

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2022] NZERA 204  
3133415

BETWEEN

FRANK MURRAY  
Applicant

AND

WATERSHED LIMITED  
Respondent

Member of Authority: Pam Nuttall

Representatives: Simon Greening, counsel for the Applicant  
Scott Worthy, counsel for the Respondent  
Anthony Kamphorst, counsel for the Respondent

Investigation Meeting: 27-28 January 2022 in Auckland

Submissions received: 22 March 2022 from Applicant  
4 February 2022 from Respondent

Determination: 19 May 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The applicant, Mr Frank Murray, claimed he was unjustifiably dismissed on the grounds of redundancy by his employer Watershed Limited (Watershed), the respondent.

[2] Specifically, Mr Murray claimed that the dismissal was not predominantly for genuine business reasons but was motivated by dissatisfaction with other issues that had arisen in the employment relationship. He also claimed he was unjustifiably disadvantaged during the redundancy process, and that the redundancy was unjustified, because of lack of adequate information and consultation and because alternatives to

dismissal, including possible redeployment, were not adequately considered. Mr Murray claimed his employer did not act in good faith.

[3] Watershed denied that Mr Murray was unjustifiably dismissed or disadvantaged. It said the redundancy was genuine and substantively justified, that fair consultation opportunities were provided and that it reasonably determined that Mr Murray was not eligible to carry out any of the new roles arising from the restructuring process.

### **The Authority's investigation**

[4] For the Authority's investigation, written witness statements were lodged from the applicant, Mr Murray, and from Mr Kris Morris-Vette, the Managing Director and Mr Mark Twomey, the General Manager of Watershed. The respondent and its counsel attended an investigation meeting in person, and the applicant and his counsel attended by AVL (Zoom). All witnesses answered questions under affirmation from me and the parties' representatives. The representatives also subsequently provided written closing submissions. The Member requested additional documentary material by way of minutes or internal communications evidencing discussion or development of restructuring proposals prior to the letter given to Mr Murray on 31 August 2020. Two additional documents were provided with the respondent's closing submissions.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law and expressed conclusions on issues necessary to dispose of the matter. Extensive evidence was provided, both in writing and in answers to questions during the investigation meeting. The parties also provided documents about the restructuring process and communication during and about it. All this evidence has been thoroughly reviewed. However, as provided for in the Act, this determination does not set out an account of all that evidence or the closing submissions made by the parties' representatives at the investigation meeting about the facts and relevant legal principles. Rather, conclusions reached are explained by reference to the key facts and in light of the parties' submissions. Those conclusions are reached on the civil standard of proof, that is the balance of probabilities. It is an assessment, from the evidence, of what was more likely than not to have happened.

## **The issues**

[6] The issues requiring investigation and determination were:

- (a) Was the decision of Watershed Limited to dismiss Frank Murray on the grounds of redundancy, and how that decision was reached, what a fair and reasonable employer could have done in all the circumstances at the time (including whether Watershed provided Mr Murray with sufficient information about proposals for changes to roles and adequately consulted with him; whether its decision about Mr Murray's employment was made predominantly for genuine business reasons and not for any ulterior purpose related to any dissatisfaction with Mr Murray; and whether Watershed fairly considered alternatives to dismissal, including the prospect of redeploying Mr Murray to other roles); and
- (b) If Watershed's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:
  - Lost wages (subject to evidence of reasonable endeavours to mitigate Mr Murray's loss); and
  - Compensation under s123(1)(c)(i) of the Act
- (c) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Murray that contributed to the situation giving rise to his grievance?
- (d) Did the actions of Watershed in carrying out its redundancy process and dismissal of Mr Murray amount to a breach of its good faith obligations and, if so, should a penalty be imposed?
- (e) Should either party contribute to the costs of representation of the other party.

## **Background:**

[7] Mr Murray was employed as a property manager by Watershed on 17 May 2019 and a little later also assumed the Site Support role when this was relinquished by the Cleaning Operations manager. He continued with these dual responsibilities until the appointment of a replacement Property Manager in about February 2020. From this

point until his dismissal on 25 November 2020 Mr Murray was employed as Site Support Operations Manager.

[8] During his employment, Watershed's operations were affected by lockdown because of the Covid 19 pandemic from 21 March 2020 until 8 June 2020 and again from 12 August 2020 until late August 2020

[9] Mr Murray described several incidents which occurred between June and August 2020, which he perceived as affecting the employment relationship and these are further discussed below at [38].

[10] On 31 August 2020 when he returned to the office after working from home under the Auckland Level 3 lockdown, Mr Murray was handed a letter which proposed the restructure of the respondent's business. This appeared to him to be in response to the other issues that had arisen in the working relationship.

[11] Mr Murray sought legal representation. A consultation meeting and exchange of letters as to Mr Murray's feedback on the redundancy proposal followed. Mr Murray was very stressed and took sick leave on medical advice from 8 September 2020.

[12] A letter dated 6 October 2020 confirmed that the restructure proposal would proceed, that three existing roles, including Mr Murray's, would be disestablished and that three new roles would be created.

[13] Mr Murray was not redeployed into one of the new roles, despite a request from his legal counsel that this should happen. Instead he was invited to apply for one of these new positions which had been advertised.

[14] Before applications for these new roles closed, Mr Murray, through his legal representative, raised a personal grievance claiming unjustified dismissal. He did not apply for one of the new positions.

[15] A letter dated 28 October 2020 provided four weeks' notice that employment would terminate on 25 November 2020.

## **The test of justification**

[16] A standard definition of redundancy<sup>1</sup> refers to a situation where the employment of an employee is terminated by the employer in circumstances attributable, wholly or mainly, to the fact that the position filled by the employee is, or will become, superfluous to the needs of the employer.

[17] In considering an employer's decision on redundancy, the Authority does not substitute its own judgement for the employer's assessment of whether a position was surplus to its needs. Rather, when called on to consider if a dismissal for redundancy was justified, the Authority must determine, on an objective basis, whether the employer's actions, and how the employer acted, met the statutory standard of being what a fair and reasonable employer could have done in all the circumstances at the time.<sup>2</sup>

[18] Where questions are raised about the commercial rationale for the employer's decision, or ulterior motives are alleged for the selection of a position and an employee for redundancy, the Authority's evaluation may consider whether the employer's decisions were made for genuine business reasons and not as a pretext for dismissing a disliked employee.<sup>3</sup>

[19] The Authority must also consider whether the employer's process for making and carrying out that decision was fairly conducted. Fairness, in this context, includes meeting the statutory good faith obligations placed on an employer proposing to make a decision likely to have an adverse effect on the continuation of a person's employment. Employees likely to be affected should have access to information relevant to the continuation of their employment and an opportunity to comment on it before a decision is made.

## **Was restructuring considered for genuine business reasons?**

[20] Watershed is a business focused on planning and property management predominantly in the education sector and employs caretakers, cleaners, maintenance and management staff and contracts builders and tradespeople.

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<sup>1</sup> *GN Hale & Sons Ltd v Wellington Caretakers IUOW* (1991) 1 NZLR 151 (CA) at 155, derived from s 185 Labour Relations Act 1987.

<sup>2</sup> Employment Relations Act 2000, s 103A.

<sup>3</sup> *Grace Team Accounting Ltd v Brake* [2014] NZCA 541 at [85].

[21] The evidence given by Kris Morris-Vette, business founder and managing director since 2006, and Mark Twomey, general manager since 2011, was that the first covid 19 lockdown from March to June 2020 prompted a major strategic re-think of Watershed's business and structure. The review was a big picture exercise looking at future positioning of the business and was predominantly carried out by Mr Morris-Vette and Mr Twomey.

[22] The outcome was a proposal for a more vertical structure for both the projects and property aspects of the business to enable reduced operational involvement by the heads of these divisions. The intention was that this would provide for more senior and strategic roles for a head of projects and a head of property in developing new business opportunities.

[23] The projects division of the business managed specific capital works projects for predominantly education sector clients. A restructure was implemented within the projects division by creating a layer of management between the Head of Projects and the project managers with a new senior project manager role. The review had not found that any project manager positions were redundant. The senior project manager position was competed for by two project managers, with the unsuccessful applicant subsequently resigning.

[24] In the property division, the review envisaged that three new sections in property management would be created, each with its senior manager reporting to the head of property. It was proposed that three of the property manager positions should consequently be disestablished. As with the project division, proposed changes were intended to interpose an additional management layer between the head of property and existing reporting roles.

[25] In the context of the covid pandemic and the first extensive lockdown during 2020 there was genuine business reason for reviewing business operations and considering restructuring to meet future and existing challenges. It was not a situation where the business needed to look at reducing staff and cutting costs. Watershed could reasonably have decided to consider how its management roles were structured given the impact of the pandemic on property management in the education sector.

## **Was a fair process followed?**

[26] On 31 August 2020 a letter setting out the proposed restructure of the property team was provided to Mr Murray and other affected employees in the property team. The letter explained the rationale for reviewing the structure of roles reporting to the newly created Head of Property position, the intention to create new senior project manager positions to oversee three areas in property management and the proposal to disestablish two existing property manager roles and the site support operations manager role (held by Mr Murray). The letter also invited Mr Murray and other members of the property team to a meeting to “discuss this proposal in more detail and take on board any feedback you may have”. The meeting was scheduled for 2 September 2020.

[27] Mr Murray obtained legal representation. On 1 September 2020 his counsel requested further detail as to the proposed restructure. A separate meeting for Mr Murray and his representative with the Watershed management was also sought.

[28] Watershed’s response elaborated on the rationale in general terms and emphasised its intent to have a full discussion of the proposal. Arrangements were made for Mr Murray and his legal counsel to meet with Watershed management separately from the rest of the property team on 7 September 2020.

[29] From 8 September 2020 Mr Murray was on sick leave from his employment because of stress. He provided detailed written comment on 22 September 2020, based on his understanding of the restructure proposal from the 7 September 2020 meeting. His view was essentially that the objectives of the restructure were already met by the existing structure.

[30] Watershed provided detailed written feedback on Mr Murray’s comments on 25 September 2020. This feedback indicated that Mr Murray had misunderstood the proposal in thinking the intention was to merge his role with that of the Operations Manager, Cleaning, to create a senior property management position. The feedback explained that the proposal was that the cleaning manager role would remain and report to the new senior position, which would oversee all operational matters. The intention was that this would both deal with current situations of absence, where the head of property was required to step in to directly oversee operations, and also ensure that the head of property could focus on growing market share and retaining existing clients.

This feedback was accompanied by a job description for the proposed new senior manager role.

[31] Watershed provided a suggested time and date for a further meeting with Mr Murray to work through this written feedback and any further thoughts or feedback from Mr Murray.

[32] In a letter from his representative on 2 October 2020, Mr Murray maintained his position that the existing structure met the objectives of the restructure and that existing reporting lines were to the current operations managers, not the head of property. He did not have further feedback on the proposal and consequently did not take up the offer of a further meeting.

[33] Watershed's communication of 6 October 2020 again engaged with why its management did not agree with Mr Murray's view, before confirming that the restructure would take place and encouraging Mr Murray to apply for the new roles when they were advertised.

*Was Mr Murray provided with sufficient information about proposals for changes to roles and was he adequately consulted with?*

[34] While the initial letter of 31 August 2020 is clear as to new roles proposed and positions to be disestablished, the rationale for change is posed in the form of questions and problems raised by reviewing the current situation. Evidence from Watershed's management was that this collaborative approach was how the project team restructure was undertaken and had been the process for annual strategic review days within the business over at least the last 16 years.

[35] This would seem to be a somewhat optimistic approach to take to consultation with employees for whom a decision will, or is likely to, have an adverse effect on the continuation of their employment. Mr Murray's request for more specific detail was a rational response in the circumstances and his misunderstanding of what was intended as to the cleaning manager and site support positions suggests some lack of specificity in the information provided.

[36] However, these initial interactions did not end the consultation process. It appears that Watershed's detailed feedback on Mr Murray's comments of 22 September 2020 and the provision of a suggested job description for the new role of Senior

Property Manager-Site Based Services was seen as a basis for further discussion at a subsequent meeting. A specific time and date were proposed for this next meeting to take place.

[37] Mr Murray continued to have the opportunity to comment and ask further questions to elicit further details and information.

[38] While stressful for Mr Murray, this apparently open-ended iterative process cannot be the basis for a finding of inadequate consultation or a breach of the statutory good faith consultation obligations. The consultation process came to an end because Mr Murray chose not to participate further.

### **Was an ulterior motive established?**

[39] Mr Murray perceived that his employment relationship with Watershed deteriorated between June and August 2020.

[40] In June, Mr Murray asked for mentoring sessions with Mr Morris-Vette by way of professional development with someone with construction industry experience and knowledge. He viewed his direct manager, Ms Catherine Brown, as being unable to provide support on operations management because she referred to Mr Morris-Vette on issues about building maintenance, tradespeople and related matters. Mr Murray then requested a change in his reporting line to Mr Morris-Vette. Mr Murray did not discuss this suggested change with Ms Brown before requesting it and seemed surprised that she should have reacted. He described his request as being “met with hostility from Catherine”.

[41] Mr Murray also requested a change in hours in order to collect his son from day care. He describes this request as being refused “outright”, although it was Mr Twomey’s evidence that the request was made informally in a “pull aside” meeting. A more considered proposal on the matter was suggested and it appeared that Mr Murray did not follow this up.

[42] During the Level 3 lockdown in August 2020, Watershed staff were offered the option of working from home at a reduced salary if they did not return to the office. Mr Murray took this option because his wife was an essential worker and he needed to be at home with the children. Some other staff made the same choice.

[43] While Mr Murray was working from home, he was asked to return the company car to the office so that other staff could use it. Mr Murray's evidence was that he believed "the request was purely to bully me as I decided to work from home." He saw refusing to return the car as pushing back against unfair bullying behaviour and did not accept the explanation of covid related concerns provided by Mr Twomey in evidence.

[44] It appeared from his written witness statement and responses to my questions that Mr Murray felt himself beleaguered before he was presented with a restructuring proposal. He had been surprised that there was any concern about his request to change his reporting line because he saw "my department" (the site support team) as separate from the rest of property management. He also clearly felt entitled to exclusive use of "my car" and Watershed's management did not in the end insist it was returned to the office car park.

[45] Mr Murray also perceived the tone of emails about returning the car as bullying and related this to bullying behaviour he claimed to have witnessed directed at other staff.

[46] Given this perspective, it is unsurprising that Mr Murray should also have perceived the restructuring proposal, presented to him on the day he returned to the office after a period of working from home, as directed at him personally. He described the letter as starting a humiliation process and linked it to having "stood my ground on the car issue. I felt they are being retaliatory and applying bullying tactics."

[47] However, the evidence from Watershed's managing director and general manager was that the review process had begun around June, triggered in part by client concerns with costs because of loss of school's discretionary income during the first covid lockdown. The review was seen as responding to this situation by promoting a strategy of growth rather than retrenchment.

[48] The review process seemed to have largely consisted of discussion between Mr Morris-Vette and Mr Twomey and to have generated very little documentation. In response to the Authority's enquiries, however, minutes of two senior executive team meetings were produced, dated 18 June 2020 and 26 August 2020. The June meeting already indicates a potential shape for the restructure:

The area that will have the most sub-parts is Property. We may need to split this out with Leaders reporting to the Head of Property. E.g. Cleaning, Security, Onsite.

[49] The minutes corroborate the witness evidence that the restructure was under active consideration before the beginning of the deterioration Mr Murray reports in his employment relationship with Watershed.

[50] There were also two other property managers' positions disestablished as part of the restructure of the property section of the business. Neither applied for the newly established positions, although one had indicated an intention to do so. One of the property managers resigned and the other "went through an employment process". Mr Murray was not the sole employee to lose his employment as a result of the restructure.

[51] The timing of the incidents Mr Murray perceived as indicating a deterioration in the employment relationship could readily have led him to conclude that they were directly related to the redundancy process. However the review and proposals were clearly on foot prior to these events and the process evolved on a larger scale than the impact on one specific employee. The Authority concludes from the evidence that the restructure was not a pretext to dismiss a disliked employee but was embarked upon for genuine business reasons.

#### **Was redeployment fairly considered as a feasible option?**

[52] On 6 October 2020 Watershed confirmed that the restructure would go ahead and invited Mr Murray to apply for one of the newly created senior property manager roles. Through his legal representative, Mr Murray noted on 8 October 2020 that redeployment had not been addressed and asked to continue his employment in the new position of senior property manager. "Mr Murray has previously done the role of Property Manager and subsequently Operations Manager-Site Support and at some point both while in transition. The new role encompasses the tasks that have previously been undertaken by the Operations Managers and clearly presents an opportunity for redeployment."

[53] Watershed's obligations as a fair and reasonable employer clearly extended to considering redeployment opportunities as an alternative to making Mr Murray redundant.<sup>4</sup> The evidence of Watershed's managers was that they seriously considered whether Mr Murray should be appointed to one of the newly-created roles both before and after the letter requesting redeployment on 8 October 2020.

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<sup>4</sup> *Wang v Hamilton Multicultural Services Trust* [2010] NZEmpC 142 at [40], [42]-[43].

[54] Both Mr Morris-Vette and Mr Twomey viewed the new Senior Property Manager role overseeing site based services as substantially different from Mr Murray's current role. The new role was seen to carry greater responsibility and seniority and increased remuneration.

[55] On paper, the job descriptions for Mr Murray's roles as project manager and project manager and site support look very similar to the new proposed role of senior property manager-site based services. The in-house generated job descriptions appear to have large chunks of text cut and paste from one role to another.

[56] Watershed's testimony to the Authority, however, was that the proposed senior roles carried significantly more responsibility. The contrast provided was between a role with 1.5 FTE reports, managing 120 hours of work per fortnight and \$203,000 in revenue per annum with a position of 80 reports, 2,400 hours of work per fortnight and \$1,500,000 in revenue per annum. Although there was valid objection to this characterisation in that the reporting line of the 80 cleaners would actually be to the manager who reported to the new role and that budgetary responsibility rested with the managing director and general manager, the comparison does provide some reasonable indication of the comparative scale of the positions' scope.

[57] The contrasting levels of responsibility are congruent with an initial reaction from the beginning of the structural review from the Minutes of the 18 June 2020 executive team meeting that "maybe when Tigi (Cleaning Operations Manager) moves on we get more of an Executive level person running cleaning who could then be part of the Exec meetings. Needs more thinking."

[58] The major differentiation between the roles as far as Watershed's management was concerned, however, was in the oversight of managing cleaning sites and staff. While immediate operational responsibility would remain with the existing Cleaning Operations Manager, the oversight role would require skills and knowledge in this area which were seen as outside of Mr Murray's experience.

[59] This is not a case where the undisputed evidence is that, with some training and upskilling, the employee would have adequate skills and knowledge to fill the available new position. Although Mr Murray believed he had the necessary experience and track record, this was not the view of the Watershed management. When pushed as to why Mr Murray did not have the capabilities to fill the new position, Mr Morris-Vette said

that Mr Murray demonstrated many of the skills and capabilities at a lower level. That particularly in leading and mentoring the cleaning operation he needed greater experience and a higher skill set than the operations manager below him. The three basic reasons for not redeploying Mr Murray came down to seniority, responsibility and cleaning oversight. Mr Twomey's view was that Mr Murray functioned better in a situation which was known and planned but that the more senior position required a degree of flexibility and being able to respond to the unexpected. Both of the testifying executives had considerable experience in overseeing cleaning management and could not see that Mr Murray could carry out the role, even with further training.

[60] Given that the Watershed management did not consider that redeployment into the new, more senior roles should be offered to Mr Murray why was he encouraged to apply for these positions? The testimony given to the Authority was that Mr Murray was on sick leave and all communication went through his lawyer. There was no opportunity other than the job interview to have a conversation with Mr Murray about why he thought he was suitable for the role.

[61] I find that Watershed did fairly consider redeployment as an alternative to redundancy and that not offering redeployment was an action that a fair and reasonable employer could take in all the circumstances.

### **Outcome**

[62] For the reasons given, I do not find that Watershed Limited acted unjustifiably in the process followed or decisions made that led to the termination of Frank Murray's employment.

### **Costs**

[63] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[64] If they are not able to do so and an Authority determination on costs is needed Watershed Limited may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Frank Murray would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[65] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[66] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>5</sup>

Pam Nuttall  
Member of the Employment Relations Authority

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<sup>5</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].