

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 271
5310190

BETWEEN JOHN MCKINNEY
 Applicant

AND TRANSPORTATION
 AUCKLAND CORPORATION
 LIMITED
 Respondent

Member of Authority: K J Anderson

Representatives: G Froggatt, Advocate for Applicant
 J Douglas, Counsel for Respondent

Investigation Meeting: 23 March 2011 at Auckland

Submissions Received: 8 April 2011 for the Respondent
 2 May 2011 for the Applicant

Determination: 23 June 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr McKinney, claims that he was unjustifiably dismissed, on the ground of redundancy, effective from 4th June 2010. He asks the Authority to find that he has a personal grievance and award him the remedies of reinstatement without loss of service, seniority, conditions or benefits; reimbursement of lost wages and compensation. Conversely, the respondent, Transportation Auckland Corporation Limited (TACL) says that Mr McKinney was not unjustifiably dismissed and that his employment was terminated following the disestablishment of his position; resulting in a genuine redundancy.

Background facts and evidence

[2] TACL operates a bus company trading as NZBUS. It has several bus depots within Auckland City.

[3] Mr McKinney had been employed by TACL (and its predecessors) for approximately 36 years and had been promoted from the role of bus operator (driver) to Operations Assistant.

[4] The evidence of Mr David Gould, the National Human Resources Manager for TACL, is that around February 2010, the management of NZ Bus carried out a review of the Auckland operations. Mr Gould says that there was a concern that the existing structure did not allow sufficient line management and communication at the bus operator level. This was because the operations manager for each business unit was responsible for a large number of bus operators and it was difficult to successfully implement performance processes and manage employment issues effectively. Mr Gould says that as a consequence, a number of issues were being left unmanaged with an associated effect on service delivery, safety and business performance. Further evidence in a similar vein was given by Mr Jon Calder, the General Manager – Central for TACL. The outcome of the review carried out by TACL is that the company proposed to introduce a number of new roles; one of which was the position of Duty Supervisor.

[5] The affect on Mr McKinney of the decision by NZ Bus to establish the new positions of Duty Supervisor is that it was also proposed that the Operations Assistant positions would be disestablished. A consultation process took place during February and March 2010 during which feedback was sought from affected employees. Via a letter from Mr Calder, dated 11th March 2010, Mr McKinney was informed that:

As identified in our previous discussions with you, your current role as Operations Assistant will not be required once the new structure has been established. We will keep you informed on the likely timeframe for the formal disestablishment of your role, but it is unlikely to be any earlier than May 2010 at this stage.

Mr McKinney was further informed that:

This letter is not a notice of redundancy.

The letter informed Mr McKinney that as the operations structure “is still under transition,” his role was to continue as normal until the company was able to advise him of “a particular date” when his role would be disestablished. Mr McKinney was invited to apply for any of the new roles that were to be established or any other internal vacancies that may be suitable.

[6] Mr McKinney applied for one of the newly created Duty Supervisor positions. Unfortunately, via a letter dated 16th April 2010, he was informed by Mr Colin Sommerville, the Operations Manager – Metrolink Outer, that his application had not been successful. Mr McKinney was also informed that the operations structure remained “under transition” and that he would be informed of the date when his current position would be disestablished. Mr McKinney was also advised that while it was not a notice of redundancy, his contractual entitlements pertaining to redundancy were set out. Finally, Mr McKinney was invited to apply for any other positions that he may be interested in and he was encouraged to use the Employee Assistance Programme for counselling services if he needed to.

[7] In his witness statement (para 6) Mr McKinney says that on 16th April 2010, he attended an interview with his manager and was told that he had been unsuccessful with his application for one of the new positions. Mr McKinney also says that: “*I was told that I was to be made redundant and to hand in my gear.*” However, at the investigation meeting Mr McKinney acknowledged the content of the letter of 16th April 2010 (above); and that his written evidence is “*mistaken.*” The evidence of Mr McKinney is also confusing in regard to what he actually did after Friday, 16th April 2010. In his statement Mr McKinney attests that:

I was not offered retraining for another role or reskilling. I was a bit upset and stressed at what had happened and I left the interview room. I requested annual leave and when my leave ran out I contacted the Operations Team leader by phone who told me my position was terminated and not to come to work. No one from the Company came to see me and I was not contacted by the Company and did not receive any support or communication from the Company.

[8] It appears that the evidence of Mr McKinney is mistaken in a number of respects, particularly as it relates to what he was told in regard to the disestablishment of his position and how this was conveyed to him. However, it seems that the last day that Mr McKinney was available for work was, most probably, Friday, 16th April 2010. It is unclear if Mr McKinney worked on Monday, 19th April and to add to the

confusion, it is difficult to reconcile the sick leave and annual leave records provided by TACL with a retrospective medical certificate provided by Mr McKinney, on or about 17th May 2010. The doctor (creatively) records that Mr McKinney:

... reported to me on 17/5/10 ... stating that he has been unfit/will be unfit for work from 20/4/10 ... to 7/5/10.

While it seems that Mr McKinney may have been in receipt of a combination of sick leave and annual leave, what is commonly agreed is that, Mr McKinney was not at work from Tuesday, 20th April 2010 and he never returned.

[9] Formal notice of redundancy was conveyed to Mr McKinney in a letter from Mr Sommerville dated 4th June 2010. In substance, the letter informs Mr McKinney that:

As previously outlined in your letter dated 16 April 2010, your role of Operations Assistant is no longer required and will be formally disestablished on 4 June 2010. Your Individual Employment Agreement provides for 4 weeks notice and the balance is reflected in the payments below. This letter therefore confirms the commencement of your notice period from Friday 4 June 2010 onwards.

On the basis of this letter, the last day of actual employment for Mr McKinney would have been Friday, 4th June 2010. However, as we have seen, Mr McKinney was on sick leave, apparently from 20th April to 7th May 2010 and then on annual leave, presumably until 4th June, after which he was paid for four weeks in lieu of notice.

[10] The oral evidence of Mr McKinney is that he telephoned his Team Leader, Mr Stephen Bower and indicated that he was "*willing*" to come back to work. Mr McKinney was unable to identify when he made this phone call but he says that Mr Bower told him that he would have to call him back. The evidence of Mr McKinney is that when Mr Bower called back, he informed Mr McKinney that he was "*not required*." Mr McKinney says that he did not "*take issue*" with that. Unfortunately, I have considerable difficulty reconciling the oral evidence of Mr McKinney with that in his written brief of evidence. Adding to this difficulty is that Mr McKinney was unable to establish when he rang Mr Bower and/or what his leave arrangements were at this particular time. I regret to say that in regard to those matters leading up the termination of his employment, I found the evidence of Mr McKinney to be inconsistent and unreliable.

The reasons why Mr McKinney believes his dismissal on the grounds of redundancy was unjustified.

- (i) Firstly, it is submitted for Mr McKinney that the redundancy of his position was not genuine. He says that there were four Operations Assistant positions prior to the review and then after the review, four Duty Supervisor roles were available. Effectively, Mr McKinney argues that there is little difference between the two roles and hence his position continued to exist but with a different title.
- (ii) It is also submitted for Mr McKinney that there was no consultation over the redundancy.
- (iii) Mr McKinney also says that he was not offered redeployment or retraining. He says that TACL did not want him to continue to work for the company and simply chose to dismiss him on the grounds of redundancy.
- (iv) In regard to his failure to be appointed to the Duty Supervisor position that he applied for, Mr McKinney says that he was not given any reasons why he was not considered to be suitable and that the company made no attempt to contact him from the date of his interview in April 2010.

Analysis and Conclusions

[11] As with any dismissal, the test the Authority must apply is whether the decision to dismiss Mr McKinney on the ground of redundancy was what a fair and reasonable employer would have done in the circumstances.¹

[12] And then, as was held by the Employment Court (Colgan CJ) in *Simpsons Farms Ltd v Aberhart*:²

So long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make and not for the Authority or the Court, even under s103A.

[13] The above statement from the Employment Court is consistent with the findings of the Court of Appeal in *G N Hale & Son Ltd v Wellington etc Caretakers etc IUOW*,³ where the Court held that:

¹ Section 103A, Employment Relations Act 2000. Given that Mr McKinney was dismissed prior to 1st April 2011, this is the test that applies, rather than the subsequent test provided by the Employment Relations Amendment Act 2010.

² [2006] ERNZ 825.

An employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, re-organisation or other cost-saving steps, no matter whether or not the business would go to the wall. A worker does not have a right to continued employment if the business can be run more efficiently without him.⁴

Further:

When a dismissal is based on redundancy, it is the good faith of that basis and the fairness of the procedure followed that may fall to be examined on a complaint of unjustified dismissal.

Then in a discussion about the statutory concept of unjustified dismissal, Richardson J. stated that:

The statutory concept of unjustified dismissal is concerned with both the reason for the dismissal and the manner in which it was handled; with the substantive justification and with procedural fairness.

Application of the law to the circumstances of Mr McKinney

Was the redundancy of Mr McKinney's position genuine?

[14] Essentially the argument for Mr McKinney is that the redundancy of his position was not genuine because, he argues, if the job description for his role of Operations Assistant is compared with that of the new role of Duty Supervisor, there is very little difference between the two positions. The evidence of Mr McKinney is that the new position of Duty Supervisor appears to be “*exactly the same*” as the Operations Assistant. But Mr McKinney does acknowledge that there is a change in that the bus operators are established into teams of about 40; whereas previously, the manager on duty was responsible for the total of 200 drivers employed on any given day.

[15] Conversely, it is submitted for TACL that the two roles are “substantially different.” The evidence from Mr Calder is that while it is accepted that there are four Duty Supervisors positions (as there were four Operations Assistants), it is the difference in duties associated with the Duty Supervisor role that is significant. The evidence of Mr Calder is that the company has added “*considerable responsibility*” for frontline management and supervision of the drivers to the new Duty Supervisor role. This view is corroborated by the evidence of Mr Gregory Stilwell. Mr Stilwell was appointed to one of the new Duty Supervisor positions, having been a Leading

³ [1990] 2 NZILR 1079.

⁴ Cooke P, delivering the leading judgment.

Operator under the earlier structure. The evidence of Mr Stilwell is that he has noticed a “*substantial change*” in the operation of the depot since the restructuring took effect. Mr Stilwell says that under the previous structure because there were a large number of drivers reporting to an operations manager, “*many issues*” would not be progressed and some serious driving performance issues were left unattended to with consequent health and safety implications. Mr Stilwell explained his role as a Duty Supervisor and expressed his belief that standards have improved in the depot, particularly in regard to customer complaints and the close monitoring of driver performance.

[16] A comparison of the respective position descriptions for the roles of Duty Supervisor and Operations Assistant reveals some similarity but the positions are clearly not “*exactly the same*” as Mr McKinney suggests. In particular, there appears to be considerably more autonomy given to the Duty Supervisor in regard to *Performance Management* of operators, as set out in *Section 4 – Major Accountabilities*, of the Duty Supervisor position description. The performance management of operators is weighted at 30% of the major accountabilities for the Duty Supervisor. The weight put on the performance management of operators in the position description is consistent with the evidence of Mr Calder and Mr Stilwell in regard to the increased responsibility for the day-to-day management and performance of operators.

[17] A contrary view to the above evidence (apart from that of Mr McKinney) is contained in the evidence of Mr Karl Johansson. Mr Johansson was appointed to one of the new Duty Supervisor positions. He was previously an Operations Assistant. Mr Johansson also says that he noted that the respective job descriptions “*appeared to be exactly the same*” but acknowledges that there is a change in regard to there now being teams of 40 operators. Mr Johansson says that he does “*the same work*” as when he was an Operations Assistant. However, his oral evidence is that he is now “*pretty involved*” with individual drivers and with managing disciplinary issues.

[18] While there are some similarities between the two roles in question I find that the responsibility for the performance management of operators is a significant difference and given the operational implications associated with that change, I conclude that TACL was entitled to make its business more efficient by

disestablishing the position of Operations Assistant and replacing it with the new position of Duty Supervisor. It follows that I find that the redundancy of Mr McKinney's position was genuine.

Was the termination of Mr McKinney's employment procedurally fair?

[19] Mr McKinney says that there was no consultation regarding the redundancy. But the evidence shows otherwise. Firstly, there is a letter to Mr McKinney from Mr Calder dated 22nd February 2010. Mr McKinney was advised that:

The Company is currently reviewing the operation of the Metrolink Business Units to determine if the current structure is the most appropriate to meet the business needs of the company for the future.

Mr McKinney was invited to attend a meeting on 23rd February 2010 to: "... discuss this proposal with you further."

Then following the meeting on 23rd February 2010,⁵ Mr McKinney received a further letter⁶ of this date informing (among other things) that:

I would like to invite you to participate in the consultation process regarding the possible restructure. As discussed at the meeting, we are seeking your suggestions, alternatives and comments before we move to the decision making process. This is the start of the consultation period. We ask that you consider what other options may be available for the business. It was agreed that you would provide written feedback with your suggestions, alternatives and comments by 5.00pm on the 2nd March 2010.

Following this there was a powerpoint presentation that explained the reasons for the restructuring and what was being proposed. An information pack was given to Mr McKinney and other affected staff. The evidence of Mr Gould is that the Union provided feedback approximately two weeks after the initial change proposal was announced. The feedback and the company's responses have been produced to the Authority.

[20] There is the further correspondence to Mr McKinney as set out in the background to this matter (above). The totality of the evidence clearly refutes the allegation advanced by Mr McKinney that he was not adequately consulted in regard to the redundancy of his position.

⁵ It appears that the meeting on 23rd February was originally for the purpose of bargaining for the collective employment agreement for the Operations Assistants but due to the proposal to disestablish these positions, the discussion with the union was about the restructuring.

⁶ From Mr Calder.

[21] Mr McKinney also says that he was not offered redeployment or retraining but this allegation is not supported by the weight of the evidence before the Authority. For instance; in the letter of 23rd February 2010, Mr Calder conveys to Mr McKinney that:

I would ask that you also consider if the proposal went ahead whether you would like to be considered for one of the positions available or re-deployed within the business.

Subsequently, Mr McKinney did apply for a Duty Supervisor position but was notified by Mr Sommerville, via a letter dated 16th April 2010, that he had been unsuccessful. This letter also informed Mr McKinney that:

As we discussed, all internal employment opportunities will be notified on the staff notice boards and you have the opportunity to apply for any positions you are interested in.

There is no evidence in regard to what positions may have been available to Mr McKinney but in any event,- following the receipt of this letter, it appears that he effectively withdrew from the process and showed no interest in exploring any possible alternative employment opportunities within the company. On the other hand, there is no evidence that his employer made any particular effort to discuss any possibilities with Mr McKinney. Rather, it seems that both parties simply failed to communicate with each other after the fact of Mr McKinney not being appointed to a Duty Supervisor position; except of course, Mr McKinney was given formal notice of his redundancy on 4th June 2010. Given the long service of Mr McKinney, it seems to me that TACL could have made more effort to communicate with him about possible alternatives to redundancy, but then, Mr McKinney was also unavailable to engage in any such process after on or about 19th April 2010. Given that there is no evidence before the Authority of any possible redeployment possibilities for Mr McKinney, I do not find that he was treated in a manner that made his dismissal unfair or unreasonable on the grounds that he was not redeployed and/or retrained.

[22] Finally, Mr McKinney claims that he was not given any reasons pertaining to why he was not considered to be suitable for the role of Duty Supervisor. However, in a letter dated 29th October 2010, apparently in response to a request from Mr Gary Froggatt, for the Union, Mr Sommerville responded thus:

I was very clear in my communications throughout the restructure process in regards to the rationale behind the organisations [sic] structural changes. The verbal and written information given to John [Mr McKinney] specifically explained the difference between the Operations Assistant and that of the new Duty Supervisor role, namely the significant shift in focus to that of a people manager. This was a critical change from the old Operations Assistant role.

The interview process consisted of a face to face interview with myself and another Operations Manager, and also involved an in tray exercise. All candidates underwent the same structured process. As a result of this process my concern was that John did not see the differences between the two roles or show any understanding, even though I had been explicit about the differences in various communication media. John did not indicate that he had the ability to change to the focus required of the new role. I am also aware that John's interactions with the staff on a day to day basis were not always ideal and in high pressure situations he did not always react well.

We had a clear profile of what was required from the candidates for this role and John, based on the process we conducted did not fit the profile. I am satisfied on this basis that a rational decision was made on the day. I would have liked to have conveyed the rationale behind my decision to John at the meeting but he did not give me the opportunity, as he left abruptly. I hope this response clarifies to you the reasons why John was not successful in obtaining a role of Duty Supervisor.

[23] I conclude that this was a reasonable response to Mr McKinney in regard to the question of why he was not found suitable for the role of Duty Supervisor. Indeed, my own observation of Mr McKinney at the investigation meeting was that, regrettably, he still appears not to understand why the new role was created and the difference in what was required from the appointees to the Duty Supervisor role as compared to the role of Operations Assistant.

Determination

[24] For the reasons set out above I find that the redundancy of Mr McKinney's position was genuine and that the procedures adopted by TACL leading up to and including the termination of Mr McKinney's employment, were procedurally appropriate. It follows that I also find that the dismissal of Mr McKinney on the ground of redundancy was the action of a fair and reasonable employer in all the circumstances.

Costs: Costs are reserved. The parties are invited to resolve the matter of costs if they can, taking into account the outcome and that the investigation meeting was completed within half of a day. In the event a resolution cannot be reached, the respondent has 28 days from the date of this determination to file and serve submissions with the Authority. The applicant has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority