Determination Number: AA 119/06
File Number: AEA 922/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Leslie Hunt, Lyle Drysdale, John Rusden (Applicants)
AND	Transportation Auckland Corporation Limited t/a Stagecoach Auckland (Respondent)
REPRESENTATIVES	Stephen Corlett, Counsel for Applicant David France and Jane Taylor, Counsel for Respondent
MEMBER OF AUTHORITY	Robin Arthur
INVESTIGATION MEETING	14 and 15 February 2006
SUBMISSIONS	22 February 2006 (Applicant); 23 February 2006 (Respondent); 23 March 2006 (Applicant in reply) and 29 March 2006 (Respondent in reply)
DATE OF DETERMINATION	6 April 2006

DETERMINATION OF THE AUTHORITY

[1] The applicants say their dismissals for redundancy of their jobs as Area Quality Controllers ("AQCs") were unjustified because two of the six redundant jobs still exist and they should have had the opportunity to apply for those two jobs. They claim they were misled – in breach of the duty of good faith – during the redundancy process by not being provided with adequate, accurate information about alternative positions. They also claim that the respondent breached its statutory duty to provide employee protection provisions in their employment agreements. They seek remedies of reimbursement for lost wages, compensation for distress, costs, and penalties for breaches of good faith and not providing employee protection provisions.

[2] The respondent ("Stagecoach") says redundancy of the AQC roles were for genuine business reasons; that the applicants were informed and given an opportunity to comment on the proposal before a decision was made; that the new roles were developed at the suggestion of the applicants' representative and are substantially different to the AQC role; and that the applicants pressed for redundancy as they did not wish to apply for the new roles or alternative jobs

[3] The investigation meeting was initially scheduled for December 2005. It was delayed following the respondent's late filing of a witness statement for an additional witness. By the time the meeting was held one of the applicants, Leslie Hunt, had moved to Perth, Western Australia. On application from his counsel, and because he had been available for the original scheduled meeting time and not caused the delay, I agreed to take his evidence by telephone from Perth during the investigation meeting.

[4] One applicant – John Rusden – did not attend the investigation meeting. On the second day of the meeting Lyle Drysdale advised that he has spoken overnight with Mr Rusden's wife and understood that Mr Rusden had unexpectedly gone to Hawkes Bay to attend a family member seriously injured in an accident. There was no direct information from Mr Rusden. As a result – and as advised to the parties at the meeting – this determination relates only to the claims of the other two applicants – Mr Hunt and Mr Drysdale. No findings are made in respect of Mr Rusden's claim. Subsequent references in this determination to the applicants are, unless otherwise stated, to Mr Hunt and Mr Drysdale only.

[5] During the meeting over one-and-a-half days, evidence was heard from Mr Drysdale; Mr Hunt (by telephone from Perth); Auckland Branch president of the Tramways Union, Gary Froggatt; union delegate Brian Webb (by telephone); a former AQC and present Service Delivery Manager for Stagecoach, Dean Mitchell; Stagecoach human resources manager Gavin Cook; Stagecoach operations director Warren Fowler; and Stagecoach Central Area Manager Colin Somerville. Counsel had the opportunity to put additional questions to the witnesses after they had answered the Authority's questions. Closing submissions were provided in writing after the meeting.

[6] At the time of filing closing submissions (done at the same time as the respondent), the applicants applied for the Authority to hear evidence from Mr Rusden. The family member who was injured remained in a serious condition but Mr Rusden offered to make himself available for questioning from the Authority and any further questioning from opposing counsel. After hearing in writing from both counsel on this proposal I resolved not to re-convene the investigation meeting to hear from Mr Rusden.

[7] The respondent fairly complained that any evidence at this point from Mr Rusden would have the advantage of being made after closing submissions had been made. It would also add to the respondent's costs. From the discussion at the investigation meeting, it understood that any findings on the facts in relation to Mr Drysdale and Mr Hunt would have a bearing on how it might then deal with Mr Rusden. If there were findings in favour of those applicants, but – even with the assistance of those findings – the parties were not able to settle any claim from Mr Rusden, an investigation could be held to determine his remedies, if any. And, as discussed with counsel at the investigation meeting, if the applicants were unsuccessful and exercised the right to challenge such a determination in the Employment Court, Mr Rusden would be able to participate in the challenge either on the basis that his application had effectively been dismissed in the Authority (albeit for non-attendance) or as a witness in any challenge by Mr Hunt and Mr Drysdale.

[8] Further, I doubt Mr Rusden's evidence could have added anything new for the purposes of my investigation of the relevant events and conversations. Three meetings are at the heart of this case and I had detailed written and oral evidence from Mr Hunt, Mr Drysdale, Mr Fowler, Mr Cook, Mr Mitchell and Mr Froggatt about those meetings and surrounding events. Mr Rusden's written statement – albeit not sworn and tested under questioning – largely says much the same as the statements of Mr Hunt and Mr Drysdale.

Legal framework

[9] The employment agreements of Mr Hunt and Mr Drysdale state that:

> *15.1 Redundancy means the situation where Stagecoach considers it has employee(s) surplus to requirements due to change in the organisation, its method of operation, the closure or ceasing of some operations, or a change in the skill and attributes required of employees so there is a need to reduce staff numbers or replace some staff with people possessing different skills and/or attributes.*

> *15.2 It may be that Stagecoach does not wish to continue to employ the employee in the position the employee currently occupies but requires the employee to occupy a different position. Where this does not reduce the employee's total remuneration, this does not constitute a redundancy situation. Redundancy occurs only if Stagecoach terminates the employee's employment because they believe there is no alternative position, or if the alternative proposed involves a reduction in the employee[']s total remuneration package …*

[10] Their agreements also provide for eight weeks notice of redundancy and a redundancy compensation scale, which in their case, provided up to a maximum of 26 weeks pay plus payment of one-fifth of the value of any accumulated sick leave. Both men were entitled to the maximum payment in the event of redundancy.

[11] In addition to its contractual obligations, the respondent had a statutory duty to act in good faith in making its redundancy proposal and dismissing the applicants for redundancy, including providing access to relevant information and an opportunity to comment on the information before the decision was made.

- *Genuineness of redundancy*

[12] An employer is entitled to make its business more efficient and a worker does not have a right to continued employment if the business can be run more efficiently without that position.[1] Where an employer decides as a matter of commercial judgment that there are too many employees in a particular area, it is for the employer as a matter of business judgment to decide on the restructuring strategy, what positions should be dispensed with, and, whether an employee, whose job has disappeared, should be offered another position elsewhere in the business.[2]

[13] While the Authority or Court does not substitute its view for the business judgement of the employer, the genuineness of any redundancy determination can be reviewed. If it is not one an employer acting reasonably and in good faith could have reached, it may be impeached.[3] An important indicator of whether a redundancy was for genuine commercial reasons is whether the employer can show "a significant paper trail or other solid foundation of evidence demonstrating its consideration of a reorganisation".[4]

[14] An employer must provide an adequate commercial explanation for the course adopted.[5] The usual rule, subject to any contractual duties, is that an employer justifying the disestablishment of an existing position must show that the work being done by the holder of the position is no longer needed by the employer. The inquiry is not as to whether there is merely a rearrangement or renaming of functions but whether the work to be performed has disappeared. The mix of activities making up the job content may alter but if the work is still there and needs to be done, it cannot be said that the incumbents are redundant. Whether a job is the same with a change of focus or emphasis or is a different position, requiring different work, different skills or a different kind of worker, is a question of fact and degree to be determined exclusively and conclusively by the evidence.[6] The general test developed by the Courts to assist in making this assessment asks the question: *Would a reasonable person, taking into account the nature, terms and conditions of each position and the characteristics of the [worker], consider that there was sufficient difference to*

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[1] *GN Hale and Son Ltd v Wellington Caretakers and Cleaners IUW* ERNZ Sel Cas 843, 848 (CA)
[2] *Aoraki v McGavin* [1998] 1 ERNZ 601, 618 (CA)
[3] *NZ Fasteners Stainless Ltd v Thwaites* [2000] 1 ERNZ 739, 747 (CA)
[4] *Rolls v Wellington Gas Co* [1998] 3 ERNZ 116, 123 (EC)
[5] *GN Hale*, above, at 851 (CA)
[6] *McCulloch v NZ Fire Service Commission* [1998] 3 ERNZ 378, 390-2 (EC)

break the essential continuity of employment?[7]

[15] Where an employer believes a new position will be substantially different, but in a practice that position remains similar to the former position for some time, determining whether the redundancy was justified will involve an assessment of whether the employer genuine believed, at the time of making the decision, that the position was significantly different.[8]

[16] Inadequate consultation and inadequate exploration of redeployment possibilities may cast doubt on the genuineness of an alleged redundancy.[9] However the genuineness of the redundancy of a position once established cannot be negated by a failure to offer a different position.[10]

- *Procedural fairness*

[17] A just employer – subject to mutual obligations of confidence, trust and fair dealing and the statutory duty of good faith – will consult on a redundancy proposal and implement any redundancy decision in a fair and sensitive way. Fair treatment may call for counselling, career and financial advice, retraining and related financial support.[11] This requires more than "going through the motions" and will not justify a course of conduct carried out in a way that bruises rather than reasonably minimises the impact on the employee.[12]

Issues

[18] The issues to be determined are:

(i) Were two new jobs developed by the respondent – initially advertised as a Regional Support Supevisor ("RSS") but called Service Delivery Manager ("SDM") by the time of appointment – sufficiently different to the AQC jobs?

(ii) Were the AQCs properly advised of the nature of those two new jobs so as to enable them to make an informed decision on whether to apply for those jobs?

(iii) Whether the absence of employee protection provisions in the applicants' employment agreements warrants a penalty?

Background facts and evidence

[19] In early 2005 the respondent started a review of the AQC positions. Other areas of its operation were reviewed and restructured earlier.

[20] A letter to the applicants dated 28 January 2005 invited them to a meeting to discuss their roles as part of a review of business needs. They were invited to bring a representative.

[21] At a meeting with the applicants, Mr Rusden and three other AQCs on 3 Feburary 2005 ("the first meeting"), Mr Cook and Mr Fowler explained that the respondent was looking at restructuring how it carried out on-road checks of bus trips and provided assistance to drivers at breakdowns and accidents. The two managers said the company was incurring fines from the Regional Council – which monitors the quality of the bus services Stagecoach was contracted to provide – of around $20,000 a month for failed trips. They referred to health and safety concerns about the AQCs

[7] *Auckland Regional Council v Sanson* [1999] 2 ERNZ 597, 604 (CA)
[8] *Wilkinson v Wairarapa CHE Ltd* [1999] 2 ERNZ 133, 145 (EC)
[9] *Aoraki*, above, at 618; *NZ Fasteners Stainless Ltd* , above, at 747
[10] *NZ Fasteners*, above, at 747
[11] *Aoraki*, above, at 619 and 631 (CA)
[12] *Coutts Cars Ltd v Baguley* [2001] 1 ERNZ 660, 673 (CA)

attending breakdowns and the prospect of contracting out the work of attending accidents and incidents involving passengers. They were asked: "*Are our jobs on the line?*" Mr Cook's notes record the answer given as "*Yes*".

[22] The reasons for the review and possible restructuring were outlined in a letter to the AQCs on 7 February which invited them "*to participate in the consultation process regarding the possible restructure*". The men were asked for their "*suggestions, alternatives and comments before we move to the decision making process*".

[23] A second meeting was held on 10 February ("the second meeting"). Mr Froggatt attended as the union representative of some of the AQCs. Mr Fowler explained that the company needed to have more staff out during peak hours doing checks on whether the buses were running to the scheduled levels of service. He suggested university students could be employed as casual staff to do these checks. Notes taken at the meeting – and confirmed in the evidence of all witnesses – show that Mr Froggatt asked who would supervise these bus checkers. Mr Fowler replied that he did not know but agreed some supervision would be needed. Mr Froggatt also said a supervisor would be needed to make a decision to call out a contractor to provide breakdown or security services. Mr Fowler agreed.

[24] The applicants also provided some written comments on their roles and what they saw as the needs of the job.

[25] A further letter to the AQCs dated 11 February 2005 confirmed the content of the meeting and set a further meeting date to continue the consultation process. That meeting was held on 28 February 2005 ("the third meeting").

[26] Mr Fowler discussed the company's need for a greater volume of bus checks. Notes from the meeting show he referred to between 300 and 800 checks made by the AQCs on 123,100 trips made in a certain period. He also provided figures on the staffing costs if the company used part-time staff to do checks. These costings included the annual cost of a supervisor and totalled around $166,000 a year. This was contrasted with the cost of employing the AQCs at around $330,000 a year.

[27] After further discussion Mr Fowler proposed setting a further meeting date. At this point Mr Rusden asked it Mr Fowler would let them know then whether the AQC positions would be made redundant. The applicants deny that they insisted on knowing but I prefer the evidence of Mr Cook, Mr Fowler and one of the other AQCs, Mr Mitchell and find that the request was made.

[28] Mr Fowler and Mr Cook left the room for around 20 minutes. By the time they returned Mr Froggatt had joined the meeting and some time was spent recapping for him the earlier discussion. Mr Fowler confirmed that the company required the capacity to carry out a higher number of on-road checks, wanted depot managers more involved in attending on-road incidents and for health and safety reasons wanted to contract out break-down and security services for attending accidents and passenger incidents. Mr Fowler then confirmed that the company intended to make the AQC roles redundant but create at least one supervisory position and possibly a second. He also referred to the availability of bus driving positions. The AQCs were told that if they did opt for re-deployment as a bus driver they would also be paid half of their redundancy compensation.

[29] Mr Hunt met immediately with Mr Cook following the meeting. He said he did not want to apply for the supervisor or bus driving position. Instead he asked to be paid his redundancy entitlements and finish by the coming Friday, four days later. Mr Cook agreed to that request.

[30] Mr Drysdale met with Mr Fowler shortly after the meeting. He said he did not want redeployment as a supervisor or bus driver and wanted his redundancy compensation to include all his accumulated sick leave. Mr Fowler agreed to consider his request and, after checking with his managing director, offered to pay half of the accumulated sick leave. Mr Drysdale accepted this.

[31] Letters to each of the applicants the following day confirmed the reasons for the redundancy and that they did not want redeployment. They were also offered "outplacement assistance" in seeking new jobs.

[32] Mr Fowler's evidence was that the company had not expected that the AQCs would be gone so quickly. One AQC did not attend the third meeting as he had already requested a transfer to a bus driving job. Three opted for redundancy. Mr Mitchell, and one other – Doug Lyons – remained. They took up the offer of a bus driving job and payment of half of their redundancy entitlement.

[33] On 10 March the respondent posted an internal advertisement for the RSS position which was subsequently titled SDM. The advertisement noted that this was "*a new role and at this stage we have not finalised the job name or all the specifics of the job description*". The role was described as overseeing the smooth running of the people employed to undertake bus checks, liaison with on-road support contractors, overseeing special events and liaising with terminals.

[34] The two remaining former AQCs, Mr Mitchell and Mr Lyons, were subsequently appointed to the positions. The SDM job description identifies key responsibilities to oversee running of bus checks, liaising with on-road support contractors, overseeing running of special events and liaison with transport terminals.

[35] The applicants say they were not informed prior to opting for redundancy that these roles would include overseeing special events and liaison with transport terminals, tasks they undertook as AQCs. Further they allege that Mr Mitchell and Mr Lyons have attended road break-downs and accidents as they did in their former roles as AQCs.

Sufficiently different jobs?

[36] I find that the SDM role is sufficiently different from the former role of the AQC position. I accept Mr Mitchell's evidence that he spends around 80 per cent of his time co-ordinating the activities of the bus checkers now engaged to carry out on-road checks. Previously he and the other AQCs would spend a large proportion of their working day carrying out those checks themselves but not generate the volume of checks now achieved by the checkers. Some of the AQCs were assisted from time to time to carry out bus checks by a few drivers who were on light duties but this was occasional and involved small numbers compared with the systematic and substantial system now run by the SDMs.

[37] I accept that Mr Mitchell and Mr Lyons have both attended some accidents or break-downs since their appointments as SDMs. These activities were formerly tasks of the AQCs. However I find that these have been occasional activities and are more likely to be attended to by a depot manager or the company's break-down services. Attendance at these incidents is also likely to reduce as arrangements for contracting of break-down and security services are finalised.

[38] I accept that Mr Mitchell and Mr Lyons have been involved in arrangements for special events – where special bus services are needed for large public events such as rugby tests at Eden Park and festivals or concerts such as Pasifika and the Big Day Out. From Mr Drysdale's evidence it is clear that he at least saw this as a major part of his role, largely because he clearly enjoyed working with

the representatives of local councils and the transport authorities on the detailed and challenging preparation and execution of plans for efficiently and safely moving large numbers of people to and from such events. However I find that this task – however interesting – formed a small portion of the total actual daily working requirements of the AQCs. It is also clear from the evidence that the two SDMs are now only some of the managers who are involved with this occasional task. The depot managers now play a greater part in these arrangements than they did when the AQC roles existed. Mr Somerville's evidence confirmed this.

[39] For these reasons I am satisfied that the positions of AQC and SDM are substantially different. Having closely examined the detailed evidence of each element of the job descriptions I find that the difference meets the general test that a reasonable person would consider there is sufficient difference in the roles to break the essential continuity of employment. Further I find that the redundancy of the AQC positions meets the specific contractual requirements of the applicants' employment agreement. The respondent's need to increase its level of bus checking required a change in its method of organisation and reallocation of other tasks in the AQC role resulted in genuine commercial reasons for the redundancy of those positions.

Was there a fair process in deciding on the redundancies?

[40] I find that the applicants have not established that the process followed by the respondent in deciding to make the AQC roles redundant was unfair.

[41] I was not persuaded to a different view by the evidence of Mr Webb. He suggested that during earlier bargaining for renewal of the Stagecoach collective employment agreement, Mr Fowler had referred to the prospect of making the AQC positions redundant. Mr Fowler did not deny that he may have made some comment along those lines but could not recall doing so during the 42 days on which bargaining over the collective agreement occurred. However, in the circumstances of this case, even if he did made such a comment, I am not satisfied that this would establish that the respondent's decision was pre-determined. Rather I find that the respondent did fairly consult the AQCs about the future of their roles and seek their input through three meetings. Mr Fowler's response to Mr Froggatt's suggestion about the need for supervisors of bus-checkers and contractors supports the view that the respondent consulted with an open mind.

[42] It was the applicants who brought the process of consultation and decision to a close and an early end. There were still an opportunity open to them to explore more options for redeployment or the precise nature of alternative roles but they bought the decision to a head by their request for an immediate decision at the third meeting.

Sufficient information on alternative roles?

[43] The prospect of a new supervisory role, raised in the second meeting by Mr Froggatt, referred to supervising casual bus-checkers and service contractors. These were the tasks referred to by Mr Fowler in the third meeting. However that the possible extent of the role was not fully explained or developed cannot be a criticism laid solely at the feet of the company. It was the applicants who bought the discussion to an end.

[44] Mr Drysdale was adamant that he was not interested in a job supervising – or as he put it, "nursemaiding" – university students. He closed his mind to further exploration of its prospects.

[45] That the job retained some involvement in special events does not negate, I find, the genuinely held belief by the respondent's representatives at the time of making the redundancy decision that the role would be largely supervisory.

[46] Further I find that the respondent did not fail to provide access to financial information about savings which might be generated by the redundancies. Mr Fowler provided comparative costings at the third meeting.

Absence of employee protection provision

[47] The applicants complain that the respondent had not complied with the requirements of Part 6A of the Employment Relations Act 2000, as amended with effect from 1 December 2004, for the inclusion of an employee protection provision in their employment agreements. Such a provision is required to set out the steps that an employer will take to protect employees' interests in a "restructuring" situation. Restructuring is defined for the purposes of this provision as including a situation where an employer contracts out to another business work previously done in-house.

[48] Mr Cook properly conceded that the company had failed to include such a provision in the AQCs employment agreements by the required time.

[49] Mr Hunt said having such a clause would have made a difference as it would have been clear what procedures the company would have to follow.

[50] Mr Froggatt confirmed that an employee protection provision is now in the respondent's collective employment agreement, and, to the extent he knows, the company's individual employment agreements.

[51] The purpose of the relevant section – here applying to "other employees" rather than the more substantive protections provided to employees in certain specified sectors – is to give the best prospects for negotiating a transfer where the work is being shifted to a new employer. Simply put, it is to increase the chances that a worker can 'follow' the work. In the circumstances of this particular case, such a clause would have made little, if any, real difference. The 'bus checking' work was staying with the same employer, and the element of attending break downs, accidents and passenger incidents that was to be contracted out formed such a small part of the role that there were no real prospects of any of the men being able to 'follow' that work to a new employer.

[52] I find that the respondent's breach of the statutory requirements was more than technical but not ongoing and does not warrant a penalty in the circumstances of this case.

Determination

[53] I find that the dismissal for redundancy of the applicants was for genuine commercial reasons and was not conducted in a procedurally unfair way. The applicants "short-circuited" the process by insisting on an early decision on redundancy of their roles before the respondent's proposal was finalised and the details of any alternative positions fully worked through and job descriptions prepared. The applicants did rely on imperfect information in making their decision to press for redundancy but I am satisfied that this was not the fault of the respondent which was still talking with them and developing a restructuring proposal, including the supervisory positions.

[54] Mr Hunt and Mr Drysdale do not have a personal grievance. Their applications are dismissed.

[55] I have not investigated and determined the application of Mr Rusden due to his non-attendance at the investigation meeting. While his employment agreement has different wording in its definition of redundancy, his circumstances and the events surrounding his redundancy are largely the same as Mr Drysdale and Mr Hunt such that if investigated, his application is more

likely than not to have had the same result as that of these two former colleagues.

Costs

[56] The parties are encouraged to discuss and agree the matter of costs. If they are not able to do so, the respondent may apply to the Authority to have costs determined. The applicants will be provided with an opportunity to comment on any such application before costs are determined.

Robin Arthur
Member of Employment Relations Authority