

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 372/09
5166826

BETWEEN REX GEORGE
 Applicant

AND COMPUTER TRANSPORT
 SERVICES (NZ) LIMITED
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Applicant in person
 Phil Clarke, advocate for Respondent

Investigation Meeting: 19 October 2009

Determination: 27 October 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Mr Rex George was employed by the respondent Computer Transport Services (NZ) Limited (CTS) at its Auckland branch from November 2008 until August 2009. He held the position of Afternoon (or PM) Operations Manager.

[2] Mr George's claim investigated by the Authority is that he was unjustifiably dismissed by CTS from that employment.

[3] Mediation has not resolved this employment relationship problem.

[4] Written notice of dismissal was given to Mr George on 24 July 2009 by Mr Phil Clarke, the Branch Manager. Mr Clarke advised Mr George that his position had been disestablished and that he would be redundant from 23 August 2009. The four week period of notice given was in accordance with the terms of the written individual employment agreement between the parties.

[5] There was a corresponding Operations Manager position for the morning (or AM) shift but the holder of it resigned about a fortnight before Mr George was given notice.

[6] In explaining CTS's decision to terminate Mr George's employment, Mr Clarke gave a summary of key points as follows:

- *Reviewed the operational structure to respond to the challenges of F09/10 where we have significantly lower volumes/revenue which will not enable us to retain the same cost structure.*
- *We have reduced our employee numbers on both the AM & PM shifts to a level which cannot sustain two Operational Manager positions.*
- *The review concluded that moving to one new Operations Manager position which will have overall responsibility for all aspects of the operation both morning and evening was the optimal structure for the following reasons:*
 - *Single customer interface.*
 - *Clear accountability.*
 - *Cost effective.*
 - *Eliminates duplication.*
 - *Facilitates a more responsive approach to opportunities and issues.*
- *As discussed the review of the structure results in the disestablishment of the AM & PM Operations Managers positions, and creates a new Operations Manager role with overall responsibility for all aspects of the operation across both morning and evening functions.*
- *The new Operations Manager role will be advertised later this week and you are invited to apply. You will receive a copy of the job description and the new organisational structure chart.*

[7] Mr George worked out the notice period given to him. He was offered further work for three weeks after that date but declined because he regarded the offer as degrading in the circumstances.

[8] Earlier during the employment disharmony had arisen as a result of the issue to Mr George of a written warning regarding his performance. In May 2009 he was warned that a reoccurrence of the problem would result in a final warning being placed on his file. The warning given was expressed to remain in effect for six

months, from 15 May 2009, but after discussion with Mr Clarke this term was reduced to 90 days.

[9] Although Mr George has not pursued a grievance in respect of the warning he referred to it as a part of the factual background he says is relevant to his claim of unjustified dismissal. He says it shows his employer was out to get him and that the warning points to the real reason for his dismissal as being related to performance rather than to redundancy or restructuring.

[10] The Authority met with and interviewed Mr George, Mr Clarke and Mr Stewart Lorimer, HR Manager for CTS and its associate companies.

[11] The test of justification to be applied by the Authority is provided at s 103A of the Employment Relations Act 2000.

[12] I conclude that the likely reason CTS had for terminating the employment of Mr George was redundancy. I find that the decision reached in this regard was open to a fair and reasonable employer as a business or commercial decision made particularly in response to the recession and its effects that were being felt and measured by CTS.

[13] Declining freight numbers had led to redundancies among drivers employed by the company and this reduction of staff led in turn to an examination of the management structure at Mr George's level. CTS decided that instead of having two operations managers, one for each shift, it could operate with just one overall position.

[14] It is well established law that the decision to declare positions or employees redundant is for the employer to make, not the Authority.

[15] I find that a fair procedure was followed by the employer. Mr Clarke clearly advised Mr George of the possibility of the disestablishment of his position and fully consulted him about that before any decision was made.

[16] The restructuring has led to more than a 50% reduction in staff for CTS, both in the Auckland branch where Mr George was employed, and also nationally.

[17] There was, I find, a proper basis for the warning that had been given to Mr George in May and it was not merely an action taken to undermine him. Mr Clarke had investigated performance concerns resulting from the handling of a new

client's business and problems with the correct despatch of the customer's property. At the time of dismissal the giving of the warning was a recent historical fact but, in my view, did not play any significant part in the decision to disestablish Mr George's position.

[18] I am also satisfied that the instructions given by Mr Lorimer to Seek, a recruitment agency, on about 16 July 2009, were not an indication of predetermination by CTS with regard to the dismissal of Mr George. I accept that the advertisement was placed as a response to the resignation on 8 July of the AM Operations Manager and as a way of assessing the availability of suitable people, either to replace the resigning manager or to be appointed to a new position if restructuring was decided upon.

[19] I find that the new position CTS created was different from the one held by Mr George. This is reflected to some extent in the remuneration, but more strongly in the duties and responsibilities of the position which was more senior in its scope.

[20] Mr George applied and was interviewed for the new position but was unsuccessful. He says that the successful appointee has less merit in many respects to himself, but in my view the process was a fair one and ultimately it was a matter for the employer's discretion as to who was appointed.

Determination

[21] For the above reasons I determine that the dismissal of Mr George was a justified dismissal within the meaning of s 103A of the Employment Relations Act. No orders of any kind are therefore required to be made against CTS.

[22] No issue as to costs appears to arise, as the parties competently represented themselves.