailed letter to the Guild dated 9 February 2009 presented at a meeting that afternoon between senior management of the defendant, Ms Dench and Mr Conrad. The proposal identified the Milford Sound scenic cruise and day cruise operations as the most negatively affected part of the defendant's business and singled out that area of operations for change. The key features of the proposal were:

(a) Extension of the winter season from five to six months, including October, and corresponding reduction of the summer season from seven to six months. This change would reduce the period for which summer staff were employed and reduce the peak earning period for launch masters.

(b) Change the winter roster for affected launch masters from ten on and four off to seven on and seven off. The effect would be to reduce launch master earnings.

(c) Only one vessel would be operated during the winter season and three during the summer season.

(d) The number of sailings each day during the summer season would be reduced from six to four. The effect of this would be to reduce the number of permanent launch master positions required at Milford from six to five.

(e) The rate of pay for launch masters would be related to the main vessel to which they were assigned rather than the highest rated vessel for which they were qualified. This would reduce the pay of some launch masters.

(f) The rate paid for reimbursement of travel costs would be reduced.

[38] The stated consequences of the proposal included the disestablishment of one permanent launch master position and the dismissal of one launch master as a result. Selection criteria and a detailed selection process were set out in the letter and attachments to it. The letter also contained a timetable providing for a two week consultation period until 23 February 2009, a final decision by 9 March 2009 and implementation of changes, including selection for redundancy, by May 2009.

[39] Later that day, management held a meeting with staff at Milford to present the proposal directly to them. Afterwards, members of the Guild met with Ms Dench and Mr Conrad.

[40] As the proposal included changes to the established terms of employment of staff, an issue raised at the initial meeting on 9 February 2009 was whether, in relation to the Guild members, the defendant was seeking a variation of the collective agreement. Ms Dench and Mr Conrad also asked a few other questions. The defendant's human resources manager, Kerry Hood, responded in a letter dated 18 February 2009 which included:

(a) Confirmation that the defendant was seeking a variation of the collective agreement to the extent required by the proposal. She noted that, if a variation was not acceptable to the Guild, the alternative may be a revised proposal involving more job losses.

(b) Advice that the defendant regarded all six launch masters operating scenic and day cruises at Milford Sound as permanent employees.

[41] The significance of this last point is that, although three of the launch masters at Milford had employment agreements confirming that they were permanent employees, the other three had been employed for a period of years on a succession of fixed term agreements. What Ms Hood was telling the Guild was that, given the history of the latter three men's employment, the company regarded them also as permanent employees.

[42] The following day, 19 February 2009, Ms Dench sent a letter to Ms Hood containing the Guild's initial response to the company's proposal. The approach of the Guild was summarised in a sentence in the opening paragraph: "We require further information and a real opportunity to consult with our membership before we will be in a position to give you a full response." There followed a series of 28 questions seeking information about the economic circumstances of the defendant, further details of the proposal and possible consequences if the proposal was to be implemented.

[43] On 24 February 2009, Ms Hood replied in a five page letter responding specifically to each of the questions Ms Dench had asked. The responses were very largely substantive and informative. In respect of two questions about the impact on shareholders, however, Ms Hood declined to provide the information sought on the grounds that it was commercially sensitive. Apparently recognising that it would take Ms Dench some time to analyse this further information and to consult with the Guild's members, the time period for feedback on the proposal was extended from 23 February to 4 March 2009.

[44] From that point on, Ms McAra took over communications with the company on behalf of the Guild. She sought a further extension of the time for a response to the proposal to suit her other commitments and this was agreed by Ms Hood. Specifically, Ms McAra said that she was available to meet with union members on Monday 9 March 2009 and to then provide feedback to the company at a meeting the following day or on Wednesday 11 March 2009. Ms Hood agreed to this. She also

agreed to relieve Mr Conrad of his duties so he would be available to attend the meeting with the company. Over the next week or so, Ms Hood also provided answers to several further questions asked by Ms McAra.

[45] The meeting of Guild members held on 9 March 2009 was poorly attended. As a result, when they met with company representatives the following day, Ms McAra and Mr Conrad sought a further extension of the time to respond to the company's proposal. Because the company was seeking a variation of the collective agreement, they also sought to have a stop work meeting with all Guild members. This caused consternation. The company had placed some of its operations on hold until the proposal was finalised and management were coming under increasing pressure from the Chief Executive and the directors to make progress. Ms Hood and Mr Norris nonetheless agreed to extend the timetable further and to facilitate an early meeting of Guild members. It was also agreed that, following further meetings of members, the Guild would provide written feedback on the company's proposal.

[46] At this meeting on 10 March 2009, there was some limited discussion of the Guild's view of the proposal. Ms McAra undertook to provide more detailed written feedback promptly with the option to add to that subsequently. Ms McAra's evidence was that she prepared that document but, for reasons which were not explained, it was never sent to the company.

[47] One of the factors affecting when the Guild might have a further meeting of its members was the requirement in s 26 of the Act that 14 days notice of any such meeting be given to the employer. At the meeting on 10 March 2009, the company agreed to waive that requirement and suggested that a meeting could be held during the following four days. It appears that Ms McAra neither accepted nor rejected that suggestion and the company representatives went away believing that the meeting would be held promptly. On 11 March 2009, however, Ms McAra sent an email to Ms Hood saying that a meeting could not be held before 20 March 2009. This prompted a detailed email from Ms Hood in response. She reiterated what had apparently been said at the meeting on 10 March 2009 that the company would make all the necessary arrangements to ensure Guild members were available for a meeting during the following four days. This was rejected by Ms McAra for reasons

she did not disclose at the time but which, in evidence, she gave as her involvement in meetings overseas.

[48] In these circumstances, the company agreed to stop work meetings being held on Friday 20 March 2009 and made arrangements for Guild members to be released from work to attend them. Two meetings were duly held that day and were well attended.

[49] At the meeting on 10 March 2009, it had been agreed that the company representatives would meet with the Guild representatives following the stop work meetings to receive and discuss the Guild's feedback. Despite Ms Hood's efforts, such a meeting was never arranged and the company became increasingly anxious about when and how feedback from the Guild would be received. On 24 March 2009, Ms Dench informed Ms Hood by email that the Guild was preparing written feedback which would be provided to the company but, when Ms Hood immediately asked when it would be provided, there was no response. As a result, Ms Hood sent a firmly worded letter to Ms McAra on 26 March 2009, recording the history of the consultation process to date and saying that, unless the Guild provided its feedback by the following day, the company would proceed without its input.

[50] That ultimatum produced a swift response from the Guild in the form of a memorandum sent to Ms Hood early in the evening of 26 March 2009. The key points of the Guild's response were:

(a) A rejection of the variations to the collective agreement proposed by the company affecting mileage rates and calculation of launch masters' salaries.

(b) A challenge to the company's figures indicating a downturn in business. This challenge was based largely on the anecdotal observations of Guild members and effectively invited the company to offset reduced revenue in its Milford Sounds operations against sustained or increased revenue in other operations. The Guild

concluded: "The company is in a strong financial position and can withstand a period of downturn."

(c) Concern that the proposed savings were to be made very largely in the Milford Sound scenic operation as compared to other areas of the company's business. The Guild concluded: "We don't see this as fair and equitable way of sharing the perceived pain."

(d) Criticism of the proposed selection criteria and concern that they would be used unfairly. The feedback included the following statement: "All the Launchmasters spoken to felt the proposed criteria for selection were unacceptable, and relate not to actual performance or professionalism, but to the individual's relationship with company management." This was accompanied by suggestions that criteria such as "team work" and "self management" had not been used before and would be used to perpetuate favouritism.

(e) The suggestion that the company explore alternatives to dismissal for redundancy, including seeking volunteers, redeploying a launch master into a training role or making any selection for redundancy on a "Last on / First off" basis. This part of the memorandum also contained the following sentence: "Spread any necessary reductions more evenly; proposed reductions for a handful of members are too drastic." This equivocal statement was not explained.

[51] Noting the Guild's rejection of any variation to the collective agreement, the company made a revised proposal for restructuring in a letter to the Guild dated 1 April 2009. The essential change in the proposal was to disestablish two launch master's positions rather than one although it was said that those made redundant would be given preference for summer fixed term launch master work. The letter also identified Mr Bourne, Mr King-Turner and Mr Conrad as the three employees directly affected by the revised proposal. The clear implication of this was that the company proposed selecting two of those three men for redundancy. A revised

timetable was provided allowing two weeks for further consultation and implementation to be completed by 1 May 2009.

[52] Although the letter of 1 April 2009 was sent to Ms McAra by email that day, there was no response from the Guild until 9 April 2009 when Ms McAra sent a very brief email saying that the Guild was "seeking legal advice." That was followed up on 14 April 2009 with an email in which Ms McAra said:

> We now raise a dispute with the company as we believe it is questionable as to whether the proposal is in accordance with the good faith requirements of the employment agreement. In addition, we question whether, and the manner in which, the company has applied the principles in the redundancy clause of the agreement. In the circumstances, we do not believe the company is lawfully entitled to implement its proposals, particularly termination of employment, until this dispute is resolved.

[53] In response, Ms Hood wrote to Ms McAra on 16 April 2009, noting that the Guild had not provided any feedback on the revised proposal and again inviting it to do so. She also sought particulars of the dispute referred to by Ms McAra.

[54] On 21 April 2009, Ms McAra sent a letter to Ms Hood, the operative text of which was:

> The original restructuring proposal was unreasonable as:
>
> It targeted a small group for an excessive amount of cost recovery.
>
> The claimed reduction in rostered working hours would not have occurred for most members, but they would have a significantly reduced salary.
>
> The company's figures of expected revenue loss (by the restructuring of the cruises) do not match a situation where one vessel would not require a crew for most of the year.
>
> The further proposal of 1 April is even more unreasonable:
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> Increased savings are demanded of the Scenic Launchmasters without any justification.
>
> The redundancy proposal is now restricted to three employees, all of whom are Guild members.
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> It is clear that the role of 'Variable Permanent Launchmaster' is a redeployment, but the offer of this role has unfairly excluded Guild members.

[55] On 24 April 2009, Ms Hood sent a comprehensive reply to Ms McAra. This traversed the history of the consultation process and responded to the Guild's

particular criticisms of the revised proposal. She then recorded the company's decision to proceed with the revised proposal including the redundancy of two Milford Sound permanent launch masters. The consequences of this decision were also recorded in detail, including the selection process and the composition of the selection panel.

[56] The Guild responded with a threat to issue proceedings for an interim injunction restraining the company from proceeding with the restructuring. This led to discussions between Ms McAra and Janet Copeland, as solicitor for the company, who reached an interim agreement that no action would be taken by either party until urgent mediation had been undertaken.

[57] That mediation took place on 29 April 2009 with the assistance of a very experienced member of the statutory mediation service, Walter Grills. No resolution was reached that day. Immediately following the mediation, the Guild instructed its solicitors to write to the company.

[58] The following day, 30 April 2009, Mr McBride wrote on behalf of the Guild to Ms Copeland. After setting out a brief summary of the Guild's views, Mr McBride said: "Accordingly, we are instructed now to seek injunctive relief to preclude your client from proceeding to purport to *"select"* from the three Guild members (over any others) for purported redundancy."

[59] Ms Copeland replied to Mr McBride on 1 May 2009. In that letter, she responded in detail to the complaints made by the Guild and set out a specific offer of settlement. A response to this offer was sought by 4pm on 4 May 2009. The evidence of Ms Hood and other witnesses for the company was that no response to this letter was ever received. In her evidence, Ms McAra said that she did respond to that offer but that she did so through Mr Grills rather than directly to the company or to Ms Copeland. Witnesses for the company said that they heard nothing from Mr Grills at that time and that, when he did contact them some time later, he made no mention of having heard from Ms McAra after the mediation.

[60] When there had been no response from the Guild by 7 May 2009, the company commenced a selection process involving only the three scenic launch masters based at Milford Sound being Mr Bourne, Mr King-Turner and Mr Conrad.

[61] On 12 May 2009, Mr McBride commenced proceedings in the Authority on behalf of the Guild and those three launch masters alleging breach of the collective agreement, an unfair selection process and discrimination on grounds of union involvement.

[62] On 15 May 2009, the company extended the selection process to include all six launch masters who commanded scenic cruise vessels at Milford Sound. A timetable for interviews was given but the company specifically told the employees involved that "the results of this selection process will only be released and/or implemented in accordance with the determination of the Employment Relations Authority".

Authority proceedings

[63] In the statement of problem lodged with the Authority, both interim and final relief was sought. The interim relief sought was an injunction restraining the company from proceeding with the restructuring of its Milford Sound scenic operations until the dispute and the claims of discrimination had been resolved. The final relief sought was an interpretation of provisions of the collective agreement, a compliance order requiring compliance with the collective agreement and a declaration that the company had unlawfully discriminated against Guild members. Monetary remedies were also sought but were unspecified.

[64] An investigation meeting to consider the claims for interim relief was held on 28 May 2009. Prior to that meeting, the company gave an interim undertaking to include all six Milford Sound scenic cruise launch masters in the selection process. In its determination given on 5 June 2009, the Authority required the status quo, including that undertaking, to be maintained until the substantive issues were determined. The Authority then said:

> [28] However, I can see no reason to preclude the respondent from proceeding with its marketing and sales activities based on a reduced schedule of sailings at Milford Sound. Two positions are to be dispensed with and the sailing schedules are not at issue in this case. The present matter involves which launch masters will be aboard those vessels come summer.

[65] The substantive investigation meeting was conducted over three days beginning on 23 June 2009. By that time, the company had initiated a counter claim alleging that the Guild and its members had breached their duty of good faith by failing to be "active, constructive, responsive and communicative" during the consultation process as they were required to be by s 4(1A)(b) of the Act. The company also alleged that the plaintiffs had breached the collective agreement and that the personal grievances pursued by the launch masters were an abuse of process.

[66] In its substantive determination, the Authority described the claims made by the parties and continued:

> [10] To determine these matters, the Authority needs to make findings on the following issues:
>
> - How, if at all, is the status of the second applicants' [the first three plaintiffs in this proceeding] failure to provide an undertaking as to damages in an interim setting affected in a substantive action; and
> - Which launch masters ought to be included in the selection pool for possible redundancy; and
> - Has the respondent acted in accordance with the terms of the CEA where redundancies are contemplated; and
> - Has the respondent breached its obligations to act in good faith under s. 4 of the Act; and
> - If the respondent is in breach, what are the appropriate remedies to be applied?
>
> [11] In respect of the counterclaim by the respondent, the issues are:
>
> - Have the applicants abused the employment problem solving process as set out in the Act; and
> - Have the applicants breached their obligations under s. 4 of the Act; and
> - Have the applicants breached clause 22 of the CEA; and
> - What, if any, remedies are to be awarded to the respondent?

[67] The Authority summarised it conclusions on these issues as follows:

[74] Returning to the issues set out above in this determination I find:

- The second applicants have status to approach the Authority in relation to a substantive matter despite their failure to provide undertakings at the interim stage.
- All six Milford launch masters ought to be included in the selection pool. The selection of the two positions to be dispensed with is at the respondent's prerogative in light of its cost savings objectives.
- The respondent has acted in accordance with s. 15.2 of the CEA in its approach to addressing the redundancy issue.
- The respondent has not breached its obligations under s. 4 of the Act.

[75] In respect of the counterclaim, I find:

- The actions of the applicants fall short of abuse of the problem resolution process.
- The applicants have breached their obligations as their behaviour fell short of being active, constructive, responsive and communicative in their dealing with the respondent, as required under s. 4 of the Act.
- The applicants have breached their obligations to behave in a fair and reasonable manner towards the respondent throughout the employment relationship and to comply with all obligations and responsibilities contained in this agreement in good faith (clause 22). Their failure to respond to the respondent's 1 May 2009 proposal and begin action in the Authority is the behaviour in question.

[68] Curiously, the Authority did not include in these summaries the claims by Mr Bourne, Mr King-Turner and Mr Conrad that the company had discriminated against them by reason of their involvement in union activities. The Authority did, however, consider and determine those claims. It found that the three men had been involved in union activities for the purposes of s 104 of the Act but that the company had not discriminated against them by reason of that involvement.

[69] The Authority reserved its position with regard to damages, penalties and costs.

Breach of collective agreement?

[70] The Guild and the company were parties to a collective agreement covering launch masters and crew employed to work on company vessels. The agreement in question in this proceeding was in force from 1 April 2007 until 30 June 2009 (the collective agreement).

[71] The plaintiffs say that the company breached clause 15.2 of the collective agreement which provided:

> 15.2 Redundancy
>
> Redundancy is a situation where the position of employment of an employee is or will become surplus to the requirements of the employer's business.
>
> Redundancy does not include a situation solely involving a seasonal lay-off or the completion of a fixed-term engagement.
>
> Whenever a possible redundancy situation arises, for whatever reason, the employer will review the circumstances in detail and consider all options open to them, including redeployment retraining rearrangement of tasks and possible changes to performance criteria.
>
> We will then advise employees of our proposal and consult with those affected, together with their representatives or support people. We will consider the employee's responses alongside the proposal, and the employer will then make a final decision after taking into account all information. Employees selected for new or redefined positions will be chosen on their ability to perform the tasks to the standards required.
>
> ...

[72] The plaintiffs rely on the final sentence of the passage set out above to say that the company was bound to make any selection for redundancy on the basis of the candidates' "ability to perform the tasks to the standards required". They then say the company breached its obligation by failing to make that the sole criterion, or at least one of the criteria, for selection and by adopting other criteria which were inconsistent with that obligation.

[73] The plaintiffs also say that the company "unilaterally determined subjective criteria to be applied to the selection of staff"[7] and that this was also in breach of clause 15.2.

[74] The selection criteria adopted by the company were set out in appendices to its letter to the Guild of 9 February 2009 and repeated in subsequent correspondence. There were 18 criteria to be applied to each candidate in an initial assessment process and 22 criteria under ten headings for discussion in a subsequent interview. The plaintiffs' concern was particularly directed at two of the second set of criteria; "ability to handle change" and "loyalty and positive attitude to Real Journeys Ltd".

[7] Para 55 of the statement of claim.

[75] The fundamental problem with the first aspect of this claim is that the requirement in clause 15.2 that selection be made on the basis of the candidates' "ability to perform the tasks to the standards required" applies to selection for "new or redefined positions". It does not apply to selection for redundancy of employees in existing positions, which is the process the company was carrying out.

[76] Turning to the choice of selection criteria, clause 15.2 imposes a general obligation on the company to consult with affected employees about any proposal involving redundancy and it can reasonably be said that this extends to consultation about selection criteria. It is clear from the correspondence that the company consulted extensively and in detail with members of the Guild and that this consultation included the selection criteria. It is equally clear that the Guild understood the selection criteria to be part of the consultation because it commented in detail on the proposed criteria in its feedback provided on 26 March 2009. There can be no doubt that the company discharged its obligation to consult under clause 15.2.

[77] I find that the company did not breach clause 15.2 of the collective agreement. Accordingly, this part of the plaintiff's challenge fails.

Selection pool

[78] The plaintiffs allege that the Authority erred in concluding that the appropriate pool of employees from which any selection for redundancy should be made was the six launch masters engaged in scenic cruises on Milford Sound. They say that the appropriate pool was the wider group of all launch masters employed by the company to work in Fiordland, that group numbering approximately 19.

[79] This raises two issues. The first is whether it is open to the plaintiffs to pursue this claim by way of a non de novo challenge. If it is open to the plaintiffs to do so, the second issue is whether the Authority was wrong in its conclusion.

[80] The first issue turns on what the Authority decided and, in this case, whether the Authority decided that the selection pool should not be all Fiordland launch

masters. As noted earlier, I allowed counsel to provide me with additional information about what was actually before the Authority. The documents I received were the statement of problem, an email from Mr McBride to the Authority in response to a direction that the plaintiffs provide particulars of the dispute about the meaning and application of the collective agreement, extracts from written submissions made by Mr McBride to the Authority on 25 June 2009 and the whole of his submissions in reply dated 27 July 2009.

[81] It is clear from all of the evidence that the debate between the company and the Guild during the consultation process was whether the selection pool should include three or six positions. While there were some broad references to the size of the pool without mentioning either number, nowhere was there any suggestion that the pool should be any larger than six. The issue remained the same when the proceedings were commenced in the Authority. Paragraph 1 of the statement of problem described the first matter as:

> 1.1 The Respondent's unlawful and unjustifiable "restructuring process" as involving the "selection" of 2 employees for redundancy from a pool comprising solely the Second Applicants, who are all members of the First Applicant ("the Guild"), when there are a further 3 employees who have been excluded from that, who are not Guild members, and who perform substantially identical roles.

[82] The Authority's determination of the claim for interim relief is consistent with this claim that the proper pool for selection was six launch masters rather than three. The further particulars provided on 21 May 2009 at the direction of the Authority did not change that position.

[83] The Authority's substantive determination is also consistent with the issue before it being only whether the pool should be three or six. Nowhere in the determination itself is there any indication that a larger pool was advocated by either party. In answer to a question in cross examination, however, Ms Hood agreed that the plaintiffs contended to the Authority at its investigation meeting that the selection pool should have been all Fiordland launch masters. In the submissions subsequently made by Mr McBride, there was also a suggestion to this effect. In his principal submissions, Mr McBride addressed the nature of the positions occupied by the Milford launch masters and suggested that their roles were essentially similar

to all other launch masters employed by the company in Fiordland. In his submissions in reply, Mr McBride was more specific. He submitted "The pool is properly Fiordland Launch Masters."

[84] Although the Authority did not mention these submissions in its determination, it was common ground that they were before the Authority and they are referred to in the intituling of the substantive determination. It follows that, in reaching its conclusion that "[a]ll six Milford launch masters ought to be included in the selection pool", the Authority implicitly decided that the pool ought not to comprise all Fiordland launch masters. I therefore find that is open to the plaintiffs to challenge that aspect of the determination in a non de novo hearing.

[85] Turning to the substantive question whether the pool should have been wider than the six men the Authority found to be appropriate, this issue arises in the context of personal grievances. It is therefore subject to the test of justifiability set out in s 103A of the Act:[8]

> **103A Test of justification**
>
> For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[86] The case for the plaintiffs was that the six men were all employed as "Fiordland launch masters" and that their roles were essentially the same as all other launch masters employed by the company in Fiordland. Mr Conrad and Mr King-Turner gave evidence that they regarded themselves as available to work anywhere in Fiordland if required and that they were only deployed to Milford Sound on a temporary basis. There was also evidence that the Milford Sound scenic launch masters had been provided with a position description headed:

POSITION TITLE:	**DIVISION / LOCATION**
Launch Master – Fiordland	Fiordland

[8] As the events in this case occurred in 2009, s 103A must be applied as it then was rather than the amended version which took effect on 1 April 2011.

[87] In support of the plaintiffs' contention, Mr McBride also referred me to numerous provisions of the collective agreement which he submitted were consistent with the role of launch master being broadly defined and not limited to work at any particular location. He also noted that launch masters working at Milford Sound were allocated particular duties by the company's "Fiordland Operations Roster".

[88] For the company, counsel referred me to the travel provisions of the collective agreement which included the statement:[9]

> Employees are appointed to work from a defined location for the season (location will be stated in their Written Advice letters and may change from year to year) ...

[89] Consistent with this, when launch masters were appointed, their terms of employment were recorded in a letter from the company. In each case, this specified the location of their position. Similar letters were sent to each man in subsequent years, confirming the location at which he was employed. As examples, letters were produced relating to Mr Conrad and Mr King-Turner. In each case, they recorded the location as "Milford Sound" or "Scenic Cruises – Milford Sound". Also produced was correspondence between the company and the two men showing that they had applied for and been appointed to positions which were specifically described as being located at Milford Sound.

[90] The collective agreement had some provisions applicable only to employees working on Milford Sound scenic day cruises. Clause 25 required the company to provide accommodation in Milford village to such employees provided they accepted the company's accommodation agreement. Employees located elsewhere had to provide their own accommodation. Clause 4.7 allowed launch masters operating scenic cruises at Milford to choose to work either of two roster patterns during the summer. This choice was not available to launch masters engaged in other work.

[91] Under the collective agreement, there were other consequences of the location of employment. Clauses 1.6 of schedule 2 and 4.7 of schedule 3 required

[9] Clause 1.6 of schedule 2 and applicable to launch masters by clause 4.7 of schedule 3.

the company to reimburse employees for the cost of travel in their own vehicle to "locations other than where they are primarily employed". Evidence was given of a claim by an employee based at Manapouri for travel to and from Te Anau. This claim was advanced by the Guild on the basis that the employee's "designated place of work" was Manapouri.

[92] It is clear from these provisions of the collective agreement that location was recognised by the parties as a term of the employment of each employee covered by it. In particular, the role of launch master at Milford Sound engaged in scenic day cruises was recognised as a specific role with unique conditions.

[93] The company also relied on other factors to justify its original decision to make selections for redundancy from the three scenic cruise launch masters based entirely at Milford Sound, that is Mr Bourne, Mr Conrad and Mr King-Turner. The main loss of business affecting the company's operations was of Milford Sound scenic day cruise passengers. That was where savings could be made and I find that the company's decision to shorten the summer season and to reduce the frequency of sailings in winter in that part of its operations made good sense. Conversely, it would have made little sense for the company to have reduced its other services which were more flexible and largely unaffected by the downturn in tourist numbers.

[94] Mr Churchman submitted that, as the restructuring only affected the Milford Sound scenic day cruise operation, the company would have been justified in selecting launch masters for redundancy from the three men employed exclusively in that service. If any of those men had their permanent positions disestablished and they were appointed instead to summer only positions, there would be no effect on any other launch masters. If, on the other hand, a launch master located elsewhere had been selected for redundancy, it would be necessary to shuffle launch masters around to fill the gap in a service not being reduced.

[95] While there is force in that submission, the reasoning applies almost equally to the other three launch masters stationed at Milford during the summer season and elsewhere during the winter. To have disestablished their positions and replaced

them with summer only positions would have caused some disruption to the terms and conditions of other launch masters but relatively little.

[96] Another factor to be considered in this context is that launch masters varied in their experience and capabilities. Each was cleared to operate one or more particular vessels. They obviously had to be cleared to operate the particular vessel they usually commanded but most were also cleared to operate some other vessels. Which other vessels they were cleared to operate, however, varied from man to man. Had it become necessary to relocate launch masters to fill gaps, therefore, that would not have been a straightforward exercise and may have required retraining.

[97] In all the circumstances, I find that a fair and reasonable employer would have made the selection for redundancy from the six launch masters engaged either fully or partly in scenic day cruises at Milford Sound. As that is ultimately what occurred, I find that the first three plaintiffs were not disadvantaged in their employment by any unjustifiable actions of the company. This aspect of the challenge also fails.

Discrimination

[98] The first three plaintiffs say that the defendant discriminated against them by reason of their involvement in union activities. In particular, they say that the defendant discriminated against them in the composition of the selection pool and in its choice of employees to be made redundant. As this issue also arises in the context of personal grievances, the test in s 103A of the Act must be applied.

[99] The statutory provisions defining the essential concepts involved in this claim are ss 104 and 107 of the Act:

> **104 Discrimination**
>
> (1) For the purposes of section 103(1)(c), an employee is discriminated against in that employee's employment if the employee's employer or a representative of that employer, by reason directly or indirectly of any of the prohibited grounds of discrimination specified in section 105, or by reason directly or indirectly of that employee's refusal to do work under section 28A of the Health and Safety in

Employment Act 1992, or involvement in the activities of a union in terms of section 107,—

(a) refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances; or

(b) dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; or

(c) retires that employee, or requires or causes that employee to retire or resign.

(2) For the purposes of this section, detriment includes anything that has a detrimental effect on the employee's employment, job performance, or job satisfaction.

107 Definition of involvement in activities of union for purposes of section 104

(1) For the purposes of section 104, involvement in the activities of a union means that, within 12 months before the action complained of, the employee—

(a) was an officer of a union or part of a union, or was a member of the committee of management of a union or part of a union, or was otherwise an official or representative of a union or part of a union; or

(b) had acted as a negotiator or representative of employees in collective bargaining; or

(ba) had participated in a strike lawfully; or

(c) was involved in the formation or the proposed formation of a union; or

(d) had made or caused to be made a claim for some benefit of an employment agreement either for that employee or any other employee, or had supported any such claim, whether by giving evidence or otherwise; or

(e) had submitted another personal grievance to that employee's employer; or

(f) had been allocated, had applied to take, or had taken any employment relations education leave under this Act; or

> (g) was a delegate of other employees in dealing with the employer on matters relating to the employment of those employees.

[100] It was agreed that Mr Conrad fell within the definition in s 107 by reason of his having been a union delegate and negotiator. Mr McBride submitted that Mr Bourne and Mr King-Turner also fell within the definition by virtue of paragraph (d) of s 107(1). He relied solely on the fact that, as employees covered by the collective agreement, they had opposed the variation to the agreement sought by the company. Mr McBride submitted that, in rejecting the variation, the two men were implicitly making a claim for the continued benefit of their existing terms of employment and that this fell within paragraph (d).

[101] I do not accept that submission. The opening words of s 107(1) and paragraph (d) are effectively identical to those of its legislative predecessor, s 28(2) of the Employment Contracts Act 1991. Those provisions were considered by Judge Colgan in *Pacific Rim Investments Flight Catering Ltd v Groom*[10] where he said:[11]

> I do not accept that merely being employed on, and thereby receiving the benefits of, an employment contract amounts to the making or the causing to be made of a claim for some benefit of that contract. The Tribunal's conclusion and reasoning ignores the remainder of the wording of subs (2)(e) which gives a very clear interpretative pointer to the principal phrase. There the words "whether by giving evidence or otherwise" appear. A "claim" must be read in that light. It means, for practical purposes, the making of a claim to a contractual benefit that has been omitted or refused by an employer, the sort of claim that a dissatisfied employee takes up through a delegate, a union representative, through a labour inspector or even personally.

[102] I agree with that analysis and find that it applies equally to the current legislation. I therefore find that Mr Bourne and Mr King-Turner were not involved in the activities of a union as that term is defined in s 107 and that this aspect of their personal grievances must fail on that ground.

[103] Returning to Mr Conrad, the second aspect of this claim is whether the company discriminated against him within the meaning of s 104. Mr McBride did

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[10] [1998] 3 ERNZ 1000
[11] At 1018.

not address this issue in his closing submissions but, as it was properly before the Court, I must decide it.

[104] As noted earlier, the two grounds of alleged discrimination related to the composition of the selection pool and the company's selection for redundancy. The second ground cannot be considered as it arose out of events which occurred after the Authority's investigation meeting and was therefore not decided by the Authority.

[105] In deciding whether the company discriminated against Mr Conrad in the composition of the selection pool, the essential question is whether he suffered any detriment in circumstances in which other employees of the company employed on work of the same description were not subject to that detriment.[12] Being included in the selection pool was obviously detrimental to Mr Conrad because it rendered him potentially liable to dismissal for redundancy. Whether that detriment was discriminatory therefore comes down to the question of who were the other employees of the company "employed on work of the same description". For the reasons I have set out earlier, I find that the three scenic day cruise launch masters permanently located at Milford Sound had terms of employment which were the same as each other but different to those of other launch masters employed by the company. As all three of those launch masters were included in the pool, it follows that Mr Conrad was not discriminated against.

[106] In any event, I find that the company did not include Mr Conrad in the selection pool by reason of his involvement in union activities. Although s 119 of the Act creates a presumption of such a motive, I find in this case that any such presumption has been rebutted. There was no direct evidence of such a motive or compelling reason to imply it. Such a motive was convincingly denied by the company representatives involved and there was ample alternative explanation for the composition of the selection pool.

[107] This aspect of the challenge fails.

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[12] Employment Relations Act 2000, s 104(1)(b).

Section 4 of the Act

[108] Several of the remaining claims are founded on the obligation of good faith described in s 4 of the Act. The relevant parts of s 4 are:

> **4 Parties to employment relationship to deal with each other in good faith**
>
> (1) The parties to an employment relationship specified in subsection (2)—
>
> (a) must deal with each other in good faith; and
>
> (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—
>
> (i) to mislead or deceive each other; or
>
> (ii) that is likely to mislead or deceive each other.
>
> (1A) The duty of good faith in subsection (1)—
>
> (a) is wider in scope than the implied mutual obligations of trust and confidence; and
>
> (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and
>
> (c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—
>
> (i) access to information, relevant to the continuation of the employees' employment, about the decision; and
>
> (ii) an opportunity to comment on the information to their employer before the decision is made.
>
> (1B) Subsection (1A)(c) does not require an employer to provide access to confidential information if there is good reason to maintain the confidentiality of the information.
>
> (1C) For the purpose of subsection (1B), good reason includes—
>
> (a) complying with statutory requirements to maintain confidentiality:
>
> (b) protecting the privacy of natural persons:
>
> (c) protecting the commercial position of an employer from being unreasonably prejudiced.

[109] It is common ground that all of the plaintiffs were in an employment relationship with the company for the purposes of s 4. For the first three plaintiffs,

the relationship was that of employer and employee. The employment relationship between the Guild and the company arose out of their both being parties to the collective agreement.

Access to information

[110] The first three plaintiffs claim that, in the course of the restructuring process, the company breached its duty of good faith by failing to provide access to information relevant to a decision about the continuation of their employment and an opportunity to comment on that information before the decision was made. This claim is based principally on s 4(1A)(c).

[111] This claim was not expressly pleaded and few submissions were made in support of it but it appears to comprise two aspects. Firstly, the plaintiffs say that, during the consultation process, the company failed to give them access to all relevant information. Secondly, they say that they were not given access to all relevant information during the selection process.

[112] This is another aspect of the matter where the question of the Court's jurisdiction in a non de novo challenge arises. The Court can only entertain a challenge to decisions made by the Authority.

[113] Where a party challenges a determination of the Authority, the Court receives nothing from the Authority. The plaintiff is required to attach a copy of the determination in question to the statement of claim but that determination is usually the only aspect of the Authority's investigation which is before the Court. Where a hearing de novo is sought and held, that is of little consequence as the Court is seized of the entire matter and the process is one of complete rehearing. Where the challenge is non de novo, however, the Court can only be aware of what the Authority decided by considering the determination and any other information about the investigation provided by the parties. As noted earlier, I permitted and encouraged counsel in this case to provide me with additional materials informing the Court of what was before the Authority and decided by it. In dealing with this issue, I have had careful regard to all of those materials.

[114] The statement of problem contained no reference to s 4 or to the statutory duty of good faith and no allegations of fact which might support a claim that s 4(1A)(c) had not been complied with. The only reference to good faith was in a quote from clause 22 of the collective agreement which required the parties to comply with their obligations under the agreement in good faith. The collective agreement did not contain any obligation to provide access to information in an internal restructuring comparable to that imposed by s 4(1A)(c) of the Act. The further particulars provided by Mr McBride to the Authority on 21 May 2009 related solely to the claim of breach of the collective agreement and made no mention of the general duty of good faith or the particular duty imposed by s 4(1A)(c).

[115] The Authority's determination contains little reference to the company's duty of good faith. In paragraph 8, the Authority records that the company denied breaching its obligation of good faith to the plaintiffs but there is no record of any allegation that it had done so. Under the heading "Issues", is the item "has the respondent breached its obligations to act in good faith under s. 4 of the Act" and under the heading "Determination" that "the respondent has not breached its obligations to the applicants under s. 4 of the Act". No rationale for this conclusion or indication of what it is intended to encompass is given. That part of s 4 I have set out above is reproduced in the determination but all of the discussion of s 4 relates to the company's claim that the plaintiffs breached their obligation under s 4(1A)(b) to be "responsive and communicative".

[116] In the parts of his submissions to the Authority provided by Mr McBride, one of the issues was said to be "[t]he process by which the Respondent 'restructured', including good faith and the dispute".

[117] In paragraph 3 of the statement of claim, the plaintiffs described the parts of the determination being challenged. They did not include any reference to good faith on the part of the company or to the obligation imposed by s 4(1A)(c). Similarly, the "particulars of claim" which followed in paragraphs 4 to 47 contained no allegations of fact which would support or even suggest an allegation that the company was in breach of s 4 (1A)(c). Consistent with this, none of the "causes of action" relating to

the company's conduct mentions good faith or the provision of access to information.

[118] It is apparent from this analysis that there is very little indeed before the Court to support the proposition that the Authority made any decision about the discharge by the company of its obligations under s 4(1A)(c) of the Act. Even if it did, the statement of claim reveals no challenge to that decision. I find that this claim was not properly before the Court and ought not to be decided.

[119] Consistent with that conclusion, the evidence of the plaintiffs' witnesses contained very little reference to this issue. Ms McAra recorded in her evidence that the company had declined to provide some information requested by the Guild on the grounds that it was commercially sensitive but made no complaint about that. Later in her evidence, she said generally that "I did not have all the information required to properly check the validity of the premises underlying the proposal" but there was no explanation of this statement and it was not linked to the earlier statement. Mr Conrad said that, in the course of the selection process, he asked for clarification of the questions he was being asked and was not provided with a satisfactory response. He did not say when that occurred and there is nothing to suggest that evidence of this nature was before the Authority. He also accepted in cross examination that he had been invited to put his questions in writing and had chosen not to do so. Mr King-Turner did not mention this issue at all in his evidence. When the company's witnesses were cross examined, they gave some further evidence about the selection process but, again, there was nothing to suggest that evidence of this nature had been before the Authority or that the Authority had made a decision about the propriety of that process.

[120] This aspect of the challenge fails.

Selection criteria

[121] The first three plaintiffs claim that the selection criteria adopted by the company were inappropriate and, for the purposes of their personal grievances, unjustifiable.

[122] As set out earlier, the company's original proposal contained in Ms Hood's letter of 9 February 2009 described a selection process and included two sets of selection criteria. That part of the proposal remained unaltered throughout. The first part of the process was for the candidates to be assessed by a panel of company managers against 18 criteria. The second part of the process was to be an interview with each candidate where they would be assessed against a second set of criteria comprising 28 points under 10 headings.

[123] The plaintiffs' claim was directed specifically at two of the headings in the second set of criteria. They also alleged that the criteria generally were subjective and were "unilaterally determined".

[124] Every selection process will almost inevitably involve subjective assessment of the candidates by the members of the selection panel. In most cases, the impression made by the candidates, their ability to interact with others and the way they react to challenges will be entirely valid considerations. Even more concrete criteria such as the extent of an applicant's skill and experience will require assessment by the members of the selection panel and therefore reflect their subjective views. Accordingly, criteria requiring subjective assessment cannot be objectionable in themselves. In this case, some of the criteria undoubtedly were of that nature but I find that was justifiable. It was what a fair and reasonable employer would have done in the circumstances.

[125] The plaintiffs also say that the selection criteria were "unilaterally determined", the implication being that it was somehow wrong or unjustifiable for the company to adopt criteria not agreed to by the plaintiffs. If that is what the plaintiffs rely on, it appears to be based on a false premise that selection criteria were a matter for negotiation rather than consultation. Under the collective agreement, and as a matter of good faith, the company was obliged to consult with affected employees about the proposed restructuring, including the selection criteria, but there was no requirement for the company to obtain its employees' agreement to the proposal. The evidence establishes that the company did consult with employees affected by its proposal, both directly and through the Guild, and considered their responses. That was all it was required to do.

[126] The statement of claim alleges that the selection criteria "objectionably" took account of matters including "loyalty and positive attitude" towards the company and "ability to handle change". Had they been the only selection criteria or two of a small number, it might well be said that it was unjustifiable for the company to have relied wholly or largely on them. In fact, they were two of ten headings for the second set of criteria, to be applied after the candidates had previously been assessed on 18 other criteria. I find that these two criteria were legitimate considerations in the selection process in this case. It was agreed by all witnesses for the company that all six men had the necessary qualifications, technical skills and experience. The selection process was therefore one of deciding which of the candidates had the other attributes required for the positions. These were not simply maritime roles. The launch masters were a key part of the tourism aspect of the company's business. In this context, it was appropriate to assess such factors as flexibility and attitude towards the company provided, as in this case, they were not given undue prominence. To have included them in the comprehensive set of criteria adopted by the company in this case was what a fair and reasonable employer would have done.

[127] This claim fails.

Predetermination

[128] The plaintiffs allege that, before the proposal for restructuring was made to affected employees on 9 February 2009, the company had already decided to proceed with the specific restructuring it later implemented. In this way, the plaintiffs say that the company predetermined the outcome of the consultation process in breach of its duty of good faith. As this allegation is made in the context of the first three plaintiffs' personal grievances, the issue is not only whether there was actual predetermination but, if so, whether that was justifiable.

[129] This allegation relies on evidence of what occurred at a meeting of the directors of the company on 15 December 2008. An extract from the minutes of that meeting records a presentation being made by Paul Norris, the company's area manager for Milford Sound and Doubtful Sound operations:

> Mr Norris presented some scenarios based on Milford business being down and staying down for a couple of seasons.
>
> Real Journeys is seeking to increase its marketshare in a declining market, with the projected total passengers for Milford Sound being at a level last seen 7-8 years ago.
>
> We have determined not to operate the *Milford Haven* at all this season and also to lay up the *Milford Monarch* for all but the busiest 2 months of the 2009/10 season.
>
> By doing this we can make cost savings of around $770,000 in 2009/10 which is about 10% of their total costs.
>
> Mr BS Hutchins questioned the company's offering at Milford Sound and Ms Jebson agreed that the Milford offering needs to be simplified.
>
> To this end there will be:
>
> - Scenic Cruises which will be closely aligned to the wholesale market; and
> - Explorer/Nature Cruises which will be broken into standard (*Mariner/Wanderer*) and premium (*Sinbad)*
>
> Most promotion for the FIT market will be on the Nature Cruise.
>
> Mr Hawkey advised that executives were making finals calls on when various services would cease in mid-January.
>
> It was also noted that the reduction in cruises leads on to reductions in coach and air craft services.
>
> Mr Norris does not believe that our staffing in Milford will increase over the next three years but we need to continue to upgrade accommodation so that staff are not sharing rooms.

[130] The case for the plaintiffs relies on the use in this minute of expressions such as "we have determined" and "there will be" which Mr McBride submitted showed that final decisions were made at that meeting, before any consultation with affected employees. Viewing the document in isolation, there is obvious force in that submission.

[131] For the company, a good deal of other evidence was presented to put these minutes into context. Mr Norris produced the power point presentation he had made to the meeting. He said that the board gave management a mandate to make changes but did not direct what was to be done. Consistent with this, Mr Norris and Ms Hood gave evidence that they met in late January 2009 to discuss what options there were to reduce costs in the Milford Sound operation and that the proposal presented to affected staff on 9 February 2009 was developed in the course of that discussion. Ms Hood produced notes she had made in the course of that meeting.

[132] Roger Wilson, a director of the company who was present at the meeting on 15 December 2008, also gave evidence. Acknowledging the effect of time on his recollection, Mr Wilson said that the minutes recorded what the board was considering rather than any decision it had made. The company's chief executive officer, David Hawkey, gave similar evidence. He too had been present at the meeting on 15 December 2008. His recollection was that the Board authorised management to proceed with restructuring but did not decide what the nature of it should be.

[133] Minutes of the board's next meeting on 5 February 2009 were produced. They recorded:

> There was a discussion on tentative plans for next summer including consideration to tying-up vessels and whether the Milford product needed to be simplified. Laying up the Milford Haven and using only one boat with one backup was an option. The overriding consideration is to remove costs and simplify the Milford operation. However the result will be some loss of product differentiation. It was accepted that this was a complex operation as consideration had to be given to all of the feeder services including coach and air connections, along with the MDA wharf timetable. Comment was made that if it was accepted that the product was right, then it maybe the way the product is presented that needed to be simplified. It was accepted that the Milford operation was the one area that could generate significant savings, given the company is operating at approximately 50% capacity.
>
> ...
>
> The Chairman noted the board was encouraged by the efforts of management and the resultant cost savings.

[134] The company's witnesses were quite extensively cross examined on this issue. While this did not result in the essential nature of their evidence changing, it provided further context for the events in question. The board had become increasingly concerned about the company's performance during 2008 and, during the third quarter of that year was expecting management to generate options for reducing costs. By December 2008, that had become what Mr Hawkey described as an "objective" the board expected management to achieve but he was adamant that the board did not direct how it was to be achieved.

[135] The other evidence relevant to this issue is the sequence of events after the proposal was made to affected staff and the Guild on 9 February 2009. At several

stages of the process, the company changed the proposal, most importantly after the Guild members rejected any variation of the collective agreement.

[136] Having regard to all of the evidence, I am not persuaded that the company predetermined the nature of the restructuring which it ultimately undertook or that the consultation process was conducted by the company other than in good faith.

[137] This claim fails.

Good faith by plaintiffs

[138] In the proceedings before the Authority, the company pursued a counterclaim against the plaintiffs. I was not provided with the statement in reply in which that claim was made but it appears from the Authority's determination that it comprised:

(a) An allegation that the plaintiffs' proceedings were an abuse of process designed solely to delay the company's restructuring process.

(b) An allegation that the plaintiffs' conduct during the consultation process was in breach of their duty of good faith under the Act and of their obligations under the collective agreement.

(c) A claim for damages for breach of contract.

(d) A claim for the imposition of penalties for breach of s 4 of the Act.

[139] The Authority rejected the allegation that the proceedings were an abuse of process. That aspect of the determination is not challenged.

[140] The Authority found that the plaintiffs had breached their duty of good faith both under s 4(1A)(b) of the Act and under clause 22 of the collective agreement. The basis for these conclusions appears to be in following parts of the determination:

> [67] The raising of the dispute itself does not constitute an abuse of process. The circumstances surrounding it being raised however, warrants further scrutiny. Following an unsuccessful mediation, the respondent sent a revised proposal for settlement to the Guild's counsel on 1 May 2009. The proposal was not responded to and the applicants commenced proceedings in the Authority.

> [68] These actions go beyond discourtesy and border on contempt of the dispute resolution process and of the respondent's genuine efforts at resolution. The manner in which the dispute was raised is not in accord with the principles of good faith nor in accord with clause 22 of the CEA.
>
> ...
>
> [70] The Guild experienced some difficulties in conducting meetings with its members given the geographical dispersion of those members. This was particularly so in relation to the first restructuring proposal. The variations were rejected following a second series of members' meetings as the first series had been poorly attended.
>
> [71] From the evidence before the Authority, the greater delays occurred following the notification of the reworked second proposal. I think it fair to observe the company, and particularly Mrs Hood, was prompt and thoroughly professional in replying to requests for clarification from the Guild. The Guild was less prompt in its responses which led to deadlines for feedback being extended on several occasions. I am not convinced the delays were deliberately obstructive. However, given the seriousness of the company's situation and its pressing need to progress matters, both known to the Guild, was certainly very unhelpful. The behaviour falls short of being *responsive and communicative* as required by s.4(1A) of the Act.
>
> [72] In addition, I find the applicants' behaviour is in breach of their obligations under clause 22 of the CEA.

[141] What I take from these passages is that the Authority's primary focus was on the manner in which the plaintiffs responded to the company's settlement proposal made on 1 May 2009. The Authority's view was that failing to respond directly to the company and subsequently issuing proceedings was a breach of good faith. In addition, the Authority found that the plaintiffs were tardy in their responses to the company's communications throughout the consultation process and that this was not "responsive and communicative" behaviour.

[142] It is unclear from these passages whether the Authority found that the plaintiffs' behaviour warranted the imposition of a penalty under s 4A of the Act. That would seem to be implicit, however, in the Authority's invitation to the parties to make submissions about "penalties and/or damages".

[143] In challenging this aspect of the Authority's determination, Mr McBride's primary submission was that the company's letter of 1 May 2009 was privileged and ought not to have been taken into account by the Authority. In support of this submission, Mr McBride referred me to numerous authorities on the subject of "without prejudice" correspondence in both this country and in the United Kingdom.

Those authorities applied and enlarged on the basic principle neatly summarised as follows:[13]

> Written or oral communications which are made for the purpose of a genuine attempt to compromise a dispute between the parties may generally not be admitted in evidence.

[144] The use of the word "generally" is significant. There are exceptions to this principle. In *Bayliss, Sharr & Hansen v McDonald*,[14] I said:

> As Colgan J said in para 19 of his decision in the *Enterprise Motor Group* case,[15] there remains a residual jurisdiction to consider evidence of "without prejudice" communications where the effect of excluding it will be more prejudicial than admitting it. Exercising that jurisdiction, I would adopt the proposition advanced by the authors of *Cross on Evidence* (8th ed), Wellington, LexisNexis, 2005 at para 10.48:
>
> > If the making of a statement itself constitutes a cause of action, or is an ingredient of one, it is submitted that the statement is not privileged because it cannot be regarded as incidental to "without prejudice" discussions aimed at settling a pre-existing litigation or dispute.

[145] I adopt that view again for the purposes of this case. The making of the offer contained in Ms Copeland's letter of 1 May 2009 was a vital ingredient of the company's causes of action for breach of the collective agreement and breach of good faith. Put another way, had that letter not been written, those claims would have lacked the strongest element of their foundation.

[146] Two other factors support this approach. The only facts the Court needs to know about the letter of 1 May 2009 are that it was received and that it contained a genuine offer to settle the dispute which had then recently been the subject of mediation. Making the Court aware of those facts does not reveal any admissions, concessions or weaknesses which might disadvantage either party now. The second point is that, in this Court, there can be only limited scope for arguments that evidence be excluded on legal principles. Section 189 of the Act provides that the Court "may accept, admit and call for such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not".

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[13] *Phipson on Evidence* (16th ed, Sweet & Maxwell, London, 2005) [24-14].
[14] [2006] ERNZ 1058 at [49].
[15] *Jackson v Enterprise Motor Group (North Shore) Ltd* [2004] ERNZ 424.

[147] I find that the letter of 1 May 2009 ought to be taken into account to the limited extent of it existence and general nature and I have done so.

[148] The company says that the conduct of all the plaintiffs was in breach of their statutory obligation of good faith to be "active and constructive in establishing and maintaining an employment relationship in which the parties are, amongst other things, responsive and communicative" and of their obligations under the collective agreement. These provisions are in s 4(1A)(b) which is set out earlier.

[149] The provision of the collective agreement relied is clause 22:

> **22. MUTUAL UNDERSTANDING AND COOPERATION**
>
> The employee agrees to cooperate fully with the employer over changes in duties or work operations that may be reasonably required to maintain an efficient and productive business.
>
> Conversely, the employer agrees to discuss changes with the employee and the union if either party deems necessary.
>
> The employer, employees and the union agree to behave in a fair and reasonable manner towards each other throughout the employment relationship and to comply with all obligations and responsibilities contained in this agreement in good faith.

[150] The Authority found that the plaintiffs' conduct was in breach of both the statutory obligation of good faith and of clause 22 of the collective agreement. Those conclusions were based on the evidence before the Authority relating to the events up to 25 June 2009. That was the conduct of the plaintiffs during the consultation process and the initiation of proceedings. The main thrust of the defendant's case was that the plaintiffs had repeatedly delayed in providing their responses during the consultation process. In the statement of defence, the company also supported the Authority's conclusion that the plaintiffs failure to respond to the company offer of 1 May 2009 and the issue of proceedings instead was a breach of good faith. Mr Churchman did not rely on this second factor in his submissions but, as it formed a substantial part of the Authority's reasoning, I must deal with it.

[151] In his final submissions, Mr Churchman attempted to extend the scope of the allegation of breach to include some aspects of the manner in which the plaintiffs' case was conducted at the Authority's investigation meeting. In particular, it was

suggested that the minutes of the board meeting on 15 December 2008 were produced by surprise in an attempt to ambush the company. While the Authority recorded the circumstances in which this evidence was introduced into its investigation, there is nothing in the determination or other documents to suggest that the Authority decided whether or not those circumstances amounted to a breach of good faith or of the collective agreement by the plaintiffs. The allegation that they were is therefore outside the jurisdiction of the Court in a non de novo challenge. It is notable also that the statement of defence includes no such allegation and it was not mentioned in Mr Churchman's opening. For these reasons, I find that this allegation of breach of good faith and of the collective agreement based on the production of evidence at the Authority's investigation meeting is not properly before the Court.

[152] Other allegations relating to the manner in which the plaintiffs' case was conducted before the Authority are in the same position. They were not mentioned in the determination and there is no reason to suppose that the Authority considered them, let alone decided them.

[153] In his final submissions, Mr Churchman also constructed a claim for damages arising out of the interim injunction ordered by the Authority. Again, this was not a matter decided by the Authority or pleaded in the Court. If the company wishes to pursue this further, it will need to be the subject of an affirmative claim.

[154] I return then to the two principal bases for the Authority's conclusion: repeated delay during the consultation process and the plaintiffs' response to the 1 May 2009 offer of settlement.

[155] On the evidence, there is no doubt that the consultation process progressed very much slower than the company wanted or would normally be entitled to expect. I find that this was due in large part to the delay in responses by the Guild to communications from the company.

[156] The plaintiffs' explanation for delay was that the Guild's resources were limited, that communication with its members was difficult because of their location

and that the company's proposal required considerable analysis. The evidence established that each of these factors was real and that they did significantly affect the Guild's ability to get its members' views and respond to the company promptly.

[157] There were also other factors which slowed the process down. As originally presented, the proposal was not entirely clear and, as the company acknowledged, required clarification. The company provided detailed information relating to the proposal but only in response to a request from the Guild. That information was commendably comprehensive and would have required some time to absorb and analyse. The original proposal required variation of the collective agreement. That could not be achieved without the Guild having a proper mandate from all of its members affected by the proposed variation. When the variation was rejected, the company made a significantly revised proposal which required further consultation. The plaintiffs cannot be criticised for rejecting the variation. That was the collective wish of the affected members of the Guild and the Guild itself was bound to reflect its members' wishes. Another factor which clearly slowed the latter stages of the consultation process was the Guild's view that the company's proposal was being advanced in breach of the collective agreement. While I have found that view to be in error, I was not persuaded on the evidence that the Guild raised a dispute about the application of the collective agreement simply in order to delay the restructuring.

[158] On 1 May 2009, the company's solicitor wrote to the Guild's solicitors offering terms on which the dispute about application of the collective agreement and other differences arising out of the restructuring might be settled. It is common ground that the company did not receive any response from the Guild to that letter. Rather, the next step taken by the Guild was to issue proceedings in the Authority seeking an injunction to restrain the restructuring. The company says that the Guild's failure to respond directly to the offer of settlement was a breach of good faith.

[159] The evidence given by Ms McAra was that she received a copy of Ms Copeland's letter of 1 May 2009 promptly and communicated the Guild's response to Mr Grills, the mediator, expecting he would pass it on to the company. Ms McAra agreed that she then heard nothing further from Mr Grills or the company and took

no steps to follow up what she had said to Mr Grills. Ms Hood gave evidence that it had later been reported to her that Mr Grills had contacted the company some time afterwards but that he had said nothing about any proposal for settlement, let alone the Guild's response to it.

[160] It is helpful to summarise the background to these events. The company and the Guild were at the end of a long consultation process about restructuring. On 14 April 2009, the Guild had raised a dispute about the application of the collective agreement. On 24 April 2009, the company had announced its decision to nonetheless proceed with the restructuring. In discussions between Ms McAra and Ms Copeland on 27 April 2009, the option of the Guild seeking an injunction had been raised. That was averted by an agreement to attend mediation about the dispute supported by an undertaking by the company not to proceed with the restructuring in the meantime. The mediation took place on 30 April 2009 but was unsuccessful. Immediately afterwards, the Guild's solicitors wrote to Ms Copeland saying that proceedings were to be issued and seeking a further undertaking not to proceed with the restructuring until those proceedings were determined by the Authority. It was in response to that letter that Ms Copeland wrote back to the Guild's solicitors on 1 May 2009 offering terms of settlement.

[161] Counsel made submissions about whether I should receive evidence about what was said to or by Mr Grills in light of s 148 of the Act which requires any information disclosed in the course of mediation to be kept confidential. I find that Mr McBride's letter of 30 April 2009 effectively brought mediation to an end. While it remained open to the parties to seek further mediation assistance at any time, this letter signalled a clear decision by the Guild to resolve matters by litigation. It follows that the communications which followed were not part of the mediation process and s 148 did not apply to them.

[162] In this context, where increasingly stern correspondence was being exchanged between solicitors, it is surprising that Ms McAra would think it appropriate to respond verbally through the mediator to the formal offer of settlement contained in Ms Copeland's letter of 1 May 2009. It is even more surprising that she would do so the day after she had instructed the Guild's solicitors

to commence proceedings. While I cannot entirely discount her evidence on this issue, I find it likely that she is mistaken in her recollection. If she did speak to Mr Grills as she claims to have done, however, what is clear is that she made no effort to follow that up when there was no response from the company.

[163] Considering the plaintiffs' conduct as a whole, I find that the delay throughout the consultation process was substantial and, to an extent, avoidable but that it did not amount to a breach of good faith. I reach that conclusion by a relatively narrow but clear margin.

[164] I find that, in its response to Ms Copeland's letter of 1 May 2009, the Guild did breach its obligation of good faith. The purpose of the specific obligations imposed by s 4(1A)(b) is to assist in "establishing and maintaining a productive employment relationship". Litigation is almost inevitably corrosive of an employment relationship. Where it is imminent, the duty of good faith imposes a particularly strong obligation on the parties to resolve their differences by agreement if possible. To that end, they must be "active and constructive" and "responsive and communicative". Even putting Ms McAra's evidence on this issue at its highest, her response on behalf of the Guild fell well short of that standard. At the very least, the Guild needed either to communicate directly with the company or its solicitors or to ensure that any response made through a third party was actually received. I reject Mr McBride's submission that the issue of proceedings in the Authority on 12 June 2009 discharged the obligation of good faith. To respond to an offer of settlement with the issue of proceedings was not constructive.

[165] Not every failure to comply with the obligation of good faith in s 4(1) warrants the imposition of a penalty. To do so, the failure must occur in one of the circumstances described in s 4A of the Act, the relevant parts of which are:

> **4A Penalty for certain breaches of duty of good faith**
>
> A party to an employment relationship who fails to comply with the duty of good faith in section 4(1) is liable to a penalty under this Act if—
>
> (a) the failure was deliberate, serious, and sustained; or
>
> (b) the failure was intended to undermine—

(i) bargaining for an individual employment agreement or a collective agreement; or

(ii) an individual employment agreement or a collective agreement; or

(iii) an employment relationship

...

[166] The company alleges that the plaintiffs' behaviour warrants a penalty because it was "deliberate, serious and sustained" and because it was "intended to undermine the employment relationship".

[167] While I find that the breach of good faith involved in the Guild's response to the letter of 1 May 2009 was serious, I do not find it was deliberate or sustained. Equally, although I find that the breach may have had the effect of undermining the employment relationship between the company and the Guild, that was not the Guild's intention. There is no scope for the imposition of a penalty.

[168] The company's case for breach of the collective agreement seemed to proceed on the assumption that the reference to "good faith" in clause 22 of the collective agreement imposed a contractual obligation of good faith effectively identical to that imposed by s 4 of the Act.

[169] The reference to "good faith" is in the third sentence of clause 22:

> The employer, employees and the union agree to behave in a fair and reasonable manner towards each other throughout the employment relationship and to comply with all obligations and responsibilities contained in this agreement in good faith.

[170] It is apparent from this sentence that the requirement to act in good faith applies to compliance with obligations imposed by the collective agreement. The obligation which the Authority found the plaintiffs had breached was that in the first part of the sentence set out above, that is "to behave in a fair and reasonable manner" during the employment relationship. Mr Churchman submitted that it also applied to the first sentence of clause 22 which imposes a requirement to "cooperate fully with the employer" but, as Mr McBride correctly observed, that obligation was imposed only on "employees" and not on the Guild.

[171] This claim raises the question of what the parties to the collective agreement intended the expression "in good faith" to mean in this context. The term is not defined in the agreement and no evidence was provided or submissions made about the history of the document. In particular, there was nothing to suggest that the parties intended to adopt the extended meaning of "good faith" in s 4 of the Act. In the absence of any reason to do otherwise, the expression should be given the everyday meaning of the words used which is "honesty or sincerity of intention".[16] On the evidence, I do not find that the actions of the Guild in responding to the letter of 1 May 2009 were lacking in honesty or sincerity. It follows that they were not in breach of clause 22 of the collective agreement.

[172] On this aspect of the challenge, the plaintiffs are partly successful. Although I find that the Guild was in breach of its statutory duty of good faith, there is no scope for the imposition of a penalty. I find there was no breach of the collective agreement.

Summary of conclusions

[173] The plaintiffs' challenge to the Authority's determination succeeds to the limited extent described in the last paragraph. Otherwise the challenge fails.

[174] Those aspects of the Authority's determination which were challenged are set aside and this judgment stands in their place.

Comment

[175] This judgment is being delivered long after the hearing. That delay, and the resulting inconvenience to the parties, is regrettable. There are several reasons for it.

[176] In the course of the hearing, the plaintiffs' case shifted significantly as the issues of jurisdiction emerged. By the end of the hearing, the plaintiffs were relying significantly on alleged breaches by the company of its obligations under s 4(1A)(c) of the Act to provide access to information. In their final submissions, however,

[16] *Concise Oxford English Dictionary* (11th ed, 2006).

counsel made only relatively brief and general submissions about the important issue of statutory interpretation involved. The same issue was then before the Court in another case which had been set down for hearing by a full Court. In the expectation that I would be considerably assisted by the decision in that case, I postponed consideration of this case until the full Court judgment was available. Counsel were then given an opportunity to make further submissions in light of that decision.[17] Unfortunately, the full Court judgment was not available until April 2011.

[177] Because of the unsatisfactory nature of the pleadings and presentation of this case, it required a great deal of time to extract and analyse the issues from the large amount of evidence given.

[178] The Christchurch earthquakes have impacted heavily on the Court's resources and my availability to devote the necessary time to completing this judgment.

Costs

[179] Although the plaintiffs have been successful in their challenge, that has only been to a very limited extent. My preliminary view is that costs should lie where they fall. If any party wishes to seek an order for costs, however, a memorandum should be filed and served within 30 working days after the date of this judgment. The other parties will then have 20 working days in which to respond.

A A Couch
Judge

Signed at 4.30 pm on 28 September 2011

[17] *Vice-Chancellor of Massey University v Wrigley & Kelly* [2011] NZEmpC 37