

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2020] NZERA 202
3024472

BETWEEN

CLEMENT BRIAN
LIVINGSTONE
Applicant

AND

DOWNER NEW ZEALAND
LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: The applicant in person
Anthony Russell, counsel for the respondent

Investigation Meeting: 17 February 2020

Submissions received: At the investigation meeting from both parties

Date of Determination: 18 May 2020

DETERMINATION OF THE AUTHORITY

- A. Brian Livingstone raised a personal grievance in time.**
- B. Mr Livingstone was unjustifiably disadvantaged by the action of
by Downer New Zealand Limited.**
- C. Downer New Zealand Limited (Downer) is to pay Mr Livingstone
\$10,000 as compensation for humiliation, loss of dignity and**

injury to feelings for his grievance within 28 days of the date of this determination.

- D. Downer does not owe Mr Livingstone any wage arrears.**
- A. Downer is to pay Mr Livingstone \$71.56 for the Authority's filing fee within 28 days of the date of the determination.**
- B. Other costs are reserved and a timetable set if the matter cannot be resolved by agreement.**

What is the employment relationship problem?

[1] Clement Brian Livingstone, known as Brian, worked for Downer New Zealand Limited (Downer or the company) from 2015 to 2017 as a Programme Works Manager in the Auckland region water contract operation. Downer is a large company providing integrated services in transport, energy and other sectors.

[2] Mr Livingstone's role involved managing the central and northern stormwater contracts planned works. He had initially been based at Penrose and was then transferred to Albany. As a result he moved up to live north of Auckland.

[3] Mr Livingstone was made redundant by Downer and has subsequently challenged aspects of Downer's actions including his notice, final pay and dismissal.

What is the litigation history between the parties?

[4] Another Authority Member issued a determination in the first claim by Mr Livingstone regarding whether his final pay was calculated correctly.¹ That determination focused if the right salary had been paid when the employment agreement provided for a monthly salary payment. It resulted in Downer being ordered to pay a modest amount of wages to Mr Livingstone.

[5] Downer filed a de novo challenge which resulted in an Employment Court judgment.² The Court found the company had correctly calculated the pay due for the final broken month of service.

¹ *Livingstone v Downer NZ Limited* [2018] NZERA Auckland 73, file number 3020375.

² *Downer NZ Ltd v Livingstone* [2019] NZEmpC 15.

[6] Mr Livingstone filed another matter in the Authority which, after amendment, included claims which appeared to be in the nature of personal grievances. He alleged that the termination of employment was predetermined and that he had been harassed and bullied. Downer argued that the grievance/s were not raised within the 90 day period as required by s 114 of the Employment Relations Act 2000 (the Act).

[1] A question arose about whether Mr Livingstone was entitled to refer to two of his emails, with Downer objecting that they were subject to confidentiality relating to mediation. The Authority decided they were not.³ Downer challenged that determination. The Court dismissed the challenge, finding that the emails were not covered by mediation confidentiality and were admissible.⁴

[2] The matter then continued in the Authority. An investigation meeting was held on 17 February 2020. I heard evidence from Mr Livingstone, Marcel de Leur (Downer Water Manager – Northern Region), Neil Cherry (Downer’s Northland Contract Manager) and Mary Gaylard (Downer HR Business Partner – Utilities Water ITS and WMC).

[3] As permitted by s 174E of the Act this determination has not recorded everything received but has stated findings, expressed conclusions and specified orders made as a result.

What are the issues?

[4] The issues for investigation and determination are:

- (a) Did Mr Livingstone raise with Downer one or more personal grievance in times, as required by s 114 of the Act?
- (b) If not, should he be granted leave under s 114(4) of the Act, including a consideration of s 115?
- (c) If Mr Livingstone is able to pursue a personal grievance claim, was he unjustifiably dismissed by Downer?
- (d) Was Mr Livingstone harassed and bullied by Downer?
- (e) If Mr Livingstone establishes a personal grievance, what lost wages reimbursement and/or compensation should he be entitled to, if any?

³ *Livingstone v Downer NZ Limited* [2019] NZERA Auckland 134.

⁴ *Downer New Zealand Limited v Livingstone* [2019] NZEmpC 109.

(f) Does Mr Livingstone have a wage claim against Downer regarding his notice period?

[11] During the investigation meeting Mr Livingstone raised the possibility of age discrimination by Downer in its decision making about restructuring. This issue appears not to have been raised before. Although the Authority does have the ability to find grievances other than the type alleged,⁵ I am not satisfied that the evidence available supports an age discrimination grievance.

What happened in the lead up to Mr Livingstone's termination?

[6] On 3 August 2017 Downer announced to staff that it was proposing to restructure the management teams of its Auckland Stormwater and Water Care operations into a new Water Operations Northern Region group. Consultation commenced.

[7] The following day Mr de Leur and Ms Gaylard met with Mr Livingstone and told him that his role within those dis-established under the proposal. He was informed that if the proposal went ahead he could apply for roles in the new structure.

[8] On 15 August the final structure was confirmed. Mr Livingstone proceeded to register his interest with Mr de Leur for two roles; Programme Co-ordinator Water and Contracts Administrator – Water, Whangarei. The first was a new role whereas the second was outside the scope of the restructuring. The Programme Co-ordinator role had a salary around \$20,000 more than Mr Livingstone's salary. The Contracts Administration role had a salary approximately half of his salary, although that was not specified to Mr Livingstone.

[9] Mr de Leur and Ms Gaylard from Downer interviewed Mr Livingstone for the Programme Co-ordinator role. Mr Livingstone's impression was that his ability to undertake IT requirements was questioned. Mr de Leur and Ms Gaylard thought Mr Livingstone made few comments and were not confident that he brought ideas or systems experience about how to handle what was described as a big and complex role. He was not offered the role.

[10] On the online application for the Contracts Administrator role there were two areas regarding salary. The first referred to salary and hourly rate Mr expectations.

⁵ Section 122 of the Act.

Livingstone was able to skip these questions as so “Not answered” is recorded. In the salary section there was an expected salary item in dollar figures. Mr Livingstone says that he could not skip this item and so he recorded \$80,000. That figure was over \$10,000 less than his previous salary but as it turns out some \$30,000 plus more than the role involved.

[17] Mr Cherry, the manager responsible for the Contracts Administration role, considered a number of applications. Sometimes he would be contacted from within Downer about a staff member needing redeployment although that was more within the depot they worked in, rather than from other areas. There was no contact here about Mr Livingstone.

[11] Salary expectation as one of the first things Mr Cherry looked at when shortlisting job applicants. He regarded Mr Livingstone as overqualified and over experienced for the role, confirmed by the salary expectation. He was not aware whether a figure had to be specified in that section of the form.

[12] Mr Cherry did not get a sense that Mr Livingstone had contract administration as distinct from contract management experience. Mr Livingstone’s experience was more in managing contract administrators rather than undertaking that role himself. There is reference in his CV to responsibility for contract administration in his role prior to coming to Downer, although that could potentially cover either scenario.

[13] On 18 August 2017 Downer informed Mr Livingstone that he was not successful in his application for the Programme Manager role. He was also told that he had not obtained the other role. There was no discussion with him about these outcomes.

[14] Mr de Leur met with Mr Livingstone on 23 August 2017. Mr de Leur told Mr Livingstone that he was to finish at Downer.

[15] Downer wrote to Mr Livingstone by 29 August 2017 letter, specifying that as per his employment agreement his notice period was four weeks. Unfortunately the letter did not state the date when the notice period commenced. Mr Livingstone’s last day of employment is stated to be 19 September 2017, and “encompassed in that” was his notice period. Assistance was offered to apply for vacant roles in the wider business although was as per the local processes. Downer referred Mr Livingstone to a website with Downer vacancies on it.

[23] Ms Livingstone finished work and in accordance with the employment agreement, Downer paid him four weeks' salary as redundancy compensation.

[5] Mr Livingstone subsequently saw both the jobs he had applied for advertised on Seek. The Programme Co-ordinator role has not been filled and had been renamed before being advertised on 3 October 2017. The Contracts Administrator role had been filled by an internal applicant who later to go elsewhere.

Was Mr Livingstone given proper notice of termination?

[6] The first question here is whether Mr Livingstone was given verbal notice at the 23 August 2017 meeting and if so, whether that was sufficient.

[7] Both Mr Livingstone and Mr de Leur were reasonably frank that it was hard to remember events after this length of time. Mr Livingstone thought that he had been told that he was getting a month's notice. He then did not consider that he got a calendar months' notice from 23 August. Mr de Leur accepted it was possible that at the meeting he did not say the date Mr Livingston's employment was to end. He thought he had mentioned four weeks' notice.

[8] I find it more likely that Mr de Leur said that it was four weeks' notice, rather than mentioning a month. Four weeks is the company's standard individual employment agreement term for staff of that level, as well as being what was in Mr Livingstone's employment agreement.

[9] Verbal notification of the notice period was acceptable as the agreement did not require written notice to be given. However, this dispute indicates the advisability of promptly confirming any verbal notice in writing. The letter confirming the termination came out later than would usually be the case after a meeting of this nature. Only then was the final date specified.

[10] Having decided that effective notice was given orally, I do not need to go on to consider Downer's argument that Mr Livingstone waived any remaining notice period.

Did Mr Livingstone raise his grievance?

[11] Mr Livingstone is trying to pursue a dismissal grievance focused on predetermination and not being re-deployed.

[31] The earlier Authority determination on confidentiality included the following statement “... it is more likely than not that the purpose of Mr Livingstone’s emails were to put Downer on notice that ... he wished to have two other matters discussed at mediation.”⁶. However, that is not determinative of the issue which I must now answer.

[32] In the recent decision *Chief Executive of Manukau Institute of Technology v Zivaljevic* Judge Holden outlined the key principles applicable to the raising of a grievance.⁷ These included that:

It does not matter what an employee intended his or her complaint to be, or his or her preferred process for dealing with it was in the first instance. ... The issues are whether the nature of the complaint was a personal grievance under s 103 of the Act and, if so, whether the employee’s communications complied with s 114(2) of the Act by conveying the substance of the complaint to the employer.⁸

[33] The 90 days issues focuses on emails Mr Livingston sent to Downer and the Mediation Services.

[34] In his 16 October 2017 email to Mediation Services, Mr Livingstone said that he wished to have two other matters addressed at mediation. He copied in Ms Gaylard from Downer. Mr Livingstone described the two additional matters as:

1. I wish to be given the full notice period of redundancy as specified in the Second Schedule of my IEA : 4 weeks.
2. My termination for reasons of redundancy was pre-determined, I feel unwanted, hurt, humiliated and bullied.

[35] Ms Gaylard responded by requesting Mediation Services obtain full details of his further claims from Mr Livingstone.

[36] Mr Livingstone emailed the company and Mediation Services on 13 November 2017, setting out fuller details of his concerns. The email is slightly over a page. The first issue concerned calculation of salary. The second was about whether he was given a full notice period. The third is headed “Termination” and reads:

At a staff briefing on Thursday, 3 August 2017 it was announced that the Auckland Stormwater and Water Care operations were to be restructured into the new Water Operations Northern Region group. The next day, Friday 4

⁶ *Livingstone v Downer New Zealand Ltd* [2019] NZERA Auckland 134 at [13].

⁷ *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at [33] – [38].

⁸ Above at [37].

August 2017 I was called into a meeting with Marcel and Mary and told that my role as Programme Manager , Stormwater was to be dis-established.

My registration of interest in the Programme Manager role in the new Water Operations Northern Regions group was declined, as was my application for the role of Contract Administrator – Water in Whangarei. I had the necessary skills and experience for both these new roles.

Several months prior to the restructure I completed my annual Performance Leadership process (PLP) review with my manager, Lucas. All performance objectives for the previous year had been met and there was no issues raised regarding my performance. I never received my completed PLP for the coming year despite several requests for the plan, including the response “I’ll get back to you tomorrow”.

[It] is now apparent to me that I was no longer wanted by Downer. I was hurt and humiliated. I felt bullied by the process used to terminate my employment with Downer.

[37] Mr Livingstone does not use the words “unjustifiably dismissed”, “unjustified dismissal” or “disadvantage” but that it not required when raising a grievance.⁹

[16] Reading the two emails, Mr Livingstone does identify that it is matter relating to his dismissal. More specifically he identified concerns that Downer’s decision to make him redundant was pre-determined and roles which he could have undertaken. He identified that he wanted Downer to do something about his concerns, as he wanted them discussed at mediation. The fact that Mr Livingstone has not identified specific remedies is not fatal.¹⁰

[17] Mr Livingstone did raise an unjustified dismissal personal grievance claim within the 90 day period.

What is Mr Livingstone’s dismissal claim?

[18] Mr Livingstone’s concerns are focused on whether Downer had predetermined its decision to terminate his employment and its failure to redeploy him.

[19] I find that Downer’s decision to restructure was a genuine business decision and the company had consulted with its staff.

[20] Mr Livingstone’s predetermination claim was based partly on events following his last performance leadership process (PLP). In June or July 2017 he and his manager

⁹ Above at [36].

¹⁰ *Idea Services Ltd (in Stat Man) v Barker* [2010] ERNZ 454 at [36]

met. Performance objectives were assessed as having been met and no performance issues raised. He did not receive the written PLP form despite requests. Mr Livingstone took this as evidence that Downer planned not to continue his employment. Mr de Leur indicated that this situation was due to the manager's other work commitments and was not unique to Mr Livingstone.

[43] The PLP situation was not sufficient to satisfy me that Downer had decided in advance to get rid of Mr Livingstone. I will consider the re-deployment issues below but note at this point that I do not see any problems with offering Mr Livingstone other work as providing a basis for his predetermination claim.

Did Downer meet its obligations regarding redeployment?

[21] Mr Livingstone considers that he had the skills for both the roles he applied for. Downer does not agree. As well as looking at these roles, I also refer to wider redeployment possibilities.

[22] I have considered several cases concerning redeployment including *HP Industries (NZ) Limited v Davison*¹¹, *Jinkinson v Oceania Gold (NZ) Ltd*¹² and *Wang v Hamilton Multicultural Service Trust*¹³.

[23] In considering Downer's redeployment obligations I take into account that the company at that time had around 7,000 to 8,000 staff and was growing.

Programme Manager role

[24] Mr de Leur describes the Programme Manager role as significantly larger than Mr Livingstone's existing role, with increased complexity. It encapsulated the Watercare contract routine programme works including water and wastewater, with about 60% of the role not relating to storm water, Mr Livingstone had previously been responsible exclusively for storm water. He accepted that this was essentially two roles put into one. The new role was responsible for around three times the portfolio of the disestablished role as well as being over a bigger area. It reported directly to Mr de Leur. He described the role as having a slightly different skillset in the non-stormwater area.

¹¹ *HP Industries (NZ) Limited v Davison* [2008] ERNZ 514

¹² *Jinkinson v Oceania Gold (NZ) Ltd* [2010] NZEmpC 102, especially [52] to [55].

¹³ *Wang v Hamilton Multicultural Service Trust Ltd* [2010] NZEmpC 142, especially [40] to [43].

[48] In addition, the new position required experience with external IT and complex scheduling due to the large amount and variance in assets. Mr de Leur was looking for comments at the interview indicating new systems or idea about how to deal with the work and did not consider that Mr Livingstone presented such ideas.

[25] Mr Livingstone has not established that he had the necessary skills and experience for the new programme manager role, nor that he could have attained that level with a reasonable amount of training supported by Downer.

Contract Administrator and other roles

[26] The Contract Administrator role was a less complex role than Mr Livingstone's previous job as well as being on a significantly lower rate of pay. There is a question about whether he had the contract administrative experience as distinct from contract management experience. He maintains he did and there was some evidence of this from his CV although his predominant work had been in contract management.

[27] There was no pressure imposed on Mr Livingstone to apply for another position, so the fact he applied meant it should have taken it seriously and explored with him including whether he was really interested at the lower salary level. His home was actually closer to the Whangarei base than the Albany one where he had been working. He applied for that position recognising that at least a modest pay cut was to be involved. Given those circumstances there was a prospect that he would have taken the job at least for a period, had he been offered it.

[28] Ms Gaylard described Downer as having an absolute commitment to redeploy staff, assuming they have the competencies to match a role. She described the process as varying depending on the restrictions which the employee puts in place, for example not being prepared to move home, retain a certain salary or a company vehicle. Vacancies are then examined and a discussion held with the recruitment team about possibilities.

[29] Mr Cherry also referred to being approached on other occasions about a possible candidate for a vacancy whose role elsewhere had disappeared.

[30] It was not evident that these steps occurred in Mr Livingstone's situation. There does not appear to have been discussions with Mr Livingstone about how such things

as whether he was prepared to move, which areas of the business he might be interested in and the importance of salary maintenance and company vehicle retention to him.

[55] Neither management nor human resources approached Mr Cherry about the Whangarei role, despite Mr Livingstone having formally expressed an interest in it and filling out an application.

[31] Ms Gaylard was based in Hamilton although she came to Auckland meetings at key times. She had only just transitioned to the Water area and had a considerable workload.

[32] Essentially Mr Livingstone was left to his own devices to identify possibly suitable roles. Those dealing directly with him were not aware whether there were other possibilities with Downer's Water business elsewhere in the country.

[33] There seemed to be an expectation that he would approach Downer for discussion. While it would have been desirable if he had, having been turned down for a more senior and a more junior position it is perhaps not surprising that he felt unwanted by the company.

[34] As regards redeployment I am not satisfied on balance that the company acted as a fair and reasonable employer could have done. The Contracts Administration position should have been explored further for and with Mr Livingstone. Other redeployment prospects in such a large organisation should also have been explored. Mr Livingstone had demonstrated flexibility in his living arrangements and work elsewhere was a real possibility.

[35] I do not consider that the defects in Downer's process were minor.

[36] Mr Livingstone's dismissal was substantively justified but Downer failed to meet its obligations regarding redeployment. This is better characterised as an unjustified action by Downer. I am able to find a grievance of a type different to that claimed. I find that Mr Livingstone was disadvantaged by Downer's unjustified action.

What remedies should Mr Livingstone receive?

[37] Mr Livingstone was paid redundancy compensation by Downer. As he has only established an unjustified action I do not consider that lost wages should be awarded.

[63] Mr Livingstone claims compensation for humiliation, loss of dignity and injury to feelings. He found Downer's unwillingness to redeploy him to either a more senior or less senior role upsetting. His self-confidence was dented. He had a long period without work. Although perhaps not someone inclined to emotional expressions, I gained a strong sense of him feeling deeply hurt by the way he was treated.

[12] However, Mr Livingstone's sense of unfairness seems likely influenced by his views that the dismissal was predetermined and the possibility of age discrimination applying. I have not upheld either of those assertions. The impacts on him have also been much effected by the subsequent litigation and that is not something which I can take into account for this grievance.

[13] I have considered under s 124 of the Act whether Mr Livingstone's remedy should be reduced due to any contribution by him. I do not find any conduct by him which can be regarded as causative of the outcome and blameworthy.

[14] I order Downer New Zealand Limited to pay Mr Livingstone \$10,000.00 under s123 (1)(c)(i) of the Act, within 28 days of the date of this determination.

What was Mr Livingstone's bullying and harassment claim?

[15] Mr Livingstone argues that he was bullied and harassed by Downer. One aspect of this is the lack of resolution regarding his final pay before he finished work with the company. While it is preferable that pay issues are resolved employment finishes, that is not always feasible. I cannot see the lack of resolution in itself as amounting to bullying or harassment by the company.

[16] The remainder of Mr Livingstone's arguments about bullying and harassment relate to events after his employment finished, primarily in the course of the conduct of the litigation and difficulties he had finding other work. Downer submits that it was entitled to pursue challenges to Authority determinations. As regards the wages issue it says it sought clarification from the Court as the issue affected a number of its staff.

[17] Personal grievance claims relate to events between an employer and an employee. Mr Livingstone's claims relate to events after his employment relationship with Downer finished and thus cannot be the basis for a grievance. In any event, while I appreciate that Mr Livingstone has been through rather more litigation than he might

have wished, I do not see a basis for establishing any improper action by Downer, in its involvement with this litigation.

Costs

[70] Costs are reserved and the parties invited to resolve the matter.

[18] Mr Livingstone was not represented so it may be that he has not incurred any representation costs which are claimable. However, if there are and the parties are unable to agree on resolution Mr Livingstone shall have 21 days from the date of this determination to file a memorandum on costs. Downer shall have a further 14 days in which to file a memorandum in reply. Submissions claiming costs must include a breakdown the costs and be accompanied by supporting evidence.

[19] Given the prospect of no representation costs being claimed, I deal with the filing fee now. I award Mr Livingstone the Authority's filing fee and order Downer to pay Mr Livingstone \$71.56 within 28 days of the date of this determination.

Nicola Craig

Member of the Employment Relations Authority