

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2011] NZEmpC 140
ARC 7/09**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

BETWEEN GEOFFREY SCHOLEFIELD GWILT
 Plaintiff

AND BRIGGS & STRATTON NEW ZEALAND
 LIMITED
 Defendant

Hearing: 26-29 July and 10 August 2010 (5 days)
 (Heard at Auckland)

Appearances: Garry Pollak, counsel for the plaintiff
 Margaret Lewis and Moira Macnabb, counsel for the defendant

Judgment: 27 October 2011

JUDGMENT OF JUDGE A A COUCH

[1] Mr Gwilt was employed by Briggs & Stratton New Zealand Ltd from June 2004 until he was dismissed in April 2008. The broad issues in this case are whether that dismissal was justifiable and, if it was not, what remedies Mr Gwilt should receive. A particular issue is the significance of conduct by Mr Gwilt not discovered until after his dismissal.

[2] Before the Employment Relations Authority, Mr Gwilt actively sought reinstatement to his former position together with reimbursement of lost earnings and compensation for distress. The Authority determined¹ that Mr Gwilt had been unjustifiably dismissed but that he had contributed substantially to the situation

¹ AA 35/09, 9 February 2009.

giving rise to his dismissal. As a result, the Authority declined to order reinstatement and reduced the monetary remedies awarded to Mr Gwilt by 50 percent.

[3] Mr Gwilt challenged the whole of that determination and the matter proceeded before the Court by way of a hearing de novo, that is a full rehearing of the entire matter. Mr Gwilt again sought reinstatement, reimbursement of lost earnings and compensation for distress.

Background and events up to the dismissal

[4] Briggs & Stratton New Zealand Ltd (BSNZ) is a subsidiary of an international business group based in the United States of America. The company makes small petrol engines for use in mowers, generators, pumps and other similar appliances requiring an independent power source. Briggs & Stratton engines are very well known and widely used. They are fitted to machines made by many other manufacturers and are serviced through an extensive dealer network.

[5] Mr Gwilt was trained and experienced in servicing machinery. He also had experience in warehousing, parts supply and handling warranty claims. In June 2004, he was employed by BSNZ in a customer services role, providing technical and warranty support. He performed well in this position and was highly regarded by his colleagues and by management. While in this role, Mr Gwilt successfully participated in a five day course on the technical aspects of Briggs & Stratton engines, known as the Authorised Field Service School. As a result, he obtained the Briggs & Stratton Master Service Technician qualification.

[6] In his initial role, Mr Gwilt worked closely with Richard Noakes who then held the position of Technical, Training and Warranty Manager. One of the responsibilities of this role was to organise and conduct training courses on Briggs & Stratton products for service agents. BSNZ routinely offered a series of training courses each year, usually beginning in June. Each year, information about the courses to be offered was made available in what was called a “training calendar”. This document was usually published several months in advance of the courses to enable service agents to plan for their staff to attend.

[7] In January 2006, Mr Noakes left. Mr Gwilt applied for his position and was appointed to it. He reported to BSNZ's National Manager, Glenn Woollett.

[8] Although an important aspect of Mr Gwilt's new role was training, he had no experience in teaching people in groups. Recognising this, Mr Woollett did not expect Mr Gwilt to conduct training courses in 2006. In 2007, arrangements were made for Mr Gwilt to learn the necessary skills and techniques under the supervision of Rohan Carroll, the training manager for Briggs & Stratton Australia.

[9] In early 2007, Mr Gwilt was involved in preparing the annual training calendar for BSNZ. In May 2007, Mr Gwilt went to Melbourne where he attended a Technical Update Seminar and a training course for Hydro-Gear, a product marketed by Briggs & Stratton. Mr Gwilt observed these courses with a view to conducting them himself and was given all of the material required to conduct the courses. While in Melbourne, Mr Gwilt also attended a sales course covering the range of Briggs & Stratton products.

[10] In August 2007, Mr Carroll came to New Zealand where he and Mr Gwilt conducted Technical Update Seminars and Hydro-Gear training courses. In each case, Mr Gwilt initially assisted Mr Carroll and then took a greater part in presenting subsequent sessions. Mr Gwilt ran the final two Technical Update Seminars and the first half of two Hydro-Gear courses.

[11] Later in August 2007, Mr Gwilt went to Brisbane where he participated in another five day Authorised Field Service School. Mr Gwilt was largely an observer but assisted the presenter to an extent. In September 2007, Mr Gwilt conducted two more Technical Update Seminars in New Zealand.

[12] In about October 2007, Mr Gwilt told Mr Carroll he was considering a move to Australia. Mr Carroll said that, if that was what he decided to do, Briggs & Stratton Australia may be interested in employing him. Mr Gwilt discussed this with Mr Woollett but eventually said he was not going to pursue it. About the same time, Mr Gwilt told Mr Woollett that he had received an offer of employment in a mining

related business in Australia. They discussed the pros and cons of this but Mr Gwilt did not tell Mr Woollett the outcome.

[13] In early January 2008, Mr Gwilt went to Brisbane for a week where he was involved with a company called Sandvik Mining and Construction Australia Pty Ltd. He did not arrange leave for this time, nor did he tell Mr Woollett or anyone else in BSNZ where he had been. I deal with these events in more detail later.

[14] It was Mr Gwilt's responsibility to produce the training calendar for 2008. Mr Woollett expected this to be done by mid-February. To make sure Mr Gwilt was aware of this expectation, Mr Woollett sent an email to Mr Gwilt on 25 January 2008. The email was copied to Tracy Pullin, the office administrator. It read:

Geoffrey,
Can you please start putting together a Training calendar for 2008? We need to send this out mid February (after the sales guys have been up).
You will need to have MST schools, Hydro-gear, OHV, and Technical Updates, I can't remember if you have completed the Electrical schools so if you haven't don't worry about them.

Tracy there should be on file (electronically) the last training calendar that Geoffrey can use as a guide.

GW

[15] The term "MST schools" was an alternative name for the Authorised Field Service Schools. "OHV" referred to a training course on overhead valve engines. In response to this email, Ms Pullin provided Mr Gwilt with a copy of the previous year's training calendar but Mr Gwilt did not start preparing a calendar for 2008. Ms Pullin was surprised by this and reported it to Mr Woollett. On 12 February 2008, Mr Woollett sent Mr Gwilt a further email:

Geoffrey,
How is the training school calendar coming along?
I have had three dealer ships in the past two days enquiring about MST schools.
I need this completed by Friday?

GW

[16] Mr Gwilt did not respond to this email either. In late February 2008, Mr Woollett asked Mr Gwilt directly where the calendar was. Mr Gwilt replied that he

did not know what he was expected to do. This led to a meeting of the two men on 10 March 2008. They went through the Australian training calendar for 2008, identifying which courses Mr Gwilt was able to teach. This came down to two courses: the Technical Update seminar and the Hydro-Gear training course. In addition, it was agreed that Mr Carroll would deliver the Authorised Field Service School with Mr Gwilt's assistance. Mr Gwilt expressed concern about his ability to run the first two courses unaided. Mr Woollett offered to assist in presenting the courses but Mr Gwilt declined the offer. Mr Gwilt also said that he had not received some of the materials he needed to present the Technical Update seminar. Mr Woollett told Mr Gwilt it was his responsibility to get those materials and to liaise with Mr Carroll about them.

[17] By the first week of April 2008, Mr Gwilt had still not produced a training calendar. Mr Woollett wrote to him on 8 April 2008:

08 April 2008

TECHNICAL, TRAINING & WARRANTY POSITION

Geoffrey, Re: BSNZ's training schools

This is how I understand the situation,

Back in March 2006, you accepted the position of Technical, Training and Warranty Manager for BSNZ, after the resignation of Richard Noakes.

BSNZ gave you 12 months or so to settle into this new roll before you started the Technical training and service schools (incorporating update seminars, Master Service Technician & Hydro-Gear schools etc).

BSNZ have sent you to Australia on more than one occasion to participate in these service schools, as a student and as the instructor's assistant, learning how to hold and run service schools.

In August 2007 Rohan Carroll came out from B&S Australia to oversee your training. Together you and Rohan held Technical update & Hydro-Gear schools in both Auckland & Christchurch.

In Late September 2007 you travelled to Palmerston North and ran the same Technical updates & Hydro-Gear schools for the Dealers in that region. This basically finished your Service schools for 2007.

Since then you have been asked to produce a training calendar for the 2008 calendar year, which to date you have not done. We have had a meeting to discuss this, in this meeting I tried to get you to set some dates for Technical update and Hydro-Gear service schools, you told me you were

uncomfortable teaching, you had lost your confidence and did not wish to run the service schools. I tried to talk you around and help you through what appears to be a fear of teaching by offering to run these classes with you but I could not convince you to do so.

BSNZ is now in the situation where technical training is not being done and Dealers are requesting dates for service schools.

BSNZ must run these service schools and we require our Technical, Training & Warranty Manager to be capable of this. By not producing the required and requested Training calendar it appears to me that you no longer wish to be this person.

I request you attend a meeting in my office tomorrow 9am Wednesday 09 April where we will discuss where we go from here.

Glenn Woollett
National Manager
Briggs & Stratton NZ LTD

[18] The meeting planned for 9 April 2008 was postponed until 11 April 2008 at Mr Gwilt's request. This was to enable his employment advocate, Clive Bennett, to attend. At the meeting, Mr Gwilt expressed doubts about his ability to do the training he was expected to do. He suggested that he needed more training himself. Mr Woollett did not accept that and pointed out to Mr Gwilt the training he had already received. The two men discussed the possibility that Mr Gwilt's role in BSNZ might change to one which did not involve him training others. This possibility had come about following the retirement a few weeks earlier of another employee, Terry O'Connor. The proposed new role would have the title Technical, Inventory and Internal Sales and would comprise parts of Mr Gwilt's existing role together with parts of Mr O'Connor's former role. The salary would be the same but Mr Gwilt would no longer have a company car or his own office. Those would be allocated to a new role of Training Officer. Mr Woollett agreed to provide an employment agreement and a position description for Mr Gwilt to consider.

[19] By the end of the meeting, it was clear that Mr Gwilt had two options. He could accept the new position and no longer have a training role. Alternatively, he could remain in his existing position but, if he did so, he would be required to carry out his training duties. Mr Woollett made it clear that, if Mr Gwilt chose to remain in his existing position, he had to provide the training calendar as soon as possible.

[20] Later that day, 11 April 2008, Mr Woollett gave Mr Gwilt a draft employment agreement and position description for the proposed new role. He told Mr Gwilt that, unless the offer to take up the new role was accepted promptly, he would be staying in his existing role and would be expected to produce the training calendar.

[21] By this time, Mr Woollett had also sought advice. He engaged a company called Employers Assistance Limited, the principal of which was Tim de Latour. On 14 April 2008, Mr de Latour telephoned Mr Bennett. Although this call was made without Mr Woollett's approval, Mr de Latour had apparent authority to represent BSNZ. He told Mr Bennett that there was pressure coming on BSNZ from Australia to organise training and that, unless Mr Gwilt either accepted the new position or got on with the training aspect of his existing position, there was a significant risk he would be dismissed. He said that a senior manager was coming over from Australia and that a decision was required urgently if Mr Gwilt was to avoid dismissal. Mr De Latour then offered a third alternative that Mr Gwilt would be paid \$2,000 if he left BSNZ voluntarily. Mr Bennett relayed to Mr Gwilt what Mr de Latour had said, including the prospect of dismissal and the offer of payment if he resigned. Mr Gwilt rejected that offer.

[22] When he had heard nothing further from Mr Gwilt by 16 April 2008, Mr Woollett wrote to him that day. The first paragraph of that letter read:

Further to our meeting last Friday my understanding of the current situation is that you are coming back to me regarding whether or not you will accept the position offered. Further, I understand you have refused the "Training Position" and after your discussions with Mr Clive Bennett I am expecting a response from you so I ask you to confirm my understanding of the situation is in line with yours. Management in Australia insist I resolve this quickly and I ask for your co-operation.

[23] Mr Woollett then went on to express concern that Mr Gwilt may have "personal health" problems and offered to provide counselling by a psychologist of Mr Gwilt's choosing to be paid for by BSNZ.

[24] On 18 April 2008, Mr Woollett and Mr Gwilt met briefly. Each gave the other a letter dated that day.

[25] In his letter, Mr Gwilt explained his position regarding training by saying, “I have never actually refused to do the training; I only ever stated that to enable me to be competent, confident and able to fulfil this aspect of this role I needed to have adequate factory training myself.” This reference to “factory training” harked back to discussions Mr Gwilt had with Mr Woollett in late 2007 and early 2008 and an issue which had been raised again in their meeting on 10 March 2008. Mr Gwilt wanted to attend a “Train the Trainers” course conducted by Briggs & Stratton in the United States. Mr Woollett had told him this was unnecessary and inconsistent with current company policy which was that Mr Carroll would provide the training required by training staff in the Australasian region.

[26] In his letter, Mr Gwilt went on to say that he had not refused the “Training Position” but that he needed more training before he could carry out the training aspects of the role. He then said “I am, however, happy to provide a training calendar on the basis that I will have received the required training prior to the commencement of the training.” Turning to the offer of the alternative position which did not involve training, Mr Gwilt said:

I have also now taken advice on the draft employment agreement you provided and confirm it is acceptable subject to the following few suggested amendments:

...

Clause 40.1

...

The Position Description in Schedule 3 needs to be replaced with a Position Description covering my present duties. In addition, Schedule 2 needs to be replaced to reflect my current pay scale in respect of the aforementioned.

[27] The essential parts of Mr Woollett’s letter were:

Dear Geoff

Further to our meeting last Friday my understanding of the current situation is that you were coming back to me regarding whether or not you would accept the position offered. Further, I understand you have refused the ‘Training Position’ and after your discussions with Mr Clive Bennett I have been expecting a response from you asking you to confirm that my understanding of the situation is in line with yours. I have had no response from you.

...

Mr de Latour yesterday suggested you have indicated you are now prepared to accept the role of ‘training officer’ when clearly you had turned the position down and that position was not offered to you after you refused it.

After your refusal I have appointed another person. Mr Bennett suggested that there was a letter coming but there has been no such letter.

During conversations with Briggs & Stratton staff in Australia there was mention you had actually taken up a full time position with another company in Queensland and worked there for a week and purchased a property there. I was unaware of this or a resignation or notice.

I ask you to again attend a formal meeting next Wednesday 23 April at 9.00 a.m. in my office. Please feel free to arrange representation.

The agenda will consist of my asking you to respond to the above issues namely:

- Why you have failed to respond as promised to the offer of position?
- Why you have given me no response to the offer of medical help?
- Why you have not accepted or rejected the job offer?
- Did you in fact take another position with another company in Australia?
- Would you prefer to discuss an exit package?
- Given your situation now please indicate your wishes as to the outcome of the meeting.

...

In the absence of acceptable responses at the meeting your employment is in jeopardy.

...

[28] As each of these letters was written without knowledge of the other, Mr Woollett and Mr Gwilt were, to an extent, talking past each other but there was no discussion or correspondence between them in the days which followed to clarify the outstanding issues before the meeting on 23 April 2008. Rather, Mr Gwilt wrote a letter which was given to Mr Woollett at the beginning of what turned out to be their final meeting.

[29] The meeting took place as arranged on 23 April 2008 but, at Mr Gwilt's request, was held at Mr Bennett's office rather than at BSNZ. By this time, Mr De Latour was unavailable and had been replaced by one of his employees, Martin Round. When he and Mr Woollett arrived for the meeting, they were given a letter from Mr Gwilt dated that day and left alone for some time to read it. The essential parts of that letter were:

Dear Glenn

I refer to your letter dated 18th April to which I now respond as follows:

I confirm that I have not at this stage refused the new 'Training Position', which is oddly named as it actually takes away the training function of my job. In Mr Bennett's presence, I undertook to come back to you on this once I had had the opportunity to see in writing, the new position you were offering namely Technical Inventory & Internal Sales Support and consider it. You will appreciate that it is a big decision for me, particularly since you informed us that the new position would not include my company vehicle and that this was 'not negotiable'. No date was set for my response but I agreed to get back to you on it. I did so last Friday which I do not believe was unreasonable, given that I was only given the documents late on the 11th April which included the first employment agreement I have ever been presented with and I needed to get advice on this too.

...

I reiterate that I have not ever refused to do the training that is part of my existing and present role. I am, as a result, shocked to hear that you have already appointed another person to perform a role that was supposed to be a part of my duties. Aggravating my concern is the fact that you have done this prior to having my formal response and I consider this to constitute a unilateral variation of the terms of my employment with the Company. I would like to know when exactly this offer was made, where it was advertised and what the start date is.

Most of the proposed agenda issues have already been dealt with and those that have not been will be dealt with during today's meeting. In view of the above and in view of the issues on the agenda, I fail to see or understand how or why my employment may be in jeopardy.

...

[30] When Mr Gwilt and Mr Bennett returned there was a meeting between the four men. Mr Bennett took notes which were generally accepted as representative of the discussion. Initially, there was discussion about the extent and sufficiency of Mr Gwilt's training. Mr Gwilt maintained his position that he needed more training before he could train others. Mr Woollett repeated his view that Mr Gwilt had been adequately trained and that the difficulty was his attitude towards training others. Mr Gwilt was asked whether he had taken employment in Australia over the Christmas break. He denied doing so. Mr Bennett referred to the statement in Mr Woollett's letter that the 'Training Position' had been filled and asked when and how this had come about. Mr Woollett asked Mr Round how he should reply and Mr Round told him he did not need to answer the question.

[31] The discussion then returned to issues of training, including the courses Mr Gwilt had attended in Australia and Mr Carroll's availability to assist Mr Gwilt with courses later in the year. Mr Gwilt was recorded as saying that he could not produce the training calendar because he was not properly trained. Mr Woollett then referred

to an email from Mr Carroll that morning expressing the view that Mr Gwilt was sufficiently trained and that he had all the necessary materials to carry out the training he was expected to do.

[32] It appears the meeting ended abruptly and inconclusively when Mr Round closed his notebook and went to leave. Mr Gwilt asked if he should come back to work and Mr Woollett replied that he could see no reason why not.

[33] The following day, 24 April 2008, Mr Woollett went to Mr Gwilt's office and gave him the following letter:

Dear Geoff

Re: Termination of Employment

This is to advise that your employment with Briggs & Stratton New Zealand Limited is to be terminated. A notice period of 4 weeks will be provided to you. However, we will not require you to work out the notice period.

The reason for the termination is that you have refused to run the technical training and service schools for the Company despite having been provided with the necessary training.

You had an opportunity to explain your action at a meeting held on 23 April 2008, but I do not consider that you have provided an acceptable explanation.

We require you to hand over the company computer now and all Company property in your possession, including, office key(s), vehicle (and keys), and cell phone, and provide us with the password for your company computer, by the close of business today.

Yours faithfully

[signed]

Glenn Woollett
National Manager
Briggs & Stratton NZ LTD

[34] In the course of the brief discussion which followed, Mr Gwilt twice asked Mr Woollett whether he was sure he wanted to go through with the dismissal. In reply, Mr Woollett was very apologetic, saying that he had no choice. Mr Gwilt left BSNZ that day. He was paid four weeks' salary but no payment was made in recognition of his loss of private use of the company vehicle.

Events discovered after the dismissal

[35] After Mr Gwilt was dismissed, information came to light suggesting that he had actually been employed in Australia in January 2008. That information was initially sketchy but, in the course of the hearing before me, became much more detailed. This came about largely through the evidence of Michael Jones, the Human Resources Manager for Sandvik Mining and Construction Australia Pty Ltd (Sandvik) and the documents he produced.

[36] In October 2007, Mr Gwilt applied for the position of Warranty Claims and Invoicing Administrator with Sandvik at its Brisbane head office. He was interviewed and completed a pre employment medical examination form.

[37] On 31 October 2007, Sandvik sent Mr Gwilt a letter offering him that position on a full time, permanent basis. The letter comprised a detailed employment agreement running to five close typed pages. Several versions of this document were produced but the one extracted from Sandvik's records is clearly the most reliable. It is signed by two senior managers of Sandvik. Under their signatures is the sentence, "I hereby agree to be bound by the terms and conditions set out above." Below that is Mr Gwilt's signature and the date "15 November 2007" in what he agreed was his handwriting. That date is the same as a covering letter Mr Gwilt sent to Sandvik which was as follows:

15th November 2007

Dear Jo

Thank you for the offer of employment with Sandvik which I received yesterday.

I have counter signed the letter of offer from you which you should find attached.

During my interview with Steven Weeks it was agreed that I could take Holidays in advance that were already booked and I would just like the dates to be clear.

12th March 2008 – 17th March 2008

5th September 2008 – 29th September 2008

If there are any problems please get back to me, otherwise I look forward to meeting you all in January.

Yours Sincerely
Geoffrey

[38] Two matters mentioned in this letter relate back to the signed employment agreement. Alongside the “**Annual Leave**” clause, Mr Gwilt had written “Pls see attachment”, this apparently being a reference to the agreed periods of annual leave to be taken in advance during 2008. Clause 2 of the agreement provided for the start date to be as agreed between the employee and his supervisor. Alongside this clause, Mr Gwilt had written “7th January 2008”. This tallied with the reference in Mr Gwilt’s letter to meeting people at Sandvik in January.

[39] In early December 2007, Mr Gwilt made enquiries about renting a house near Brisbane for six weeks from 6 January 2008.

[40] Over the Christmas period in 2007, Mr Gwilt visited friends in Cairns, in northern Queensland. On his return, he purchased a one way ticket to Brisbane. The electronic ticket shows that it was issued on 2 January 2008 for travel on Sunday 6 January 2008.

[41] Mr Gwilt returned to work at BSNZ on 3 January 2008. Although he spoke to Mr Woollett that day and the next, Mr Gwilt said nothing about his plans to go to Brisbane. He made no attempt to arrange leave for the following week. Rather, he left a message on Mr Woollett’s office voice mail early in the evening of Sunday 6 January 2008, saying that he would not be at work the following day but not why.

[42] On Monday 7 January 2008, Mr Gwilt went to Sandvik’s office in Brisbane. He signed three employment related documents:

- (a) Another copy of the detailed employment agreement which Mr Gwilt dated “7.1.2008”.
- (b) An Australian Taxation Office form in which Mr Gwilt declared that he was being paid on the basis of full time employment and that he was an Australian resident for tax purposes. Mr Gwilt gave an address in Queensland as his home and signed the form under a declaration that its contents were true and correct.

- (c) A Sandvik payroll input sheet containing his personal details, emergency contact details, bank details and superannuation details.

[43] Apparently using the information provided in these forms by Mr Gwilt, the Sandvik HR department completed a check list for “new starter” with the company. Mr Gwilt was allocated an employee number and the document recorded that an “Approval to Recruit” form had been received. It also recorded that Mr Gwilt was to attend an induction course on 22 January 2008. Mr Jones explained that such courses were held monthly and the course on 22 January 2008 would have been the next one available. Mr Jones also explained that attendance at this formal induction course was not necessary before a new employee could start work as essential health and safety information was given orally.

[44] Another document produced by Mr Jones was a detailed “Employee Listing” for Mr Gwilt printed on 8 January 2008. This showed that a wide range of information about Mr Gwilt’s employment had been entered into the company’s records. It included a note that approval had been given for Mr Gwilt to take annual leave in advance in September 2008.

[45] On Tuesday 8 January 2008, Sandvik paid Mr Gwilt his salary for the balance of January 2008. The amount was \$4,384.62 which, after tax, resulted in \$3,448.62 being deposited in Mr Gwilt’s Australian bank account.

[46] At about 3am on Wednesday 9 January 2008, Mr Gwilt left another voice message for Mr Woollett saying that he would not be at work for the rest of the week.

[47] At about 5am on Monday 14 January 2008, Mr Gwilt sent an email to his manager at Sandvik saying that he intended to return to New Zealand and that he would cancel arrangements which had been made for him to go to Newcastle the following day. As a result of that email, Mr Gwilt’s salary was suspended by Sandvik. It is clear from internal emails that Mr Gwilt’s departure was a surprise to Sandvik and that there was uncertainty about whether he would return.

[48] When it became clear that Mr Gwilt would not return, a member of the payroll staff at Sandvik sent Mr Gwilt an email on 25 January 2008 asking him to refund the salary he had been overpaid. The basis of this request was perfectly clear. The subject was “overpayment of Sandvik wages”. The email included images of Mr Gwilt’s pay records showing the payment to him of salary for the month of January, including deductions of tax and payment of superannuation contributions. The email then said:

The difference which is your overpayment is \$3230.77 gross \$707 tax and \$2523.77 Net.

Please repay the net amount of \$2523.77 by telegraphic transfer as repayment of the overpayment made to you.

[49] In response, Mr Gwilt transferred \$1799.84 to Sandvik the same day. This was based on the repayment sought by Sandvik less half of his airfares which Sandvik had agreed to pay.

[50] In the meantime, when Mr Gwilt returned to New Zealand on 14 January 2008, he told no-one where he had been. He spoke to Cameron McLean, the company accountant who was apparently responsible for leave records. By then, Mr Gwilt was unwell and this prompted Mr McLean to assume that the reason for Mr Gwilt’s absence the previous week had been illness. He attributed the balance of Mr Gwilt’s sick leave and two days of annual leave to the absence. Mr Gwilt did not correct Mr McLean and accepted payment by BSNZ on that basis.

[51] Mr O’Connor, the ex-BSNZ employee who had retired in early 2008, gave evidence that, on a social occasion later in 2008, Mr Gwilt told him that he had taken a job in Brisbane earlier that year where he had worked for a week and been paid.

Issues

[52] The primary issue is whether Mr Gwilt’s dismissal was justifiable. In deciding that issue, I must apply the test in s 103A of the Employment Relations Act 2000 (the Act) as it was at the time of the dismissal:

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

[53] In this case, that test gives rise to several issues about both the substance of the decision to dismiss Mr Gwilt and how that decision was reached. Considering always what a fair and reasonable employer would have done in all the circumstances of this case, those issues include:

- (a) Whether it was appropriate to reach the conclusion that Mr Gwilt had “refused to run the technical training and service schools for the Company despite having been provided with the necessary training,”
- (b) If that conclusion was properly reached, whether it justified dismissal.
- (c) Whether Mr Woollett acted fairly and in good faith in reaching that conclusion.

[54] If I conclude that Mr Gwilt was unjustifiably dismissed, there are further issues regarding remedies:

- (a) Whether reinstatement should be ordered.
- (b) The extent to which he ought to be reimbursed for lost remuneration.
- (c) The appropriate measure of compensation for distress.
- (d) The extent of Mr Gwilt’s contribution to the situation giving rise to his dismissal.
- (e) How Mr Gwilt’s conduct in relation to Sandvik ought to be taken into account.

Was the dismissal justifiable?

[55] The sole reason for Mr Gwilt's dismissal given in Mr Woollett's letter of 24 April 2008 is that he "refused to run the technical training and service schools for the Company despite having been provided with the necessary training." That reason is obviously in two parts which must both be examined on the evidence.

[56] The wording of this sentence is curious. Throughout the first four months of 2008, the principal issue concerning Mr Woollett had been Mr Gwilt's failure to produce the training calendar. That is something quite different to running the actual training courses and schools. When that distinction was put to Mr Woollett for comment, he said "I sort of see it differently. I see it as he was refusing to do the role which he was employed for, which was the training calendar and the training." While I accept that may well have been what was in Mr Woollett's mind, it was not what he recorded in his letter as the reason for dismissal. A fair and reasonable employer would make sure that the reasons given for dismissal were those actually relied on.

[57] There was little if any evidence that Mr Gwilt had explicitly refused to run any actual training courses or schools. Rather, he had consistently qualified his willingness to do so by saying on many occasions that he would carry out the training provided he received more training. Whether that amounted to a refusal to conduct the courses depends on whether Mr Gwilt was justified in making his agreement to do so conditional. That, in turn, depends on whether Mr Gwilt had received sufficient training to be able to run the courses expected of him.

[58] In 2008, the only courses Mr Gwilt was expected to conduct were the Technical Update seminars and the Hydro-Gear school. It was clearly understood that Mr Carroll would take the lead in teaching the only other course to be offered, the Authorised Field Service School.

[59] Mr Carroll's evidence was that the nature and extent of training received by Mr Gwilt up to the end of 2007 was sufficient to enable him to conduct the Technical

Update seminars and the Hydro-Gear schools. Indeed, Mr Carroll said that, by the time he and Mr Gwilt finished courses conducted in Christchurch in August 2007, he considered Mr Gwilt to be a confident and competent trainer. There can be no question about Mr Gwilt's ability regarding the Technical Update seminars as he had already conducted four of them in August and September 2007. As to the Hydro-Gear school, Mr Gwilt had observed the course in Australia and conducted increasing amounts of two courses with Mr Carroll in August 2007. Mr Gwilt had the technical knowledge and access to the materials necessary for the course. Mr Carroll was confident that Mr Gwilt could conduct the full course. In the course of cross examination, Mr Gwilt agreed that he was able to teach the Hydro-Gear course. There was also a standing offer from Mr Carroll to provide Mr Gwilt with advice and support in the training component of his role.

[60] A theme which emerged from the evidence was that Mr Gwilt believed that he should have been sent to the United States to do the "Train the Trainers" course. He heard about it from Mr Carroll and discovered that Mr Noakes had done the course. As he had taken over Mr Noakes' role, Mr Gwilt believed that he too should do that particular course. Mr Woollett had declined to send Mr Gwilt on that course. He said that there had been a change in corporate policy which required him to use regional resources for training rather than send staff to the United States. Consistent with that, Mr Carroll said that, since he became National Service Manager for Briggs & Stratton Australia in November 2005, he had developed regional training programmes to equip staff engaged in training with the necessary skills. These explanations for not sending Mr Gwilt on the "Train the Trainers" course were reasonable and I find that they were conveyed to Mr Gwilt. Notwithstanding that, Mr Gwilt continued to believe that he should be sent to the United States for training.

[61] This belief seemed to have unduly coloured Mr Gwilt's perception of his position. In his letter to Mr Woollett of 18 April 2008, Mr Gwilt said: "Due to a lack of training, I have never actually run a training course on my own." That statement was clearly incorrect with respect to the Technical Update seminars. Mr Gwilt went on in that letter to say that he had not been trained in a number of areas which he listed, including Hydro-Gear. That was also incorrect as Mr Gwilt had attended one course in Australia and conducted parts of two courses in New Zealand.

[62] Having regard to all the evidence, I find that it was unreasonable for Mr Gwilt to insist on further training before conducting the two courses he was expected to do in 2008.

[63] Mr Gwilt was plainly at fault regarding preparation of the 2008 training calendar. He always knew that it was his responsibility to prepare the calendar. After he received Mr Woollett's email on 25 January 2008, he knew that management wanted it completed promptly. The initial target date was mid-February but, by that time, Mr Gwilt had done nothing. As time went on, Mr Woollett put increasing pressure on Mr Gwilt to get the calendar completed and there can be no doubt that Mr Gwilt knew what was required of him. Despite that, he had still not produced anything by time he was dismissed on 24 April 2008.

[64] In his evidence, Mr Gwilt offered three explanations for his failure to produce the calendar. The first was that he needed to know when Mr Carroll was coming to New Zealand in order to set dates for the Advanced Field Service School. The second was that he accepted the alternative position offered by Mr Woollett which did not involve training and was thereby relieved of responsibility for preparing the training calendar. The third was that he wanted confirmation that he would receive more training to conduct the courses before he would prepare the calendar.

[65] The issue of the timing of Mr Carroll's visit in 2008 turned into a "chicken and egg" situation. Mr Gwilt said that he could not prepare the calendar until he knew when Mr Carroll was coming. Mr Carroll said he could not finalise his dates until the calendar was prepared. From early 2008, probably as early as January, Mr Carroll had said he was available to come to New Zealand in the second half of July. Mr Gwilt said he was unaware of this until 11 April 2008 but he conceded that he had given evidence on oath to the Authority that Mr Carroll had told him in telephone calls in February and March 2008. Those earlier dates were consistent with the evidence of Mr Carroll and of Mr Woollett who said that Mr Carroll's availability was discussed at the meeting he had with Mr Gwilt on 10 March 2008. Mr Woollett also said that, at the time of that meeting, the wall planner in his office showed Mr Carroll being in New Zealand for the last two weeks of July 2008 and that he pointed this out to Mr Gwilt. I do not accept Mr Gwilt's evidence on this

issue. I find that he was well aware of Mr Carroll's availability from a time no later than 10 March 2008.

[66] The second explanation given by Mr Gwilt was that he accepted the offer of an alternative position made by Mr Woollett at their meeting on 11 April 2008. That proposition was based on Mr Gwilt's response to the draft employment agreement contained in his letter to Mr Woollett of 18 April 2008. What Mr Woollett had offered was the alternative position of Technical, Inventory and Internal Sales Support as described in schedule 3 to the draft employment agreement delivered to Mr Gwilt late on 11 April 2008. It was unmistakably clear from schedule 2 of this agreement, and from what Mr Woollett said at the meeting on 11 April 2008, that the remuneration package associated with that position would be limited to the salary Mr Gwilt was then receiving. He would no longer have a company vehicle. He would also lose the private office he then had.

[67] In his response to that offer, Mr Gwilt said he was accepting it subject to several changes in the agreement. Most of those changes were minor but two were fundamental. He wanted the position description changed to cover his "present duties". He also wanted the remuneration package changed to reflect his "current pay scale". Far from accepting an alternative position with lesser benefits, Mr Gwilt was seeking to retain both his existing position and remuneration. It was a counter offer. In terms of the two alternatives given to Mr Gwilt on 11 April 2008, this letter showed he was opting to remain in his present position rather than moving to the alternative position. That being so, he remained responsible for preparing the training calendar.

[68] Mr Gwilt appeared to understand that at the time. In his letter of 18 April 2008, after saying that he had not been sufficiently trained, he said "I am, however, happy to provide a training calendar on the basis that I will have received the required training prior to the commencement of the training." This showed that Mr Gwilt still saw it as his responsibility to prepare the calendar but that he was seeking to place a condition on doing it. For the reasons I have given earlier, it was not open to Mr Gwilt to insist on further training at that point.

[69] I conclude that there was no acceptable reason why Mr Gwilt failed to produce the BSNZ 2008 training calendar. This was a sustained breach of his obligations as an employee.

[70] In the course of cross examination, Mr Gwilt suggested that he had actually started to prepare the calendar. He said that he had a draft in his desk drawer but had never shown it to Mr Woollett. It is significant that Mr Gwilt had not suggested this in his evidence in chief and it emerged only when he was being pressed in cross examination to explain his failure to do anything about the calendar. It is also incredible that Mr Gwilt would have kept such a document secret when he was being repeatedly pressured by Mr Woollett to produce it. I find this evidence inherently unreliable and place no weight on it.

[71] Although Mr Gwilt was at fault in failing to carry out his duty as an employee, the response of Mr Woollett to that situation was also seriously flawed. In particular, the process leading up to Mr Gwilt's dismissal was unfair and in breach of BSNZ's duty of good faith. That duty is imposed and described by s 4 of the Act, the first parts of which 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.

[72] In a disciplinary process, the requirements of fairness and good faith include at least the following:

- (a) It must be clear to the employee when a matter of concern has become a disciplinary issue.
- (b) The issues of concern must be clearly identified.
- (c) The seriousness of the matter must be conveyed to the employee. In particular, if dismissal is a possible outcome, the employee must be told this.
- (d) The employee must be given all information relevant to the issues of concern.
- (e) The employee must be given a proper opportunity to respond to the employer's concerns before a decision is made.

In this case, BSNZ's process failed to meet the necessary minimum standard in any of these respects and certainly did not meet it overall.

[73] It is difficult to discern the point at which Mr Woollett's concern about the training calendar moved from being an administrative issue to a disciplinary one. In Mr Woollett's mind, the turning point was probably when he wrote his letter to Mr Gwilt of 8 April 2008 in which he suggested that Mr Gwilt's failure to produce the training calendar meant that he no longer wished to retain his position. If that was so, it was not clearly communicated to Mr Gwilt. The first unequivocal indication that disciplinary action might be taken was given in Mr Woollett's letter of 18 April 2008 in which Mr Gwilt was expressly told that his employment was in jeopardy.

[74] Mr Woollett was far from clear or consistent in telling Mr Gwilt what his concerns were. In their discussions and correspondence up to mid-April 2008, the

emphasis had been on producing the training calendar and, to an extent, Mr Gwilt's commitment to conducting the training. In his letter of 18 April 2008, Mr Woollett set out a series of six bullet points for discussion at the proposed meeting on 23 April 2008. They were followed by the statement "In the absence of acceptable responses at the meeting your employment is in jeopardy." None of the bullet points related to training or the training calendar. Indeed, training was not mentioned in the letter apart from a reference to the "Training Position". After reading that letter, Mr Gwilt would not have known that training remained an issue at all. Notwithstanding that, there was considerable discussion about training at the meeting on 23 April 2008 and it subsequently became the stated reason for Mr Gwilt's dismissal. Mr Gwilt was never told that his employment may be at risk for that reason.

[75] It follows that, while Mr Gwilt was told that his employment was at risk, he was told that the issues placing it at risk were quite different to those subsequently relied on to dismiss him. This was misleading and effectively deprived Mr Gwilt of a proper opportunity to be heard on the issues of actual concern to Mr Woollett.

[76] The disciplinary process was complicated and confused by Mr Woollett's offer to Mr Gwilt of an alternative position without a training component. While it appears that offer was made in good faith, the manner in which it was subsequently dealt with fell well short of that standard. In his letter of 18 April 2008, Mr Woollett said that he had "appointed another person" to the position of "training officer". In evidence, Mr Woollett admitted that he knew this statement was untrue at the time he gave the letter to Mr Gwilt and that he never corrected the error. While Mr Woollett attempted to suggest in oral evidence that Mr Gwilt had later been told indirectly that this was in error, I found that evidence unconvincing. At the meeting on 23 April 2008, Mr Woollett was asked directly about that statement but chose not to answer. This can only be viewed as deliberately deceptive conduct.

[77] At the meeting on 23 April 2008, one of the principal topics of discussion was whether Mr Gwilt was sufficiently trained. Mr Woollett relied significantly on an email he said he very recently received from Mr Carroll saying that Mr Gwilt had had ample training. That email should have been provided to Mr Gwilt as part of the statutory obligation of good faith in s 4(1A)(c) of the Act.

[78] The meeting on 23 April 2008 was brought to a premature and abrupt end by Mr Round. No explanation for this action was ever given. It further deprived Mr Gwilt of a proper opportunity to be heard.

[79] Viewed as a whole, the process leading up to Mr Gwilt's dismissal was plainly unfair and in breach of BSNZ's obligation of good faith. It was certainly not what a fair and reasonable employer would have done in all the circumstances. No conclusion which resulted from that process could be relied on.

[80] Two other aspects of Mr Woollett's response to the situation created by Mr Gwilt's failure to produce the training calendar also require consideration. Producing the training calendar was not a major task. Only three courses were to be offered in 2008. Venues had to be arranged but the document itself was likely to be a single page. One option open to Mr Woollett was to work with Mr Gwilt to produce the calendar. He agreed in evidence that this would have taken no more than two hours of his time. He also said that, had Mr Gwilt asked for his help, he would have willingly given it. Rather than take that constructive approach, Mr Woollett allowed the matter to escalate into a major disciplinary issue. While that course was open to him on a legalistic analysis of the situation, it is not what a fair and reasonable employer would have done in all the circumstances of this case.

[81] The second factor is that Mr Gwilt's misconduct in relation to the training calendar was a sustained failure to carry out a relatively simple task. Similarly, Mr Gwilt's conditional commitment to conducting training courses was a matter of attitude which could readily have changed. This was not serious misconduct. It was conduct warranting a formal warning and an opportunity for Mr Gwilt to change his ways before dismissal was considered.

[82] Overall, the decision to dismiss Mr Gwilt, and the process leading to that decision, were not what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. The dismissal was therefore unjustifiable.

Remedies

[83] The test in s103A must be applied to the circumstances at the time of the dismissal. What this means is that information not available to the employer at the time of dismissal cannot be relied on to justify it. The same constraints do not necessarily apply to remedies. In appropriate cases, conduct of the employee in the course of employment which is only discovered after the employment has ended can be taken into account in assessing remedies.

[84] The subsequently discovered conduct which BSNZ relied on in relation to remedies was the relationship between Mr Gwilt and Sandvik. The case for BSNZ was that Mr Gwilt had accepted employment by Sandvik and that this was fundamentally inconsistent with his continued employment by BSNZ.

[85] Mr Gwilt denied that he had ever been employed by Sandvik. While he accepted that he had signed an employment agreement in November 2007, he said that he had subsequently decided not to take up the position. He said that he went to Brisbane in the second week of January 2008 at the urging of Sandvik to reconsider taking the position. As to the money Sandvik paid him, he said that all he expected to receive was reimbursement of his airfare and that any payment of salary was a mistake by Sandvik.

[86] I entirely reject Mr Gwilt's evidence about his relationship with Sandvik. All of the contemporary documents establish beyond doubt that Mr Gwilt entered into a binding employment agreement with Sandvik in November 2007 and that he commenced actual employment on 7 January 2008. The documents he signed on 7 January 2008 make his claim that he was only considering employment during his time in Brisbane incredible. It is also clear that he intended that employment to be on-going as he had arranged for leave in September 2008.

[87] It is equally clear that Mr Gwilt knowingly accepted payment of salary for the week after he commenced work with Sandvik. This is shown by his email exchange with the Sandvik payroll officer on 25 January 2008. She sent him copies

of two sets of pay records. One showed what he had been paid as salary from 7 to 31 January 2008. The second showed what he ought to have been paid as salary from 7 to 14 January 2008. The difference was described as the overpayment which Mr Gwilt was asked to refund. What Mr Gwilt refunded was that difference less half of his airfares. He kept the payment of salary for the week he was in Brisbane. It is abundantly clear from the email that this money was paid as salary. It is also clear that Mr Gwilt received the email as he included it in his reply to Sandvik later on 25 January 2008.

[88] By taking employment with Sandvik, Mr Gwilt was fundamentally in breach of his duty of fidelity to BSNZ. He obviously could not carry out both his existing job with BSNZ and his new job with Sandvik. His employment agreement with Sandvik also contained an express prohibition on taking outside employment. By entering into that agreement with Sandvik, therefore, Mr Gwilt effectively made his continued employment by BSNZ a breach of contract.

[89] Mr Gwilt's actions also involved several breaches of his duty of good faith to BSNZ. He deliberately avoided speaking to Mr Woollett about his absence by leaving messages on his office phone when he knew Mr Woollett would not be at work. He was deliberately vague in the messages he left. He allowed Mr McLean to believe that he had been ill at home during the time he was in Brisbane. He accepted payment for sick leave when he had already been paid salary by Sandvik for the same period. He never told BSNZ that he had taken up employment with Sandvik while employed by BSNZ. When asked directly at the meeting on 23 April 2008 whether he had worked in Australia during the Christmas period, Mr Gwilt replied that he had not. While that answer was technically correct, in the sense that the Christmas period was regarded as ending on 3 January 2008, Mr Gwilt withheld the fact that he had worked in Australia less than a week later. That was deceptive.

[90] I find that these breaches of duty by Mr Gwilt were so egregious that, had BSNZ been made aware at the time of the true circumstances of Mr Gwilt's involvement with Sandvik, it would have been justified in dismissing him.

[91] How such subsequently discovered conduct ought to be taken into account in assessing remedies for what was otherwise an unjustifiable dismissal was discussed at length by the members of the Court of Appeal in *Salt v Fell, Governor for Pitcairn, Henderson, Ducie and Oeno Islands*.² At issue in that case was whether or not conduct not known to the employer at the time of dismissal could be regarded as contributory conduct under s 124 of the Act:

124 Remedy reduced if contributing behaviour by employee

Where the Authority or the court determines that an employee has a personal grievance, the Authority or the court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance,—

- (a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and
- (b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[92] Justice Hammond took the view that s 124 should be given a broad construction encompassing the actions of the employee as a whole. On that analysis, he concluded that subsequently discovered conduct could be taken into account under s 124.

[93] The majority, Chambers and Robertson JJ, took a different view. They concluded that subsequently discovered conduct was outside the scope of s 124 but that it could and should be taken into account in fixing remedies for lost remuneration and distress under s 123. The result should be that an employee does not benefit from the deliberate or fortuitous concealment of misconduct.

[94] It was common ground endorsed by all members of the Court of Appeal that subsequently discovered conduct could be taken into account directly in deciding whether reinstatement should be ordered.

[95] Following the judgment of the majority in *Salt v Fell*, as I am bound to do, I must take into account all the evidence when deciding whether to order reinstatement and in my initial assessment of the quantum of reimbursement of lost remuneration and compensation for distress. I must then consider the extent to

² [2008] ERNZ 155.

which Mr Gwilt's actions contributed to the situation giving rise to his dismissal. That can only be in relation to the actions which BSNZ knew about at the time of dismissal. If I find there was contribution, the remedies must then be further reduced. Obviously, I must take care to ensure that Mr Gwilt's actions are not taken into account twice in this process.

Reinstatement

[96] As I have found that Mr Gwilt was unjustifiably dismissed and he sought the remedy of reinstatement, s 125 of the Act as it was in 2008 applies:

125 Reinstatement to be primary remedy

- (1) This section applies where—
 - (a) the remedies sought by or on behalf of an employee in respect of a personal grievance include reinstatement (as described in section 123(1)(a)); and
 - (b) it is determined that the employee did have a personal grievance; and
- (2) If this section applies the Authority must, whether or not it provides for any of the other remedies provided for in section 123, provide, wherever practicable, for reinstatement as described in section 123(a).

[97] It is apparent that whether reinstatement is ordered turns largely on whether it is practicable. The meaning of that word in this context was recently considered by the Court of Appeal in *Lewis v Howick College Board of Trustees*³ where the Court endorsed the view adopted in a previous decision:⁴

Practicability is capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully.

[98] A good deal of evidence was given in relation to reinstatement. Although I have had regard to all of that evidence, I need not detail it here as, in my view, Mr Gwilt's conduct in relation to his employment by Sandvik alone renders reinstatement impracticable. Now that it is known that he secretly took paid

³ [2010] NZCA 320 at [2].

⁴ *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School* [1994] 2 ERNZ 414 (CA).

employment with another employer and allowed BSNZ to pay him as well, there is little or no potential for the employment relationship to be successfully restored. All trust in Mr Gwilt is gone.

[99] A further impediment to reinstatement must be the extent of Mr Gwilt's contribution to the situation giving rise to his dismissal. I deal with this factor later but note here that s 124 requires the Court to take contribution into account in deciding the nature of remedies as well as their extent.

Reimbursement of lost remuneration

[100] Mr Gwilt sought reimbursement of all lost earnings following his dismissal. In support of this claim, he produced a schedule of what he said he would have earned had he remained at BSNZ and what his actual earnings have been. As at the date of hearing, he said the difference amounted to more than \$80,000.

[101] At the time of his dismissal, Mr Gwilt was paid four weeks salary in lieu of notice. He then made numerous job applications before accepting alternative employment in Perth, Australia. It appears he began that job in June 2009. In the meantime, Mr Gwilt was employed for several short periods and his claim gave credit for what he earned there.

[102] Reimbursement is governed by s 128 of the Act:

128 Reimbursement

- (1) This section applies where the Authority or the court determines, in respect of any employee,—
 - (a) that the employee has a personal grievance; and
 - (b) that the employee has lost remuneration as a result of the personal grievance.
- (2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.
- (3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for

remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

[103] In *Salt v Fell*, the majority of the Court of Appeal discussed how s 128 might be applied in the circumstances of a case such as this, that is where the subsequently discovered conduct would have justified dismissal.⁵ I am guided by the approach suggested there. Pursuant to s 128(2), Mr Gwilt is entitled to reimbursement of remuneration he has actually lost or three months' ordinary time remuneration, whichever is less. In this case, the three month figure must apply. What is to be reimbursed is loss of salary at the rate Mr Gwilt was being paid at the time of dismissal, plus eight percent holiday pay. I adopt the figures calculated by the Authority to set the quantum. Three months' ordinary time salary was \$15,132.75 and the holiday pay on that amount would be \$1,210.62.

[104] It is then a matter of discretion whether to award more of the remuneration actually lost. I decline to do so, principally because of Mr Gwilt's conduct in relation to Sandvik. Had that conduct been known to BSNZ at the time, Mr Gwilt may well have been justifiably dismissed and, as the majority in *Salt v Fell* emphasised, it would be wrong that he should be better off by keeping those matters secret from his employer than if he had been candid at the time.

Compensation

[105] Mr Gwilt gave evidence that he was significantly distressed by his dismissal and the manner of it. This was supported by evidence from his wife. This evidence was not seriously challenged and I accept it. As all members of the Court in *Salt v Fell* recognised, however, the jurisdiction to award remedies for a personal grievance provided for in s 123 is flexible and is to be exercised in accordance with equity and good conscience. In this case, that requires me to take into account Mr Gwilt's conduct in relation to Sandvik. I do so in the manner suggested by the majority in *Salt v Fell*,⁶ that is to approach the question of compensation on the basis that, while

⁵ At [100] – [101].

⁶ At [102].

Mr Gwilt was unjustifiably dismissed, he could have been justifiably dismissed if all relevant information had been available to his employer.

[106] I take that approach by awarding compensation only for the distress suffered by Mr Gwilt as a result of the unjustifiable process followed by BSNZ as opposed to the distress he suffered as a result of losing his job. I consider an award of \$5,000 appropriate.

[107] Mr Gwilt also sought compensation for the loss of benefits he said he would have received but for his dismissal. The principal claim was for the value of private use of a motor vehicle but Mr Gwilt also sought compensation for bonus payments which he said formed part of his remuneration package. I think it proper that Mr Gwilt be compensated for the loss of private use of the vehicle for the period of notice which was four weeks. The value of that was \$1,060.38. It would not be equitable to compensate Mr Gwilt further and, in any event, I am not satisfied on the evidence that any bonus payments would necessarily have been paid to him had he not been dismissed.

Contribution

[108] Mr Gwilt contributed greatly to the situation that gave rise to his dismissal. He unreasonably failed for an extended period to carry out the relatively simple task of preparing the 2008 training calendar. He also sought to impose unreasonable conditions on carrying out training. Had he not behaved that way and simply got on with his job as he knew it to be, there would have been no question of his being dismissed. Like the Authority, I find that Mr Gwilt seemed unaware of the consequences of his own behaviour and unwilling to accept responsibility for it. On the other hand, I have also found that Mr Gwilt's default was not so serious as to warrant dismissal and that the process adopted by BSNZ was seriously flawed. Thus, while it can properly be said that no disciplinary issue would have arisen but for Mr Gwilt's behaviour, BSNZ must take the majority of responsibility for the unjustified nature of the process and dismissal which did actually occur. I assess Mr Gwilt's degree of contribution at 50 percent and his monetary remedies will be

reduced accordingly. This level of contribution also reinforces my decision not to order reinstatement.

Conclusion

[109] In summary, my judgment is:

- (a) Mr Gwilt was unjustifiably dismissed.
- (b) Reinstatement is not practicable and is not ordered.
- (c) Mr Gwilt contributed to the situation giving rise to his personal grievance to the extent of 50 percent.
- (d) BSNZ is ordered to pay Mr Gwilt \$8,171.69 as reimbursement of lost remuneration.
- (e) BSNZ is ordered to pay Mr Gwilt \$530.19 as compensation for the loss of private use of a vehicle.
- (f) BSNZ is ordered to pay Mr Gwilt \$2,500.00 as compensation for humiliation, loss of dignity and injury to his feelings.
- (g) By operation of s 183(2) of the Act, the determination of the Authority is set aside and this decision stands in its place.

Comments

[110] This judgment is being delivered long after the hearing. That delay, and the resulting inconvenience to the parties, is regrettable. The principal reason for that delay is the Christchurch earthquakes, which have impacted heavily on the Court's resources and my availability to devote the necessary time to reviewing the evidence and completing this judgment.

[111] Counsel made detailed submissions in closing. Although I have not referred to them in this judgment, I confirm that I have considered them in their entirety.

[112] During the hearing, evidence was given about several events said to have occurred immediately after Mr Gwilt's dismissal. I have not recorded that evidence

or made any findings of fact about those issues because it was not necessary to do so in order to decide the case and witnesses may have been needlessly embarrassed had I done so.

[113] I commend Ms Macnab. She came into the hearing as junior counsel but, when Ms Lewis was taken ill after the first day, had to conduct much of the case for BSNZ. She did so ably.

Costs

[114] Although I have sustained the Authority's conclusion that Mr Gwilt was unjustifiably dismissed, the remedies I have awarded him are less than those awarded by the Authority. In that sense, Mr Gwilt's challenge has been unsuccessful. If costs are to follow the event, it may well be that costs ought to be awarded in favour of BSNZ. I am, however, aware from the interlocutory judgement of Judge Travis in this case⁷ that various offers of settlement were made prior to trial and it may be that they have a bearing on where costs should fall. I am also aware that various sums of money have been paid into Court and that orders will be required to disburse them. The parties are urged in the first instance to agree costs and the disbursement of money in Court. If so, a joint memorandum should be filed to enable consent orders to be made. If agreement is not possible, counsel for any party seeking an order for costs or for the disbursement of money should file and serve a memorandum within 30 working days of the date of this judgment. Counsel for the other party will then have 20 working days in which to reply.

AA Couch
Judge

Signed at 11.00am on 27 October 2011.

⁷ [2010] EmpC 86.