IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2015] NZERA Christchurch 49
5425154

	BETWEEN	CARL LINES Applicant
	A N D	SOUTHLINK LOGISTICS LIMITED Respondent

Member of Authority:	M B Loftus
Representatives:	Steven Zindel, Counsel for the Applicant Nicole Ironside, Counsel for the Respondent
Investigation Meeting:	26 September 2014 at Nelson
Submissions Received:	At the investigation meeting with further memoranda on 29 September and 2 October 2014
Date of Determination:	17 April 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Carl Lines, claims he was unjustifiably dismissed by the respondent, Southlink Logistics Limited (Southlink), on 4 June 2013.

[2] Southlink accepts it dismissed Mr Lines but claims its decision was justified by reason of redundancy and carried out in a fair manner.

Background

[3] Southlink is a transport company carrying general freight and refrigerated goods in the Nelson and Marlborough regions. It is owned and directed by Donna Lloyd and Kym Parsons.

[4] Mr Lines first came to Southlink's attention in 2010 when he enquired about the availability of work. None was then available but he did leave a CV in the event something might eventuate in the future.

[5] Increased volumes later led to a decision Mr Parsons focus on administration and Ms Lloyd replace him on the 101 run. That left the 102 position vacant and Mr Lines was asked if he was interested. He commenced on 21 November 2012.

[6] Mr Lines claims that prior to accepting the job he and Southlink discussed various issues. He says these included the obtaining of a guarantee about job security and an undertaking he would be trained to get a Class 4 driver's licence, a dangerous goods licence and renew a lapsed forklift licence.

[7] Southlink says at the time it operated four delivery runs. Run 101 delivered refrigerated goods in the Nelson area and was now driven by Ms Lloyd. Mr Lines run, 102, transported refrigerated goods between Nelson and Marlborough. Run 103 took refrigerated goods to Takaka and Run 104 general freight to the Murchison area. The latter two were performed by employees.

[8] Southlink say Mr Lines was advised he would need a Class 2 driver's licence and a dangerous goods licence which he did not have. Southlink says it agreed to pay for the attainment of the dangerous goods license but denies any discussion about job security or attaining either a Class 4 or forklift licence.

[9] Southlink says there were various problems with Mr Lines over the following months with four client complaints which were all discussed with him.

[10] Mr Lines disagrees. He says one issue was raised early in the employment but the concern was resolved and he transitioned into permanent employment having been on a 90 day trial.

[11] Mr Lines says nothing further arose until Wednesday, 8 May. That day he received a letter advising Southlink wished to discuss a client complaint and the matter was potentially serious and could result in either a formal warning or dismissal. There are no details in the letter about the nature of the complaint but it concerned Mr Lines having allegedly distracting the clients staff while making deliveries and thereby delaying the performance of their duties.

[12] Mr Lines, accompanied by Ray Weston, met Mr Parsons and Ms Lloyd on 9 May to discuss the allegation.

[13] The meeting resulted in the issue of a final written warning on 13 May. The warning letter advises the decision was the result of Southlink having previously spoken to Mr Lines about the time he spent talking at customer premises and the resulting complaints. Suffice to say the parties disagree about the way the meeting was conducted and whether the warning was justified.

[14] On 15 May Mr Parsons phoned a previous employer of Mr Lines' in the United Kingdom. He characterises the call as a reference check. The same day Mr Parsons received a report from a client that Mr Lines had been at its premises complaining about the final written warning.

[15] Mr Parsons asked the UK employer why Mr Lines had terminated his employment. The response was Mr Lines left to move to New Zealand. It added he was considered its number one employee and would be re-employed immediately if he returned to the UK.

[16] Mr Lines takes issue with this approach saying the belated inquiry illustrates an attempt to find something to use against him. Southlink says it was entitled to make the inquiry pursuant to an enabling provision contained in the job application Mr Lines had completed in 2010.

[17] Mr Parsons goes on to say:

> *In April 2013, following the end of the 31 March 2013 financial year, Ms Lloyd and I had discussions with the company's accountants to evaluate the financial viability of the various runs that the company was operating. … This was something we always did as a matter of practice at the end of each financial year.*
>
> *Since the 102 run had started, it had always been the least profitable run for the company, except during the summer months. The run was essentially propped up by sporadic delivery jobs that we got from Mainfreight for this run. If Mainfreight thought it was uneconomic for them to do a delivery on this run then they would arrange for us to do the delivery for them … This additional work was sporadic and unreliable and not particularly economic for the company.*

[18] Mr Parsons goes on to say Southlink was, at this time, looking to increase the level of business on the 102 run. It was in negotiation with a potential client who was

then using a competitor. He says these attempts ceased at the end of April 2013 when a further competitor commenced a service between Nelson and Blenheim. That competitor acquired the work of the potential client Southlink was courting and also took some existing clients. Shortly thereafter a third competitor commenced a Nelson/Blenheim/Nelson run which meant the situation had changed significantly since Mr Lines was employed and competition was limited.

[19] Mr Parsons goes on to say he and Ms Lloyd decided that if Southlink was to remain profitable in such a competitive environment they had to either increase business on the 102 run by purchasing a larger truck and trying to get new customers or downsize the run and combine it with 101. They could then focus on building the general freight business which had higher profit margins.

[20] Mr Parsons says they discussed this with their accountant and concluded the first option involved too great a financial outlay and risk. They therefore decided to explore the option of merging the 101 and 102 runs. They did not consider it viable to merge any other combination of runs which had by then been augmented by the creation of a new general freight run to Motueka. That commenced on 27 May and was being performed by a recently engaged new start.

[21] On 31 May, Southlink wrote to Mr Lines. The letter opens by stating Southlink had received advice from its accountant that it had to consider ways of reducing costs to ensure the refrigerated business remained efficient and sustainable. The letter goes on to advise Southlink was considering consolidating the 101 and 102 runs and *This would mean that 102 Duty and your position as the driver undertaking this run would no longer be required*. While not stated, this was because Ms Lloyd, as both an owner and the 101 run driver, would drive the combined run. Mr Lines was asked to provide his feedback by the close of business on Tuesday, 4 June 2013.

[22] Mr Lines, Mr Parsons and Ms Lloyd met to discuss the proposal on 4 June. Mr Lines proposed he drive the combined 101/102 run but says that was rejected by Southlink as not being cost-effective. Mr Lines says the meeting only lasted some five minutes, lacked detail and the outcome was advised therein. He was under the impression he was not discussing a proposal but a fait accompli.

[23] The dismissal was confirmed by letter that day (4 June 2013) though there is a debate as to when. Mr Lines says the letter was produced at the meeting while

Southlink says Mr Lines performed the run that day and the letter was prepared while he was away.

Determination

[24] As already said, Southlink accepts it dismissed Mr Lines. In doing so, it accepts it is required to justify the dismissal. The justification is redundancy occasioned by increased competition which meant run 102 ceased to be viable and, as a result, Southlink's accountant recommended discontinuance. Some residual business would remain and this could be performed by incorporating that within the 101 run. As the driver operating the run Mr Lines was potentially redundant with his selection being confirmed by virtue of the fact he lacked the class 4 licence required to drive the vehicles used on the other runs.

[25] Mr Lines' position is the redundancy was a sham devised to cover a dismissal attributable to other factors. In support of his argument he points to five factors which he says illustrate the existence of an ulterior motive. They are:

a. The issuing of the warning which he says was an extreme and unjustified reaction given absence of a history of relevant misbehaviour;

b. The approach to Mr Lines previous employer in the UK;

c. The failure to adhere to promises regarding job security and attainment of both a class 4 and forklift license;

d. A belief that runs 101 and 102 were not ultimately combined; and

e. The recruitment of new drivers around the same time as Mr Lines position was disestablished.

[26] It is well established that when reviewing redundancy decisions the Authority or Court will look at two factors. They are the genuineness of the redundancy and the procedure by which it is carried out. The inquiry into each factor is carried out separately.[1]

[27] Looking first at the genuineness of the decision to disestablish run 102.

[1] *Coutts Cars Ltd v. Bageley* [2001] ERNZ 660 (CA)

[28] Southlink's claims regarding its business situation were not undermined by questioning. Indeed its answers strengthened the impression run 102 was no longer viable with examples as to why being elicited and the deteriorating situation illustrated by, for example, the fact deliveries to Picton no longer occurred daily and the run could, at times, be performed using a van as opposed to a truck.

[29] Added to that were a number of observations made by Mr Lines which supported Southlink's conclusion the run was no longer viable. For example he accepted there was increased competition and a reduction in the volume carried. He was evasive when asked about the use of the van and would not deny Southlink's claim he sometimes asked whether it was worth going to Blenheim some days.

[30] Turning to Mr Lines arguments as to why the redundancy was attributable to other factors.

[31] First the warning. The evidence, and in particular answers given by Mr Lines, confirms there was conduct that warranted an inquiry and to which an employer could respond with some form of remedial action. That said Southlink jumped straight to a final warning which would appear to be an overreaction but this is perhaps explained by answers given by both parties which confirm the conduct which led to the warning was repetitive and had been previously discussed. The severity of the response is something Mr Lines could have challenged but he chose not to either at the time or later given the lack of an unjustified action claim in the statement of problem.

[32] Southlink's response to its approach to Mr Lines' previous employer is that it was authorised to do so by the application he had signed. That is technically correct and there is the fact there was a catalyst that day in the form of a report of further misconduct similar to that covered in the warning letter by Mr Lines.

[33] The argument Southlink failed to honour promises regarding job security and the attainment of both a class 4 and forklift license was undermined by answers Mr Lines gave when questioned. He accepted *nothing* was said regarding job security and his answers regarding the class 4 and forklift promise suggest the talk was nothing more than a suggestion Southlink was willing to consider their attainment in the future.

[34] Similarly the belief runs 101 and 102 were not ultimately combined may have been legitimately held but the evidence shows it was ill-founded. There is now only one run which is substantially the old 101.

[35] Finally there was the issue of driver recruitment. Southlink accepts five others have entered its employ following Mr Lines' cessation but the timing of their engagement and nature of their roles is inconsistent with Mr Lines belief he could have had one of their jobs.

[36] The first of these did not arrive until September and that person was only employed one day a week on a temporary seasonal engagement. One more was a casual engaged to cover a period of annual leave in October. The first permanent employee did not arrive until November and was to replace the driver on the 103 run who had resigned. That new employee did not stay long which led to the fourth new start who arrived after the New Year. The fifth, who was also a permanent employee, commenced in 2014 and replaced the driver who had previously performed the 104 run and resigned

[37] Having considered the evidence discussed above I conclude the decision to disestablish the 102 run substantively justified.

[38] Turning to process. Section 103A of the Employment Relations Act 2000 (the Act) requires that an employer must, before dismissing an employee, raise its concerns, allow the employee an opportunity to respond and consider the response with an open mind (ss.103A(3)(b) to (d) of the Act). That these requirements, in the form of a consultation process, remain in the redundancy setting is expressly confirmed by s.4(1a)(c) of the Act and the relationship between the two sections has been confirmed by the Court.[2]

[39] It is here Southlink's attempt to justify the dismissal falters. While Southlink denies the meeting of 4 June only took 5 minutes, it agrees it was short. Southlink accepts Mr Lines was simply told of the situation and there were no supporting details such as financial records he could peruse or consider. Southlink also accepted when answering questions that Mr Lines ability to respond was curtailed and portrayed this as a *realistic* response to the situation. That is both inconsistent with the invitation to

[2] *Jinkinson v. Oceana Gold (NZ) Ltd* [2010] NZEmpC 102

provide feedback in the letter of 31 May and an indication the decision had effectively been made.

[40] Furthermore I note the debate about when the letter advising Mr Lines of his redundancy was delivered and conclude, given the content of Mr Lines drivers logbook that shows he did not work that day, that it was at the meetings end as he claims.

[41] There is then the fact the 103 run also delivered refrigerated goods and the vehicle used did not require a class 4 license. In other words Mr Lines was capable of performing those duties yet no enquiry was made of its operator as to his intentions. This means a possible alternate to Mr Lines dismissal was not investigated.

[42] For the above reasons I conclude the process used by Southlink failed to adhere to the requirements of section 103A. It was not a comprehensive consultation and the dismissal is therefore unjustified.

[43] The above conclusion raises the question of whether or not the deficiencies can be excused by reason of the resources available to Southlink (s103A(3)(a)). The answer is no given Southlink received professional advice about how to address this situation.

[44] The conclusion Mr Lines dismissal is unjustified means remedies must be considered. Mr Lines seeks lost wages of $4,937.40 plus $32.60 per week being the difference between what he earned at Southlink and his wage in the replacement job he subsequently obtained. He also seeks $12,000 as compensation for hurt and humiliation.

[45] Often a successful applicant dismissed for redundancy will be unable to recover lost wages. This is due to the redundancy being substantively, if not procedurally, justifiable meaning there would have been no loss of wages. My conclusion the decision to disestablish the 102 run was justified means that is the situation here.

[46] Given the evidence I conclude that notwithstanding the procedural failures it was highly unlikely Mr Lines would have remained. It was his run that had been amalgamated with 101 and it made sense for Ms Lloyd to drive the combined run. I

also note that while the 103 driver was not approached about his intentions there is nothing to suggest there was, at this time, any indication he would later resign.

[47] Mr Lines supports his claim for compensation with considerable evidence though the bulk of his angst was generated by the fact he considered the redundancy a sham. My conclusion the decision to cease operating run102 was justified along with the conclusions that the factors upon which Mr Lines based his belief the decision was an attempt to cover an ulterior motive were ill-founded means a lot of this evidence must be considered irrelevant. Having considered the evidence I consider an award of $5,000 appropriate.

[48] The conclusion remedies accrue means I must, in accordance with s.124 of the Act, address whether or not the applicant contributed to the situation in which he found himself. The answer is no as Southlink's defence, redundancy, automatically implies no fault.

Conclusion and orders

[49] For the above reasons I conclude Mr Lines has a personal grievance as he was unjustifiably dismissed.

[50] As a result the respondent, Southlink Logistics Limited, is to pay the applicant, Carl Lines, $5,000.00 (five thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[51] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority