IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 213/09
5147892

	BETWEEN	JOHN CHARLES HALL Applicant
	AND	TRANSOTWAY LIMITED Respondent

Member of Authority:	Philip Cheyne
Representatives:	David Clark, Counsel for the Applicant Mark Beech and Amy Scott, Counsel for the Respondent
Investigation Meeting:	4 June 2009 at Blenheim
Further Information:	Affidavit dated 9 June 2009 of William Smith
Submissions Received:	15 June 2009, 1 & 10 July 2009 from the Applicant 23 June 2009 & 6 July 2009 from the Respondent
Determination:	14 December 2009

DETERMINATION OF THE AUTHORITY

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[1] Charlie Hall worked for Transotway Limited as a driver from January 2007 until August 2008 when he was given four week's notice of dismissal due to redundancy. Mr Hall says that he was unjustifiably dismissed and has a personal grievance against Transotway while the company says that Mr Hall was fairly dismissed for redundancy after it made a decision to discontinue his driving run.

[2] To resolve this problem I will set out in more detail what happened before considering the application of the statutory test for justification of a dismissal.

[3] During the employment Mr Hall had several work accidents. In May 2007 he hit a cow on the road while he was driving early one morning. He required some time off work. Mr Hall had another work related accident in July 2007 and was off work

until the beginning of September 2007 and returned to fulltime work in October 2007. There is some dispute about the level of support Transotway provided to Mr Hall during his recovery but it is not necessary to canvass that.

Mr Hall's runs

[4] Mr Hall was based at Transotway's Blenheim depot. William Smith is the branch manager.

[5] There is a signed employment agreement dated 23 January 2007. It is labelled *Fixed Term Driver Contract* and clause 3(a) says that it shall have effect for a period of three months from 23 January 2007. Curiously for a purported short duration fixed term agreement it includes a redundancy clause that provides for a minimum of four weeks notice but no severance payment. Redundancy is defined as the termination of employment attributable to the fact that the position is superfluous to the employer's needs. No other terms of employment were discussed or agreed at the end of this initial engagement but Mr Hall simply continued working. There is no dispute that Mr Hall was a permanently employed driver as at the date of the termination of his employment.

[6] The employment agreement describes Mr Hall's position as *Driver*. It required him to perform incidental duties in addition to driving for a minimum of 40 hours per week, with normal days of work Monday to Sunday *subject to runs and the roster*. Those provisions reflect Mr Smith's evidence that drivers worked in accordance with a roster set by the company and that they had *no choice* by which he meant that Transotway reserved the right to allocate drivers to runs.

[7] Mr Hall's evidence is that Transotway operated five runs, three runs from Blenheim to Nelson and return and two runs from Blenheim to Christchurch return. That evidence is not disputed. Mr Hall started out doing the early Blenheim to Nelson return run (King Salmon No 1). By the time of the July 2007 accident Mr Hall was on one of the Blenheim Christchurch return runs. The accident happened in Christchurch. After that accident he was placed on one of the Christchurch runs (the Rocket run) because its lesser frequency and lighter lifting requirement suited his graduated return to work programme. Sometime later he was placed on the King Salmon No 1 run and the King Salmon No 3 run. Eventually he was doing only the King Salmon No 3 run. In about late May 2008 Mr Hall was transferred to one of the

Christchurch runs, apparently as a temporary allocation for another driver who had left Transotway.

[8] The evidence about Mr Hall's work patterns establishes that he was assigned to different runs at different times to suit Transotway's business requirements, as were the other permanent drivers. Some account was taken of Mr Hall's personal preferences and circumstances but he was contractually obliged to work whatever runs Transotway assigned to him. Conversely he had no contractual entitlement to any particular run.

[9] Transotway provided information about the drivers employed at the time of Mr Hall's redundancy. There were seven drivers plus two storemen who did relief driving. One of the seven drivers was apparently employed on *casual weekend work only*. Another did the McDonalds run said to be for another division of Transotway. Based on this information, there were five permanent drivers including Mr Hall subject to the same or similar terms of employment. One of those permanent drivers had been offered employment on or about 16 July 2008 and started just before the end of the month.

[10] In about mid 2008 Mr Hall was diagnosed with an eye problem that required him to have an operation. By a letter dated 9 July 2008 he was advised that he would be admitted to hospital on 6 August. He understood that it would take a week or less to recover. Mr Hall told his branch manager (Mr Smith) about these arrangements and Mr Smith said it was fine. In the lead-up to the operation Mr Hall was reassigned to the King Salmon No 3 run. The undisputed evidence is that shortly before 30 July 2008 Mr Smith told Mr Hall that he was being reassigned to the King Salmon No 3 run because it would be easier to cover for him part way through the week on that run as opposed to the King Salmon No 1 run. The reassignment took effect from early August. In submissions counsel argued that Mr Hall consented to the reassignment. That overstates the position. Mr Hall did not oppose the reassignment, nor did he have a right to do so.

[11] On or about 27 July 2008 Mr Hall was required to undergo a drug test. A provision in the employment agreement refers to the company's drug and alcohol testing policy under which the company randomly tests employees. Mr Hall's test was clear. In his evidence Mr Hall refers to the requirement to undergo a test as reflecting him experiencing a problem with his employer by which he means

Mr Smith. However I am satisfied that there is no basis for that view. The evidence before the Authority indicates that selection for drug testing was dealt with on a random basis by the company's head office.

The redundancy process

[12] Mr Smith's evidence is that in or around early July he was told by head office that *we had to review our current runs to determine their financial viability and that based on this information, some runs may have to be cut*. Mr Smith knew that the least financially viable run was the NZ King Salmon No 3 run.

[13] Dean Martin is Transotway's Auckland-based Manager-Operations. He commenced in March 2008 to audit the operations and structure of the business which at that time had been suffering substantial financial losses. His evidence, which I accept, is that Transotway strategically looked at routes from a national viewpoint and that branch managers such as Mr Smith had little say in which runs were being cut. That is supported by Mr Smith's evidence, when questioned, that the decision to discontinue the third run was made a week or two prior to 30 July and that it was Mr Martin who told him to cut that run.

[14] Following the investigation meeting, Transotway provided a copy of an email dated 24 July 2008 at 8.51am from Mr Martin to Mr Smith about *truck 112 Blenheim to Nelson return*. The body of the email reads:

> *Billy, we are undertaking an across the board approach on utilization and we have identified the above run as a major cost to the business. For the total month of June we only generated $4.7k in charges and therefore need to cancel this run.*
>
> *Before doing so we need to implement the following:*
>
> 1. *Find a way to deliver Heller and Goodman Fielder into Nelson.*
> 2. *Find a sub contractor (if we can't do ourselves) to bring King Salmon.*
> 3. *Once the plan is agreed we will then need to reduce the head count by one.*
>
> *Can you please come back to myself, on points 1 & 2 before the 1st August if you need any assistance then please let me know. We need to have it implemented by the 18th August and all associated costs out by the 29th August.*
>
> *Regards,*
> *Dean*

[15] Also following the investigation meeting, Transotway provided a copy of Mr Martin's diary for 24 July 2008 which indicates that he and Mr Smith had a discussion that afternoon about the email.

[16] This material should have been provided with the statement in reply or prior to the investigation meeting in accordance with directions made in preparation for the meeting. Despite that, it is clear enough that Mr Smith had instructions on 24 July to terminate the King Salmon No 3 run and reduce the headcount by one. After receiving these instructions Ms Smith reassigned Mr Hall from the Christchurch run to the King Salmon No 3 run giving the explanation recorded above but not referring to the email instructions just mentioned.

[17] On or about 30 July, Mr Smith gave Mr Hall a letter of that date. The letter said that Mr Hall's position was one that had been identified as possibly affected by restructuring *because your role has been proposed to be combined with another role*. Mr Hall was invited to a meeting scheduled for Monday 4 August to discuss the proposal and he was offered the opportunity to be supported or represented.

[18] There is little specific evidence about the 4 August meeting. Mr Smith says *I explained to Charlie what Transotway was thinking in terms of the restructure and tried to answer any questions that Charlie had*. Following this meeting, Mr Hall was given a letter dated 4 August setting out arrangements for a second meeting scheduled for 11 August.

[19] Mr Hall had eye surgery on 6 August but could not return to work as quickly as he had thought so the second meeting was moved to 15 August, then to 18 August. These arrangements were made despite Mr Hall being certified unfit for work from 6 August with a medical review scheduled for 21 August. Although no one told Mr Hall at the time, the requirement to meet on or before 18 August reflected Mr Martin's email instruction to Mr Smith.

[20] There is more evidence about what happened during the 18 August meeting. Mr Hall's evidence is that he was told that the *third King Salmon run* was ending, there was no other work for him and that he could not do other runs because of his bad back. He was asked for suggestions but responded by asking what would he know about how to reorganise their operation. He did ask why they were making him redundant, having just taken on a new driver three weeks earlier.

[21] Mr Smith's evidence is that Mr Hall said he had no feedback on the proposals; that he was unwilling to participate in a roster covering the remaining runs because he did not want to work weekends; that he was not interested in the Foodstuffs run to Christchurch because the heavy lifting might further injure his back; and that he hoped for a job with another Transotway employee who had applied to become an owner driver. Mr Smith then told Mr Hall that he would have to give him four weeks' notice starting 19 August and ending 16 September and that they would discuss things further if any runs became available during the notice period.

[22] To some extent therefore each man disputes the other's account of this meeting. It is common ground that no-one wrote any notes during the meeting. Mr Smith says that he wrote a file note after the meeting but the same day. A printed note dated 18 August 2008 was provided before the investigation meeting. At the meeting I asked for further information about the computer file. It appears that Mr Smith amended an existing file as the properties dialogue box reports its creation date as 20 June 2008. Nothing about the printed note relates to events in June 2008. The file was apparently printed on 19 January 2009. By that time Transotway had received correspondence about the grievance and been served with the proceedings. The file was forwarded to Transotway's HR manager on 8 May 2009 so that is shown as the date it was last modified. These circumstances make it difficult to place weight on the file note as a contemporaneous account that could assist with resolving the conflicts between Mr Hall and Mr Smith. The *bona fides* of a letter dated 19 August 2008 is not disputed but the text of the letter does not throw any light on the evidential disputes.

[23] When questioned, Mr Hall said he thought there was some discussion about him possibly working for Mr Simmons, the permanent driver who wanted to become an owner driver. He denied being offered the chance to do the McDonalds or the Foodstuffs runs and he denied that there was any talk about a new roster system or that he said he was unavailable for rostered weekend work. I will return later to resolving the conflicts between the two men. It is common ground that Mr Smith told Mr Hall that he would be dismissed and that Mr Hall later received a letter dated 19 August confirming this. It says that Transotway has been forced to restructure to continue operating in a financially viable way; that at the two meetings Mr Hall provided no suggestions or proposals for consideration; that there were no redeployment options; and that Mr Hall was being given four weeks' notice.

[24] Mr Hall remained off work until the last week of the notice period when he returned to duty. Mr Hall's employment ended on 16 September 2008.

After the dismissal

[25] Mr Hall received a reference dated 1 October 2008 from Mr Smith confirming his employment from January 2007 until September 2008. As to the reasons for the dismissal it reads *Charlie's role within the Company was as a Linehaul Driver, on a Blenheim to Nelson or Blenheim to Christchurch return trip daily. …Due to a down turn in the economy our line haul runs have been reconstructed and unfortunately Charlies run has been made redundant.*

[26] Neil Otway is a director of Transotway. Sometime after the dismissal, but before 27 November 2008, Mr Hall rang Mr Otway to complain about having been made redundant. Mr Otway tasked Mr Martin with responding. Mr Martin rang Mr Hall and listened to his concerns. Mr Martin said he would investigate and call back. When he called back, Mr Martin offered to travel to Blenheim for a meeting. There was also some discussion about whether Mr Hall would be interested in work if there was any available. Mr Hall said he needed to discuss that with his wife. When they spoke again, Mr Hall said he was not interested in any work from Transotway.

[27] On 27 November Mr Hall's solicitor sent a fax to Transotway's HR manager setting out details of Mr Hall's personal grievance. There was eventually a response on 22 December 2008.

Justification for the dismissal

[28] Whether Mr Hall's dismissal was justifiable must be determined on an objective basis, by considering whether Transotway's actions and how Transotway acted were what a fair and reasonable employer would have done in all the circumstances at the time.

[29] There are several circumstances not already detailed that should be mentioned. Transotway is a national company with a number of depots nationwide. Mr Martin's evidence, which I accept, is that Transotway had experienced substantial financial losses in the lead up to the restructuring programme. The restructuring included returning a number of leased trailers, selling vehicles and closing two depots. Overall, staff numbers reduced from over 250 at the beginning of 2008 to about 170

as at June 2009. Most of that reduction must have been by way of attrition because the HR manager says in the letter 22 December 2008 that eleven employees were given redundancy letters. Mr Martin's evidence, which I also accept, is that Transotway decided to discuss options directly with the drivers on affected routes rather than involve all employees.

[30] In *Simpsons Farms Ltd v Aberhart* [2006] 1 ERNZ 825 the Employment Court confirmed that a fair and reasonable employer must be able to establish that they have complied with the statutory obligations of good faith including those about consultation. Consultation must be a reality not a charade and must not be treated perfunctorily or as a mere formality. Sufficiently precise information must be given to enable an employee to express a view. Judged against these standards Transotway falls short.

[31] Mr Hall was not given any details of the extensive company wide restructuring referred to in the evidence, nor was he told how the decision to cease the King Salmon No 3 run fitted in to that restructuring programme. The communication to him as reflected in the 30 July letter was that there was a proposal to combine his role with another role and at least inferentially that the King Salmon No 3 run might cease. That communication was misleading because the decision to end the run had already been made and there was no proposal to combine his role with another role. I find that there was a lack of sufficiently precise information so as to enable Mr Hall to respond.

[32] Significantly, there was no consultation with Mr Hall about the decision only to consult with drivers of affected runs.

[33] The written communications and the two meetings were no more than mere formalities as far as Transotway was concerned. That is apparent from the failures mentioned above but also because Ms Smith had no power to do anything other than terminate Mr Hall's employment by 18 August 2008 on the approach mandated from head office.

[34] The definition of redundancy in the employment agreement reflects common usage: see *GN Hale & Sons Ltd v Wellington etc Caretakers etc IUOW* [1990] 2 NZILR 1079. It requires the position filled by the employee to be (or to become) superfluous to the needs of the employer. The evidence referred to thus far indicates

that a permanent driver's position was likely to be superfluous to Transotway's needs in the Blenheim depot. What is not established is that Mr Hall's position was superfluous. While Mr Hall had driven the King Salmon No 3 run during his employment, when Mr Smith was instructed to reduce the headcount by one Mr Hall was not driving that run. When Mr Hall was reassigned to it, Mr Smith knew what was going to happen but said nothing. I have not been given any evidence about who was assigned to the Christchurch run to replace Mr Hall or who had been doing the King Salmon No 3 run while Mr Hall was on the Christchurch run. Assuming that it was a straight swap, then the established redundancy situation potentially affected both Mr Hall and the other driver. If other drivers were involved then the redundancy situation extended to them as well. A fair and reasonable employer would not have reassigned Mr Hall to the affected run and then treated him as the only person who could be dismissed so as to reduce the headcount of permanent drivers by one.

[35] I should return to the evidential dispute about the 18 August 2008 meeting. The main point of difference is whether there was discussion about Mr Hall's reluctance to work at weekends. Mr Smith says that his proposal was to include the remaining runs on a roster system which would have involved the drivers each taking a share of the weekend work required by several of the runs. Mr Smith acknowledged that such a roster would not have reduced the head count. In any event, there is reference to such a discussion in Mr Smith's file note. There is also a similar mention in the HR manager's letter of 22 December 2008. There is no mention of the discussion in any documentation that can reliably be dated prior to when Mr Hall raised his grievance. I find that there probably was some reference to Mr Hall's reluctance to work weekends during the 18 August meeting which Mr Hall has forgotten. There had been similar discussions earlier unrelated to redundancy. However, during the redundancy process this was put to Mr Hall as a reason along with his health issue why Transotway was not prepared to deploy him on other runs. I prefer Mr Hall's evidence as to the tenor of the communication to him on 18 August. Transotway had already decided to terminate his employment and Mr Smith's meetings with him were a charade.

[36] To summarise the above findings, Mr Hall was unjustifiably dismissed because Transotway has not established that his position was superfluous to its needs, it failed to properly consult with him about making him redundant and it did not

consult with him at all about its policy decision to dismiss as redundant the driver of the run to be cancelled.

[37] A number of other arguments are advanced on Mr Hall's behalf but it is not necessary to canvass those in light of the conclusion that a fair and reasonable employer would not have dismissed Mr Hall in the circumstances at the time.

Remedies

[38] In submissions counsel for Mr Hall asked for a penalty to be imposed on Transotway for its breach of the redundancy provisions in the employment agreement. No such claim was included in the statement of problem. I am not prepared to entertain a penalty claim at such a late stage.

[39] Mr Hall did not contribute in a blameworthy way to the circumstances giving rise to his grievance.

[40] There is a claim for $10,000.00 compensation for distress. Transotway points out that there is no independent evidence to support this claim by which is meant no evidence other than from Mr Hall. However, there is no reason to doubt Mr Hall's evidence that he felt Transotway just wanted to get rid of him and that he was no good to them, that he was completely gutted, that his life was wrecked at a time when he was at a low ebb because of his eye operation from which he had not recuperated and that he felt gutted that an employer to whom he had been loyal would *stick it to me like that*. Mr Hall also points out that he still has not been able to obtain permanent replacement employment so he has not been able to leave these things behind and move on. The situation is quite different from that where an employee complains of a poorly handled but genuine redundancy. Here Mr Hall is entitled to have assessed the distress caused by his loss of employment. The proven effects on Mr Hall are not trivial. I consider an award of $8,000.00 is appropriate to remedy them.

[41] There is a claim for lost remuneration. The remedy is provided for in s.128 of the Act. If loss is established the Authority must order the lesser of three months' ordinary time remuneration or the proven loss. However the Authority can order compensation for a greater amount if such loss is proven. Here, Mr Hall lost remuneration from 17 September 2008. Counsel lodged a memorandum on 4 May 2009 showing Mr Hall's actual loss to date after accounting for other earnings totalled $11,907.67. However in evidence Mr Hall acknowledged that the calculations did not

include earnings of approximately $900.00 from another source. I accept that Mr Hall lost remuneration of about $11,000.00 and Transotway is ordered to pay him that sum.

[42] There was a possibility that Mr Hall might have had some work with Transotway after his dismissal but he declined to consider that possibility. That does not disentitle him to the remedy of compensation for lost remuneration. At the time Mr Hall was aware that new drivers had been employed after his dismissal and he correctly believed that he had been singled out unfairly and was not genuinely redundant. It is not surprising that he would not consider any further work with Transotway. In addition, Mr Hall took steps to mitigate his loss by actively seeking other employment.

[43] I should acknowledge the view that Mr Hall might have been selected to be redundant if Transotway had properly involved other drivers in its quest to reduce its Blenheim headcount by one. Against that, Mr Smith told me that he knew that one of the drivers would leave if not permitted to become an owner-driver. Transotway was considering this at the time it orchestrated Mr Hall's dismissal. Shortly after Mr Hall's employment terminated that driver was told he could not become an owner driver, he gave notice of resignation and a new employee was engaged to replace him. A proper selection process and the ensuing notice period probably would have extended into that driver's resignation which would have resolved the desire to reduce the headcount by one. Mr Hall's employment probably would have continued unaffected.

[44] Mr Hall has apparently made a claim on an mortgage protection insurance policy related to redundancy. That is a matter between him and the insurer and does not affect the assessment of his lost remuneration.

Summary

[45] Mr Hall was unjustifiably dismissed.

[46] Transotway Limited is to pay Mr Hall compensation of $8,000.00 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.

[47] Transotway Limited is to pay Mr Hall compensation of $11,000.00 (gross) pursuant to s.123(1)(b) and s.128(3) of the Employment Relations Act 2000.

[48] Counsel for Mr Hall seeks costs of $2,500.00 while counsel for Transotway has not dealt with the point, no doubt thinking that the Authority would reserve costs. That sum seems not inappropriate so nothing more is required form Mr Hall's counsel at this stage. If Transotway wishes to argue for a different outcome counsel should lodge and serve a memorandum within 28 days and counsel for Mr Hall may lodge and serve a reply within a further fourteen days. If that does not happen, an award of $2,500.00 for costs will be made.

Philip Cheyne
Member of the Employment Relations Authority