

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 304
3082333

BETWEEN LEO WATERS
 Applicant

AND S.T.L LINEHAUL LIMITED
 Respondent

Member of Authority: Nicola Craig

Representatives: Lawrence Anderson, advocate for the applicant
 Alwyn O'Connor, counsel for the respondent

Investigation Meeting: 15 March and 19 April 2021

Submissions and Further At the investigation meeting from both parties
Information Received:

Date of Determination: 19 July 2021

DETERMINATION OF THE AUTHORITY

- A Leo Waters was unjustifiably dismissed by S.T.L Linehaul Limited.**
- B S.T.L Linehaul Limited is to pay Mr Waters \$17,000 compensation without deduction as compensation within 21 days of the date of this determination.**
- C Costs are reserved and a timetable set if the parties are not able to reach agreement.**

What is the Employment Relationship Problem?

[1] Leo Waters was appointed by S.T.L Linehaul Limited (STL or the company) as an administration assistant. STL operates a national transportation business. Mr Waters began

work in Auckland in late August 2019 and then less than two months later was told he was redundant.

[2] Mr Waters challenges his dismissal which STL says was a genuine redundancy carried out using a fair process.

[3] This investigation did not progress as smoothly as it might have. Difficulties included obtaining evidence from a decision maker from STL. Months before the investigation meeting the Authority specified that a witness statement be provided from STL's Robert Pearson, he being the person who signed the letter terminating Mr Waters' employment.

[4] After the date timetabled for witness statements, STL lodged two witness statements. Neither related to Mr Pearson, who is in charge of STL's Auckland branch. STL's representative then indicated twice that he was working to obtain a witness statement from Mr Pearson. However, on the last working day before the investigation meeting STL's representative advised that Mr Pearson was not "involved in the process". No witness statement was filed.

[5] The investigation meeting commenced on 15 March 2021. I heard evidence from Mr Waters and from STL's Auckland administration manager Annie Vasau. The attendance of a co-worker for whom a witness statement was filed, was not arranged by STL and so I have set her evidence aside.

[6] On Ms Vasau's evidence it was clear that she was not a decision-maker in Mr Waters' dismissal. STL's representative indicated that Cherie Pearson, executive officer from STL's head office in Christchurch, had been involved although no witness statement had been filed from her. She was indicated to be unavailable and so another date had to be arranged to complete the investigation meeting.

[7] The meeting resumed on 19 April 2021 with Ms Pearson giving evidence by Zoom and submissions then being heard.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received but has stated findings, expressed conclusions and specified orders made as a result.

Issues

[9] The issues for investigation are:

- (a) Was Mr Waters unjustifiably dismissed by STL or alternatively, was he disadvantaged by unjustified action by STL?
- (b) If so, what remedies, if any, should he receive?

[10] At the investigation meeting Mr Waters' representative indicated that Mr Waters was not pursuing claims for penalties for failure to provide an employment agreement and wages and holiday records.

[11] Mr Waters was uncomfortable about things said to him when he worked at STL, feeling that he had been bullied. STL strongly denied any bullying. Mr Waters did not pursue an additional claim regarding bullying. I was unable to establish that anything which did occur was related to the company's decision to terminate Mr Waters' employment except to the extent that performance was a consideration in the selection for redundancy. This is discussed below.

What was Mr Water's employment history with STL?

[12] Mr Waters worked in an admin team of about six staff. He and another administrative assistant did the same job, usually covering different periods of the day. Ms Vasau was Mr Waters' supervisor.

[13] Ms Vasau and the dispatch manager had a meeting with Mr Waters on 8 October 2019 to discuss some issues focused on Mr Waters' paperwork. No warning was given. Ms Vasau recognised that Mr Waters had sought further training on several occasions.

[14] STL filed an unsigned letter following on from the meeting but I was unable to establish that it was provided to Mr Waters. Mr Waters recalls a discussion at the meeting about his work being reassessed in a week but he says that did not happen. STL did not assert that any such reassessment occurred.

What was STL's process prior to telling Mr Waters he was redundant?

[15] Both Ms Pearson and Ms Vasau's witness statements did not well match the evidence that they gave at the investigation meeting. I found their evidence at the meeting more persuasive.

[16] Ms Pearson's witness statement refers to a review of company resources being undertaken, including depot locations and human resources. Head office identified excess resources in the Auckland admin team and the issue being raised with Ms Vasau during a management meeting. When asked whether Ms Vasau usually attended management meetings, Ms Pearson was uncertain what was being referred to. When asked whether there was any documentation of the review she did not think so and recognised that it did not sound good.

[17] Ms Vasau's witness statement referred to Mr Waters being invited to a meeting which "followed on from a meeting with administrative staff". The administrative staff meeting was said to have discussed human resources, the economic trading conditions and generally how they could operate more efficiently. The witness statement states that Ms Vasau could remember that there was "a pre-prepared bunch of information provided". Individual meetings were said to have been scheduled thereafter.

[18] On questioning Ms Vasau accepted that the meeting with administrative staff referred to in her witness statement was one of the regular office team meetings. She recalls having mentioned about the office being overstaffed and that they would need to justify their staff numbers. She acknowledged that there was no reference to redundancy during any such discussion.

[19] When asked about the "pre-prepared bunch of information" provided, Ms Vasau responded "What's that?" She said there might have been some information but was unable to provide any. Ultimately she concluded it would have been "quite verbal". Ms Pearson was not aware of any written information going to staff.

[20] Ms Vasau says that she sent minutes of a meeting to head office and Ms Pearson referred to Ms Vasau emailing head office about the meetings. However, neither were able to provide any such minutes or emails.

[21] Ms Vasau acknowledged during questioning that she had not had an individual meeting with Mr Waters where he was informed that his job might be made redundant.

[22] Ms Pearson's witness statement referred to her not being able to remember whether the decision to disestablish one, or possibly two, positions was discussed with Mr Waters "at a second individual meeting or his first one". However, she was not at any meetings with Mr

Waters, did not know when meetings occurred, had no documentation of any meetings and had only a very broad understanding of what Ms Vasau may have said to staff.

[23] Mr Waters only recalled usual office meetings and did not attend any individual meeting with Ms Vasau to discuss a possible restructuring, disestablishment of his role or redundancy.

How was Mr Waters informed?

[24] On 21 October 2019 Mr Waters messaged STL telling Ms Vasau that he was sick and received an acknowledgement without issue. He was shocked to receive email from Mr Pearson, the Auckland depot manager at 7pm attaching a letter informing him that he was redundant. The email was sent at 3.25pm.

[25] The letter was signed either by hand or with an electronic signature of Mr Pearson. It included:

...during the last few months we have faced a decline in our business, and due to current economic conditions, the only way forward is to look at reducing staff numbers in order to reduce payroll expenses. We have looked at our staff payroll expenses throughout the country in order to make cuts where necessary.

The Auckland depot is one area that stands out as to the number of staff on board overall, particularly in the office administration area and which is not compatible with the revenue being generated currently.

...I have to inform you that we are disestablishing your role and we do not have any other roles available for you at this time.

[26] The letter continues that the redundancy was to be effected immediately. Mr Waters was paid two weeks' wages in lieu of notice along with outstanding entitlements and did not return to the workplace. STL offered to provide a verbal or written reference.

[27] Ms Vasau acknowledges being involved in printing out the letter for Mr Pearson to sign and then sending it through to Mr Waters. She was told by the dispatch manager that STL needed to let someone go and Mr Waters had the least experience.

[28] The question of who made the decision was not entirely resolved. Ms Vasau says Auckland managers (Mr Pearson and the dispatch manager) made the decision along with HR from Christchurch. Ms Pearson's witness statement states that she and the dispatch manager made the decision with contribution from Ms Vasau. In her oral evidence Mr Pearson the

Auckland manager was included in the group. She also said that ultimately she and Mr Pearson from Auckland made the decision.

[29] On 22 October 2019 Ms Vasau emailed some remaining admin team members thanking them for their time recently and “confirming the discussion”. The email goes on to talk about what the management team have been doing. Further the “Auckland depot had been identified as having more staff for quantified administrative work had” (*sic*) and Mr Waters’ position had been disestablished. Despite the first line, the remainder of the email could be taken to suggest that there had been no consultation of these matters with staff earlier.

Was Mr Waters’ dismissal unjustified?

[30] STL was required to conduct itself as a fair and reasonable employer could have done.¹

[31] STL appears to have been operating in a somewhat chaotic manner as far as its employment appointments went. In around May and June 2019 the company was short-staffed after two administrators left. Two new people started in June 2019 with one going off on extended sick leave the following month. Ms Pearson’s witness statement referred to parental leave being taken but on checking during the investigation meeting she found that parental leave had not been sought.

[32] A week before Mr Waters started, another employee started who was doing four or five hours’ work a day of a type not dissimilar to Mr Waters’ work. She was Ms Vasau’s friend.

[33] From Ms Vasau’s evidence, Mr Waters was appointed as the dispatch manager said they needed someone to do a few hours in the evenings. At the time Mr Waters was appointed Ms Vasau was away on two weeks’ annual leave. Ms Pearson said it all happened very quickly.

[34] In contrast to the apparent need for a few hours, Mr Waters was appointed to a full time role as his minimum hours were prescribed as 40 a week.² There was some suggestion that the dispatch manager had a plan for Mr Waters and possibly others to flow between different jobs at times but this was not implemented prior to Mr Waters’ departure.

¹ The Act, s 130A(2).

² Employment agreement, “Hours of Work”, p 1.

[35] Although STL witnesses talked about a downturn in the business I was not provided with any documentary evidence of this.

[36] On the balance I conclude that Mr Waters was made redundant although this was largely due to the fact that there was insufficient work at the time of his hiring to necessitate a full time appointment, at least on the basis of the unwell employee coming back to work. Once Mr Waters and the part timer started and the employee returned from sick leave the total hours were more than were usually required. There was no evidence of consideration being given to a temporary or part time appointment during Mr Waters' hiring round.

[37] In its statement in reply STL asserted that it had undertaken a redundancy consultation process. However, the evidence supporting consultation was unsatisfactory. There was no contemporaneous documentation of any part of a process except the termination letter. While I accept STL's point that the law does not require everything to be put in writing, there must be some reliable evidence to support assertions that a process occurred. The oral evidence did little to persuade that there was any process which involved Mr Waters.

[38] Mention of staffing levels in regular office meetings without the use of "redundancy", "redundant" or equivalents was unsatisfactory and insufficient to focus employees' minds on possible job losses.

[39] Any individual meetings with staff were in the nature of regular catch ups rather than for discussions about the possibility of redundancies.

[40] None of the group of people identified as being involved decision makers met with Mr Waters to discuss the situation, or interacted with him in any other way, either before the decision was made or after.

[41] When asked whether Mr Waters would have been given financial information about STL's position as part of a redundancy process Ms Pearson replied "definitely not".

[42] Under the Act, the duty of good faith requires employees whose employment may not continue to be given access to relevant information and an opportunity to comment on it.³ STL

³ The Act, s 4(1A)(c).

did not provide such information nor give Mr Waters an opportunity to comment on the possible loss of his job.

[43] Mr Waters questions why he was selected for redundancy. Ms Vasau referred to experience which suggested a 'last on first off' approach. However, from Ms Pearson's evidence four of the administrators, including Mr Waters had started within a couple of months. The part time employee started days before Mr Waters.

[44] Ms Pearson says that performance was one part of the decision but ultimately the last person employed was the first one off.

[45] There was no discussion with Mr Waters about the selection criteria nor the inclusion of performance considerations. The dismissal letter does not identify the basis for choosing Mr Waters as the person to be made redundant.

[46] Ms Pearson had some sense of what a redundancy process should include but acknowledged that Ms Vasau had not been involved in such a process in the almost ten years she had been at STL. Ms Pearson was candid that the company may not have got the process 100% right.

[47] I conclude that, other than at most a general warning of being overstaffed, there was no consultation about the possibility of restructuring and job loss. Mr Waters had no opportunity to comment or provide other alternatives.

[48] I cannot even be confident that there were no other jobs which Mr Waters could have moved to. Ms Vasau did not believe there were but there is no evidence of any checking being done either at the time or retrospectively in preparation for the investigation meeting. The possibility of Mr Waters doing some driving for STL had been discussed with him early in his employment but not in the context of him losing his administrative role. He preferred to have a break from driving, which he had done previously. Had it been a choice between driving and leaving the company his approach may have been different. Mr Waters would have been willing to look at other options such as operating the forklift if it had been discussed with him, but it was not.

[49] Ms Pearson's witness statement refers to other staff being interested in diversifying and being trained in other areas but not Mr Waters. However, she was able to provide little detail

of who that concerned. There was no discussion with Mr Waters as part of redundancy discussions about his willingness to diversify. Redeployment was not properly explored.

[50] STL failed to act as a fair and reasonable employer could have done and therefore unjustifiably dismissed Mr Waters.

What remedies should Mr Waters receive?

[51] Mr Waters does not claim lost wages but does seek compensation under section 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings.

[52] Mr Waters describes feeling so angry and shocked to receive the dismissal letter, having had no notification that redundancy was on the cards. As he was abruptly told the news and then not allowed to return to work he felt STL had tried to keep his departure a secret. He felt he had no reason to get out of bed after being terminated. He was stressed and pressured at being out of work and without pay all of a sudden. Mr Water's previous health issues, which had been improving, worsened. He felt humiliated by the lack of humanity with which STL treated him.

[53] I understand STL's arguments that it is the real consequences to Mr Waters which must be looked at and that compensation should not be used as a penalty. However, I find that Mr Waters' reaction to his dismissal is unsurprisingly affected by the decision to make him redundant so shortly after his appointment and the almost complete lack of process by STL including the absence of good faith provision of information to him. Mr Waters' sense that there may well have been other reasons why he was dismissed is understandable in these circumstances. STL is responsible for the impact of its actions. There is some acknowledgement in Ms Pearson's recognition that it sounded a bit harsh to inform Mr Waters of his redundancy by letter and then require him to finish immediately.

[54] I do not consider that Mr Waters' conduct can be seen as blameworthy and causative of the decision to dismiss him.

[55] I order STL to pay Mr Waters \$17,000 compensation without deduction under s 123(1)(c)(i) of the Act within 21 days of the date of this determination.

Costs

[56] Mr Waters has been successful in his claim and seeks a contribution towards his costs. The notional daily tariff for the first day of an investigation meeting is \$4,500 with the tariff for subsequent days being \$3,500 per day. Mr Waters sought that costs be reserved and it is anticipated that he may seek an uplift on the daily tariff.

[57] Costs are reserved. The parties are to discuss resolution on costs between themselves. If they are unable to reach agreement, Mr Waters shall have 21 days from the date of this determination to lodge a memorandum on costs, attaching documents supporting any claim. STL shall have a further seven days within which to provide any reply.

Nicola Craig
Member of the Employment Relations Authority