

Attention is drawn to the  
non-publication order  
at paragraph [62]

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2021] NZERA 457  
3050532

BETWEEN	PETER BEST Applicant
AND	WELLINGTON COMBINED TAXIS LIMITED Respondent

Member of Authority:	Michael Loftus
Representatives:	Charles McGuiness, counsel for the Applicant Paul McBride, counsel for the Respondent
Investigation Meeting:	19, 20, 22 August, 2, 3 and 5 December 2019 at Wellington
Submissions Received:	At the investigation meeting
Date of Determination:	15 October 2021

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment Relationship Problem**

[1] The applicant, Peter Best, claims he was unjustifiably dismissed by the respondent, Wellington Combined Taxis Limited (WCT). He also claims WCT breached the duty of good faith by virtue of the way it approached his dismissal and for this he seeks penalties.

[2] WCT accepts it dismissed Mr Best but is of the view it can justify its decision on the grounds of redundancy. WCT claims the decision was actioned in an appropriate way and therefore denies it breached the duty of good faith.

## Background

[3] WCT is a co-operative operating taxis in Wellington. Mr Best was employed by WCT as its Chief Financial Officer (CFO) at the end of 2015. The terms of his employment were contained in an individual employment agreement which had been signed some time earlier and as the result of an offer made in August 2015.

[4] It would be fair to say the evidence suggests the appointment was controversial with witnesses for WCT suggesting it resulted not from an established need but due to a previous working relationship and alleged friendship between Mr Best and the then Chief Executive Officer (CEO). There is evidence of disquiet about the need for the role and its cost which was aired both at, and before, an AGM which occurred in August 2015 but to which the answer was the offer had already been made. That said, Mr Best now says that is not so and acceptance did not occur till after the AGM though nothing turns on that other than the fact of disquiet.

[5] There was also disquiet about the appointment process and the fact the Board did not approve the expenditure as it is claimed it was required to do.

[6] At the 2015 AGM the composition of WCT's Board changed and there were, amidst the new members, ones who held concerns about the need and cost of the CFO role. Prime amongst these was David Clyma along with a returning member, David Johnson, and it is these two who Mr Best claims were later instrumental in a campaign to remove him.

[7] Ancillary to these issues were environmental ones which, from WCT's perspective, were significant and had to be addressed. Using Mr Clyma's words the issue was that:

... there has been huge change in the small passenger service vehicle industry in the last few years. Uber (and other similar providers) are in various quarters seen as either the cause of that. Either way. Low cost, low margin, and low overhead have become even more crucial in the last few years than they once were. Web-based (rather than telephone), App based rather than call Centre, and other developments, mean we had to move significantly.

[8] Witnesses for WCT go on to assert these issues were apparent by the time of Mr Best's appointment which is why its circumstances caused such angst with some of WCT's shareholders and which, they say, should probably have mitigated against the appointment. They also speak of a tension between the Board which sought to streamline support services and reduce costs and the CEO who some believe wished to impose a "corporate structure"

which promised additional cost through, for example, the filling of positions such as the CFO and an IT manager. Ultimately that tension saw the CEO's departure in July 2016 and that was followed by a Board meeting in August 2016 that charged a sub-committee with investigating options for a possible restructure and cost-savings.

[9] Also at that time the Board appointed a General Manager into what was described as a downgraded role when compared to that of the previous CEO. Mr Best applied, unsuccessfully, for the role. It is WCT's evidence the new General Manager embraced its desire to see costs reduced and adopted various measures to address that.

[10] In the interim the sub-committee continued its work focussing mainly on call centre staffing, IT and Finance. This resulted in a Special General Meeting held on 15 August 2016 at which at least some, including Mr Johnson, expressed the view WCT should revert to a previous finance structure whereby it maintained an in-house accounts function which was not necessarily staffed by qualified accountants and then used external firms as required. Indeed Mr Johnson successfully stood for re-election to the Board on a manifesto that included that along with other initiatives. It is his view this endorsement, along with the election of similar minded individuals, provided a mandate to continue investigating possible cost savings.

[11] It is also WCT's evidence Mr Best was well aware of what was going on given his position and the fact he was frequently involved in the Board's discussions.

[12] In October 2017 the General Manager departed for personal reasons and was replaced by Board member, Bahman Fakharzadeh, in an acting capacity though that appointment soon became permanent.

[13] In the interim the process of reviewing WCT's costs continued and on 31 October the Board asked Messrs Clyma and Johnson to continue the task as a sub-committee and provide a report and recommendations. This they did on 13 November having consulted with a former external accountant and having received an indication of the cost of external provision of the tasks they envisaged as requiring such assistance. Mr Clyma says the conclusion they reached from this exercise was that a return to the previous structure where in-house accounts processing supported by an external accountancy firm would suffice while also offering a potential and significant cost saving over the retention of an expensive CFO role.

[14] Their report and the attached business case was accepted by the Board which approved its use as a basis for consultation with affected staff. At the same time it was decided to advance cost saving initiatives in the IT department and call centre. The approval itself read that the restructure committee (Messrs Johnson and Clyma) was to approach the Head of Department (CFO) to explore various options including proceeding as proposed, modifying the proposal on the basis of any input from the CFO which might result in similar savings or simply keeping the current structure.

[15] That led to a letter to Mr Best dated 24 November 2017. It attached a consultation document covering proposals to change the structure of finance and the call centre. Crucial to this claim it proposed the disestablishment of the CFO position and the use of an external accountancy firm to perform a monthly review of the finances and *to take the annual accounts to the standard required by the Auditors*. The letter asked for feedback, by e-mail, by 1 December.

[16] It is Mr Best's evidence that he prepared a response but as events transpired it was not forwarded at that point. Instead Mr Best asked that he speak to the Board which accepted expecting he would present his response. Instead the evidence is the parties engaged in a without prejudice discussion though it is WCT's evidence the Board was not willing to respond to Mr Best's request for an exit package on the grounds it was pre-emptive given a decision had not yet been made regarding the restructure. Mr Best says he did not want to yet respond to the proposal as he was *hedging given the settlement talks* though he also now states, when giving oral evidence, that by this stage he had *checked out* of the process.

[17] In any event time for a response was extended to 4 December 2017 and on that day he provided an e-mail critical of the proposal which he saw as flawed and incapable of achieving the foreseen savings. That said little detail was offered in support of that contention and instead the e-mail's content was primarily a criticism of Mr Clyma against whom various assertions of impropriety were made and who, it was asserted, intended removing Mr Best *any way he can*.

[18] The following day the Board responded. Included therein is the statement *Unfortunately, other than attacking board members (and Dave Clyma in particular), and questioning costs, your comment reads like you think a decision has been made, and not for any good reason. 1. No decision has been made ...*

[19] The e-mail advises that given the responses content, Mr Best was invited to meet the Board the following day and give *Any further input that you might wish* after which a final decision would be made.

[20] Mr Best replied saying 6 December was not suitable and suggested that if the offer had been made in good faith he would have been given more time to organise representation etc. He also asked the Board explain why, as stated in its 5 December e-mail, there were good reasons for at least airing the proposed restructure.

[21] The Board replied reiterating the reasons were in the proposal and advising the Board would progress its consideration of the proposal but left the door open for further input from Mr Best.

[22] The following day, 6 December 2017, and absent any further input from Mr Best the Board wrote advising it had decided to adopt the proposed change and disestablish the CFO role. It also advised that given Mr Best's criticisms, Mr Clyma had abstained from the decision making. The letter goes on to say that in light of the decision the next issue was what *to do in relation to your employment*. The letter did note there were unlikely to be any alternate roles but said that before a final decision was made Mr Best was again invited to comment. He was asked to do so by 8 December.

[23] Absent any substantive response Mr Best was approached by the Board chair on 8 December 2017. He again asked if Mr Best wished to provide any input and was told no. Here it should also be noted that when Mr Best left for the final time that day he told two others he was not interested in pursuing the possibility of contracting back to WCT, which had also been floated.

[24] As a result the Board made its decision and confirmed the restructure would proceed with the CFO position being disestablished and Mr Best's employment terminated. The decision was conveyed by letter that day.

## **Discussion**

[25] This determination has not been issued within the three month period required by s 174C(3) of the Employment Relations Act (the Act). As permitted by s 174C(4) the Chief of

the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

[26] As already said Mr Best claims he was unjustifiably dismissed. WCT accepts it dismissed Mr Best and therefore accepts it must justify the dismissal. The justification relied upon is redundancy.

[27] With respect to justification s 103A of the Employment Relations Act 2000 (the Act) states the issue:

*... 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 could have done in all the circumstances at the time the dismissal ... occurred.*

[28] In determining this the Act requires I consider, having regard to its resources, whether the employer's enquiry was sufficient. A sufficient investigation requires, as a bare minimum, that the employer put its issues/concerns to the employee, allow an opportunity to reply and consider the response with an open mind. Resources and knowledge are not an issue here with many experienced business people involved in the business.

[29] Traditionally and while issues of substance and process overlap and there is no such thing as a firm delineation, separation has often been used for analytical purposes especially as the requirements of [28] are enshrined in statute and have a procedural focus.<sup>1</sup>

[30] In a redundancy setting this might be simplistically summarised as requiring the employer to establish it had a genuine business reason for the termination (the substantive justification) and that there was full and genuine consultation incorporating the good faith and information sharing requirements of s 4(1A) of the Act (the procedural requirements).

[31] With respect to genuine business decision it is well established the employer is entitled to make its business more efficient and doing so might include *re-organisation or other cost saving measures*.<sup>2</sup> It is also well established a decision to restructure is a commercial one and the strategy and its wisdom cannot be questioned by the Authority.<sup>3</sup>

---

<sup>1</sup> Employment Relations Act 2000 at ss 4(1A) and 103A(3)(b) to (d)

<sup>2</sup> *G N Hale & Sons Ltd v Wellington Caretakers IUOW* [1990] 2 NZILR 1079 (CA) at 1084

<sup>3</sup> See *Rittson-Thomas t/a Totara Hills Farm v Davidson* [2013] ERNZ 55 at [50] citing *G N Hale*.

[32] Furthermore the correctness of the employer's business judgment is not the issue and it is not the role of the Authority to minutely examine all the detail of the purported cost saving as I am being encouraged by Mr Best to do here.<sup>4</sup>

[33] Applying these requirements to the current situation it is readily apparent from the evidence that WCT's shareholders and directors had been concerned the cost structure was not sustainable given changes in the market and increasing competition along with what was perceived as a growing and bloated management structure. It is also clear these concerns predated Mr Best's engagement but that said the evidence also shows there was a high level of internal politicking in the organisation and getting traction to address these issues was difficult.

[34] To advance the issue the Board established a restructuring sub-committee and delegated the task of looking at potential change to the company structure. The evidence makes it clear that Mr Best was a party to a number of discussions about this. These efforts continued after a new Board was elected in August 2017 with a focus on four areas including finance. Here it should be noted change subsequently affected other areas that were examined with the IT support function being contracted out and the call-centre downsized.

[35] In November 2017 the sub-committee recommended consideration of a restructure of the finance team with an estimated cost saving of around \$118,500. The estimate was based on relevant data taken from the company accounts with one exception which was an estimate sourced from an external accountant of the cost associated with an outsourced monthly review function. The accountant in question had had a previous relationship with WCT and the estimate was subsequently revisited and confirmed with both its initial provider and others.

[36] As already indicated one of the thrusts of Mr Best's challenge was that the projected cost savings did not eventuate but that I discount for two reasons. One is the Court's negativity about such a challenge and its conclusion some variance will occur.<sup>5</sup> The second and more significant reason is the evidence, albeit based on data sourced after Mr Best's departure, suggests WCT achieved a significant portion of the projected savings. As Mr McBride submitted it was open to a fair and reasonable employer to place reliance on those figures when considering its options, especially as they now appear justified.

---

<sup>4</sup> *New Zealand Nurses Union v Air New Zealand* [1992] 3 ERNZ 548 at 571.

<sup>5</sup> Above n 4

[37] Here I note some further points. Mr Best made no credible challenge to the figures at the time and his subsequent attempts to undermine them have failed. Indeed, I have to note one of his own witnesses confirmed she fully understood why the decision was made and that considerable savings eventuated. Another of his witnesses, an ex Board member of WCT who was critical of the decision, also accepts he initially favoured the establishment of the sub-committee as it had the goal of saving money and that was desperately needed.

[38] The evidence leads to a conclusion WCT had a substantive situation that needed addressing. It then did that and was entitled to do so, though there is a further issue that must be discussed. It is that there is an additional overlay when redundancy is used as a justification and that is the 'genuineness' of the decision and, in particular given the arguments being mounted by Mr Best, that the decision was ...*based on business requirements and not used as a pretext for dismissing a disliked employee.*<sup>6</sup>

[39] In saying this I note the main thrust of Ms Best's challenge is, as already said, that he was specifically targeted and that Messrs Clyma and Johnson, in particular, had in in for him. Both deny that is the case. They assert their interest was cost saving and their evidence remained consistent with that throughout.

[40] Here I note and agree with Mr McBride's submission that:

While the cases say it is upon the employer to justify its actions as fair and reasonable in all the circumstances, the onus is squarely placed on the employee where they seek to impugn a redundancy based on allegations of some other cause, including that a redundancy is a sham.<sup>7</sup>

[41] This is especially so when the accusations include allegations of reprehensible behaviour as some of those levelled by Mr Best do.<sup>8</sup> While there were allegations of various impropriety Mr Best failed to support those accusations.

[42] In essence the general thrust of Mr Bests claim was that he was being targeted because he was making a nuisance of himself by highlighting irregular behaviour by Mr Clyma who had an additional grudge in that Mr Best had previously provided evidence detrimental to WCT in a matter being pursued by Mr Clyma. It is Mr Best's position Mr Clyma

---

<sup>6</sup> *Grace team Accounting Ltd v Brake* [2014] ERNZ 129 (CA) at [85]

<sup>7</sup> *na Nagara v McGrath, Chief Executive of the Auckland College of Education* EmpC Auckland AEC56/96, 13 September 1996 at 11.

<sup>8</sup> *Trotter v Telecom Corporation of NZ Ltd* [1993] 2 ERNZ 659 at 682

was then given the opportunity to exact revenge by being appointed to the restructuring committee and recommending the removal of his position.

[43] Unfortunately for Mr Best not only did he fall short in establishing these claims they were not supported by his own witnesses. Indeed some of their evidence was diametrically opposed.

[44] For example the ex Board member who appeared for Mr Best ([37] above) denied he had ever heard Mr Clyma say WCT had to get rid of Mr Best. He instead attributed such comments to Mr Johnson but added they were linked to the fact Mr Best cost too much as opposed to any other rationale. He also said Board discussions about the proposal were *all about costs* and that he had supported the appointment of the sub-committee as its goal was to save costs. While he expressed negativity about the outcome he refused, when asked, to deny he considered the proposal credible instead saying *can't comment*.

[45] There was then a summonsed witness who it was said would support a multiplicity of Mr Best's claims including that she herself had been threatened by Mr Clyma. She had been an assistant accountant and failed to support most of the contentions put to her. She then went to far as to describe attempts to get her to be witness for Mr Best as amounting to harassment. She supported WCT's view cost savings had to be made and undermined a proposition she had effectively been promoted after Mr Best's dismissal and an alternate could therefore have been his retention and her dismissal with evidence her role hardly changed. She simply continued preparing reports and financials for the Board which were now checked externally, rather than in house by the CFO. While she accepted her salary had increased she said that was balanced by the fact she was no longer eligible for a bonus.

[46] Turning now to process and in particular the requirements of section 4(1A) of the Act which amount to an obligation to give an employee potentially affected by change access to relevant information and an opportunity to comment.

[47] As already said the evidence is Mr Best was party to a number of discussions about the requirement to save costs. His evidence is he understood the situation and the environment even if he did not necessarily agree wholeheartedly.

[48] The restructuring committee's presentation to the Board on 13 November 2017 included documentation containing information about the existing wage costs (CFO, Assistant

Accountant, Senior Accounts Clerk, CFL Clerk, Part-time assistant) and the cost of the proposed structure (Assistant Accountant, Senior Accounts Clerk, CFL Clerk, Part-time assistant, contracted part-time accountant) along with other supporting information. It also noted nothing was decided and there were a multiplicity of possible outcomes including maintenance of the current structure or modification of the proposal as a result of staff input that might result in similar savings.

[49] The same information was then transposed into the document sent to Mr Best on 24 November 2017 and a week was allowed for feedback. Added to that is the fact that as CFO Mr Best had full access to any further financial information he might have though relevant and as a well qualified CFO he also had the ability to understand and reconcile the figures. In summary, Mr Best having been provided with the relevant information (financial and structural), had an opportunity to comment.

[50] Mr Best was asked to respond by 1 December 2017 but failed to do so despite having accepted in evidence that his response had been prepared.<sup>9</sup> Instead, he chose to initiate discussions regarding an exit and declined opportunities to respond verbally or in writing at the meeting. Despite that a further opportunity was given and Mr Best now had till 4 December 2017 to reply.

[51] That he did but it is fair to say Mr McBride's submission the *...response took the form of an email which alleged a grand conspiracy, centred on Dave Clyma, rather than a response to the consultation document or proposal* is supported by the evidence.

[52] Despite that approach, the Board provided Mr Best with another opportunity to respond to the proposal, and provide any other input he felt appropriate. Also available was the option of verbally addressing the Board and Mr Best continued to have access to all relevant information. Additionally, and in light of Mr Best's criticisms, the Board also took the step of removing Mr Clyma from the decision making process.

[53] Mr Best continued to decline the opportunity despite being told a decision would be made in the absence of input. The decision was then made and the Board voted to disestablish the CFO role with the discussion being informed by the cost information provided to both it and Mr Best.

---

<sup>9</sup> Brief of evidence as 4.21

[54] Even then, and despite Mr Best's characterisation of the decision as an act of personal retribution rather than a legitimate restructuring proposal, the Board attempted to interact on the question of what to do with respect to his employment. This was by letter dated 6 December though it did record the Board itself had failed to identify a viable option for Mr Best's retention. Here it should be noted two senior roles had recently been filled (General Manager and Operations Manager) though Mr Best's skills meant he was probably not appointable to either – indeed he had previously failed to attain the General Manager role. The only possible vacancies were in the call centre, which was itself undergoing a restructure, and there was no suggestion Mr Best was interested in such a role.

[55] Finally there is the suggestion the colleague whose evidence is discussed in [45] above could have been made redundant though that is only being alleged in hindsight and was not raised by Mr Best at the time. Given decisions can only be made in light of information and input at the time of the decision this would therefore appear an untenable argument but in any event the evidence is her work hardly changed. It follows her role was not therefore surplus. It would therefore be improper to displace her to make way for someone whose role was truly surplus unless she was willing to go which she was not.

[56] Again there was no response to the request for input on 6 December, even when members of the Board tried to approach Mr Best and engage orally on 8 December. That, in turn, led to the decision to terminate though even then the possibility of Mr Best providing some services as a contractor was canvassed. Remember here, the proposal envisaged a portion of work being outsourced and the fact it was pursued further undermines Mr Best's assertion the aim of the exercise was to remove him.

[57] There can be no doubt the evidence shows Mr Best was afforded multiple opportunities to provide input. The evidence also shows he spurned those chances, though that is perhaps not a surprise given his admission he had already *checked out*.

[58] Minimum standards of fair and reasonable dealing along with the requirements of s 4(1A) of the Act are, I conclude, met when multiple opportunities are given to respond. Given the evidence I therefore find WCT discharged its procedural obligation and acted in good faith.

[59] However, and as submitted by Mr McBride I also have to conclude Mr Best did not. The duty of good faith operates two ways yet it was Mr Best who effectively chose not to

communicate on the issue. By doing so he essentially ensured the outcome which came to pass.

[60] For these reasons I conclude a challenge on procedural grounds also fails and with it the claim WCT breached the duty of good faith. Accordingly the penalty application is dismissed.

### **Conclusion and Orders**

[61] For the above reason I conclude Mr Best has failed to support his claims the redundancy was a sham. Wellington Combined Taxis Limited has justified its decision to declare him redundant.

[62] Similarly Mr Best has failed with his claim the duty of good faith was breached with the process adopted meeting the relevant requirements of ss 4(1A) and 103A(3) of the Act.

[63] Finally it should be noted a significant amount of commercially sensitive data, particularly financial information, was presented and discussed during the investigation. The parties agreed there should be a prohibition on the publication of any such information and it is so ordered.

[64] Costs are reserved.

Michael Loftus  
Member of the Employment Relations Authority