IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 150
5350970

	BETWEEN	MARK ANDREWS Applicant
	A N D	TALLEYS GROUP LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Lara Williams, Counsel for Applicant Raewyn Gibson, Advocate for Respondent
Investigation meeting:	22 June 2012 at Ashburton
Submissions Received	4 July 2012 from the applicant 20 July 2012 from the respondent
Date of Determination:	26 July 2012

DETERMINATION OF THE AUTHORITY

A. The applicant was neither dismissed nor constructively dismissed.

B. The applicant was unjustifiably disadvantaged in his employment and is awarded $1,000.

C. No penalty is awarded against the respondent.

D. Costs are reserved.

Employment relationship problem

[1] Mr Andrews claims that he was unjustifiably dismissed, constructively dismissed and/or that his employment was unjustifiably disadvantaged. He also claims that the respondent breached its duty of good faith and asks for *"an inquiry into penalties"*.

Brief account of the events leading to the ending of Mr Andrews' employment

[2] Mr Andrews was employed by the respondent as a truck driver. He was one of two truck drivers employed by the respondent to transport the respondent's produce in container trucks. The other driver was Mr Anderson who is still employed by the respondent but who gave evidence on behalf of Mr Andrews.

[3] On 8 March 2011, the freight manager of the respondent based at Ashburton, Mr Chudleigh, had a short meeting with Mr Anderson and, separately, with Mr Andrews to advise them that the respondent was going to embark on a trial with Kiwi Rail in accordance with which, produce would be transported from the Ashburton rail head to Lyttelton by rail, instead of by truck. Mr Chudleigh said in evidence that he told Mr Anderson and Mr Andrews separately that the two month trial period with Kiwi Rail would mean that only one container truck would be needed during the trial period and that, because Mr Andrews drove a truck that was leased by the respondent (whereas Mr Anderson drove a truck owned by the respondent), Mr Andrews would be required to drive the potato truck instead.

[4] Mr Chudleigh's evidence was that he told Mr Andrews that the trial period would be for at least two months, specifically timed to start at the commencement of the potato season and that any final decision about whether the respondent would continue to use Kiwi Rail would not be made until the end of the trial. His evidence was that he told Mr Andrews that, if a final decision was made to use Kiwi Rail on a permanent basis, then this could impact on the number of container truck drivers needed by the company.

[5] Mr Chudleigh's evidence was that Mr Andrews asked him what the selection process would be and whether it would be on a *first-on/last-off* basis. Mr Chudleigh's evidence was that he said that the company was not making anyone redundant and that no selection criteria had been developed but that, if it came to that, it was likely the selection would be done on an assessment of ability rather than a *first-on/last-off* basis. His evidence was that, at that stage, Mr Andrews got angry and stormed out of the meeting slamming the door behind him.

[6] The evidence of both Mr Andrews and Mr Anderson was somewhat different. Mr Andrews' evidence was that Mr Chudleigh told him that the respondent intended to put the containers on rail and that he was being made redundant. He said he was

told that he would receive one month's pay in lieu of notice and that, in response to his question about whether the selection was on a *first-on/first-off* basis (presumably he meant *first-on/last off*), Mr Chudleigh said that all the drivers had been assessed and that he was at the bottom of the list. Mr Andrews' evidence was that Mr Chudleigh said he did not have the paperwork for the assessments with him as it was *upstairs* and that Mr Andrews could do a job doing potatoes until the end of the season but that it was *"a shit job"*. Mr Andrews agreed that he did get angry and left the office, slamming the door.

[7] Mr Anderson's evidence was that Mr Chudleigh told him, prior to Mr Chudleigh's meeting with Mr Andrews, that the company was going to trial using rail for a period of two months starting in April and only one container driver would be needed. He said that Mr Chudleigh told him that Mr Andrews was being made redundant because it was he who drove the leased truck.

[8] Mr Chudleigh denies saying that Mr Andrews was to be made redundant. His evidence was that the company had made no decisions about making anyone redundant and that, in any event, he was aware that there might be the need for drivers in the near future because another company in the Talleys Group (South Pacific Meats Limited) was coming on stream in Malvern and that plant would be serviced by truck drivers from the respondent company.

[9] Mr Andrews' evidence was that the news that he was to be made redundant caused him a great deal of stress and he immediately began looking for work. A short time after the meeting on 8 March (according to the respondent, on 10 March), Mr Andrews approached Mr Chudleigh asking for a letter from the respondent company, for insurance purposes, confirming that he was to be made redundant. Mr Andrews states that Mr Chudleigh said that he was not going to be made redundant yet, but that he would check with Mr Nicholson, the branch manager of the Talleys Group Ashburton branch. A little later that day, Mr Chudleigh spoke again to Mr Andrews and told him that the company would not be giving him such a letter because he was not being made redundant yet.

[10] Mr Chudleigh's evidence is that he simply said that Mr Andrews was not going to be made redundant, and did not use the word *yet*.

[11] Towards the end of March, Mr Andrews managed to secure alternative work with another company (TNL) and he tendered his resignation by email on 24 March 2011, before the Kiwi Rail trial started. The new job was a night shift position and paid $2.05 an hour more than the position at Talleys. Mr Andrews states, however, that he had to drive twice as far to get to his new place of work which cost him more in petrol.

The issues

[12] The Authority must determine the following issues:

(a) Whether Mr Chudleigh told Mr Andrews that he was going to be made redundant;

(b) If the answer to the above question is in the affirmative, whether that fact gave rise to an unjustifiable dismissal or constructive dismissal;

(c) Whether Mr Andrews suffered an unjustifiable disadvantage in his employment through the actions of the respondent;

(d) Whether there was a breach of good faith by the respondent and, if so, whether it justifies the award of a penalty.

Did Mr Chudleigh tell Mr Andrews that he was to be made redundant?

[13] It is noteworthy that Mr Anderson, who still works with the respondent, gave evidence to the Authority without being the subject of a witness summons that it was his clear understanding from the conversation on 8 March 2011 with Mr Chudleigh that Mr Andrews was to be made redundant as a result of the use of Kiwi Rail for a trial.

[14] It is also noteworthy that Mr Andrews reacted so angrily at what he said was the news that he was to be made redundant because the company was not using a *first-on/first-off* approach but one that resulted from an assessment of the drivers' abilities. I have no doubt that both Mr Andrews and Mr Anderson are telling the truth in that they genuinely believed, separately, that Mr Andrews was to be made redundant.

[15] However, Mr Chudleigh's evidence was also credible. Mr Chudleigh gave evidence that he had never made anyone redundant in the company before and did not

know of anybody who had been made redundant. He said that he deferred to Mr Nicholson in matters such as dismissals. Mr Chudleigh also mentioned several times how he regarded the matter of a redundancy as a *strong* or *serious* issue, implying that it would not have been something which he would have communicated himself.

[16] Mr Chudleigh also gave evidence that the respondent was going to acquire a new truck to be used by South Pacific Meats at Malvern in May or June which would have required a driver. The Kiwi Rail trial was not to start until April (to coincide with the potato season) and it seems that the new truck would have needed a driver before the end of the Kiwi Rail trial. It would not have made sense, therefore, for the company to have decided as early as March to make Mr Andrews redundant (whom the company regarded as a reasonably good driver) before it even knew if the Kiwi Rail trial would be a success and knowing that it would need another driver to drive the new South Pacific Meats truck. Mr Nicholson's evidence was that, after Mr Andrews had resigned, he had had to recruit two new drivers; one to replace Mr Andrews and one to drive the new South Pacific Meats truck.

[17] Therefore, the only way to reconcile the two differing accounts is that Mr Chudleigh did not express himself particularly clearly in the meeting of 8 March 2011 and did so in a way that led both Mr Andrews and Mr Anderson separately to believe that the possibility of the company not needing as many container truck drivers meant that it did not need Mr Andrews.

[18] In conclusion, therefore, I do not believe that Mr Chudleigh intended to tell either Mr Anderson or Mr Andrews that Mr Andrews was definitely going to be made redundant but had explained matters in a way that was not clear and which led the two drivers to believe that that was the case.

Was Mr Andrews dismissed or constructively dismissed?

[19] Mr Andrews' evidence was that he had been told by Mr Chudleigh that he would receive one month's pay in lieu of notice. When questioned as to when this would take effect, Mr Andrews explained that he believed it would take effect at the end of the potato season. That was going to start around the beginning of April and would last around two months. (Mr Chudleigh denies having made any mention of pay in lieu of notice and I am unable to account for this conflict in evidence.

However, I do not believe that the conflict changes my view that the situation arose out of a misunderstanding rather than a specific statement by Mr Chudleigh that Mr Andrews was to be made redundant or given notice.)

[20] Mr Andrews found himself new work and terminated his employment prior to it being terminated by the respondent. Therefore, whether or not the respondent had effectively given Mr Andrews some form of indefinite notice of termination, in law, the termination was effected by Mr Andrews. Therefore, it cannot be the case in law that the respondent dismissed Mr Andrews.

[21] It follows that it is necessary to consider whether Mr Andrews' resignation arose out of a constructive dismissal. To be successful in a claim of constructive dismissal, Mr Andrews must show that there was a course of conduct by the respondent which either had the dominant purpose of forcing the employee to resign or which amounted to a breach of duty sufficiently serious that it would be reasonably foreseeable that the employee had no choice but to resign.

[22] The conduct of the respondent that Mr Andrews relies on is the statement to him that he was to be made redundant. I have already found that such a statement was not made in bald terms, but that Mr Andrews inferred it (as did Mr Anderson) from what Mr Chudleigh said on 8 March. However, there do not seem to be any untruths in what Mr Chudleigh said on 8 March. Mr Chudleigh explained the situation, as he saw it, to Mr Andrews and indeed was obliged to advise Mr Andrews of the proposed trial that was to start at the beginning of April.

[23] Whilst I find (as will be explained below) that the respondent did commit a minor breach of the duty of good faith, I do not find that this was a repudiatory breach of Mr Andrews' contract. I also do not find any other action by the respondent to have been a repudiatory breach, whether separately or cumulatively.

[24] Mr Andrews states that he was told by Mr Chudleigh, around two days later, that he was *"not to be made redundant yet"*. However, it is my finding that the respondent did not have any intention of making Mr Andrews redundant and it must therefore follow that it is not likely that Mr Chudleigh said that Mr Andrews was not to be made redundant *"yet"*. It is more likely to be the case that Mr Andrews had by now become convinced that he was to become redundant and had simply interpreted

Mr Chudleigh's assurances on or around 10 March that he was not to be made redundant in a way that accorded with his, by then fixed, belief.

[25] The plain truth is, I believe, that Mr Andrews resigned because he did not wish to wait until he was made redundant but, sensibly, looked for work and resigned when he was successful in finding it. These circumstances cannot possibly give rise to a repudiatory breach by the respondent of Mr Andrews' contract and therefore Mr Andrews cannot succeed in his claim of constructive dismissal.

Was Mr Andrews unjustifiably disadvantaged in his employment?

[26] Mr Andrews argues that he has suffered an unjustified disadvantage in three main respects:

(a) That he was communicated with in such a way that he reasonably believed that he was to be made redundant, thereby causing him distress and causing him to leave work that he had found congenial;

(b) That there had been no consultation with him about the proposal to trial the Kiwi Rail method of moving containers to Lyttelton; and

(c) There had been no attempt to pacify him when he stormed out of Mr Chudleigh's office in a state of upset.

Communication with Mr Andrews

[27] It is my belief that Mr Chudleigh was probably not very experienced in communicating what was potentially quite complicated information about the proposal to trial Kiwi Rail and the possible effects it could have on the drivers. I believe that the message should have been delivered in a more structured and formal manner. Even though the proposal involved nothing more than a trial of Kiwi Rail which, at that point, may or may not have proven successful, it still had a potential impact on the employment of the two drivers affected. Even if it may not have necessarily resulted in a driver losing his employment with the respondent, it was foreseeable that, if successful, it would result in a driver having to cease driving container trucks. (Although it must be noted that Mr Andrews was obliged, pursuant to his employment agreement, to drive any trucks that he was instructed to drive.)

[28] There is little doubt that Mr Andrews suffered a disadvantage in his employment when he believed that he was going to be dismissed for redundancy. It caused him stress and forced him to seek alternative employment. The question is, however, whether that disadvantage was unjustified.

[29] The conversation in question took place on 8 March 2011 prior to the amendments to the Employment Relations Act 2000 (the Act). Section 103A of the Act prior to the April 2011 amendment stated as follows:

> *For the purposes of s.103(1)(a) and (b), the question of whether 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.*

[30] The fact that the respondent was embarking on a trial that had the potential of adversely affecting Mr Andrews' employment prospects demanded, in my view, a more formal and certain approach than the one that was taken. Whilst I do not believe that Mr Chudleigh deliberately misled Mr Andrews, the chances of the communication being misunderstood would have been considerably reduced had the company either written to Mr Andrews and Mr Anderson in clear terms to confirm the trial and its potential effects, including a timeline, or spoken to the two men in a more formalised way, giving them the chance to ask questions and explore the possible outcomes. In addition, they should have been given prior notice of the meeting. As it was, it was sprung on Mr Andrews out of the blue.

[31] I suspect that the respondent would regard these observations as being overkill, given that it did not view the rail trial as a major development in the company. However, the very fact that a significant misunderstanding arose in the minds of two men, which gave rise to an employment relationship problem that is before the Authority, demonstrates the importance of clear and unequivocal communications to employees on matters that could, even remotely, adversely impact their employment.

[32] In this respect, therefore, I do find that how the respondent acted was not what a fair and reasonable employer would have done in all the circumstances at the time the action occurred. Accordingly, I find that there has been an unjustifiable disadvantage in Mr Andrews' employment. This is because a fair and reasonable

employer would have communicated the rail trial in a more effective manner to Mr Andrews and Mr Anderson.

Consultation

[33] The statutory requirement for consultation arises from s.4(1A) of the Act. This states that the duty of good faith in subsection 4(1):

> *(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, amongst 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 the employment of one 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.*

[34] Section 4 (1) of the Act provides:

> *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.*

[35] Section 4(4) of the Act states as follows:

> *The duty of good faith in subsection (1) applies to the following matters:*
>
> *…*
>
> *(d) A proposal by an employer that might impact on the employer's employees, including a proposal to contract out work otherwise done by the employees or to sell or transfer all or part of the employer's business.*

[36] I accept the submissions of Ms Gibson for the respondent that the obligation to consult under s 4(1A) (c) of the Act is triggered by circumstances which would have had to have been more advanced than those which actually existed on 8 March 2011.

At that stage, there was no more than an exploration of an option (using rail) which may have led to *a decision that* [would], *or* [be] *likely to, have an adverse effect on the continuation of the employment of one or more … employees*. Therefore, I do not find that there has been a breach of s 4(1A) of the Act by the respondent.

[37] Although I have found that there was no intention on 8 March 2011 to make Mr Andrews redundant (so that s.4(4)(e) did not apply either), the respondent was proposing to contract out work otherwise done by Mr Andrews, for a period of at least two months, and that proposal could have impacted on Mr Andrews. The duty of good faith was, therefore, expressly triggered by the decision to trial Kiwi Rail pursuant to s4 (4) (d) of the Act.

[38] However, I do not believe that the respondent company breached its duty of good faith towards Mr Andrews in this respect. First, it did not set out to mislead or deceive Mr Andrews. Section 4(1)(b) does not prevent an action that turns out inadvertently to mislead, but one that is intended to do so; that is evident from the wording of the section.

[39] Secondly I believe that the respondent did set out to be active and constructive in establishing and maintaining a productive employment relationship when it told Mr Andrews about the Kiwi Rail trial. The fact that it did so in a manner that initially caused confusion was not a deliberate breach of the Act in my view.

No attempt to pacify Mr Andrews

[40] Mr Chudleigh agreed in cross examination that he did not do anything to deal with Mr Andrews storming out, and did not speak to him again until two days later when Mr Andrews asked for the letter confirming his redundancy. Mr Nicholson also confirmed that he did not arrange to meet with Mr Andrews when he was told of him getting upset.

[41] If either Mr Chudleigh or Mr Nicholson had met with Mr Andrews soon after he had stormed out to find out what had upset him, the misunderstanding on his part may have been rectified. I believe that this failure was a breach of s 4 (1A) (b) of the Act, and that it also caused Mr Andrews an unjustified disadvantage in his employment.

Remedies

[42] Section 123 of the Act provides that, where the Authority finds that an employee has a personal grievance, it may provide for one or more remedies, including, at s 123(1)(b), reimbursement of a sum equal to the whole or any part of the wages or other money lost as a result of the grievance. Mr Andrews claims $2,308.80 in respect of the cost over three months, of extra petrol he used to travel to his new work. I decline to award any sum in respect of the disadvantage personal grievance as the loss he claims arises out of his resignation, not the disadvantage. To attribute the loss claimed to the unjustified disadvantage that I have found Mr Andrews suffered would be too remote in my view.

[43] I heard evidence from Mr Andrews of the stress caused to him when he believed he was to be made redundant. I therefore believe that Mr Andrews is entitled to compensation pursuant to s.123(1)(c)(i) of the Act in relation to humiliation, loss of dignity and injury to his feelings arising out of the unjustified disadvantage that I believe he suffered.

[44] Whilst Mr Andrews' evidence was that he felt strong emotions in relation to the possible redundancy, these lasted for a relatively short period until he secured new work, around 24 March 2011. Furthermore, I believe that Mr Andrews had been told, unequivocally, two days after the meeting on 8 March, that he was not being made redundant, and that it was not the fault of the respondent in any material sense that he failed to realise that.

[45] Therefore, the harm suffered by Mr Andrews arising from the disadvantage caused by the inadequate communication of the rail trial, and by the failure to talk to him immediately he stormed out of the office, can only reasonably be attributed to the respondent's actions for the space of two days. In such a circumstance, I set the compensation at a total of $1,000 for the two failings taken together.

[46] I am obliged, pursuant to s.124 of the Act, to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[47] Whilst it is arguable that Mr Andrews' misunderstanding of Mr Chudleigh's message on 8 March 2011 contributed towards the situation that gave rise to the

personal grievance and that his further misunderstanding on or around 10 March when he was told that he was not to be made redundant also did so, I do not believe that it would be appropriate to characterise those misunderstandings as blameworthy. If they do carry any blame, I do not believe that it is of any material extent.

[48] Therefore, I decline to reduce the award of $1,000 compensation.

[49] Finally, Mr Andrews has asked for the Authority to consider awarding a penalty in respect of a breach of good faith. I have found above that there was a relatively minor breach of s 4 of the Act. Section 4A of the Act provides that a party to an employment relationship who fails to comply with the duty of good faith is liable to a penalty under the Act if:

> *(a) The failure was deliberate, serious and sustained; or*
>
> *(b) The failure was intended to undermine*
>
> *...*
>
> *(iii) an employment relationship.*

[50] It is my belief that the failure on the part of the respondent was neither deliberate, serious and sustained nor intended to undermine the employment relationship. Therefore, I decline to award a penalty against the respondent.

Costs

[51] If either party believes that a contribution towards its legal costs is appropriate and they are unable to agree, they should lodge and serve a memorandum within 28 days of the date of this determination. The other party should lodge any objections by way of memorandum within a further 28 days.

David Appleton
Member of the Employment Relations Authority