

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Brian Saipe (Applicant)
AND Waitakere Enterprise Trust Board (Respondent)
REPRESENTATIVES Brian Saipe in person
Peter Craighead for Respondent
MEMBER OF AUTHORITY Vicki Campbell
INVESTIGATION MEETING 15 June 2005
16 June 2005
17 June 2005
FURTHER INFORMATION RECEIVED 23 June 2005
SUBMISSIONS RECEIVED 1 & 4 July 2005 from Applicant
30 June from Respondent
DATE OF DETERMINATION 27 September 2005

DETERMINATION OF THE AUTHORITY

The Authority determines that this employment relationship problem shall be resolved by the following orders:-

- A. Waitakere Enterprise Trust Board is ordered to pay to Mr Saipe 3 months lost wages of \$13,750.00 gross pursuant to s.123(b) of the Employment Relations Act 2000.**
 - B. Waitakere Enterprise Trust Board is ordered to pay to Mr Saipe \$8,000 without deduction pursuant to s.123(c)(i) of the Employment Relations Act 2000.**
 - C. The parties are encouraged to resolve costs between them, but failing agreement, they are to lodge and serve a memorandum within 28 days of the date of this Determination.**
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Employment Relationship Problem

[1] The Waitakere Enterprise Trust Board (“Enterprise Waitakere”) is an incorporated trust, incorporated under the Charitable Trusts Act 1957.

[2] Mr Brian Saipe was employed by Enterprise Waitakere as a business facilitator reporting directly to the Chief Executive, from 1996 until 2002 when his position was made redundant.

[3] Mr Saipe claims his dismissal for redundancy was unjustified. In addition Mr Saipe claims he was deprived of his company vehicle and seeks compensation for that loss as a disadvantage grievance.

[4] Enterprise Waitakere says Mr Saipe was dismissed due to redundancy when it was unable to find alternative work for Mr Saipe to undertake or which Mr Saipe was prepared to undertake.

[5] The issues for determination:

- in relation to the loss of his vehicle - did Mr Saipe suffer a loss compensable pursuant to the Employment Relations Act?
- was the redundancy genuine?
- was the redundancy handled in a fair manner?

[6] In coming to my conclusions in this matter I have taken into consideration the plethora of documents and evidence provided by the parties. I have investigated the causes of action set out in Mr Saipe’s statement of problem. In his final submissions Mr Saipe appears to be raising further causes of action and it is not appropriate for me to consider those new complaints when they are not properly before the Authority.

In relation to the loss of his vehicle - did Mr Saipe suffer a loss compensable pursuant to the Employment Relations Act?

[7] Mr Saipe says that in August 1999 he was asked to return his work vehicle which he had previously been allowed to use for travel to and from work. He says that in exchange he agreed to work a four day week and that his normal duties would be supplemented by contract work provided by Enterprise Waitakere. Mr Saipe claims he suffered a disadvantage as a result of this agreement, because Enterprise Waitakere did not provide him with the requisite contract work. Mr Saipe claims \$4,168.00 under this heading for loss he suffered for the period August 1999 - 16 January 2001 in relation to the loss of the vehicle for travel to and from work.

[8] Section 114(6) of the Employment Relations Act 2000 provides:

No action may be commenced in the Authority or the Court in relation to a personal grievance more than 3 years after the date on which the personal grievance was raised in accordance with this section.

[9] I am satisfied that Mr Saipe raised his grievance for disadvantage with his employer in accordance with the requirements of the Act, in February 2001. However, at the time Mr Saipe filed proceedings in the Employment Relations Authority on 29 June 2004 more than 3 years had elapsed since the grievance was raised.

Pursuant to section 114(6) I am unable to assist Mr Saipe further with this aspect of his claim.

Was the redundancy genuine?

The need for restructuring

[10] Enterprise Waitakere was established by the Waitakere City Council (“WCC”) in 1994 to facilitate business investment, employment and economic development in Waikakere City. Operating costs are met by funding received from government contracts, private sector sponsorship and WCC.

[11] Each year WCC determines through its Annual Plan process, the amount of funding and range of activities to be purchased from Enterprise Waitakere. Staff levels and the types of activities staff are engaged on is related to the activities purchased by WCC. Mr Clyde Rogers, Chief Executive Officer told the Authority that as a result of the differences in funding levels for different projects from year to year staff are expected to be, and on the whole are, flexible as to the work they are required to undertake.

[12] For 2002/2003 the focus required by WCC was in the sectors aligned to creativity, ‘green’ technologies and organics. Central funding agencies required local funding agencies like WCC to focus resource and funds on regional initiatives supporting those key sectors. There were also opportunities for funding through a new Tertiary Education Strategy which provided opportunities to link tertiary education more directly with social and economic development.

[13] While the funding allocations from WCC remained the same as for the 2001/2002 year, the allocation of funding for various projects changed. For example the funding allocated for the delivery of Tourism initiatives was significantly reduced. As a result of the funding changes, Mr Rogers embarked on a review of the resourcing requirements for Enterprise Waitakere.

Genuine commercial need?

[14] In *GN Hale & Sons Ltd v Wellington, etc Caretakers, etc IUOW* [1990] 1 NZLR 151, the Court of Appeal confirmed an employer's prerogative to reorganise its business as it sees fit. The approach in Hale was reinforced by the Court of Appeal in *Aoraki Corporation Ltd v McGavin* [1998] ERNZ 601.

[15] In *Aoraki*, Richardson P, stated:

Where it is decided as a matter of commercial judgment that there are too many employees in a particular area or overall, it is for the employer as a matter of business judgment to decide on the strategy to be adopted in the restructuring exercise and what position or positions should be dispensed with in the implementation of that strategy.

[16] In March or April 2002, at an informal, meeting of the management team, Mr Rogers outlined proposals for changing the structure of the organisation to meet the changing requirements in the allocation of funding.

[17] At that meeting Mr Rogers tabled a draft organisation chart and asked all those present to take a copy and provide feedback. There was no specific mention at that meeting about possible redundancies. No-one could advise the Authority whether Mr Saipe was present at that meeting or not. No minutes of the meeting were kept. Mr Saipe could not recall being at the meeting, however, he produced a copy of the draft organisation chart to the Authority which had his handwriting on it. I have concluded, that irrespective of whether Mr Saipe was present at the meeting or not, he was provided with the relevant information at the time.

[18] On Monday 26 August 2002 Mr Rogers met with his management team and discussed the redrafted organisation chart.

[19] After considering the comments made at that meeting and on 27 August 2002 Mr Rogers forwarded a further updated organisation chart via email to the members of the management team including Mr Saipe. In this email Mr Rogers refers to discussions held the previous day. Mr Rogers advised his management team that job advertisements would appear in the New Zealand Herald the following day.

[20] The new organisation chart removed the business facilitator roles and identified four new management positions:

- Business Manager Industry & Skills Development
- Business Manager Contracts
- Business Manager Incubator
- Business Manager Entrepreneurship & Innovation

[21] One of Mr Saipe's complaints about the redundancy is that aspects of his job did not disappear – they were spread across two of the new positions. He also says that the position of business manager industry and skills was essentially the position he had been filling.

[22] I have compared the job description attached to Mr Saipe's employment agreement and that of the new business manager positions. I have concluded that the business manager role required more autonomy and a more strategic approach overall than the business facilitator role required. I am supported in that conclusion by the stated purpose of Mr Saipe's role prior to the restructuring which required the incumbent to assist and support the business development programme and investment and assist the Chief Executive with a range of projects in targeted sectors as required. [my emphasis]

[23] The purpose of the new role is to be responsible for a range of initiatives and programs focussing on industry and sector activities, education initiatives and partnerships. [my emphasis]

[24] Another of Mr Saipe's complaints relates to the selection process for the appointment to the new position. Mr Saipe says the selection process was predetermined and unfair. The selection process included interviews with all candidates using a ratings scale of 1-10. Each interviewee completed their own ratings for each candidate. Enterprise Waitakere provided the Authority with copies of the ratings of both Mr Saipe and Mr Wadsworth (the successful candidate). The ratings are similar, however, Mr Wadsworth clearly rated more highly than Mr Saipe overall. I am satisfied that the selection process was objective and was not unfair.

[25] Enterprise Waitakere is entitled to manage and organise its business and the Authority can not interfere with that prerogative. The significant reduction in funding for Tourism combined with the change of focus to creativity, 'green' technologies and organics required Mr Rogers to reassess the structure of his organisation to ensure the delivery of services in accordance with the requirements of WCC's annual plan. Enterprise Waitakere developed a strategy and embarked on

a process to implement the strategy to deal with the realigned business focus. Mr Saipe was given the opportunity to apply for all the newly established positions and did apply for one of them.

Duty to consider alternatives

[26] Employers should consider options such as redeployment before making employees redundant (*NZ Nurses Union v Air NZ Ltd* [1992] 3 ERNZ 548).

[27] Mr Saipe applied for the new position of Business Manager – Industry and Skills Development, he was unsuccessful. On 24 September 2002 Mr Rogers advised all staff that Mr John Wadsworth was the successful appointee.

[28] Mr Rogers wrote to Mr Saipe on 4 October and confirmed that the restructuring of Enterprise Waitakere was to have a significant impact on his employment. Mr Rogers advised Mr Saipe that he intended to undertake a review, to be completed by the end of October, of all options for alternative employment within Enterprise Waitakere for Mr Saipe. Following the review Mr Rogers undertook to meet with Mr Saipe to discuss the options, but that if no mutually acceptable alternatives could be identified then Mr Saipe would be provided with one month's notice of redundancy.

[29] On 24 October 2002 Mr Rogers met with Mr Saipe and provided him with a copy of a draft job description for a new position of Industry Specialist – Creative Industries. The position was discussed with Mr Saipe. Mr Rogers says Mr Saipe was offered the position. I do not accept that. I am satisfied on the balance of probabilities that Mr Saipe was offered an opportunity to apply for the position, but the position was never guaranteed. The evidence shows that the position was to be advertised and Mr Saipe would have to apply and be considered along with any other applicants.

[30] On 25 October 2002 Mr Rogers advised Mr Saipe that his position as Business Facilitator would be disestablished. Mr Saipe was given one month's notice of redundancy with a final day of work being Friday, 29 November 2002. At the same time, Mr Rogers suggested to Mr Saipe that an alternative option was to consider contracting back to Enterprise Waitakere for project work within the Cluster and Skill initiatives.

[31] Mr Saipe responded to Mr Rogers disputing that he was redundant.

[32] On 30 October 2002 Mr Rogers confirmed his earlier advice to Mr Saipe that his job would be disestablished and that he was welcome to apply for the newly created creative industries role. Mr Rogers told Mr Saipe he was welcome to discuss the role if he wished to work for Mr Wadsworth and bring to the role the competencies and qualities sought. Again, no specific offer for Mr Saipe to undertake the role was made.

[33] I am satisfied that Mr Saipe was given notice that his employment would come to an end on 29 November 2002 as a result of redundancy. I am not satisfied that Enterprise Waitakere were in a position to determine that Mr Saipe was surplus to its requirements. Mr Rogers had identified two new roles within the organisation, both of which Mr Saipe had the necessary skills and attributes to fill. There was, therefore, redeployment opportunities which could have been discussed and offered to Mr Saipe.

[34] In his correspondence to Mr Rogers, Mr Saipe requested that the notice of termination be withdrawn to enable discussions over the two new roles to be properly undertaken. Mr Rogers refused to withdraw the notice of termination.

[35] At the time of giving Mr Saipe notice of redundancy Mr Rogers had identified at least one role which Mr Saipe was suitable for and during his notice period another role was also identified. Mr Saipe was not, therefore, surplus to the requirements of Enterprise Waikare and his dismissal was unjustified. As set out earlier, I do not accept Mr Rogers evidence that these roles were offered to Mr Saipe or that Mr Saipe turned them down.

I find that Mr Saipe's redundancy was not genuine as while the position of Business Facilitator had disappeared, there was work available for Mr Saipe for which he was qualified and had the necessary attributes.

Was the redundancy handled in a fair manner?

[36] Section 4 of the Employment Relations Act 2000 requires Enterprise Waitakere to deal with Mr Saipe, in good faith. This duty is to be exercised not only generally but in specific situations, including redundancy.

[37] 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 effect 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. The requirement to consult is therefore, a statutory obligation.

[38] 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 series of 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 prior 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 view.
- (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 and even start anew.

[39] I am satisfied that while Enterprise Waitakere did consult with Mr Saipe in relation to the loss of his position of business facilitator and before embarking on implementation of the new organisation structure, it failed to consult with Mr Saipe over his potential redundancy situation. Proper consultation with Mr Saipe before giving him notice of termination would have allowed the parties to embark on genuine discussions about the new roles established within Enterprise Waitakere.

[40] Mr Saipe was never provided with a real opportunity to consider the new roles.

I find Mr Saipe's dismissal to be unjustified.

Remedies

Lost wages

[41] The principles for awarding reimbursement of money lost as a result of a grievance under s123(b) are well established and may be summarised as follows:

- if a personal grievance is established which results in an employee losing remuneration, the Authority or Court must order the employer to pay at least 3 months lost remuneration: s128(2).
- there is a discretion to award a greater sum than mandated by s128(3).
- reimbursement is dependant upon proof of loss of income as a consequence of the personal grievance: s128(1).
- the employee has a duty to mitigate losses arising from the dismissal.

[42] Because of the view I have taken as to the lack of genuineness of the redundancy, I am not satisfied that Mr Saipe's job loss was inevitable, especially in view of the two new roles being established by Enterprise Waitakere for which Mr Saipe was suitably qualified. Mr Saipe is therefore entitled to compensation for the unjustifiable loss of his job.

[43] Mr Saipe gave evidence of the efforts he took to find alternative employment and to mitigate his loss. Immediately after his dismissal Mr Saipe attempted to establish himself as a consultant in his own business which did not prove successful. Then in December 2002, Mr Saipe's mother became terminally ill and he cared for her. It was only after Mr Saipe's mother passed on that he then started to consider employment opportunities.

[44] I have concluded that I will not exercise my discretion and award more than the statutory three months reimbursement of lost wages for Mr Saipe. I appreciate that Mr Saipe made efforts to find alternative employment, however, this did not occur until after Mr Saipe had already attempted to establish his own business. The causal link between the loss of job and the loss of wages was therefore interrupted by Mr Saipe's decision not to seek alternative employment and to set up his own business.

Waitakere Enterprise Trust Board is ordered to pay to Mr Saipe 3 months lost wages of \$13,750.00 gross pursuant to s.123(b) of the Employment Relations Act 2000. This amount has been calculated by dividing \$55,000 by 12 then multiplying the sum by 3.

Compensation

[45] Mr Saipe seeks a payment of \$40,000 under this heading pursuant to s123(c)(i). Having heard the evidence of Mr Saipe and observed him at the investigation meeting over a period of three days, I have no doubt that he has been affected by the dismissal. In setting an award I have been guided by the very recent judgment of the Court of Appeal, *NCR (NZ) Corporation Limited v Blowes*, unreported, 23 September 2005, CA 186/05.

[46] Mr Saipe was dismissed for redundancy through no fault of his own and therefore there is no issue of any contributory conduct by Mr Saipe.

Waitakere Enterprise Trust Board is ordered to pay to Mr Saipe \$8,000 without deduction pursuant to s.123(c)(i) of the Employment Relations Act 2000.

Costs

[47] Mr Saipe was not represented during the Authority's investigation of his employment relationship therefore no order for legal costs will be made. However, Mr Saipe appears to have incurred significant disbursements in relation to photocopying. Mr Saipe may be entitled to recover these disbursement costs and his filing fee. Before any order for such costs can be made Mr Saipe will need to provide evidence of his costs to the Authority. The parties are encouraged to discuss and resolve the matter of costs between them. In the event that they are unable to do so they may lodge and serve memorandum in the Authority for consideration.

The parties are encouraged to resolve costs between them, but failing agreement, they are to lodge and serve a memorandum within 28 days of the date of this Determination.

Vicki Campbell
Member of Employment Relations Authority