IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2018] NZERA Wellington 65
3029471

	BETWEEN	DESMOND JOHN GIBBS Applicant
	AND	TRANZIT COACHLINES TARANAKI LIMITED Respondent

Member of Authority:	M.B. Loftus
Representatives:	Desmond Gibbs on his own behalf Michael Gould, Counsel for Respondent
Investigation Meeting:	18 July 2018 at New Plymouth
Submissions Received:	At the investigation meeting
Determination:	1 August 2018

DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] The applicant, Desmond Gibbs, claims he was unjustifiably dismissed by the respondent, Tranzit Coachlines Taranaki Limited (Tranzit), on or about 27 April 2018.

[2] Tranzit accepts it dismissed Mr Gibbs but contends its actions justified by the existence of a genuine redundancy situation.

Background

[3] Mr Gibbs was employed by Tranzit as a school bus driver. This initially occurred in 2012 though that permanent arrangement came to an end when Mr Gibbs chose to become a casual relief driver for the 2016 school year. In early 2017 he

sought a return to more regular work but was told there was nothing available. A few weeks later he was rung and told the driver who normally operated run 3067 had resigned so a position was available. Run 3067 is, along with run 3097, a school bus run operated in northern Taranaki between Waitara and the vicinity of Mokau. There is a third local run operating in the area around Ahititi (and it was this Mr Gibbs drove during his first period of employment between 2012 and 2016).

[4] Upon his return Mr Gibbs was initially offered a fixed term agreement covering the 2017 school year. Later that year Tranzit was successful when tendering for the renewal of 8 Taranaki school bus runs offered by the Ministry of Education (MoE). These included both 3067 and 3097. The new contract provided for their provision through to the end of the 2020 school year.

[5] As a result of that and the fact work remained Mr Gibbs was offered a further employment agreement. It was signed on 12 January 2018 and again purports to be for a fixed term. It was stated to commence on 29 January 2018 and expire on the last day of the fourth school term in 2020 unless otherwise terminated or varied in accordance with other terms therein.

[6] The agreement states Mr Gibbs is employed to perform the duties of a school bus driver, as set out in an attached schedule, but that he agrees to carry out other duties which may be reasonably required and assist other employees as necessary in any part of the business. Both agreements were also subject to a personal arrangement under which Mr Gibbs did not work his afternoon shift each second Friday with Tranzit making arrangements to cover that work using other resources.

[7] Also therein and pertinent to this dispute is a redundancy provision which contains the following:

> 13.1 Where your position becomes surplus to requirements due to: the closure of the business, loss of our contract for which your services are required, natural disaster or financial downturn in business, you will be given not less than two weeks notice of termination of your employment, inclusive of the notice period stated in clause 11.1 above.
>
> …
>
> 13.4 Subject to clause 13.1, all things being equal, we will observe the principle of "last on, first off" in selecting employees to be made redundant.

> 13.5 It is recognised that the Company's need to maintain an efficient workforce and an efficient operation must be taken into account into the selection of employees to be made redundant. It is also accepted that redundant employees may be selected on a departmental or seasonable basis.

[8] Notwithstanding the renewal of the contract with the MoE things did not go as envisaged. It appears the school serviced by run 3097 had no pupils and the driver who normally performed that run was being used to assist with other tasks on an ad-hoc basis. Mr Gibbs accepts he was well aware of this and knew that according to the contract with MoE the run would be cancelled at the end of the school term in April.

[9] Tranzit received official notification of that cancellation on 1 February 2018 along with advice it was to be effective 13 April 2018. Being busy with other tasks Tranzit's Taranaki Manager, Colin Shotter, did not act on that until 7 March 2018. That day he phoned both Mr Gibbs and the driver who normally operated 3097. There is some difference as to what was said.

[10] Mr Shotter says … i*t was explained that the company would be completing a review of the school services based in that area due to the cancelled service and a decision about our employee requirements will be made based on operational needs.*[1]

[11] Mr Shotter accepts he raised Mr Gibbs Friday arrangement and asked if there was any way Mr Gibbs could be available each day to cover full shifts. He says Mr Gibbs was adamant the answer was no to which he (Mr Shotter) suggested there might be ways that could be addressed. He goes on to say Mr Gibbs *… was invited to give feedback to me in the next two weeks*.[2]

[12] Mr Gibbs' recollection of the conversation is he was informed 3097 had been cancelled leaving a spare driver in the area. He says he was then given an ultimatum to either forego the flexible work arrangement or accept a casual contract. He says he was told should he do neither his job may be terminated in favour of the driver who normally performed the cancelled 3097 run. This is denied by Mr Shotter.

[13] A further problem arises in that both say they were expecting an approach from the other with comments or suggestions about where to next. They agree

[1] Brief of evidence at [4]
[2] Brief of evidence at [5]

Mr Gibbs did not respond which led to a meeting at Waitara High School on 28 March.

[14] Mr Shotter says he simply advised Mr Gibbs there were issues they had to discuss before passing him a letter. He says Mr Gibbs read it and was visibly aghast. Mr Shotter say Mr Gibbs tried to raise the Fridays off but he advised *not now* as the two would discuss the issues later. He says the possibility of casual work was raised and this was the first time that had occurred.

[15] Mr Gibbs evidence is contradictory. In his written brief he claimed *Colin asked me to forgo flexible work arrangement (I said I can't be in two places at one) or accept the casual contract on offer (I said that sounds like no job)* before passing the letter. In his oral evidence he reiterated the view he had been given an ultimatum and that is reflected in his written submission but he also, when answering questions, said there has been no discussion of either Friday work or casual employment but that Mr Shotter had referred to the cost of covering his Friday arrangement.

[16] The letter, which had been prepared the previous day, states:

> I refer to our discussion on 7th March 2018 to advise that the Ministry of Education have cancelled a Mokau school 3097 run which will leave us with a spare driver in the area.
>
> At present, we are aware that you are unable to work every second Friday on your run 3067 …
>
> As discussed with you, your unavailability on those days impacts on our business and as there is now a driver in the area able to cover the run each day, we have reviewed our current situation. At this time you were advised of this review being undertaken and the possible impact on your future with Tranzit Coachlines.
>
> We have given consideration to our discussions and our business requirements, it is with regret I must inform you that your position has become surplus to our requirements effective from 13 April 2018 and as per clause 13.1 of your agreement.
>
> Unfortunately there are no suitable alternate school runs available however you may wish to consider an offer of casual employment.
>
> Please give this some thought and get back to me by Tuesday 3rd April 2018 with your response to the offer of casual employment.

[17] Mr Gibbs took issue with that, believing his job continued given run 3067 remained. He also had concerns about the veracity of both data and assumptions Tranzit used when making its decision.

[18] A series of interactions between Mr Gibbs and Tranzit then followed involving not only Mr Shotter but more senior management and representatives of Tranzit Taranaki's parent company. These included a meeting on 10 April 2018, telephone conversations and e-mails.

[19] On 20 April Tranzit aired another possible solution which would require both affected drivers agreeing to share the remaining run and to make up lost hours by performing other work, primarily at the New Plymouth depot. This would see a reduction in Mr Gibbs hours though the bulk would remain. Mr Gibbs did not respond.

[20] In the interim, Tranzit had been reviewing the basis of its decision as encouraged by Mr Gibbs but ultimately reached the same conclusion. That was the cost and disruption emanating from Mr Gibbs' work arrangement was such that it was he who should be made redundant.

[21] Mr Gibbs was advised of that by email dated 25 April. Contained therein is advice school routes are not owned by a driver and the company reserves the right to consider operational efficiencies in redundancy situations. The email goes on to advise the starting points for school bus routes are designated by MoE and while there are no children there today there could be in the future. The email refers to the alternate aired on 20 April but notes the time for response had expired. The email closes by urging Mr Gibbs continue working through the process and to make contact with company representatives at his earliest convenience. The email was sent in response to one from Mr Gibbs that essentially asserted Tranzit's position was untenable and it could not dismiss Mr Gibbs.

[22] As events transpired, Mr Gibbs did not respond to the last email and as a result Tranzit wrote, confirming the dismissal, on 27 April 2018. The letter contains a brief outline of the interaction between the parties and the offer of 20 April before stating, in closing, that:

> Given your lack of response to that offer, I regretfully advise that termination of your employment is reconfirmed.

[23] That was followed up by the preparation and payment of Mr Gibbs' final pay.

Determination

[24] As already said Mr Gibbs claims he was unjustifiably dismissed. His prime contention is he simply could not have been considered for redundancy as his job, driving run 3067, remains. Even if that were not the case his selection was invalid by reason of clause 13.4 and its reference to *last on, first off* which would have seen another of his north Taranaki colleagues selected. Finally Mr Gibbs asserts he is being victimised as a result of his refusal to reconsider the agreement he not work every second Friday afternoon and that is improper given the reason is family related and selection on that ground is incompatible with Tranzit's promise it *... will provide: ... where possible, flexible work hours and promote a healthy work / family life balance*.[3]

[25] Tranzit accepts it dismissed Mr Gibbs and in doing so accepts it is required to justify the dismissal. The justification is redundancy occasioned by MoE's decision run 3097 was no longer required leaving it with a surplus of drivers in north Taranaki.

[26] It is well established that when reviewing redundancy decisions the Authority or Court will look at two factors. They are the genuineness of the redundancy and the procedure by which it is carried out. The inquiry into each factor is carried out separately.[4]

[27] Before discussing those issues, and while it was not argued, I should first consider whether or not the employment was, as stated, a legitimate fixed term arrangement. If it was there is an argument Mr Gibbs should simply be paid for the remainder of its duration. The short answer is it is no, it is not really fixed term.

[28] For a fixed term agreement to have validity there must be a legitimate reason which dictates a specific finite term and that rationale must be revisited to ensure it remains valid at the point of expiry. This agreement, like many others I am aware of, is stated to be fixed term by virtue of the fact the role provides a service for which there is finite funding but every possibility that funding may be renewed. The evidence strongly suggests that as a result the arrangement really operates as an

[3] Tranzit House Rules
[4] *Coutts Cars Ltd v. Bageley* [2001] ERNZ 660 (CA)

ongoing one and where the MoE contract is renewed as occurred at the end of 2017 continuing employment is automatically offered to existing employees. Furthermore, and in a manner that appears incompatible with a true fixed term arrangement, there are a number of provisions under which the employment can be brought to an end for reasons other than those upon which the fixed term is said to be based. In this respect it reflects a normal ongoing employment agreement. Finally I note the ability of MoE to alter its contract and cancel or reinstate specific runs during the contracts term again appears to undermine the principle implied by the fixed term rationale that the employment is tied to the stated term of the Tranzit / MoE arrangement.

[29] Both the employment agreement and the way in which it is applied has all the hallmarks of one which can continue as long as Tranzit retains its contract(s) with MoE and this could possibly be ad-infinitum or at least for a considerable period.

[30] Returning to Mr Gibbs redundancy and its substantive justification. There is no dispute Tranzit was no longer required to operate one of the runs and this clearly left it with surplus staffing capacity. The real issue is whether or not its decision to select Mr Gibbs for redundancy was justified. Tranzit says it was given Mr Gibbs personal arrangements crated both additional costs and operational issues. He disagrees for the reasons in [24] above.

[31] I do not accept Mr Gibbs first, and prime, contention that clause 13.1 limits the possibility of redundancy to a situation in which *your position* and *your services* are no longer required.[5] He contends his position was to drive run 3067 and its continuation meant he could not therefore be made redundant. Unfortunately for Mr Gibbs that is not what his employment agreement says. It says Ms Gibbs was employed as a school bus driver who could also fulfil other duties. It makes no mention of run 3067 or otherwise limit Mr Gibbs duties to the performance of that run and Mr Gibbs accepted, when giving oral evidence, that no one had expressly limited his duties to that run. To that I add Tranzit's uncontested evidence drivers regularly move between runs, though it is conceded that is far more likely in urban areas as opposed to sparsely populated rural districts with few staff as was the case here.

[5] Refer [7] above. Underlining was Mr Gibbs'

[32] I also note Mr Gibbs argument the phrase *your run 3067* in the letter of 27 March[6] supports his contention but do not agree. I accept Tranzit's claim this was an unfortunate and inaccurate use of words given the weight of evidence supports that position.

[33] Mr Gibbs also argues clause 13.4 requires adherence to a *last on, first off* selection process and this would have seen another north Taranaki driver selected before him. Again that is not what the employment agreement says. It says that process will be applied all things being equal then goes on to further qualify the provision in clause 13.5 by saying Tranzit may, when identifying those to be made redundant, consider the need to maintain an efficient workforce and operation and perhaps more importantly select on a departmental or seasonal basis.

[34] The evidence shows that is clearly what has occurred here and while Mr Gibbs appears unable to understand or accept the maths, a cost must emanate from having to provide a vehicle to relocate drivers some considerable distance to pick up or drop off a bus each second Friday as would have had to occur here had he been retained. Furthermore Tranzit gave uncontested evidence that Friday afternoons are one of its peak periods with school borders being returned home and it is a common day for wedding charters. I accept Tranzit's evidence its operational needs will, when considering who to make redundant, advantage employees who are available on Friday afternoons over Mr Gibbs especially as he made it clear he would not forgo the arrangement and it clearly involves an additional cost.

[35] That raises Mr Gibbs other main thrust of argument which is that by selecting him Tranzit has failed to comply with its promise it will provide flexible work hours and promote a healthy work / family life balance. Again the promise is qualified. It is a case of where possible. In this case the evidence leads me to conclude that in selecting Mr Gibbs Tranzit was motivated by operational and cost considerations as opposed to a dissatisfaction with Mr Gibbs personal arrangement. It is an unfortunate fact that arrangement disadvantaged him vis-à-vis his colleagues when the cost / operational analysis was performed.

[36] I conclude Tranizt has provided a substantive justification for Mr Gibbs selection and it was not prevented from doing so by the employment agreement.

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[6] Paragraph [16] above

[37] Turning to process. Section 103A of the Employment Relations Act 2000 (the Act) requires that an employer must, before dismissing an employee, raise its concerns, allow the employee an opportunity to respond and consider the response with an open mind (ss.103A(3)(b) to (d) of the Act). That these requirements, in the form of a consultation process, remain in the redundancy setting is expressly confirmed by s.4(1a)(c) of the Act and the relationship between the two sections has been confirmed by the Court.[7]

[38] It is here Tranzit's attempts to justify the dismissal falter. As Mr Gould properly conceded its process was short of ideal. Indeed I tend toward agreeing with Mr Gibbs response the concession was an understatement.

[39] Given inconsistencies in Mr Gibbs evidence regarding what occurred during the discussions of 7 and 28 March I prefer Mr Shotter's evidence but that does not assist Tranzit. Indeed it confirms that when Mr Gibbs was first advised he was to be made redundant there had been no meaningful consultation. The issue had been aired but no more. According to Mr Shotter Mr Gibbs was told no more than Tranzit was going to review the situation. There was no advice of the factors Tranzit was taking into consideration in their deliberations and no feedback from Mr Gibbs.

[40] Nor does the confusion over who was going to contact who to advance the discussion assist. Indeed I have to conclude there was an onus on Tranzit to follow up and if it was indeed correct Mr Gibbs who was going to respond first remind him of that and the fact a nil response may operate to his disadvantage. Mr Shotter accepts this did not occur before the letter advising a decision to dismiss was handed to Mr Gibbs on 28 March.

[41] From there, and while Tranzit agreed to revisit its decision significant deficiencies remained. It is clear Mr Gibbs continued to challenge the decision though in doing so he may well have alienated those he was dealing with. The result is that once again Tranzit did not impart details which underpinned its conclusions prior to making them. Mr Gibbs says they didn't and the evidence proffered on Tranzit's behalf does not contradict that. Indeed the evidence is the cost analysis on which Tranzit based its decision to reconfirm Mr Gibbs dismissal was not provided until after 27 April.

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[7] *Jinkinson v. Oceana Gold (NZ) Ltd* [2010] NZEmpC 102

[42] It follows Mr Gibbs was deprived of an opportunity to give informed feedback and Tranzit failed to adhere to the requirements of section 103A. The consultation process was seriously deficient and the dismissal is therefore unjustified.

[43] That conclusion raises the question of whether or not the deficiencies can be excused by reason of the resources available to Tranzit (s103A(3)(a)). The answer is no. Tranzit is part of a substantial organisation with a number of staff, internal HR resource and access to external professionals whose services I am well aware it uses.

[44] The procedural deficiencies also raise the question of whether or not an adequate process would have altered the decision Mr Gibbs be made redundant.

[45] While Mr Gibbs has a contrary view I find little wrong with Tranzit's analysis but even if it was flawed it is unlikely the decision would change. Notwithstanding Mr Gibbs protestation to the contrary a cost simply must emanate if Tranzit were to maintain the Friday arrangement. Here it should be noted that when entering into the arrangement it really had little choice as there was a paucity of drivers in the area. Obviously that has now changed.

[46] Once I add the operational issues and Mr Gibbs clearly expressed refusal to consider relinquishing the arrangement I conclude the decision was always going to be that it was he who would be made redundant. Having said that, and while the evidence before me strongly suggests informed input from Mr Gibbs would not have altered the outcome, he was entitled to be allowed an opportunity to provide it or, to the extent some information/proposals were provided, told of the consequences of not responding. Again Mr Shotter concedes this was not done in respect to the proposal regarding sharing the run with the other northern driver.

[47] The conclusion Mr Gibbs dismissal is unjustified means remedies must be considered. He seeks reinstatement, lost wages and $25,000 compensation for hurt and humiliation. He also seeks penalties for breaches of s4A which he says were demonstrated by Tranzit's refusal to reinstate primarily as a result of its intransigence in respect to the Friday work arrangement and its failure to provide information during the discussions between 28 March and 27 April.

[48] Mr Gibbs seeks reinstatement. Reinstatement is attainable where its granting is both practicable and reasonable.[8] Here Tranzit have provided a substantive justification for the dismissal. There is clearly a surplus of staff and Tranzit can justify its selection of Mr Gibbs on operational and cost grounds. The failures which rendered the dismissal unjustified are procedural but my conclusion adherence to procedural requirements would not have altered the outcome means reinstatement is neither practicable nor reasonable. There is no job to which Mr Gibbs can return.

[49] Turning to wages. Often an applicant who successfully challenges a redundancy will be unable to recover lost wages. This is due to the redundancy being substantively, if not procedurally, justifiable meaning there would have been no loss of wages. My conclusion Mr Gibbs selection was substantively if not procedurally justifiable and rectification of the procedural deficiencies would not have altered that means that is the situation here.

[50] Even if that were not the situation another factor would have led to the same result. As Chief Judge Inglis recently said *It is well established that the Court will take a failure to mitigate into account when assessing a claim for lost remuneration.*[9] Here we have a situation in which Mr Gibbs has freely admitted he has done nothing to try and replace the hours he lost as a result of Tranzit's decision. That failure to mitigate would inevitably deprive him of the right to be reimbursed for a wage loss had there been one.

[51] Turning to compensation. Mr Gibbs supported his claim in this respect with a written impact statement. It describes a physically and emotionally draining experience along with sleepless nights and unwarranted reputational damage. Here it should be noted redundancy does not suggest any fault on the part of the dismissed employee and that is definitely the case here.

[52] Mr Gibbs evidence was not challenged which is understandable given it is clear from his presentation Tranzit's inadequate consultation impacted on the level of hurt Mr Gibbs has felt. His lack of understanding regarding the decision made it significantly harder to grasp what was occurring and or understand it which aggravated the harm.

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[8] Section 125(2) of the Employment Relations Act 2000

[9] Paper presented at the Law @ Work Conference, Auckland 26 June 2018 and Wellington 27 June 2018

[53] I conclude his evidence warrants an award at the higher end of the scale obtainable in a redundancy setting and consider $12,000 appropriate.

[54] I will not progress the penalty claims for a number of reasons. First some of the grounds proffered as justifying a penalty are simply untenable such as the claim Tranzit's refusal to reinstate warrants such a sanction. The outcome speaks for itself.

[55] Secondly penalties are normally considered punitive sanctions for deliberate wrongdoing. While Tranzit's process left a lot to be desired there is no evidence its failures were the result of a deliberate and wilful attempt to abrogate its responsibilities. Its failure to comply with the duty of good faith by consulting inadequately has already been addressed and remedies provided via the substantive outcome. There is no evidence Tranzit should face some form of double jeopardy.

[56] Finally and having concluded Mr Gibbs has a personal grievance and remedies accrue I am required to consider whether or not those granted should be reduced as a result of contributory conduct on Mr Gibbs part.[10] As already said redundancy implies no fault on Mr Gibbs part and that is the case here.

Costs

[57] Finally there are Mr Gibbs costs and in this respect he seeks *compensation for costs to be calculated*. This claim faces a significant issue. Costs are to reimburse a portion of the amount spent on attaining professional representation. Here, and while Mr Gibbs was assisted by family members, there is no suggestion professional costs were incurred. It is therefore highly likely reimbursable costs are limited to the Authority's filing fee of $71.56 the reimbursement of which is a given due to Mr Gibbs success. Given a costs determination can be revisited and in order to avoid putting the parties to what appears unnecessary effort and cost, I will make an order accordingly.

Conclusion and orders

[58] For the above reasons I conclude Mr Gibbs has a personal grievance in that he was unjustifiably dismissed. As a result I order the respondent, Tranzit Coachlines Taranaki Limited pay Mr Gibbs:

[10] Section 124 of the Employment Relations Act 2000

a. $12,000.00 (twelve thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000; and

b. A further $71.56 (seventy one dollars and fifty six cents) being reimbursement of the Authority's filing fee.

M.B. Loftus
Member of the Employment Relations Authority