

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

**BETWEEN** Noel Kitchen (Applicant)  
**AND** Farmers Transport Limited (Respondent)  
**REPRESENTATIVES** Guy Manktelow for Applicant  
Andrew Gallie for Respondent  
**MEMBER OF AUTHORITY** G J Wood  
**INVESTIGATION** 22 February 2006  
**MEETING**  
**DATE OF** 22 March 2006  
**DETERMINATION**

**DETERMINATION OF THE AUTHORITY**

1. Mr Kitchen claims that his dismissal by the respondent (Farmers Transport), ostensibly for redundancy, was in fact not genuine and was also not handled fairly. Farmers Transport considers that Mr Kitchen was dismissed for genuine reasons of redundancy and that the redundancy was handled appropriately.

**Process of the Investigation**

2. This matter was initially set down for an investigation meeting on 13 December 2005. Unfortunately, the investigation meeting had to be adjourned because of my unavailability. An investigation meeting was subsequently agreed to, on 12 December 2005, to commence on 22 February 2006. On 24 January, Mr Gallie, on behalf of Farmers Transport, sought an adjournment because its key witness, Mr Roebuck, had unexpected business commitments during the week of 20-25 February. Mr Gallie stated in his letter:

*“Mr Roebuck would of course need to make himself available for the hearing on 22 February 2006 unless arrangements can otherwise be made to adjourn the matter and it is for that reason that we now write.*

*We do accordingly seek an adjournment of the hearing scheduled to take place on 22 February 2006 for the reasons set out above. Mr Roebuck has indicated that should an adjournment be granted he would be available to attend a meeting through March, should an alternative hearing date be available during that period.”*

3. This application was opposed by Mr Manktelow, on Mr Kitchen's behalf, on the grounds that Mr Roebuck should have been able, even at that late stage, to arrange his affairs so that he could attend, and that there was nothing out of the ordinary in the reason now advanced for an adjournment.
4. I declined the adjournment, but offered four alternative dates, two of them outside of the week in question, and advised the parties that the investigation meeting could be rescheduled if both parties agreed to one of the dates offered.
5. On 9 February the Authority informed the parties that it had not heard anything more about the changing of the investigation date and therefore the investigation meeting was still in place for 22 February. Nothing further was heard again from the parties until the commencement of the investigation meeting. At that time Mr Gallie informed the Authority that Mr Roebuck had declined to attend the investigation meeting in full awareness of the consequences of it proceeding, basically on formal proof, because he preferred to attend to his business commitments. Mr Gallie, however, remained to represent Farmers Transport's interests.
6. The investigation meeting proceeded with the interviewing of Mr Kitchen who was the sole witness in attendance. In coming to my determination I have had regard to Mr Kitchen's evidence primarily, but also to the documents provided by both parties, including correspondence from Mr Roebuck in response to the original raising of a grievance by Mr Kitchen and to Mr Roebuck's written statement of evidence. The points made in Mr Roebuck's statement of evidence were put to Mr Kitchen, which allowed for a thorough testing of Mr Kitchen's evidence. Wherever there is dispute between Mr Roebuck's evidence and Mr Kitchen's evidence, I have preferred that of Mr Kitchen, who struck me as a straightforward and honest witness.

## The Facts

7. Mr Kitchen has lived in Feilding for more than 60 years and worked there for more than 40. He has worked in the rural transport industry since 1961. All of his work, until his dismissal in 2003, was for Farmers Transport or its predecessor companies.
8. In 1984, after Farmers Transport acquired the business that Mr Kitchen worked for, he was appointed as Feilding Branch Manager. He was later promoted to Southern Area Manager. In 2002 the role of Southern Area Manager was disestablished, but Mr Kitchen was redeployed back into his former position of Feilding Branch Manager.
9. That same year, Mr Roebuck, the Executive Chairman of Farmers Transport, part of the Eastern Equities Group, became concerned about the profitability of the Feilding branch. These problems did not improve to Mr Roebuck's satisfaction.
10. Mr Roebuck came to the view that Mr Kitchen should be replaced as Feilding Branch Manager. He asked Mr Kitchen in March 2003 if he would remain on, however, as Assistant Branch Manager. Mr Kitchen was told that "*he would not be thrown on the scrap heap*". Mr Kitchen agreed to support the new manager and stay on as Assistant Manager.
11. Mr Kitchen became concerned about his position on the basis that he felt he could lose his job once the new manager had settled in. In this regard it is important to note that the appointment of a new manager and a new assistant manager meant that there were additional costs in running the branch. Mr Kitchen was paid \$60,000 per year and was provided with a company car and telephone and the costs of a manager in addition were all new, despite the branch struggling to make a sufficient return for Farmers Transport.
12. On 26 June 2003, Mr Kitchen wrote to Mr Roebuck questioning his future prospects once the new manager was fully up to speed. Approximately three weeks later, Mr Roebuck rang Mr Kitchen to assure him that "*he would be treated with the dignity and respect his years of service deserve*".
13. By September 2003, the performance of the Fielding branch was still not to Mr Roebuck's satisfaction. Furthermore, the new Branch Manager was not settling into

living in Feilding and wanted to leave. Five driving positions were disestablished at that time as well, but I accept Mr Kitchen's evidence that these were seasonal lay offs which would have occurred anyway.

14. On 21 September 2003, Mr Roebuck contacted Mr Kitchen at home and told him not to go into work the next day and that he would ring him at home. He rang the next morning to say that he wanted to meet with Mr Kitchen and he would do so that afternoon. At 3 o'clock Mr Roebuck rang to advise that the meeting would take place at the Feilding office at 5pm.
15. The meeting commenced at 5.30pm on 22 September 2003. At the commencement of the meeting, Mr Roebuck told Mr Kitchen that he was going to be made redundant. This was said to be because the Feilding branch had to be downsized. At the meeting Mr Kitchen was told that he would be paid until the end of the following week, but that he should stay away from work. In response to a question from Mr Kitchen he was told that he could hold on to his car for the moment.
16. Mr Kitchen was also informed that there were no other jobs in Farmers Transport for him. Mr Kitchen asked if there was anything in Farmers Transport in the engineering line as he had some experience in that field, but was told this was not an option.
17. Mr Kitchen was told, however, that there was an opportunity with an associated company, Road Freighters Limited. He was told to contact the branch manager of Road Freighters in Palmerston North to discuss terms of that offer. Mr Kitchen later did so, but considered the commission sales contract arrangements were very unsatisfactory and therefore declined it. On the basis of Mr Kitchen's evidence that he did not believe there were real prospects of success with the job, I accept his that his decision to turn down this opportunity was a reasonable one.
18. Mr Kitchen then left the premises of Farmers Transport, never to return. A week later a new manager was appointed to run the Feilding branch office, but Mr Kitchen had never been informed of this matter, nor asked to apply for any potential vacancy.
19. Mr Roebuck and Mr Kitchen later discussed how Mr Kitchen's departure would be announced. Mr Roebuck suggested that the termination be categorised as early

retirement and forwarded a draft announcement to that effect. Mr Kitchen felt that he had to go along with that suggestion and therefore emailed Mr Roebuck accepting the draft announcement.

20. Mr Kitchen was paid for three months in lieu of notice. Mr Kitchen looked for alternative work through a management company he operated. He was successful in obtaining a 19 month contract relatively soon afterwards, for which his company was paid \$5,000 per month. The company, however, had to supply a motor vehicle and meet its own expenses from these payments. Mr Kitchen has also earned another \$1,800 in contract work since that contract terminated.

### **The Law**

21. In a case of dismissal for redundancy, it is up to the employer to satisfy me that the dismissal was genuine (*Wellington etc Caretakers etc IUW v. G N Hale & Son Ltd* [1993] NZILR 836). As was held in *Humphrey v. Telecom NZ Ltd* (unreported, Shaw J, WC3/02, 25 February 2002):

*“It is in cases involving a very small number of workers that the Court needs to be persuaded that redundancy and not some factor personal to the worker dismissed is the true reason for dismissal. In other words, it must be shown that the worker’s position is surplus to the employer’s needs and not merely that the incumbent of the position has outstayed his welcome. An employer’s decision to dismiss a worker will almost always have the effect of producing a cost saving, so that, unless the worker is immediately replaced by another, it is easy for the employer to assert afterwards that the effect produced was the effect intended from the start. It is therefore necessary to weigh the evidence most carefully without, however, imposing on the employer any higher than the normal standard of proof.”*

22. Obviously, redundancy can not therefore be used to camouflage other reasons for dismissal. Thus, as was held in *Rolls v. Wellington Gas Co Ltd* [1998] 3 ERNZ 116:

*“...an employer cannot evade a need for a fair process upon matters of complaint against an employee by resorting to some kind of contractual action such as a token reorganisation. It also follows that the Court should not be slow to identify the obvious link in such and similar situations.”*

23. Furthermore, when there are mixed motives for redundancy it is up to the employer to persuade the Authority that the redundancy was both genuine and the predominant motive or reason for dismissal, see *Forest Park (NZ) Ltd v. Adams* (unreported, Colgan J, AC83/00, 19 October 2000).

24. Procedural fairness is also an important consideration in dismissals for redundancy, particularly as the employee made redundant has done no wrong. The Authority must consider issues relating to representation, communication and consultation. What is important is that an employee in these circumstances is entitled to a “*dignified exit*”.

### **Determination**

25. Had Mr Roebuck attended the investigation meeting, he may have been able to satisfy me that the redundancy was carried out for genuine reasons. In his absence, however, I can not accept that Mr Kitchen’s redundancy, so soon after he had been effectively demoted to Assistant Branch Manager at Feilding, was justified. I have accepted Mr Kitchen’s evidence, in the absence of any direct evidence to the contrary, that he was effectively given no choice other than to accept his demotion. This demotion meant that Farmers Transport was adding another cost layer to the running of its branch. Yet that branch was already performing poorly. It is no surprise, therefore, that it continued to perform poorly with the addition of a new layer of management that simply increased its costs. I am therefore satisfied that it was this deliberate decision to replace Mr Kitchen as the Branch Manager at Feilding, yet retain him as Assistant Manager, that introduced this extra cost, which was subsequently removed by making Mr Kitchen redundant.
26. Mr Kitchen clearly had these same concerns himself when he wrote to Mr Roebuck two months later, questioning whether he would be thrown “*on the scrap heap*”. As Mr Kitchen impliedly relied on an undertaking from Mr Roebuck to the contrary before accepting the position of second in charge, it follows that Farmers Transport’s decision three months later to make him redundant can not be justified as genuine in employment law terms. This conclusion is supported by Mr Roebuck’s decision to deny Mr Kitchen the right to work out his notice, which was inconsistent with the usual practice in redundancy situations for employees to work out their notice. This is also an issue relating to procedural fairness in terms of a dignified exit for Mr Kitchen.
27. Another issue in relation to procedural fairness was the failure of Farmers Transport to offer Mr Kitchen the right to a representative at this meeting. In actual fact, Mr Kitchen had no knowledge of what the meeting was about and therefore could not

have been expected to envisage that the meeting was of a sort requiring representation. Importantly, Mr Kitchen was also not consulted about the decision, yet it affected him directly. This was not a decision of such urgency that consultation was not required, I find.

28. Furthermore, I find, on the basis of Mr Kitchen's evidence, and again here Mr Roebuck may have been able to persuade me otherwise, that Farmers Transport did not put sufficient effort into trying to find a new job for a man with the length of service that Mr Kitchen had.
29. Taken together with the failure to allow Mr Kitchen to work out his notice, it was clear that Mr Kitchen was not given a dignified exit and his treatment overall was unfair in procedural terms.
30. I therefore find that Mr Kitchen was unjustifiably dismissed by Farmers Transport on both substantive and procedural grounds.

### **Remedies**

31. Mr Kitchen claims compensation of \$12,000, lost remuneration, plus a contribution to his costs of \$10,000.
32. Mr Kitchen went to work in a consulting company of which he is the principal. He earned \$5,000 per month for the next 19 months after the payment in lieu of notice he was given had expired. Mr Kitchen was earning \$60,000 per year plus the full use of a motor vehicle plus petrol allowance and a free phone.
33. There is no reason to limit Mr Kitchen's loss to any particular period of time such as 12 months (*Telecom NZ Ltd v. Nutter* [2004] 1 ERNZ 315). Taking all circumstances into consideration, especially Mr Kitchen's age and length of service, I consider that Mr Kitchen should be paid for 19 months' loss of remuneration at the level of \$1,000 per month, there being no exact way of calculating his actual loss given that he was in self-employment for those 19 months. Thus he faced greater expenses, but could also claim against them on his tax return.

34. Mr Kitchen did not give much evidence about the way he was affected by his dismissal. No evidence was given from anyone else such as his wife about how it affected him either. Had there been such evidence, then Mr Kitchen may have been awarded the full sum claimed. He did state, however, that the whole thing had been very hard for him and it had been extremely difficult for him to find alternative employment. It was also very clear from his direct evidence that this matter has affected Mr Kitchen to a great degree, especially given his age and his many years of employment with Farmers Transport and its predecessor companies. In all the circumstances of this case I assess compensation at \$8,000 accordingly.
35. Mr Kitchen is entitled to a contribution of all of his reasonable costs in the investigation meeting, which only took 2½ hours to complete. In all the circumstances of this case I consider that an award of \$3,000 in costs is appropriate.
36. I therefore order the respondent, Farmers Transport Limited, to pay to the applicant, Noel Kitchen, \$8,000 in compensation under s.123(1)(c)(i), \$19,000 in lost remuneration under s.123(1)(b) and \$3,000 in costs.

**G J Wood**  
**Member of Employment Relations Authority**