IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 317
5397852

	BETWEEN	KEVIN BROWN Applicant
	A N D	MIDDLETON TRANSPORT SERVICES LIMITED Respondent

Member of Authority:	T G Tetitaha
Representatives:	A Chadwick, Counsel for Applicant C Rowe, Advocate for Respondent
Investigation Meeting:	8 March 2013 at Whangarei
Submissions Received:	15 March 2013 from Applicant 13 March 2013 from Respondent
Date of Determination:	26 July 2013

DETERMINATION OF THE AUTHORITY

A. Mr Brown was justifiably dismissed for redundancy by MTSL

B. Costs are reserved. If costs are sought, submissions are to be filed within 14 days of the determination. The other party may file submissions in reply 14 days thereafter.

Employment relationship problem

[1] Kevin Brown was employed as Manager of Transport and Logistics for the Northland region by Middleton Transport Services Limited (MTSL). He was dismissed for redundancy. He alleges the dismissal was unjustified due to

unreasonable notice, no genuine reasons for redundancy and a flawed process leading to dismissal. Alternatively he alleges a breach of good faith by misleading and deceptive behaviour about the reasons for redundancy, failure to provide relevant information and opportunity to comment. MTSL disagrees.

Issues

[2] The following issues arise:

(a) Was Mr Brown's dismissal for redundancy unjustified due to unreasonable notice?

(b) Were the reasons for the redundancy genuine? Was there mixed motive?

(c) Was the process leading to dismissal unfair?

(d) Did MTSL breach its duty of good faith by its behaviour and the non-provision of information?

(e) What remedies (if any) should be awarded to Mr Brown?

Was Mr Brown's dismissal for redundancy unjustified due to insufficient notice?

[3] Mr Brown alleges the dismissal was unjustified because there is no written employment agreement and there was an implied term of reasonable notice of 12 weeks given the length of employment of 12 years.

[4] Mr Brown was first employed in January 2000. Employment agreements were only required to be recorded in writing at the request of the employee.[1] There is no evidence Mr Brown made such a request.

[5] In 2011 Mr Brown resigned from MTSL to work for a competitor. He gave MTSL two weeks' notice of termination.[2] On 29 April 2011 his last day of work, he was told by his prospective employer the job was no longer available. Mr Brown states MTSL then asked him to stay on and his employment was continuous. MTSL states he asked them for his job back and they re-employed him.

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1 s19(5) and (6) Employment Relations Act 1991

2 Document 4.2 Statement of Problem (SOP)

[6] The parties agree Mr Brown resigned and his resignation was accepted by MTSL. There was no expectation by either party Mr Brown would continue his employment with MTSL. When Mr Brown found himself without employment on 29 April, it was more probable than not he sought re-employment at his old job. There is no evidence termination of the agreement was withdrawn or rescinded prior to 29 April. Mr Brown's notes from a meeting dated 2 May 2011 record his employment status was a point he still needed to clarify and confirm.[3] This evidence is consistent with there being no agreement to withdraw his termination as at Friday 29 April 2011. His previous employment agreement therefore terminated and a new employment agreement was formed when he started work on Monday 2 May 2011.

[7] It is common ground Mr Brown was provided with a draft employment agreement in December 2011 which he did not sign. He produced an employment agreement with pencilled notations to the hours of work and the addition of a "liberty clause".[4] There are no notations about the notice period for redundancy and restructuring. The notice period for redundancy was a *minimum of four (4) weeks' notice or payment in lieu thereof* (clause 16.2). A copy of the same agreement without notations was produced by MTSL. This included his salary of $85,000 per annum.[5]

[8] Mr Brown now alleges that he did have concerns about the notice period for redundancy. There is no other evidence of his concern about the notice period. He did not bring any concerns about the draft agreement to the attention of MTSL during his employment.

[9] Mr Brown denies the draft employment agreement governs his employment because it is an intended agreement, unsigned and he did not expressly agree to its terms. In the absence of an enforceable employment agreement, he seeks to imply a term of reasonable notice for redundancy of 12 weeks. Both parties blame the other for the agreement not being signed – Mr Brown says a meeting was to be arranged by MTSL to discuss the agreement which never occurred. MTSL says it followed up with him about the agreement on at least two occasions.

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3 SOP Document 4.3
4 SOP Document 4.1
5 Statement in Reply (SIR) Appendix 1

[10] An intended agreement must not be treated as an employment agreement if the employee has not signed it or *"agreed to any of the terms and conditions specified in the intended agreement."* (s64(6)(b)

[11] Agreement may be inferred from a parties conduct. The conduct of an employee who did not protest about the written terms at the time and accepted all the benefits provided by the draft agreement has constituted agreement.[6] Similarly, an employer who failed to respond for 5 months was held to have agreed to a counteroffer.[7] There is no basis to depart from that reasoning here.

[12] There is conduct here which infers agreement to the terms and conditions of the draft or intended agreement, at least insofar as they relate to clause 16.2 (notice period for redundancy). He had the draft employment agreement since December 2011. He didn't notify MTSL of any concerns about it. There is no contemporaneous note about clause 16.2. It can be inferred from the lack of any note on clause 16.2 it was acceptable at the time. He continued to receive the benefits set out in the agreement. In the circumstances, his conduct infers he agreed to and is bound by the intended or draft agreement including clause 16.2 the notice period for redundancy of four weeks. Four weeks' notice for redundancy was paid to Mr Brown.

[13] It is only in the absence of specific inclusion of a contractual term concerning the period of notice that "reasonable notice" of termination may be implied into a contract.[8] There is a specific contractual term of notice of four weeks for redundancy in the agreement. There is no basis to imply a term of reasonable notice.

[14] Accordingly the Authority determines Mr Brown was not unjustifiably dismissed for unreasonable notice.

Were the reasons for the redundancy genuine? Was there mixed motive?

[15] Mr Brown submits the proposed reasons for redundancy were not genuine. He submits his role was not disestablished and moved to Leigh. His role continues to be performed by another employee, Mr Bernard Davis. He accepts MTSL had a commercial need to make cost savings but failed to establish this because of the alternative cost savings he proposed at the time of dismissal. He alleges mixed motive for his redundancy.

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6 *Decom Limited v Cleaver*, ERA Christchurch, CA2A/09, 24 March 2009.
7 *Whyte v Creative Force Media Ltd* ERA Auckland AA23/10, 19 January 2010
8 *Ogilvy & Mather (New Zealand) Ltd v Turner* [1996] 1 NZLR 641, [1995] 2 ERNZ 398 (CA)

[16] The decision whether to make redundancies is part of the management's prerogative. It is not for the Authority to substitute its judgment for that of the employer.[9] Although an employer may assert this was a genuine business decision, the Authority may still review it to determine whether the decision, and how it was reached, were what a fair and reasonable employer could have done in all the relevant circumstances.[10]

[17] The test whether a redundancy has arisen is would a reasonable person, taking into account the nature, terms and conditions of each position and the characteristics of the employee consider that there was sufficient difference to break the essential continuity of employment? The test is determined objectively. It is a matter of fact and degree.[11]

[18] A reasonable employer could conclude differences were, for a person of the characteristics of an employee, of a sufficient degree to break the essential continuity of employment and amount to a new type. Differences include loss of status, responsibility and interest in a new position and significant changes in the work environment.[12]

Did Mr Brown's role continue to be performed by Mr Bernard Davis following termination?

[19] Mr Brown submits his job involved the following duties:

(a) Taking calls from fishing boats and noting their transport requirements;

(b) Collating and organising all of the various boats' transport requirements;

(c) Preparing worksheets each day which allocated the drivers' duties based on boats, transport needs, driver availability and truck whereabouts;

(d) Notifying drivers of their duties, and then supervising them in carrying out those duties;

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9 *GM Hale & Son Ltd v Wellington etc Caretakers etc IUOW* [1991] 1 NZLR 151

10 *Rittson-Thomas t/a Totara Hills Farm v Davidson* [2013] NZEmpC 39 at [53] – [54]

11 *Auckland Regional Council v Sanson* [1999] 2 ERNZ 597 at [19] referring to *Carter Holt Harvey v. Wallis* [1998] 3 ERNZ 984, 995.

12 *Carter Holt Harvey v. Wallis* [1998] 3 ERNZ 984, 997.

(e) Training drivers and disciplining them where necessary;

(f) Administrative tasks such as regular stock takes and preparation of the species report;

(g) Driving trucks as and when required; and

(h) Use of a company vehicle (the ute), mobile phone and work computer[13].

[20] Mr Brown gave evidence 70% of his time was on office work – 50% liaising with boats, 10% stocktaking/Whangarei workshop and 10% preparing species reports. The remainder involved overseeing staff. Truck driving was only as required which appeared infrequent.

[21] Mr Bernard Davis is based in Whangarei. He is employed as a truck driver and has worked for MTSL for 12 years. He is paid $48,000 per annum - $37,000 less than Mr Brown. He says his job had not really changed during his employment and he did not consider himself management.[14] He gave oral evidence that he took calls from the fishing boats during the day on his cellphone and landline. At night the phone was switched to one of the MTSL directors. He collated some worksheets but these were overseen and signed off by the MTSL directors. He did stock taking involving checking one fridge which took 15 minutes. He did not prepare species reports – these were done by his partner in return for petrol. The remainder of the time he was a truck driver.

[22] The work performed by Mr Davis is substantially different from that performed by Mr Brown. Mr Davis is primarily a truck driver. He has less responsibility and less remuneration than Mr Brown. There was no new role taken on by Mr Davis. Rather it was a reorganisation of duties as a consequence of Mr Brown's role being disestablished. No redeployment issue arose because there was no new role created.

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13 Para 36, applicant's submissions.
14 BoE BF Davis paras. 5 and 8.

Can MTSL substantively justify making Mr Brown redundant given the cost savings options? Was there mixed motive?

[23] Mr Brown submits although MTSL may have had genuine commercial need, it cannot justify making him redundant because it had alternative cost savings options available to it.

[24] It is common ground MTSL required cost savings. In August 2012 it became aware it would lose business income of $33,333 per month, effective 1 October 2012. MTSL was reviewing its operations to reduce costs prior to that deadline. One option to reduce cost was moving management of the Whangarei based drivers to the companys head office in Leigh and making Mr Brown redundant. This was advised to Mr Brown in a meeting on 27 August and by letter dated 30 August 2012. He was invited to provide feedback. On 25 September 2012 he gave his suggested cost savings. On 27 September 2012 he met with MTSL and discussed his cost savings options. The final decision to terminate his employment was made on 1 October 2012.[15]

[25] The cost saving options proffered by Mr Brown (with the exception of his redundancy) would not have solved MTSL's cashflow problem. The majority of his options proposed savings of an indeterminable amount which would be recognised at a future date. They also relied upon client consent which was not forthcoming. Redundancy of Mr Brown's position was the one option which could give immediate and certain cost savings of (at least) $85,000 per annum. There was reference to cuts to director salaries.[16] The urgency of the decision making was reasonable given the substantial loss of income on 1 October 2012. There was justification for Mr Brown's redundancy on the basis of genuine commercial need. There were no alternative cost options before MTSL which would have resolved their commercial needs other than redundancy.

[26] Accordingly, the Authority determines the reasons for redundancy were genuine and there was no mixed motive.

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15 Statement in Reply (SIR) Appendix 12 Notes of Meeting 27 September 2011

16 SIR Appendix 12 Notes of Meeting 27 September 2011 at pp 3-4.

Was the process leading to dismissal unfair?

[27] Mr Brown submits the process was unfair because he was given less than 24 hours' notice of the first consultation meeting, did not know in advance about MTSL's reduced income and the outcome was predetermined and therefore the consultation process "*a sham*". Mr Brown further submits MTSL failed to supply him with relevant information and to consider or discuss with Mr Brown any alternatives to his redundancy.

[28] MTSL submits it followed a fair process without predetermination. The information sought was provided, or where it was withheld was due to it being irrelevant, confidential, or did not exist.

[29] Mr Brown first met with MTSL on 28 August 2012. He was given a copy of a letter from MTSL's client advising from 1 October 2012 it would be reducing the monthly fee by $33,333.[17] He was told of the proposal to disestablish his role and asked for feedback. On 29 and 30 August he came up with a number of alternatives. He phoned Mr Karl Middleton of MTSL and told him he had come up with alternative cost options and asked for Mr Middleton to provide *a cost per kilometre* transport rate so he could finalise the calculations. No costing information was sent.

[30] On 3 September 2012 he received a letter from Mr Middleton reiterating MTSL's need to reduce costs and its proposal to do so by disestablishing his role and asked for feedback. On 17 September 2012 he received a further letter from Mr Middleton stating MTSL had *considered all factors affecting the proposal to make your position redundant* and invited him to a further meeting on 18 September at which the outcome of consultation would be given.

[31] Mr Brown then advised MTSL he had taken legal advice and wanted a further opportunity to put feedback. MTSL initially advised the meeting would go ahead on 21 September 2012 until contacted by Mr Brown's lawyer who requested a further postponement. MTSL agreed to postpone the outcome meeting until 27 September 2012 but requested that he provide feedback by 25 September 2012. This feedback was contained in correspondence between Mr Brown's solicitor and MTSL's advocate dated 25 to 27 September 2012 including a cost savings options document

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17 Document 4.5 to Statement of Problem.

prepared by Mr Brown. He also requested all information relevant to the proposed rationalisation of the business including:

(a) all communications regarding development of the above proposals and their reasons,

(b) all communications regarding purported need to scale back costs, options considered and rejected including reasons,

(c) all communications and negotiations on the company's current pricing and client request for reduction in pricing and

(d) the cost per km rates for the company's vehicles.

[32] MTSL refused to supply any further information stating it had supplied all relevant material and withheld confidential material.

[33] On 27 September 2012 Mr Brown attended a meeting with MTSL where he was advised of the preliminary decision to disestablish his role and make him redundant. There was some discussion about Mr Brown's options and other options MTSL considered such as assets sales. A final decision was to be made shortly thereafter.[18]

[34] On 1 October 2012 Mr Karl Middleton met with Mr Brown in Whangarei. He confirmed MTSL's decision to dismiss him for redundancy verbally and in writing.

[35] Mr Brown was told about the reduced income at the first meeting on 28 August 2012. He was subsequently given several opportunities to provide feedback before a preliminary then final decision on redundancy was made.

[36] The options he proposed were considered but would not have produced the immediate cost savings required. There was urgency because of the 1 October 2012 deadline, but this does not necessarily indicate pre-determination.

[37] Although MTSL did advise on 17 September 2012 it had considered all factors affecting redundancy, Mr Brown sought a further period of consultation which was granted. The information he put before MTSL was considered and discussed with him as noted above.

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[18] Notes meeting 27 September 2012 at p 3 paras.10 to 15.

[38] The information requested in paragraph [31](a) and (b) above would not appear to exist in written form other than what he had already been given. He had seen the client letter confirming the reduced income and MTSL had advised him they were attempting to negotiate with the client. Other options MTSL had considered (including Mr Brown's) were discussed with him at the meeting on 27 September.

[39] The information in paragraph [31](c) and (d) was confidential business information (s4(1B). MTSL had good reason to withhold information to protect its commercial position from being unreasonably prejudiced. MTSL were aware Mr Brown had approached their client to tender for transport work in competition to them.[19] The pricing of their contract with this client would have unreasonably prejudiced their commercial position, especially if Mr Brown used the information to produce competitive tenders. This was the "good reason" for withholding confidential information s4(1C)(c) is designed to protect.

[40] This information was not necessary for Mr Brown to have in order to provide feedback. Mr Brown required the information to price his cost savings options. MTSL had the available information to cost his proposal themselves. The basis for rejecting Mr Brown's options was due to reasons other than pricing, namely they did not produce immediate cost savings and required client agreement which was not forthcoming.

[41] As noted in paragraph [22] above, there was no failure to discuss alternatives such as redeployment because it did not arise.

[42] The Authority determines the process leading to dismissal was fair.

Did MTSL breach its duty of good faith by its behaviour and the non-provision of information?

[43] He further alleges breaches of good faith by non-provision of an employment agreement, misleading and deceptive behaviour regarding his removal of management transport logistics role to Leigh and a failure to be actively constructive throughout the restructuring process by not providing relevant information for Mr Brown's comment prior to a decision being made.

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19 Notes meeting 27 September 2012 at p 4.

[44] As noted above in paragraphs [15] to [26] the reasons for redundancy were genuine and there was no mixed motive. Accordingly there can be no misleading or deceptive behaviour.

[45] As noted above in paragraphs [27] to [42], all relevant information was provided or it was confidential and there was good reason for it to be withheld. Mr Brown was not deprived of the opportunity to comment on this information because it was not required to be provided. As noted in paragraph [22] above, there was no failure to discuss alternatives such as redeployment because it did not arise.

[46] The Authority determines there were no breaches of good faith by MTSL.

[47] Given the above findings, there is no need to consider remedies.

Costs

[48] Costs are reserved. If costs are sought, submissions are to be filed within 14 days of the determination. The other party may file submissions in reply 14 days thereafter.

T G Tetitaha
Member of the Employment Relations Authority