

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 92/09  
5129582

BETWEEN                      ANTHONY FLAY  
   Applicant  
  
AND                                VEHICLE TESTING NEW  
   ZEALAND LIMITED  
   Respondent

Member of Authority:      Vicki Campbell  
  
Representatives:            Ann-Marie McInally for Applicant  
   Blair Scotland for Respondent  
  
Investigation Meeting:     29 October 2008 at Hamilton  
  
Further Information  
Received:                      4 and 19 November 2008  
  
Submissions Received:     26 November 2008 from Applicant  
   28 November 2008 from Respondent  
  
Determination:              30 March 2009

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**DETERMINATION OF THE AUTHORITY**

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[1] Mr Anthony Flay was employed by Vehicle Testing New Zealand Limited (VTNZ) from 25 July 1994 as a Vehicle Inspector. Mr Flay was subject to an individual employment agreement which was made up by an expired collective employment contract and an individual employment contract.

[2] During his employment with VTNZ Mr Flay suffered injuries to his back which resulted in him having to keep his back straight. This prevented him from inspecting the interior of vehicles, completing warrants of fitness, or from inspecting cars at testing stations where vehicle inspection pit lanes were relied on.

[3] In October 2007 VTNZ notified its employees that redundancies may arise in the Waikato Compliance Centre where Mr Flay was employed. Mr Flay was made redundant with effect from 28 November 2007. He challenges his dismissal and claims reinstatement among other remedies. VTNZ denies the redundancy was unjustifiable and says the actions of VTNZ were fair and reasonable in all the circumstances.

[4] I am required to scrutinise VTNZ's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

For the purposes of section 103(1)(a) and (b), the question of whether a 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.

[5] The test of justification does not change the longstanding principles about justification for redundancy (see *Simpson Farms v Aberhart* [2006] 1 ERNZ 825).

[6] The Authority must be satisfied on two general points – that the business decision to make a position redundant in this case was made genuinely and not for ulterior motives; and that the respondent acted in a fair and open way in carrying out that decision – particularly, did it consult properly about the proposal to make Mr Flay redundant and otherwise act in a way that was not likely to mislead or deceive him, that is, in good faith?

### **Was the redundancy genuine?**

[7] The Court of Appeal in *GN Hale & Son Ltd v Wellington Caretakers IUOW* [1991] 1 NZLR 151, cemented an employers right 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 otherwise go to the wall. A worker does not have the right to continued employment if the business could be run more efficiently without him.

[8] Further, the Employment Court in *Simpsons Farms* reiterated the right of an employer to make genuine commercial decisions relating to how its business

operations will function including decisions to make positions or employees redundant.

[9] A genuine redundancy is determined in relation to the position, not the incumbent (*NZ Fasteners Stainless Ltd v Thwaites* [2000] 1 ERNZ 739).

[10] VTNZ operates 86 independent vehicle safety inspection testing stations throughout New Zealand. VTNZ provides a number of services to the public relating to vehicles and driver licensing including:

- Warrant of Fitness inspections;
- Pre-purchase inspections;
- Driver licensing;
- Vehicle registration;
- Certificate of Fitness (safety inspections for commercial vehicles);
- Road user charges;
- Entry certification (certification of New Zealand-new and re-registered vehicles to comply with legal standards); and
- Heavy vehicle break testing.

[11] Mr Flay was authorised by Land Transport New Zealand to issue Warrants of Fitness, Certificates of Fitness, and to issue entry certification. He was initially based at VTNZ's sole Hamilton testing site located at 40 Lincoln Street.

[12] In the late 1990's VTNZ entered into a contract to provide entry certification services to Waikato Vehicle Compliance Limited (WVCL). WVCL provided entry certification, or compliance services for imported used vehicles, and some local "lapsed registration" vehicles, hot rods and scratch-builds, registered motor vehicle dealers and private individuals. WVCL required VTNZ's services because WCVL employees were not authorised by Land Transport New Zealand Limited to issue certificates of compliance to vehicles. In order to meet its work load demands the contract required VTNZ to provide three employees to WVCL.

[13] VTNZ and Mr Flay agreed that Mr Flay could work at WVCL's premises from 1997 onwards where he would conduct entry certification for vehicles new to New Zealand and re-registered vehicles. Working at this site meant Mr Flay could avoid having to stand in the pits which would have required him to bend over, as WCVL operated a hoist.

[14] As a result of him working solely at WVCL, Mr Flay rarely had to undertake other duties normally undertaken by Vehicle Inspectors, such as full entry certification vehicle inspections and full warrant of fitness vehicle inspections.

[15] On 25 July 2005 Dr Black wrote to VTNZ and advised that Mr Flay was to be regarded as medically unfit for the generic position as a Vehicle Inspector at VTNZ Hamilton on the basis of incompatibility with the inevitable physical characteristics of the workplace.

[16] Due to his medical condition Mr Flay was usually the last resort to work at premises other than WVCL. If there was no work for Mr Flay at WVCL he would generally take holidays rather than work at another of VTNZ's testing stations.

[17] Mr Flay was required to work every third Saturday morning at the Lincoln Street testing station. However, during this time he would only work in the truck pits conducting vehicle inspections. If there were no trucks to inspect he would do nothing. As a result of his back injury Mr Flay was unable to bend down. Mr Flay is a tall man and the height of pits and the height of the vehicles using the pits at the testing station in Lincoln street meant that Mr Flay was unable to work safely in two of the three pits.

[18] At the investigation meeting Mr Flay produced a medical certificate from his General Practitioner dated 27 October 2008 which states that Mr Flay is now fit to undertake full duties as a Vehicle Inspector. This medical certificate came as a surprise to VTNZ's witnesses at the Investigation Meeting as Mr Flay did not indicate during any of the meetings discussing the potential redundancy situation that he was fully medically fit and able to undertake the general role of Vehicle Inspector.

[19] On 11 October 2007 WVCL lost a significant client. This had a significant impact on WVCL which advised VTNZ that the business was finished. This meant the three employees who had been working at the WVCL premises, including Mr Flay, would have no work. This in turn meant that VTNZ had to give consideration as to whether the current structure of VTNZ was appropriate. It decided to restructure the organisation and reduce staffing numbers by three.

[20] I am satisfied the restructuring of VTNZ was for genuine commercial reasons as a direct result of WVCL no longer requiring VTNZ to provide entry certification processes. This falls squarely within the ambit of the employer's right to make the business more efficient as held by the Court of Appeal in *Hale*.

**Was the redundancy handled in a procedurally fair manner?**

[21] Section 4 of the Employment Relations Act 2000 requires VTNZ to deal with its employees in good faith. This duty is to be exercised not only generally but in specific situations including redundancy.

[22] The duty of good faith set out in the Act requires an employer who is proposing to make a decision that will have an adverse affect on the continuation of employment of an employee to provide to that employee, access to information relevant to the continuation of the employee's employment, about the decision, and an opportunity to comment on the information before the decision is made.

[23] In *Communication & Energy Workers Union Inc v Telecom NZ Ltd* [1993] 2 ERNZ 429, the Court discussed the meaning of consultation in the context of redundancy and listed a serious or propositions extracted from the Court of Appeal's decision in *Wellington International Airport Ltd v Air NZ* [1993] 1 NZLR 671 (CA). In particular, the Court noted:

- (a) Consultation requires more than mere notification and must be allowed sufficient time. It is to be a reality, not a charade. Consultation is never to be treated perfunctorily or as a mere formality.
- (b) If consultation must precede change, a proposal must not be acted on until after consultation. Employees must know what is proposed before they can be expected to give their views.
- (c) Sufficiently precise information must be given to enable the employees to state a view, together with a reasonable opportunity to do so. This may include an opportunity to state views in writing or orally.
- (d) Genuine efforts must be made to accommodate the views of the employees. It follows from consultation that there should be a tendency to at least seek consensus. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses and then deciding what will be done.
- (e) The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change or even start anew.

[24] The employment agreement applicable to Mr Flay defines redundancy as including a situation where an employee's employment is terminated because the

position filled by that employee is superfluous as a result of the cessation of the whole or any part of the employer's operation. In this case the cessation affecting Mr Flay's position was in relation to his work for WVCL.

[25] With regard to selection for redundancy, the employment agreement at clause 16.4.3 provides VTNZ with the discretion to seek volunteers for redundancy, where it is considered appropriate.

[26] The agreement also makes provision for the payment of redundancy compensation and sets out a formula for calculating redundancy based on a 4 plus 2 arrangement.

[27] The employment agreement places a priority on securing alternative work through redeployment rather than cause redundancies. The contract requires VTNZ to examine all alternative job options and make every reasonable endeavour to identify and offer at least one job option before making an employee redundant. The contract also allowed VTNZ, as an alternative to redundancy, to offer, at its discretion, the option of continued employment at a lower position provided the offer was an alternative to redundancy with the objective of allowing the employee to continue in employment and the employee remained on his or her current salary for a maximum period of 2 years.

[28] As set out earlier in this determination, on 11 October WVCL advised VTNZ that the business was finished resulting in no work being available for the three employees who had been working at the WVCL premises, including Mr Flay. Following the notification by WVCL, VTNZ determined that it had three positions surplus to its requirements.

[29] The unchallenged evidence at the investigation meeting was that VTNZ had a number of different employment agreements with its employees and that a number of those agreements did not allow for voluntary redundancy or for the payment of redundancy compensation. Also, Mr Flay, in particular, had primarily worked at the WVCL site for a number of years and had moved with the business when it relocated. VTNZ also understood at the time, that Mr Flay was restricted with regard to his fitness and was unable to perform the generic role of vehicle inspector.

[30] Given those reasons, and after considering its obligations under the employment contract, VTNZ determined that it was not appropriate to seek volunteers for redundancy from the wider workforce.

[31] On 12 October 2007 Mr Hitchcock and Ms Mitzi Stites met with the three directly affected employees, including Mr Flay, and advised of the loss to WVCL of its major client. Mr Hitchcock and Ms Stites advised that the impact of that loss meant there would be insufficient work to sustain their roles. Mr Flay and his colleagues were advised that a review would be undertaken, but that in the meantime any suggestion of re-deployment or voluntary redundancy would be welcome. The two other employees who worked with Mr Flay at the WVCL site both opted to take redundancy.

[32] On 16 October Mr Hitchcock met with the other Waikato station managers to discuss what redeployment options were available for the affected employees at WVCL. All managers in the Hamilton/Waikato region reported having a full compliment of staff.

[33] That same day VTNZ wrote to Mr Flay reiterating the need for a restructure, and invited him to meet to discuss the situation. The first meeting took place on 18 October 2007. Mr Flay was represented by Mr Garth Elliot, an organiser with the EPMU.

[34] At the meeting Mr Hitchcock outlined the situation affecting WVCL. There was discussion over various vacancies around the country including a lesser position being available at Pukete. Mr Flay advised Mr Hitchcock that he was not interested in any other job.

[35] Three more meetings were held with Mr Flay to discuss the reasons for the proposed restructuring plus the vacancies available for redeployment. These meetings took place over a six week period. At each meeting Mr Flay indicated that he was not interested in any of the vacancies tabled.

[36] A common theme throughout the meetings was Mr Elliot's insistence that VTNZ open up the opportunity to take redundancy to all of the staff rather than restrict it to the three directly affected employees. For the reasons set out earlier in this determination VTNZ exercised its discretion not to extend the offer of redundancy to other staff. At this time, of course, VTNZ were also under the apprehension that Mr Flay was unable to carry out the full duties of a Vehicle Inspector and was working on the instruction from Dr Black given in 2005. No information to the contrary was ever provided by Mr Flay.

[37] On 12 November VTNZ wrote to Mr Flay and confirmed that his role was surplus to requirements and identified possible redeployment options. The third meeting took place on 27 November at which Mr Flay was represented by Mr Elliott.

[38] Following that meeting VTNZ considered the discussion between it and Mr Flay and Mr Elliott throughout the six week consultation period and made the decision to give notice to Mr Flay for redundancy. The letter of redundancy addressed issues raised by Mr Elliott in the meeting which had taken place that morning.

[39] Mr Flay was given his notice of dismissal on 28 November. He initially refused to read the letter and rejected it saying he wanted to be told what was in it. Mr Hitchcock explained that the letter responded to the issues raised the previous day and gave him notice of redundancy. Mr Flay was insistent that he wanted to have another meeting. This request was rejected by Mr Hitchcock. Instead Mr Flay was invited to use the telephone to contact his union which he did. After further rejecting the letter of notice and after further discussions between Mr Flay and Mr Hitchcock, Mr Flay was advised that he would receive one months pay in lieu of notice and that he could take the rest of the day off.

[40] When Mr Flay left his employment on 28 November 2009 he was upset. That is understandable when faced with the termination of employment which is not the fault of the employee. Mr Flay was entitled to feel aggrieved. However, where a decision such as Mr Flay's redundancy is one that is open to an employer acting fairly and reasonably, the dismissal will be justified.

[41] Separating out VTNZ's actions against the statutory objective standard of the actions of a fair and reasonable employer and how a fair and reasonable employer would have acted in these circumstances, I find VTNZ's actions were what a fair and reasonable employer would have done. Mr Flay's dismissal for redundancy is justified. I can be of no further assistance to him.

### **Costs**

[42] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, VTNZ may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell  
Member of Employment Relations Authority