

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 93
5646753

BETWEEN SCOTT ESTCOURT
 Applicant

AND NAPIER CITY COUNCIL
 Respondent

Member of Authority: M B Loftus

Representatives: Bill Calver, Counsel for Applicant
 Jol Bates, Counsel for Respondent

Investigation Meeting: 14 March 2017 at Napier

Submissions Received: At the investigation meeting along with additional
 submissions from both parties on 28 March 2017

Determination: 26 September 2017

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] The applicant, Mr Estcourt, claims he was both unjustifiably disadvantaged and unjustifiably dismissed by the respondent, Napier City Council (NCC).

[2] Mr Estcourt says the disadvantage arises from the manner in which NCC disestablished his position and then attempted to coerce him into an inappropriate replacement without redundancy compensation.

[3] NCC's conduct in this respect led Mr Estcourt to conclude his employment agreement had been breached to such an extent an ongoing relationship was no longer viable. That, in turn, led to a claim of unjustifiable dismissal, albeit constructive.

[4] NCC denies the claims have validity. It is of the view the dismissal was the result of a legitimate redundancy which was handled properly. NCC denies Mr Estcourt was disadvantaged as he was offered a suitable alternate which removed the obligation to pay redundancy compensation.

Background

[5] Mr Estcourt is an engineer who was employed by NCC as its stormwater asset manager. He was appointed in November 2012.

[6] Mr Estcourt's terms and conditions of employment were governed by a collective employment agreement. Contained therein, was a clause addressing redundancy situations. Pertinent to this dispute, it states:

19.1 General

(a) Redundant Employee shall mean a worker whose employment is terminated by the Employer if that action is attributable or mainly to the fact that the Employee is superfluous to the work requirements of the Employer thus requiring a reduction in the number of permanent employees. This includes situations where the Employer is intending to sell or contract out part of its operations.

(b) Employees shall be informed as early as possible, but not less than four weeks before redundancies are declared about proposed changes in accordance with clause 19(a) of this Agreement to allow discussion and consultation, in good faith, with Union representatives and employees affected.

(c) Subject to (d)(i) below, Employees declared redundant thereafter shall be given not less than four weeks notification before termination. Subject to 19.2(b) below, the compensatory package will be no less than a payment of six weeks' wages (average weekly earnings or ordinary weekly pay, whichever is the highest at the time of termination) for the first year of service and two weeks for each subsequent year of service with a maximum payable of 21 years service. Compensation for part years of service will be calculated on a pro rata basis according to completed months of service at the date of termination.

(d) (i) Subject to (d)(ii) below, compensatory consideration shall not extend to an employee whose position has been declared redundant but who has been offered an alternative equivalent position within the Napier City Council with no less favourable conditions.

...

(iii) Where an Employee whose position was declared redundant accepts redeployment to an alternative position within Napier City Council, and the alternative position has less favourable conditions, a "partial redundancy" one-off compensation payment will be negotiated with the Employee and the Union. The amount of

compensation will be commensurate with the decrease in conditions and the Employee's length of service. ...

[7] Mr Estcourt occupied one of three water-related positions with the others being water supply asset manager and wastewater asset manager. Each reported to the works assets manager. Other employees responsible for assets such as reserves, sports grounds and roads also reported to the same manager.

[8] Mr Estcourt describes the position as one in which he was *in charge of making all of the plans for the stormwater system, deciding what needed to be replaced, what the infrastructure was required, costing the works, and ensuring the availability of funding, approval of all of the stormwater designed works, and acceptance of new stormwater work.*

[9] He says he was essentially left to get on with the job provided he did so within the limits of the delegations he had.

[10] Mr Estcourt says his first recollection of a possible restructure came with an announcement from NCC's CEO, Wayne Jack, at a staff meeting around September 2015. He says further information came just before and after Christmas with Unions and the staff association being asked to discuss what was described as a *realignment*.

[11] Mr Estcourt says the realignment was promoted as creating greater efficiency but he had doubts that would be achieved. On 3 March 2016 he sent an email to the Director of Infrastructure, Jon Kingsford, expressing concern it would add cost and risk while reducing efficiency. The response was an acknowledgement of receipt.

[12] Formal notification the realignment would proceed was given in a memorandum dated 25 February 2016. It was followed by further documentation designed to acquaint staff with the process. Included therein was a memorandum of 13 April which contained what was described as a *proposal for consideration*.

[13] A further document on 8 June advised an enhanced proposal for consideration. It contained advice members of the senior leadership team would meet with their respective teams to discuss the proposals so as to enable considered feedback. A feedback form was attached and staff were asked to complete it by 17 June 2016. Staff were told it was hoped the new structure would be finalised by the end of June and implementation would commence on 11 July 2016.

[14] As it transpired there were further delays and Mr Jack sent an email to all staff on 15 July. It advised a proposed structure would be distributed in which staff would be able to identify the various roles; if they were vacant and which were available as redeployment possibilities. The memo goes on to describe the process that would be used to fill roles before asking that any final feedback be provided by midday on Monday 25 July.

[15] On 19 July Mr Estcourt sent an email to Mr Kingsford in which he said:

Although I appreciate the opportunity, I am not prepared to provide feedback until I fully understand what is being proposed.
As yet I have not seen final job descriptions for any of the 3 water positions that I may be interested in, nor or am I aware of how I would be effected.

[16] Mr Kingsford's response advised Mr Estcourt it was important he take the opportunity to engage in the consultation process and his feedback could be about the structure as a whole, the directorate alone and/or his individual circumstances. It goes on to say if Mr Estcourt's feedback was to be that required detail was lacking he should *provide more details of what that detail is and specifically what your concerns are with either the level of detail and/or the structure as you perceive it.*

[17] Mr Estcourt completed the feedback form and forwarded it on 25 July 2016. In it he observes he is responsible for both the short and long term planning of Napier stormwater and *there does not appear to be an equivalent position in the new structure, and I do not understand how, or which positions will provide for these functions and when.* He again reiterates his view that having the three water asset managers report directly to the director of infrastructure is the only satisfactory alternate and putting Tier 3 or 4 managers between them would only serve to add cost, reduce efficiencies and add risk. He again adds he had not seen the final job descriptions and was unaware as to exactly how he would be affected. He closes by observing:

It is disappointing that the decision to restructure has been made before first developing an understanding of the functions and capabilities of the existing staff and identifying where and how improvements could be made. I was hopeful early in the restructuring process that the asset managers would be consulted about where they saw the deficiencies, and additional support provided in order for them and their teams to achieve agreed targets.

[18] On 29 July Mr Estcourt received a letter advising his position would be disestablished when the new structure was implemented. Mr Estcourt was told NCC would like to discuss options including redeployment.

[19] Mr Estcourt replied on 8 August. He said:

Following the Council's decision to disestablish my current position, I agree to my employment being terminated for reasons of redundancy.

Further to the period of "no less than four weeks' notice" as set out in your letter, I wish to advise you that my final day of employment with the Council will be Tuesday, 30 August 2016.

[20] Mr Kingsford responded on 11 August. In it he said:

We are not at the point where we have confirmed redeployment opportunities and/or worked through these options with all staff. The process communicated by the Chief Executive on 29 July 2016 is as follows:

"The transition to the new structures will take some time as we work through recruitment processes and assess opportunities for redeployment. As part of the implementation process, staff will be expected to remain in their current role and undertake all responsibilities until appointments are made to the new role(s) that will replace those existing positions." Thus I will be working through options with you over the coming weeks.

For these reasons, I cannot confirm a termination date at this stage.

[21] The letter goes on to ask Mr Estcourt advise his intentions with respect to the following statements:

1. I am not interested in applying for or being considered for any redeployment opportunities.
2. That I have had sufficient time to fully consider this decision.

[22] On 17 August 2016 Mr Estcourt raised his first personal grievance. He was one of a number of NCC's employees to whom the application applied. The claim alleges no alternative equivalent positions were offered at the time NCC notified the complainants their positions had been disestablished and *pursuant to clause 19 of the collective agreement, once an employee's position has been declared to be "superfluous to the work requirements of the employer" and a period of four weeks' notice is given, an Employee has been declared redundant.*

[23] The letter offer the view:

It is not open to the Council to continue to keep a redundant employee's position open whilst it merely considers the prospect of redeployment. Any offer of redeployment must be specific, not generalised, and needs to be made before the employee is notified that they are surplus to the needs of the Council.

[24] It is argued NCC's failure to acknowledge the complainant's acceptance of their redundancy constituted a breach of the collective and each had been disadvantaged by NCC's failure to recognise their right to be declared redundant. There was an accompanying breach of good faith claim.

[25] NCC responded via counsel the following day. It claims the applicants had failed to appreciate the terms of the agreement and NCC's obligations. It refers to the fact redundancy is still in the future and Mr Estcourt had been advised his current position will be disestablished only when the new structure is implemented. It also notes Mr Estcourt was further advised he would only be terminated for redundancy if redeployment options could not be identified. It notes that point had not yet been reached.

[26] Further correspondence followed with Mr Estcourt's then counsel pushing the view termination had occurred and NCC denying that was the case. In addition, the parties discussed the proffering of further information so Mr Estcourt could assess whether or not there was an alternate equivalent position available.

[27] On 7 September, and once that information had been provided, Mr Estcourt's then counsel wrote to NCC advising the position was being offered *Is not an alternate equivalent position within the Napier City Council with no less favourable conditions as per clause 19(d) of the collective agreement.* The letter goes on to detail why Mr Estcourt was of that view. The letter closes by advising Mr Estcourt did not wish to accept redeployment to what he saw as a lesser role and that as result he considered himself redundant. It asks *...NCC confirms that this is the case and provides Scott with a date by which his current role should be terminated and redundancy compensation paid.*

[28] On 19 October 2016 Mr Estcourt, who had by that time, obtained the services of alternate counsel, wrote to NCC. In that letter, and having referred to the earlier disadvantage grievance, he advises he now considers he has been constructively

dismissed as a result of NCC having breached its obligations under the redundancy provisions to an extent destructive of the employment relationship. He left work the following day, 20 October 2016, though by then he had sourced, and went to, a new job.

Determination

[29] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances, or more correctly a series thereof, existed to allow a written determination of findings at a later date.

[30] The statement of problem poses three questions Mr Estcourt wants resolved. They are:

- a. Whether NCC has an obligation to pay redundancy;
- b. Whether he was disadvantaged by the process by which he was disestablished; offered a replacement and then suffered a refusal to pay redundancy;
- c. Whether he was unjustifiably dismissed.

[31] As remedies Mr Estcourt seeks redundancy compensation and \$15,000 pursuant to s 123(1)(c)(i) of the Act. There is no claim for lost wages due to his having attained replacement employment.

[32] While the parties agreed from the outset the issues were narrow¹ there was considerable evidence and extremely fulsome submissions. The submission will not be recorded or summarised² but the parties can be assured they have been considered. Similarly not all the evidence will be canvassed as there were, in my view, some crucial answers from various witnesses which determine the issues before me.

[33] In [30] above I cited the issues in the order they appeared in the statement of problem. The answers will, however, be considered in reverse order. Therefore the first question is whether or not Mr Estcourt was constructively dismissed.

¹ Telephone conference held on 9 December 2016

² Section 174E(b)(ii) of the Employment Relations Act 2000

[34] In *Wellington etc Clerical Workers etc IUOW v Greenwich*³ the Court stated that for a dismissal to be constructive:

It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee. It must be dismissive or repudiatory conduct.

[35] While a simplistic summary of more complex law, the underlying assumption is actions or words of the employer amounted to a breach which induced a subsequently proffered resignation. It is for the applicant to convince me that is the case. There must also be a causal link between the employer's conduct and the tendering of the resignation⁴ and the possibility of resignation should be foreseeable.⁵

[36] While considerable evidence was given there was one theme which was repeated when Mr Estcourt gave answers to various questions. It is that by early August he had decided he was disenchanted with NCC and *wanted out*.

[37] His evidence makes it clear his desire to leave was based on a view he was unlikely to be redeployed into a job he considered the equivalent of that he held before the restructuring. Any alternate he may eventually occupy would not provide the level of responsibility, challenge or satisfaction he had previously enjoyed.

[38] Mr Estcourt also conceded that in early August the process remained ongoing though he had, *in my mind*, concluded it had come to an end. That said he accepted, when answering one question, he had not at that stage enunciated his view there was no viable option for him at NCC, at least not to one of NCC's managers.

[39] He also accepted, when questioned by Mr Bates, that he was not actually redundant at that time as he was not superfluous in the manner contemplated by clause 19.1(a) of his employment agreement. This is a concession with which I agree. Redundancy, when considered simplistically, does not occur until two preconditions have been met. First the position previously occupied by a person must be superfluous to the employers needs and second the employee can no longer be retained due to the absence of a viable alternate.

³ (1983) ERNZ Sel Cas 95; [1983] ACJ 965

⁴ *Z v A* [1993] 2 ERNZ 469

⁵ *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140

[40] The first of those preconditions had been met. The second had not and one of the reasons was Mr Estcourt chose to disengage for the process. That is not a decision for which NCC can be held responsible.

[41] Nor can it be said NCC acted in a manner designed to induce the resignation or otherwise destroy the employment relationship. Indeed NCC was trying to maintain the relationship if only to save a redundancy payment.

[42] While the evidence leads me to accept there was room for improvement in respect to NCC's process (which was protracted and suffered from a lack of informative response to some of Mr Estcourt's queries) I do not accept these deficiencies amounted to repudiatory conduct. Inconsiderate and the cause of unhappiness maybe but not repudiatory and confirmation of this is found in the fact that even when he decided to opt out Mr Estcourt did not consider the situation warranted immediate departure. It was not so bad he could not stay while he (a) sought alternate employment and (b) continued with his attempts to secure redundancy compensation.

[43] Finally I note there was no reason for NCC to suspect its process might prompt a resignation. Mr Estcourt was in fact arguing he had already been subjected to an actual dismissal and initiated a process by which that could be further explored.

[44] For these reasons I conclude Mr Estcourt has failed to establish, as he is required to do, that he was constructively dismissed.

[45] For two reasons I also conclude Mr Estcourt has failed to convince me he was unjustifiably disadvantaged in his employment. The first is that the rationale applied when considering whether or not he was constructively dismissed also applies here.

[46] The evidence, and especially the admissions referred to above, lead to a conclusion it was Mr Estcourt and not NCC who first withdrew from meaningful engagement over redeployment options. NCC sought to continue the process while Mr Estcourt wanted it concluded with his departure augmented by a redundancy payment. It is difficult to see how someone can be disadvantaged in an employment relationship they have already decided they have no intention of continuing.

[47] The second reason is that Mr Estcourt did not allow the issues about which he complains to be properly addressed. There is a strong argument a lack of process

and/or a failure to follow contractual obligations in respect to a redundancy are best dealt with as a dispute. That was not the approach adopted here. If indeed the alleged deficiencies are best approached as a grievance Mr Estcourt is under a duty to at least allow the process a chance of resolving the differences. In this case he gave it no such chance given he had already decided to leave thus severely curtailing the available options prior to initiating the first disadvantage grievance.

[48] That leaves the question of whether or not Mr Estcourt is entitled to redundancy compensation. That is, as both parties conceded and notwithstanding the grievance applications, the prime issue in this dispute.

[49] The evidence leaves no doubt that even if it only became clear after Mr Estcourt had decided to go the only redeployment option NCC was going to offer was that of *3 waters lead*. That is the position Mr Estcourt rejected as being unsuitable on the grounds the job he held prior to the restructure was *of significant seniority and meant he had the sole responsibility for looking after the design, management and improvement to the Napier stormwater system* and the replacement was a demotion.⁶

[50] NCC is of the view that when *assessed on an objective basis, the new position offered was of equal importance and value, and it matched exactly, levels of skill experience, education and autonomy.*⁷ That means, at least from NCC's perspective, Mr Estcourt was offered *an alternative equivalent position ... with no less favourable conditions* and is not entitled to compensation.

[51] On the question of whether or not 3 Water Lead was an equivalent position to that he previously held, Stormwater Asset Manager, I agree with Mr Estcourt. The evidence leads me to conclude it was not.

[52] Mr Estcourt put forward a number of arguments in support of his view the position was not equivalent. While not a comprehensive list of the factors he cites key differences included:

- a. The scope of the work had changed with his no longer being responsible for stormwater but also having functions in respect to water supply and wastewater;

⁶ Applicant's closing submission of 14 March at [15]

⁷ Respondent's closing submission of 14 March at [3.58]

- b. Previously being responsible for ensuring NCC had a fully functioning and efficient stormwater disposal system. In doing so he had to perform numerous tasks including the preparation of ten year strategic and capital plans, case studies to justify works and capital upgrades, obtaining consent approvals and the design of the infrastructure along with the preparation of budgets. A number of these functions would be removed.
- c. Ensuring new infrastructure complied with Council's standards.
- d. A reduction in status and responsibility with the new position and its associated duties being at level five as opposed to the previous level three.

[53] While NCC accepts the new position was different it claims it involved Mr Estcourt exercising the same skill set and *was to be equal in value, force, effect and significance and contrary to what is alleged, did not involve any reduction in status or autonomy in real terms.*⁸

[54] It is here I note the development of another theme. Mr Estcourt claims the manager responsible for these changes, Jonathan Kingsford, actually had little idea what he actually did and Mr Estcourt bemoans the fact Mr Kingsford did not sit down with him to find out.

[55] Mr Kingsford's evidence and in particular the way he answered question from Mr Calver challenging his knowledge of Mr Estcourt's duties and asking why he disagreed with Mr Estcourt's assertions as to how the job was changing significantly lead me conclude there is substance to Mr Estcourt's criticism.

[56] A key plank upon which NCC bases its view the job was substantially similar was a belief Mr Estcourt was embellishing the both the scope and importance of various duties and functions. Indeed it went so far as to claim he simply did not have some of the alleged responsibilities.

[57] However when questioned about some of Mr Estcourt's assertions regarding functions and responsibilities Mr Kingsford all too often became defensive and

⁸ Respondent's closing submissions of 14 March at [3.44] and [3.45]

resorted to saying the wastewater managers job description did not prescribe the performance of an alleged function. This faces a fundamental problem. Job descriptions have a habit of morphing. Over time a gap develops between what is described and what is actually done. To that I add Mr Estcourt's evidence, supported by that of others who had worked in the area, that Mr Kingsford predecessor had allowed his reports a significant degree of autonomy. That had, in turn, meant they took additional responsibilities which were not necessarily reflected in their job description(s).

[58] Mr Kingsford displayed a lack of knowledge of what Mr Estcourt actually did which leads me to accept Mr Estcourt's evidence about his duties as preferable. That preference also leads me to a conclusion his duties had, as he alleges, changed significantly and numerous responsibilities would have been removed had he accepted the 3 Water Lead position.

[59] To that I add a couple of additional concerns. Amidst other thing it was said the realignment process was designed to deliver value, streamlined levels of management and responsive/efficient work practices.⁹ If NCC is correct and the 3 Water Lead was an equivalent to Mr Estcourt's previous role it is difficult to see how any of these objectives could be achieved when two additional levels of control/bureaucracy and their attendant costs are interposed between Mr Estcourt and the manager to whom he had earlier reported. I also have concerns about how he would have time to perform functions relating to all three waters (storm, waste and supply) without the removal of some previously performed functions. Neither of these concerns was allayed by answers given on NCC's behalf.

[60] Having considered the evidence I conclude Mr Estcourt is correct when he asserts the offered alternate position was significantly different to that he had previously occupied. While the salary might have remained many other ingredients would be removed particularly ones relating to the scope and level of responsibility exercised.

[61] That leaves the question of whether or not Mr Estcourt is entitled to redundancy compensation given that technically the process was never completed and

⁹ Memorandum: Wayne Jack to all staff dated 25 February 2016

there was never formal confirmation by NCC that the second precondition, the absence of a suitable alternate, had been met.

[62] As already said the evidence leads to a conclusion the only alternate Mr Estcourt was ever going to be offered was 3 Water Lead. The evidence also leads to a conclusion the only reason the second precondition for redundancy was not met was NCC continued to assert 3 Water Lead was a suitable alternate to Mr Estcourt's previous role of Stormwater Asset Manager.

[63] My conclusion 3 Water Lead was not a suitable alternate means the second precondition for redundancy was in fact met. In the absence of any alternate redeployment option it follows Mr Estcourt would/should have then been made redundant. It further follows he would then have been entitled to compensation according to his employment agreement. These conclusions mean that payment should now be made.

Conclusion and costs

[64] For the above reasons I conclude Mr Estcourt has failed to establish either of his grievance claims, constructive dismissal or unjustified disadvantage. They are dismissed.

[65] He has however established he is entitled to redundancy compensation in the amount of \$50,433.90. It is ordered Napier City Council now pay that compensation to Mr Estcourt.

[66] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority