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Can Collective Bargaining Deliver Decent Work?

SIMON MITCHELL*

How do we set conditions of work?

The Employment Relations Act (ERA) 2000 establishes a framework whereby terms and conditions of employment are set by bargaining for collective agreements, or by negotiations for individual employment agreements.

The Act does not provide any provision for terms and conditions of employment to be determined, other than by the employees or their union and the employer, except in entirely exceptional circumstances. The Employment Relations Authority has the jurisdiction to fix the provisions of a collective agreement, where there have been breaches of good faith that were sufficiently serious, and sustained as to significantly undermine any bargaining (Section 50J).

Therefore, if decent work conditions are to be established, employees and employers rely on the provisions of the ERA to deliver them. There are important statutory protections that contain minimum conditions, being minimum wages, the Wages Protection Act 1983 and the Holidays Act 2003. However, provided conditions are equal to, or in excess of the statutory minimum, then it is a matter for the parties to determine their terms and conditions of work.

Without doubt, many unions and employers are able to bargain for terms and conditions of employment that are acceptable to each of them. In addition, individual employment agreements are largely entered into without dispute as to the conditions of the work.

The object of our Act

The Act has as an object at s3, to build productive employment relationships, but the Act also recognises the inherent inequality of power in employment relationships (Section 3(a)(ii)). Exactly how the inherent imbalance in equality of power is recognised by the Act is less than clear. While the Act contains provisions as to how collective bargaining should occur, it does not contain any provision as to what the terms and conditions of employment should look like, or any way to assess the decency of such terms.

It seems that when the legislation was drafted, it was considered that a genuine collective bargaining, based on the principles of good faith, including the duty to conclude a collective bargain (s33), in the absence of a good reason based on reasonable grounds, was sufficient to ensure that there would be decent terms of work achieved through collective bargaining. Certainly, the Act intended a shift change from the Employment Contracts Act (ECA) 1991.

Movements in wages

* Barrister, Auckland

It is appropriate in assessing whether collective bargaining works in New Zealand to consider the situation with wages and bargaining in Australia. Anecdotally, bargaining in New Zealand is starting to be influenced by bargaining trends in Australia, as New Zealand employers are beginning to face competition from Australian employers for skilled New Zealanders.

In May 2012, the average ordinary time wage in New Zealand was $29.96 per hour, as compared to $35.56 in Australia. The average hourly wage rose 2.91 per cent between June 2011 and June 2012 in New Zealand, and 3.5 per cent in Australia between May 2011 and May 2012. In Australia, as at May 2010, 58.6 per cent of employees had their wages set collectively, as compared to 18 per cent in New Zealand.

The objects of the ERA include promoting collective bargaining (s3(a)(iii)). The Act does not seem to be working if it is intended to promote collective bargaining, certainly when compared to Australia.

Anecdotally, many employees who leave New Zealand receive significantly higher wages when they arrived in Australia. From the writer's experience, skilled workers at ports, in the meat industry and probably a whole range of other industries can earn significantly higher wages in Australia. In addition, Australia offers significant superannuation benefits. There is a movement in ports in New Zealand for experienced wharfees to move to Australia. Australian meat companies send recruiters to wait outside meat works in New Zealand, with a view to attracting New Zealanders offshore.

Trends in bargaining

There are recent trends in New Zealand from the publicised industrial disputes that employers are using collective bargaining to reduce terms and conditions of work, rather than unions using industrial disputes to improve them. In the last 24 months, this has occurred at AFFCO New Zealand Limited, Canterbury Meat Packers at its meat processing plant and Manawatu, at Ports of Auckland Limited, and in other well publicised industrial disputes. Collective bargaining is not being used by employees and unions to achieve improvements in conditions of work. Instead, collective bargaining is being used by employers to reduce conditions.

In addition, there has been, in the writer's view, a more frequent use of lockouts to compel employees to accept new conditions of work.

Effects of lockout

It is difficult for an employee who lives from day to day to sustain a loss of work by way of a lockout for any period and, in particular, for a sustained period. In workplaces that are only partially unionised, such an employee has to face a lockout in the knowledge that other employees, who are not members of the union, some of whom may be on better terms and conditions of work, are continuing to complete work while they are locked out. In this type of scenario, it is difficult for unions to prevent an employer from reducing terms and conditions of employment, or to retain terms and conditions. Certainly in this type of environment, it is practically impossible to compel

improvements in terms and conditions.

The role of the Employment Court

In many of these disputes, the role of the Employment Court has become crucial. A willingness to protect terms and conditions of work by ensuring that collective bargaining takes place in an orderly manner, or is not undermined, has been fundamental in protecting employees from the actions of employers. Examples are the case of *NZPSA v Secretary for Justice*[1], where the employer state contended that collective bargaining had ended, or the injunction in *Ports of Auckland*[2] to prevent contracting out while bargaining continued. Other settlements of major industrial disputes have taken place with the Employment Court, providing considerable assistance by providing prompt hearings that focus the attention of the parties to concluding an agreement, rather than continuing in litigation.

Disputes under the radar

These disputes where the Court has played a critical role often remain under the radar. Examples, however, are a recent dispute between the *Flight Attendants Union and Air New Zealand*, and the *AFFCO* collective agreement entered into in May 2013. Negotiations for the *AFFCO* collective agreement were concluded during negotiations in a weekend. The Employment Court had heard evidence in the week before relating to whether lockout notices were lawful, which was due to continue on the Monday.

The willingness of the Court to provide urgent time for a full court hearing provided considerable assistance to the parties to that dispute. The Court providing urgent time in the *Maritime Union* dispute assisted in terms of the injunction issued in March 2012 but, in addition, by making substantial hearing time available, and then agreeing to move it when there has been progress in the bargaining has assisted significantly with the issues progressing between the parties. In *Air New Zealand*[3], the Court was willing to grant special leave removing a matter to the Court, and to hear a challenge to actions of the employer on an urgent basis, and the matter settled in the days leading up to that Court hearing. Without doubt, this access to a specialist Court to assist with issues of collective bargaining has been of invaluable assistance to parties resolving collective agreements.

It is perhaps coupled by a lack of willingness by the Employment Relations Authority to recognise the need for urgent intervention in cases of this type, and a lack of willingness to refer them to the Employment Court. Notably, the application in *Air New Zealand* to have the matter brought to the Employment Court was the result of an application for special leave after the Authority had refused to remove the matter. A lack of immediate access to the Court for bargaining disputes can create delay.

[1] *New Zealand Public Service Association Inc v Secretary for Justice* [2010] NZEmpC 11.
[2] *Maritime Union of New Zealand Inc v Ports of Auckland* [2012] NZEmpC 54.
[3] *PARSA & Ors v Air New Zealand and Anor* [2013] NZEmpC 122

Limits on contracting out

There is no doubt that there are employers in New Zealand who use the threat of contracting out work to compel employees to accept terms and conditions of employment that they would not accept without that threat.

The recent Employment Court decisions have also made it more difficult for employers to conduct bargaining under the threat of contracting out. This includes the Port dispute, where Judge Travis found in *Maritime Union of New Zealand Inc v Ports of Auckland Limited*:[4]

> *I find that there is a seriously arguable case that the actions of the defendant in allegedly threatening to and then deciding to contract out the work on which the union employees were engaged under the expired collective agreement whilst collective bargaining was on foot for a new collective agreement was likely to undermine and arguably has undermined the bargaining. It will also, arguably, undermine the bargaining in the future. It is therefore seriously arguable that those actions have breached s 32(1)(d)(iii) of the Act. This section provides that the duty of good faith in Section 4 of the Act requires that the union and an employer bargaining for a collective agreement to do a number of things.*

This decision followed a view that there was not a breach of good faith to bargaining under threat of contracting out. This view had been expressed in *New Zealand Amalgamated Engineering, Printing & Manufacturing Union Inc v Carter Holt Harvey*[5] in which the Chief Judge had found lawful a proposal to contract out, while there was bargaining on foot, in circumstances where discussions around contracting out were not part of that bargaining. Notably in that case, s32 which prohibits the undermining of bargaining, which was central to the *Ports of Auckland* case, was not referred to by counsel.

In addition, recent cases in which it is suggested that the Court may be willing to review its approach to redundancies may lead to consideration as to whether contracting out is the action of a fair and reasonable employer, given all of the circumstances. This may provide some protection to employees who are threatened with contracting out (see *Rittson-Thomas v Davidson*)[6].

What is the role of employment law?

There is a legitimate question in whether the state has any role beyond setting minimum code to provide a mechanism for terms and conditions of employment to be set, in circumstances where parties are genuinely unable to reach agreement.

The Australia "solution"

In contrast with the New Zealand legislation, Australia's Fair Work Act 2009 (FWA 2009) gives the judicial body, Fair Work Australia (FWA), the ability to make an order to terminate industrial action, and make a workplace determination in place of a negotiated agreement. The different

[4] *Maritime Union of New Zealand*, above n 2, at [24].
[5] *New Zealand Amalgamated Engineering, Printing & Manufacturing Union In v Carter Holt Harvey* [2012] 1 ERNZ
[6] *Rittson-Thomas v Davidson* [2013] NZEmpC 36

processes in New Zealand and Australia are clearly demonstrated by the recent Qantas Airways Limited (Qantas) industrial dispute.

Qantas commenced bargaining with Transport Workers' Union of Australia (TWU) in May 2010 and with Australian Licensed Aircraft Engineers Association and Australian, and International Pilots Association in August 2010. Over the following 14 months, all three unions engaged in legal strike action relating to matters at issue in the bargaining. Qantas would later produce evidence that the strike action caused AUS$70 million in damage.

In October 2011, Qantas gave notice of a lockout of all employees to be covered by the proposed enterprise agreements. On making the announcement, Qantas grounded its fleet worldwide. The Minister for Workplace Relations made an urgent application under s424 of the FWA 2009 for an order to terminate or suspend the industrial action. Section 424 reads:

> ***424 FWA must suspend or terminate protected industry action – endearing life etc***
>
> *Suspension or termination of protected industrial action*
>
> 1. FWA must make an order suspending or terminating protected industrial action for a proposed enterprise agreement that:
>   a. is being engaged in; or
>   b. is threatened, impending or probable;
>
> If FWA is satisfied that the protected industrial action has threatened, is threatening, or would threaten:
>
>   c. to endanger the life, personal safety or health, or the welfare of the population or of part of it; or
>   d. to cause significant damage to the Australian economy or an important part of it

Almost immediately, the FWA ordered the termination of all industrial action. The parties had 21 days to reach an agreement, but failed to do so. As a result, FWA gave directions to the parties to file proposed workplace determinations. Section 266 of the FWA 2009 sets out FWA's powers to make an industrial action related workplace determination:

> **266 When FWA must make an industrial action related workplace determination**
> *Industrial action related workplace determination*
>
> 1. If:
>   a. a termination of industrial action instrument has been made in relation to a proposed enterprise agreement; and
>   b. the post-industrial action negotiating period ends; and
>   c. the bargaining representatives for the agreement have not settled all of the matters that were at issue during bargaining for the agreement

FWA must make a determination (an ***industrial action related workplace determination)*** as quickly as possible after the end of that period. Note: FWA must be constituted by a full bench to make an industrial action related workplace determination (see subsection 616(4)).

> *Termination of industrial action instrument*
>
> 2. A **termination of industrial action instrument** in relation to a proposed enterprise agreement is:

a. an order under sections 423 or 424 terminating protected industrial action for the agreement; or
b. a declaration under section 431 terminating protected industrial action for the agreement

Post-industrial action negotiating period

3. the ***post-industrial action negotiating period*** is the period that:
    a. starts on the day on which the termination of industrial action instrument is made; and
    b. ends
        i. 21 days after that day; or
        ii. If FWA extends that period under subsection (4) – 42 days after that day

The FWA heard evidence and submission on the outstanding issues between the parties. In contrast with New Zealand's facilitation process, the FWA has arbitral powers to make a workplace determination that has the same effect as an enterprise agreement. The FWA is required to consider specific factors, including the merits of the case, the public interest, how productivity might be improved, and incentives to continue bargaining at a later time.

On 8 August 2013, the FWA issued workplace determination that concluded the matter between the parties. The workplace determination has a three-year term (backdated to 2011) and it will stand until the next enterprise agreement is negotiated between the parties in 2014.

Should there be standard setting in bargaining?

Standing back from these issues, legitimate questions arise as to whether collective bargaining is providing good terms and conditions for New Zealand employees. In addition, whether collective bargaining alone should be used as the basis for setting conditions of work. Should an employer, willing or in a position to lock out employees, be able to obtain better terms and conditions of employment than an employer that is not willing? Should employees who are willing to go on strike be able to compel better terms and conditions of employment than employees who are not so willing?

The Australian system, perhaps, provides the type of solution that may be appropriate to consider as the basis of establishing terms and conditions of employment in circumstances where unions and employers are unable to do so. There is much resistance in New Zealand to the suggestion of an external body such as the Employment Relations Authority taking such a role. However, such an approach is not inconsistent with commercial agreements such as leases that provide for market rates to determine rental levels during the course of a lease. New Zealand employers presumably find it acceptable to enter into significant long-term obligations in relation to property, but not enter into such arrangements in relation to people.

Until such time as these issues are addressed, it is difficult to see how New Zealand will provide decent work through collective bargaining, and how the objects of the Employment Relations Act will be met Further, there are legitimate concerns as to whether the law is currently delivering decent outcomes.

The Demise of G.N. Hale and Son?

PETER CRANNEY*

A worker *does* have (or will often have) rights to continued employment, even if a business can be run more efficiently without him [or her].

The test is not whether the dismissal will increase efficiency, but rather whether it is fair and reasonable to dismiss in all of the circumstances. This will often include, of course, the circumstances of the worker.

The concept of a "genuine" redundancy dismissal is now itself largely redundant – what matters is not whether the dismissal was "genuine" but whether what was done was fair and reasonable in all of the circumstances.

One of the most famous pieces of modern employment law dicta is a sentence used by Cooke P (as he then was) in *G.N. Hale & Sons Limited v Wellington etc Caretakers and Cleaners Union*:[1] "A worker does not have a right to continued employment if the business can be run more efficiently without him".

The sentence is no longer good law, and probably never was.

There are a large number of circumstances in which a worker is entitled to continued employment, even though the business can be run more efficiently without him or her. Whether a mere desire for greater "efficiency" (whatever that is) can justify the extreme step of dismissal depends and has always depended on all of the facts. There is no universal rule that an anticipation of hypothetical future increased "efficiency" is some kind of trump card, ousting all other considerations.

A more correct statement of the law is: "There is no over-riding employer right to dismiss a worker merely because a business can be run more efficiently without him. The test is what is fair and reasonable in all the circumstances, including those of the employee".

The irony of the Cooke dicta is that when it is applied in practice, it has often caused or results in increased *inefficiency*. The damaging and destructive restructuring exercises that have plagued New Zealand life over the last quarter century have *Hale* as one of their principle foundations. Perceived increases in efficiency, more often than not, fail to materialise, and serious social consequences have flowed from the strange doctrine that future hypothetical efficiencies perceived by "change managers" are a desirable and appropriate basis to foist continual disruption in modern institutions.

As most practitioners and all employers know, employment is above all a human relationship. During the course of an employment relationship workers are sometimes efficient and sometimes inefficient. Further, some are more efficient than others. All have limitations, foibles, strengths and weaknesses. All eventually get older and many become less efficient as a result.

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[1] *G.N. Hale & Sons Limited v Wellington etc Caretakers and Cleaners Union* [1990] 2 NZILR 1079 at 1084.

Some workers, while young, have times of great "efficiency" and others spend two or three years settling in to work and have low levels of "efficiency". All employers know these realities. Many of them do not elevate "efficiency" to the status of an all-encompassing value which prevails over all else. Efficiency is merely one value and exists alongside others: trust, tolerance, loyalty, moderation, security, fairness, stability and reasonableness.

By failing to deal with that reality, the Court of Appeal in *Hale*, whether it intended to or not, shifted employment law sharply in the wrong direction. The effect of the case was to replace or minimise the values of fairness and reasonableness in redundancy scenarios and to substitute a new test. The new test in practice required only that the redundancy was "genuine". To meet the "genuine" test, an employer needed only to have a *subjective* belief in the anticipated increased efficiency that would arise from ending the worker's employment. Even a hunch or an instinct was said to be enough.
By and large, New Zealand's "restructuring" dismissal practices (particularly in the state sector) are based on the *Hale* doctrine. The doctrine requires (i) the creation of a hypothetically more "efficient" scenario usually in writing (ii) comment on this by the workers and (iii) dismissal of those thought to be disposable to achieve the more "efficient" scenario contemplated.

Recent cases suggest that the sun may well be setting on this approach. Before addressing those, a closer look at *Hale* is warranted.

The Case[2]

In the late 1980s, Graham Shrubshall was a cleaner at a small workplace in Petone, near Wellington.[3] This was in the days prior to Part 6A of the Employment Relations Act 2000[4], and there were no special protections for such workers. Mr Shrubshall's job was to do the cleaning and wash the cups. The employer wanted to dismiss him and replace him with a cleaning contractor. It did so without any adequate consultation or consideration of alternatives. It offered to pay Mr Shrubshall $2,000 in redundancy compensation.

Mr Shrubshall sued for unjustified dismissal. He sought reinstatement and lost wages. He won in the Labour Court, and the employer appealed to the Court of Appeal. The judgment of that Court is as important for the tone it adopted as for what it actually decided.

In uncompromising language, the Court of Appeal overturned the Employment Court's decision. Not only did Cooke P state: *"*A worker does not have a right to continued employment if the business can be run more efficiently without him", [5] but all four of the other judges made similar statements.

[2] Some of the following paragraphs are adapted from a paper by the writer and Mr Hamish Kynaston of Buddle Findlay, written for the recent New Zealand Law Society Conference. The views expressed in this paper are the writer's.
[3] The writer should again declare an interest. He was involved in the dispute and knew Mr Shrubshall (the dismissed cleaner) as a result.
[4] Recently considered by the Supreme Court in *Service and Food Workers Union v OCS Ltd* [2012] NZSC 8.
[5] *Hale,* above n 1, at 1084.

The Court's position was that it should not enquire further so long as there were "genuine" commercial reasons for the dismissal[6] (per Richardson P). If the employer "genuinely considers the employee is superfluous to the needs of the business it will to that extent be justified" [7] (per Somers J). "The only question to be asked is whether the employer made the decision for genuine commercial reasons" [8] (per Casey J). The phrase "the needs of the employer" imports a "subjective, not objective test" [9] (per Bisson J).

All five judges obviously considered increased efficiency was the paramount consideration. The notion of substantive fairness – that is, a balancing of the employer's need for increased efficiency with other values such as job security – seems to have been far from the Court's mind.

The gist of all five judgments was that it was not for the worker to reason why. He was to accept the decision of the employer and not question it. It is hard to escape the conclusion that the Court of Appeal considered the **employer's** circumstances highly relevant and **Mr Shrubshall's** as scarcely worth mentioning. Mr Shrubshall is a ghostly figure in the case, somewhat indeterminate and not distinct or very visible (unlike Ms Tan and others in cases to be addressed below).

The harshness in the tone of the *Hale* dicta is one of the somewhat puzzling aspects of the case, despite being somewhat ameliorated by Cooke P later in the judgment. His Honour thought it may well be the case that the employer should have discussed the redeployment of Mr Shrubshall to a part-time position or offered him the cleaning contract. This possible failure on the part of the employer was said to be a potential breach of *"*procedural fairness*"*. Even this approach seems harsh. The obligation alluded to was not substantive obligation to **offer** the part time position (or the cleaning contract) but merely to "discuss" that.

The case introduced the notion of a "genuine" redundancy, which seems to mean in practice a redundancy dismissal in which the dismissed employee cannot prove bad motive. The Court of Appeal did not contemplate a worker's right to question the "increased efficiency" basis for his or her proposed demise. These matters were the sole prerogative of the employer, who was even entitled to act on "instinct".

By the end of the case, the basis of modern redundancy law was established – a near absolute right to dismiss if the business can be run more "efficiently" without the employee (and no substantive right to question that conclusion); and an undefined but only "procedural" obligation to "discuss" alternatives to dismissal prior to dismissal occurring.

Under the *Hale* doctrine, whether the business could be run more efficiently without the employee was a matter entirely for the employer. The Court did not even consider the notion that a drive for efficiency may need to be balanced by moral, ethical, job security, fairness or other considerations.

Mr Shrubshall actually won his case when the matter was referred back to the Labour Court and he was awarded $5,000 compensation.[10] The Employment Court latched onto dicta from the

[6] At 1086.
[7] At 1087.
[8] At 1088.
[9] As above.
[10] *Wellington Taranaki etc Cleaners etc IUOW v GN Hale and Son Ltd* [1990] 1 NZILR 752.

Court of Appeal judgment to the effect that the offer of compensation was a factor in the assessment of the dismissal. It considered the offer of $2,000 was inadequate. It also latched onto the Court of Appeal's conclusion that the company should have discussed alternatives. These failings rendered the dismissal unjustified.

Nonetheless, the worker lost his job, and Court of Appeal's decision represented a sea change in New Zealand employment law. Just one year prior to the decision, the same Court had adopted a much softer tone. In *City Taxis Society v Otago Clerical Workers Union,*[11] the Court considered a redundancy dismissal would be justified if it was genuine and *"*unavoidable*"*. Prior to *Hale*, an employer had to prove a redundancy dismissal was necessary, as opposed to merely desirable or convenient.

Hale established the proposition that any employee whose job could be done more efficiently by another, or by another arrangement such as contracting (that is, every single employee), could feasibly face redundancy dismissal.

After Hale and before the Employment Relations Act 2000

Hale was the beginning of a short but significant period of darkness in New Zealand employment law. The case was decided on by the Court of Appeal on 11 September 1990.

By May 1991, a new National government had passed into law the Employment Contracts Act 1991. This statute's effect was to collapse union membership virtually overnight, while increasing union workloads substantially. Collective bargaining began to collapse across New Zealand, and it has never recovered. In times of great pressure against organised workers, *Hale*–type dismissals became commonplace.

On 15 January 1992, the Employment Court issued *Paul v IHC*[12], a case which introduced the doctrine of "partial lockouts". *Paul* concerned a unilateral wage reduction imposed on low paid caregivers on 6 January 1992, imposed with a view to compel them to accept the reduction permanently. The Employment Court held this to be a lawful "lockout" despite that fact that full work was still required and the employer simply pocketed the moneys taken from the worker's wages.

This conduct also became widespread (especially against low paid workers) and greatly increased employer bargaining power in what little effective collective bargaining was left. The effect of *Paul* was to legalise unilateral reduction of wages, with a view to compel permanent acceptance of such reduction. This shameful chapter in New Zealand's history only came to an end on 17 June 1994, when the full Employment Court overturned *Paul* in *Witehira v Presbyterian Support Services.*[13] The Court in *Witehira* was uncompromising and addressed the matter using the language of human rights.

As the 1990s progressed, the Employment Court became influenced by arguments based on human rights notions, and took an increasingly important role in protecting workers. One very important decision at the commencement of this process (decided between *Paul* and

[11] *City Taxis Society Ltd v Otago Clerical Workers Union* [1989] 3 NZILR 461 at 462.
[12] *Paul v New Zealand Society for the Intellectually Handicapped Inc* [1992] 1 ERNZ 65.
[13] *Witehira v Presbyterian Support Services* [1994] 1 ERNZ 578.

Witehira) was *Service and Food Workers Union v Southern Pacific Hotel Corporation*,[14] a case about right of access.

In a retrospectively amusing and ongoing skirmish between the Court of Appeal and the Employment Court, 1990s redundancy law was marked by a struggle on the part of the Courts to make sense of the consequences of *Hale*. The Court of Appeal, having held that the offer of compensation made in *Hale* was a factor going to justification, subsequently reversed itself on this point in *Aoraki Corporation Ltd v McGavin*[15]. The Court concluded that a failure to offer compensation was **not** a factor going to justification.

Then in *McKechnie Pacific (NZ) Ltd v Clemow*.[16] the Court of Appeal considered a dismissal unjustified because an offer of redeployment was **not** made but should have been, only to reverse itself on this very point in *New Zealand Fasteners Stainless Ltd v Thwaites*[17].

In *Thwaites*, the Court of Appeal criticised its previous position in *Clemow* as wrongly focussing on the **person** rather than the **position**, an approach that may be thought peculiar in light of the appropriate human rights nature of the matters at issue. The Court put this matter very bluntly: ".... the obligation to deal with the employee fairly [does not] extend beyond the job in which he or she is employed. The obligation is implied into the contract for that employment".[18]

This reasoning may, respectfully, be considered to be flawed. It is true that fairness is required to a worker employed "in a position", but the issue in *Clemow* was whether the fairness required to be applied to the worker "in a position" required the worker be redeployed to another position rather than be dismissed. There are many obvious examples that spring to mind.

The Court of Appeal then partially reversed itself again on this point in *Purchas v University of Canterbury*[19], upholding a decision requiring the respondent to appoint the appellant to a position. What was missing from the 1990s redundancy cases was a principled basis for the decisions made. This confusion began with *Hale* in 1990 and continued in the other cases, and is only recently being resolved and corrected (but as yet only in the Employment Court).[20]

Fair and reasonable treatment – Employment Relations Act 2000

Whether *Hale* was good law under the Labour Relations Act 1987 or the Employment Contracts Act 1991 is now, of course, an academic question. The more interesting question is whether it can be regarded as good law under the Employment Relations Act 2000 (ERA).

[14] *Service Workers Union of Aoteroa Inc v Southern Pacific Hotel Corporation (New Zealand) Ltd* [1993] 2 ERNZ 513.
[15] *Aoraki Corporation Ltd v McGavin* [1998] 3 NZLR 276.
[16] *McKenzie Pacific (New Zealand) Ltd v Clemow* [1998] 3 ERNZ 245.
[17] *New Zealand Fasteners Stainless Ltd v Thwaites* [2000] 2 NZLR 565.
[18] At [25].
[19] *University of Canterbury v Purchas* [1998] 3 ERNZ 925.
[20] Editors' note: By the time this issue was published the decision in *Grace Team Accounting Ltd v Brake* [2014] NZCA 541 was available upholding the Employment Court decision in that case.

The cases are beginning to establish that that in some circumstances an employee **is or may be** entitled to continued employment, notwithstanding that the business "can be run more efficiently without him" [or her].

The first issue is the language of the ERA. Unlike its predecessor statutes, the ERA (from 2004) actually defined the meaning of unjustified dismissal. Such a dismissal would be unjustified if what the employer did, and how the employer did it, were what a fair and reasonable employer would (or, after 1 April 2011, could) have done "**in all of the circumstances"** at the time of dismissal.

An illustration of the importance of the new wording will assist. A cleaner has six months to go until retirement after 40 years' service. She is getting slower as part of the ordinary passage of time. But for that, her position would not be considered for disestablishment. Under *Hale*, she could be lawfully dismissed and replaced by a more "efficient" person (even one marginally more efficient).

An application of the new test may lead to a different result. **All of the circumstances** are relevant, not just a desire for increased efficiency. This includes the circumstances of the worker as well as those of the employer (as all fair and reasonable employers already know). The first redundancy post-2000 case to deal with *Hale* substantively was *Simpsons Farms Ltd v Aberhart*.[21] The Court considered *Hale*[22] and concluded: *"*I do not consider the recent statutory changes were intended to revisit long-standing principles about substantive justification for redundancy exemplified by judgements such as *Hale*".[23]

The Court considered the then-new s103A "echo[ed]" some of the statements in *Hale*, and that the new section was focussed only on procedure and not substance. *Hale* lived on. Judicial thinking has, however, shifted considerably since *Aberhart*. A number of cases can be referred to, the first being *Air New Zealand v V*.[24]

V was not a redundancy case, but was a misconduct matter. The issue before the Court was whether, if an employee had committed serious misconduct, there was, nonetheless, a need to fairly consider whether dismissal should be imposed, or whether an employer's right to dismiss was established by the serious misconduct itself.

The case required the Court focus closely on the words *"*in all of the circumstances*"*, contained in s103A. The Court stated: *"*In these words is the answer to [the employer's] submission that once a finding of serious misconduct had been made, the Authority or Court can not review the employer's decision to dismiss".[25]

Such an approach would be to *"*exclude*"* from s103A the very thing to which the section must apply, that is, "the decision to dismiss*"*.[26] A similar comment could also be made as a matter of statutory interpretation in redundancy cases. A second significant case was *Vice-Chancellor of Massey University v Wrigley*[27].

[21] *Simpson Farms Ltd v Aberhart* [2006] ERNZ 825.
[22] See [40], [41] and [67].
[23] At [67].
[24] *Air New Zealand v V* [2009] ERNZ 185.
[25] At [35].
[26] At [36].
[27] *Vice Chancellor of Massey University v Wrigley* [2011] NZEmpC 37.

Wrigley was a redundancy case, and concerned only the issue of whether and to what extent an employee facing a redundancy dismissal could have access to, and an opportunity to comment on, relevant information (as required by s4(1A)(c) of the ERA). The decision is a significant one for a number of reasons, but may be a notable example, in particular, of developing judicial attitudes to the *Hale* doctrine (or perhaps, on another analysis, is simply the ultimate conclusion arising from the dicta of Cooke J to the effect that Mr Shrubshall should have been offered discussions about alternatives to dismissal).

In *Wrigley*, the full Court view of s4(1A)(c) is expounded, highlighting the Court's view that one purpose of obliging employers to provide relevant information is to allow them to challenge and change the employer's decision. The Court stated (and many employees will agree): "Power does not confer insight and wisdom. Fully informed employees may have ideas of equal or greater merit than those of their employers".[28]

This is the language of human equality. It appears to be a long way from the principle of extreme managerial prerogative, as it was expressed in the 1990s and *Hale*. In a further interlocutory judgment, *Edwards v Two Degrees Mobile Limited,*[29] Travis J then expressly questioned whether *Aberhart* remained good law in light of the obligation of the Authority and Court to consider *"*all of the circumstances*"*, before considering whether an employer's actions were those of a fair and reasonable employer.

Travis J referred to the statutory changes and to *"*more recent decisions of the full Court*"*. With the case law developing in this way – or at least the judicial comment – many could argue that *Hale* was increasingly becoming a marginally relevant case.

Since *Two Degrees Mobile*, the dismantling of the *Hale* doctrine has proceeded apace. The first and most significant case was *Rittson-Thomas T/A Totara Hills Farm v Davidson*[30].

Mr Davison was dismissed for redundancy. He alleged an ulterior and hidden motive, but failed in this allegation on the facts. The Court, however, did not stop there. The Court referred to *Hale* and to its previous comments about *Hale* in *Aberhart.* His Honour Chief Judge Colgan commented on his "somewhat crypti[c]" comments in *Aberhart*, and stated they should not be read as meaning that an employer need only persuade the Authority or Court that the decision to dismiss for redundancy was a "genuine" decision in the sense that it was not a "charade for other motives". More would be needed.

His Honour stated *Hale* was authority for the proposition that it is not for the Court to say: *"*... I would not have made the decision the employer did ...*"*. His Honour considered the Court cannot impose or substitute its business judgment for that of the employer taken at the time, but **can** "determine whether what was done, and how it was done, were what a fair and reasonable employer would ... have done in all of the circumstances at the time".

The result is that the Court may enquire into the "merits" of a decision to determine whether the decision and how it was reached were fair and reasonable.

Hale had finally been corrected.

[28] At [56].
[29] *Edwards v Two Degrees Mobile Ltd* [2012] NZEmpC 111 at [7].
[30] *Rittson-Thomas T/A Totara Hills Farm v Davidson* [2013] NZEmpC 88.

On the facts, Mr Davidson had been offered only an opportunity to apply for a junior shepherd's position, and had not even been offered the position itself. He had received not an offer but an invitation to treat. This was not what a fair and reasonable employer would have done. Further, the employer had informed Mr Davidson he was being dismissed to effect a 10 per cent saving in the wages bill, but his dismissal would have saved only six per cent. This "threw into doubt" the genuineness and, therefore, the justification for the dismissal.
These principles arising from these cases are becoming increasingly firmly established, as nails continue to hammer into the coffin of *Hale.* The established test is rapidly becoming not whether the business can be run more efficiently without the employee, but rather whether the dismissal was fair and reasonable in all the circumstances.

In *Brake v Grace Team Accounting Limited*[31], Travis J firmly endorsed *Rittson.* The plaintiff Mr Brake, like Mr Davidson in *Rittson*, alleged bad motive (dismissal for health reasons) and failed in the allegation. However, the dismissal was nonetheless unjustified. The decision to dismiss was tainted by a financial miscalculation about the employer's true position, and by wrong information being provided to the employee. The defendant employer could not adequately explain to the Court why it had dismissed the worker. As a result, the employer failed to discharge the burden of proving the redundancy dismissal was justified. His Honour expressed his "complete agreement" with the Chief Judge's reasoning in *Rittson.*

In *Tan v Morningstar Institute of Education Ltd T/A Morningstar Preschool Ltd*[32], the Court took a similar approach. Ms Tan looms large in the decision as a full human being, rather that the shadowy presence of Mr Shrubshall in the *Hale* judgement. In *Tan,* the directors of the childcare centre became concerned about its finances. Ms Tan was invited to a meeting and was excited because she thought she was to be given a wage increase to reflect what all agreed was her very good work. She was dismissed for redundancy.

Like the plaintiff in *Brake*, Ms Tan had been provided with incorrect information about the employer's financial position. She was misled to conclude that her redundancy was inevitable when it was not. Losses were claimed that had not in fact occurred. There was, then, evidence of the employment of others to undertake Ms Tan's role. For all of these reasons (and others), the dismissal and how it was done were not what a fair and reasonable employer would or could have done in all of the circumstances.

Conclusion

The cases have significant implications for those caught up in the old *Hale* rut. When these cases were referred to in a recent lawyers meeting in Auckland, some were heard to mutter that employers could get around them by not providing too much information when proposing dismissal so as not to be tripped up later. This, of course, misses the point and, indeed, would be an unlawful approach on multiple bases.

What is now required (and arguably always was) is no more and no less than fair and reasonable treatment. Most good employers know this, and have always put it into practice. Increased efficiency is only one factor in the mix. It is an everyday reality of life that fair

[31] *Brake v Grace Team Accounting Ltd* [2013] NZEmpC 81.
[32] *Tan v Morningstar Institute of Education Ltd t/a Morningstar Preschool* [2013] NZEmpC 82.

treatment can be costly or can add to costs. It is also an everyday reality of life that efficiency is not the be all and end all of human existence.

Hale is now history, but it is interesting to consider what could have occurred had the Court of Appeal fixed itself less exclusively on the idea of the claimed hypothetical projected efficiencies and adopted a more balanced approach, perhaps for example:

> ...examine[d] the reasons given for the termination and the other circumstances relating to the case and to render a decision as to whether the termination was justified" – Art 9 paragraph 1 ILO Convention 158 – Termination of Employment Convention 1982.

Perhaps, Mr Shrubshall should never have been dismissed after all. It could be even said that dismissing a cleaner when the cleaning still needed to be done and without full regard for his circumstances is not what a fair and reasonable employer should have done in all of the circumstances. The word "should" in the last paragraph is perhaps instructive. The focus on "would" or "could" over the years is perhaps misplaced. As many of us know, the real focus is not one what an employer **would** do or **could** do, but rather what the employer **should** do[33]. Perhaps, Mr Shrubshall **should** not have been dismissed.

[33] A point made to the writer by Wellington mediator Mike Feely on numerous occasions.