

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2016] NZERA Wellington 15  
5466557

BETWEEN            BROADSPECTRUM (NEW  
                          ZEALAND) LIMITED (formally  
                          TRANSFIELD SERVICES (NEW  
                          ZEALAND) LIMITED)  
                          Applicant

AND                    JASON NATHAN  
                          Respondent

Member of Authority:    M B Loftus

Representatives:        Richard Upton, Counsel for Applicant  
                              Jason Nathan, on his own behalf

Investigation Meeting:    1 February 2016 at Wellington

Determination:            1 February 2016

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**ORAL DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     This is a dispute over where the applicant, Broadspectrum (New Zealand) Ltd (Broadspectrum), may employ the respondent, Jason Nathan, following an order he be reinstated.

[2]     When this dispute initially commenced the applicant was known as Transfield Services (New Zealand) Limited. It has since changed its name but is therefore referred to as Transfield in the earlier determination which has given rise to this application.<sup>1</sup>

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<sup>1</sup> *Jason Nathan v Transfield Services (New Zealand) Limited* [2015] NZERA Wellington 120

## Background

[3] Mr Nathan was employed as a linesman by Broadspectrum for approximately ten years. He was engaged as part of a team fulfilling a contract to maintain and repair the Wellington overhead trolley bus network owned by Wellington Cable Car Limited (WCCL). He worked from a depot in Glover Street, Ngauranga.

[4] Mr Nathan was dismissed. He challenged his dismissal and sought, amidst other remedies, *Reinstatement*.

[5] Part way through the investigation meeting Broadspectrum essentially conceded and made an offer to meet all of the remedies sought in Mr Nathan's statement of problem. The offer, which was made openly, included reinstatement to an alternate position no less advantageous than that Mr Nathan formally occupied. The reinstatement would take effect from 1 February 2016 and any necessary training would be provided.

[6] Mr Nathan was unwilling to accept that and sought reinstatement to his former position. The parties could not resolve the issue with Broadspectrum continuing to propose reinstatement to an alternate, and no less advantageous, position.

[7] Broadspectrum's concessions essentially meant the substantive claim required no further investigation as they effectively resolved the employment relationship problem. The only issue which required determination was that of remedies as the party's inability to resolve the question of the position to which Mr Nathan would return meant the Authority had to decide this. It concluded he be reinstated to a position no less advantageous than that he occupied prior to his dismissal with effect 1 February 2016.<sup>2</sup>

[8] In reaching this conclusion the Authority noted Mr Nathan had sought reinstatement and had not qualified the request. It also noted the evidence of two of WCCLs' managers and said:

*... I am satisfied no useful purpose would be served by reinstating Mr Nathan to his former position. ... Although I had not heard all the evidence in this matter, it was already clear to me that, if I were to find Mr Nathan had been unjustifiably dismissed, and if I were to exercise my discretion in favour of reinstatement, I would not have reinstated him to his former position, but to one no less advantageous to him.*<sup>3</sup>

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<sup>2</sup> n.1 at [14](a)

<sup>3</sup> n.1 at [9]

[9] Mr Nathan does not like this. He has lodged a challenge in the Employment Court regarding the conclusion he be reinstated to another, not less advantageous, position. He has also challenged the Authority's conclusion regarding costs but that need not be considered here.

[10] Broadspectrum claims Mr Nathan has advised he will not return to the position they have identified – Transmission Line Mechanic working on the national electricity transmission grid and based in Upper Hutt. He clearly accepts he does not want to accept the job offered in Upper Hutt and has a strong *preference* for Glover Street.

[11] Broadspectrum also says he told one of its managers he was going to return to Glover Street today. Mr Nathan does not deny this and Broadspectrum seeks to prevent this outcome via the application now being considered.

### **Determination**

[12] Broadspectrum now seeks a determination it can lawfully instruct Mr Nathan perform the alternate duties it has identified as appropriate in Upper Hutt. It also seeks an order he not report at Glover Street as he has indicated he would.

[13] Reinstatement is, by definition, a return to either the employee's former position or an alternate provided it is no less advantageous.<sup>4</sup> That is what Mr Nathan sought in his grievance application and he did so without qualification. That is what he got.

[14] My colleague, in her decision, concluded reinstatement should be to an appropriate alternate position and not the one from which Mr Nathan had been dismissed. She did so on the basis of evidence she heard and explained her rationale.

[15] While that decision has been challenged and that means it may later change it is well established it remains valid until overturned.

[16] That, in turn means the only way Mr Nathan can, in the interim, avoid the position to which Broadspectrum wishes to assign him is by showing it is less advantageous. Even then he should be aware that should he be successful this would, given the reasons for the decision to reinstate him to a position other than that he had

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<sup>4</sup> Section 123(1)(a) of the Employment Relations Act 2000

previously occupied, undoubtedly mean yet another alternate. As already said, my colleague has given a reasoned decision as to why a return to Glover Street is not viable and while that may ultimately be held to be incorrect I do not have the jurisdiction to make that assessment. That is for the Employment Court.

[17] The fact I cannot return Mr Nathan to Glover Street effectively nullifies two of Mr Nathans four assertions as to why Upper Hutt is a disadvantageous option. They include his prime and most repeated contention; namely the work offered from Glover Street is unique in that there is no other trolley bus network in Wellington. It is what he describes as an orphan industry. He also says that not being reinstated to his former position would create a false image he had *committed misconduct*.

[18] In any event I must say neither argument would have convinced me. Having heard the evidence and considered the job descriptions I conclude I agree with Broadspectrum's assertion the jobs are essentially similar in that both involve the maintenance and repair of electrical distribution networks. I also note the long standing view that comparisons such as this *must be made in broad terms with particular reference to "no loss of income and no deprivation of conditions"*.<sup>5</sup> Here I note the hours are the same; the salary is the same; the potential to earn overtime is probably better in Upper Hutt and the two jobs require the same underlying skills and qualifications. I also note Mr Nathan has previously performed transmission line duties and applied for same after his dismissal. There is no question he is capable of performing the Upper Hutt work especially as Broadspectrum will provide any necessary remedial training.

[19] With respect to image I conclude Broadspectrum's concessions and the awarding of remedies more than adequately address the fear Mr Nathan may still be considered guilty of misconduct.

[20] Mr Nathan also asserts a need to climb transmission towers and a requirement he carry heavy loads will make the new position less advantageous. During the investigation he added a late reference to an injury he sustained some five years ago.

[21] Mr Nathan was required, as part of his earlier role, to work at height albeit not as great as transmission work would require. I do, however, conclude the difference

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<sup>5</sup> *Hennessey v Auckland City Council* [1983] ACJ 593 quoting *Auckland Clerical IUOW v Vacation Hotels Ltd* (1979) ACJ 313

is not so great as to constitute a disadvantage especially as Mr Nathan displayed a willingness to perform such work by his applying for similar roles after his dismissal from Broadspectrum.

[22] Similarly both jobs require work with heavy items and while, once again, the weights involved in transmission work might exceed those on the trolley network the difference is not so great as to render transmission work a disadvantage. Again Mr Nathan applied for such work and there is access to mechanical assistance when required.

[23] Opposing Mr Nathans position, and in addition to its assertion the jobs are similar ([18] above), Broadspectrum notes the evidence given during the investigation into Mr Nathan's dismissal by WCCL's managers. It asserts their attitude means he simply cannot return to Glover Street. Notwithstanding my view I do not have the jurisdiction to overturn my colleague my reading of her determination leads me to conclude that is probably correct.

[24] Broadspectrum also notes a return to Glover Street is, in reality, much less advantageous as a decision has been made to decommission the Wellington trolleybus network. The process has already started and would mean Mr Nathan would most probably be made redundant no later than mid-2017. I say no later as Glover Street is already overmanned and the first potential redundancies are likely to be announced much sooner. Here note must also be taken of Mr Nathan's evidence he seeks longevity with Broadspectrum.<sup>6</sup> Glover Street and longevity are mutually exclusive concepts while Upper Hutt offers a lot more security of tenure.

[25] There is the issue of the injury but I conclude Mr Nathan cannot, given answers proffered during the investigation, rely on this. First he accepts he asserted in an internal job application prepared post injury that he had no health issue which may impact on his ability to work. Second he accepted he could *put up with the injury* and third he applied for a number of physical jobs after his dismissal.

[26] Finally there is the issue of location. While this has not been argued by Mr Nathan it would not be a factor if it had. A perusal of relevant caselaw and Mr Nathan's residence in Lower Hutt would lead me to conclude the change in location is

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<sup>6</sup> Precise of position dated 29 January 2016 confirmed by oral answers during the investigation

not so large as to constitute a disadvantage<sup>7</sup> but in any event there is his concession that if the work of the Glover Street depot was transferred to Upper Hutt he would be happy to work from there.

[27] Having heard and considered the evidence I am satisfied the position offered by Broadspectrum is no less advantageous. It therefore follows that in offering it Broadspectrum has complied with Authority's earlier order.

[28] It is now over to Mr Nathan as to whether or not he accepts the position in Upper Hutt even if only temporarily pending consideration of his application to the Employment Court. He should, however, be made aware that a failure to do so will, in all likelihood, result in his termination.

[29] I also order him not to return to Glover Street as he has indicated he may do.

[30] Costs are reserved.

M B Loftus  
Member of the Employment Relations Authority

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<sup>7</sup> For example *New Zealand Printing and Related Trades IUOW v Sigma Print Ltd* (1979) ERNZ Sel Cas 1 (AC) and *National Distribution Union v Gordon & Gotch (NZ) Ltd* ERA Auckland AA242/08, 10 July 2008