

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 286
5407497

BETWEEN JOHN LOWE
 Applicant

A N D GRAEME WRIGHT
 TRANSPORT LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Wendy McPhail, Advocate for the Applicant
 Susan-Jane Davies, Counsel for the Respondent

Investigation Meeting: 25 August 2015 at Hamilton

Submissions Received: 31 August 2015 from the Applicant
 2 September 2015 from the Respondent

Date of Determination: 18 September 2015

DETERMINATION OF THE AUTHORITY

- A. The applicable employment agreement was the “collective employment contract” dated in 1997. This employment contract makes no provision as to redundancy compensation and does not have a restraint of trade provision.**
- B. Mr John Lowe’s dismissal was not for genuine reasons of redundancy.**
- C. Graeme Wright Transport Limited did not follow a fair and proper process when dismissing Mr Lowe.**
- D. Mr Lowe is awarded the sum of \$15,000 compensation for hurt and humiliation suffered by him pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act). This is to be reduced by \$1000 in accordance with clauses E and F below.**

- E. Mr Lowe breached his obligations of good faith and fidelity to Graeme Wright Transport Limited and is ordered to pay a penalty to it of \$1000.**
- F. Taking into account the penalty to be paid by Mr Lowe to Graeme Wright Transport Limited, Graeme Wright Transport Limited is to pay Mr Lowe the sum of \$14,000 distress compensation within 21 days of the date of this determination.**

Employment relationship problem

[1] The applicant, Mr John Lowe, claims he was unjustifiably dismissed by the respondent, Graeme Wright Transport Limited, (Wright Transport) on 19 November 2012.

[2] Mr Lowe says he had been employed by Mr Graeme Wright and then Wright Transport for over 20 years. During his employment Mr Lowe performed a number of jobs, including as a truck driver, undertaking vehicle repairs in the workshop and at the time of his dismissal, primarily as a digger driver.

[3] Mr Lowe says he was informed by Mr Wright that the reason for his dismissal was that the digger he worked on was to be sold. However, the digger was never sold and Mr Lowe says that following his dismissal another of Wright Transport's employees took over the digger work. Mr Lowe says his position was not genuinely redundant and that Wright Transport did not consult or treat him fairly before dismissing him.

[4] Wright Transport denies Mr Lowe was unjustifiably dismissed. Wright Transport says the digger work had reduced significantly, there was insufficient work for Mr Lowe and his position was genuinely made redundant.

[5] Mr Wright says he treated Mr Lowe well during his employment, including loaning him money for lengthy periods of time and charging no interest. Mr Lowe accepts he was treated well and that he was loaned money and that Mr Wright helped him obtain various motor licences.

[6] Mr Wright says before making the decision to terminate Mr Lowe's employment, Mr Lowe was given the opportunity to purchase the digger and contract

his services back to Wright Transport. However, Mr Lowe did not take up the opportunity. Mr Wright says this was another example of his ongoing good treatment of Mr Lowe.

[7] Wright Transport says after being given notice of redundancy and while still working for it, Mr Lowe canvassed its customers in breach of his duties to it as his employer and his duty to act in good faith.

Issues

[8] The issues for determination by the Authority are as follows:

- (a) What was the applicable employment agreement at the time of Mr Lowe's dismissal?
- (b) Was the dismissal for genuine reasons of redundancy?
- (c) Did Wright Transport follow a fair and proper process when dismissing Mr Lowe?
- (d) In the event that the dismissal was unjustified, what remedies are available? and
- (e) If remedies are payable to Mr Lowe, did he contribute to his dismissal?

First Issue

What was the applicable employment agreement at the time of Mr Lowe's dismissal?

Graeme Wright Transport Limited

[9] In approximately 1967, Mr Graeme Wright purchased an existing transport business delivering milk to dairy factories. Mr Wright began with one truck and carried on the business as a sole trader. The business grew significantly and Mr Wright employed more drivers.

[10] On 18 January 2008, Wright Transport was incorporated. Mr Wright is the sole shareholder and director of Wright Transport and is actively engaged in its business. Wright Transport is reasonably sized, currently employs 20 staff and

provides services to the local farming community of Puriri. Services include livestock cartage, fertiliser and lime cartage and spreading, and post peel and sawdust supply.

[11] Mr Wright and subsequently Wright Transport have carried on business in the small, close knit community of Puriri, for 48 years.

Mr Lowe's employment

[12] Mr Lowe has been a part of the local Puriri community for most of his life. Mr Lowe was initially employed by Mr Wright in approximately May/June 1992 as a general labourer/driver. In about 2000, Mr Wright purchased a digger for the business and at that time Mr Lowe became primarily responsible for organising the work for the digger and driving the digger.

[13] Terms of employment for the drivers employed by Mr Wright were contained in employment contracts modelled on contracts obtained from another large company in the transport industry.

[14] At the time of his employment, Mr Lowe was not provided with a written employment contract. Mr Lowe and Mr Wright agree that in approximately 1998, Mr Lowe was given an employment contract, which he signed.

[15] The terms of the 1998 employment contract as to redundancy entitlement is in dispute. Mr Lowe says there was provision for redundancy compensation calculated in accordance with a formula. Mr Lowe thinks the formula for calculating redundancy compensation was 4 weeks wages for the first year of employment and two weeks wages for every year of employment thereafter. Mr Wright is adamant that there was no provision for redundancy compensation. Neither party was able to provide the Authority with the 1998 employment contract.

[16] In 2008, Mr Wright incorporated Wright Transport. No meeting was held to inform staff about this change and no new employment agreements were provided to staff.

[17] At the investigation meeting, two versions of "*collective employment contract*" were provided by Wright Transport. Mr Wright says he thinks but is unsure the signatures on each of the contracts were Mr Lowe's. Mr Lowe was unable to confirm the signatures were his. Neither of the contracts were signed by Mr Wright as

the employer party and Mr Wright accepted that he had probably not signed the contracts. One of the contracts is undated in 1997 and has a notation "*Extension to 31st March 2000*". The other contract is dated 24 January 2001. Neither of these contracts allows for compensation in the event of redundancy.

[18] Mr Wright was adamant that there was no provision for redundancy compensation in any of the employment contracts or agreements he had with staff. Mr Wright says the employment contracts he modelled his on did not contain provision for redundancy compensation.

Individual employment Agreement

[19] In approximately 2010, Mr Wright provided staff with an individual employment agreement for signature. Mr Wright wished to ensure he was up to date with his employment agreements.

[20] Mr Lowe took the agreement home and discussed it with his partner. Mr Lowe was not happy with some of the provisions of the agreement, for example there was a restraint of trade clause and there was no provision for redundancy. Mr Lowe returned a marked up copy of the agreement to Mr Wright with changes he wished to have incorporated in the agreement. For various reasons, the employment agreement was never signed by Mr Lowe or Mr Wright. Other staff did sign this individual employment agreement.

[21] I find that Mr Lowe and Mr Wright signed an employment contract in approximately 1998. On the evidence made available to me, I find that on the balance of probabilities, the terms of that employment contract were as contained in the "collective employment contract" dated in 1997, provided to the Authority. This employment contract makes no provision as to redundancy compensation and does not have a restraint of trade provision. For the purposes of Mr Lowe's employment relationship problem these are the issues of relevance.

[22] I find that at the date of his dismissal on 19 November 2012, Mr Lowe's terms of employment did not make provision for redundancy compensation and did not contain a restraint of trade clause.

Second Issue

Was the dismissal for genuine reasons of redundancy?

[23] During 2012, Mr Wright and Mr Lowe had a number of conversations about the digger work and how it was declining. There were discussions about whether or not Mr Lowe could purchase the digger and if so contract his services back to Wright Transport. While there were a number of discussions, there was no agreement by Mr Lowe to purchase the digger or to perform contractor services for Wright Transport.

[24] Wright Transport employs a number of dispatchers and there was evidence that these dispatchers were finding it very difficult to work with Mr Lowe because he would not take instructions from them. Mr Wright had discussions with the dispatchers involved and he also confided in his administration assistant, Ms Baillie Snodgrass, his concerns about whether or not Mr Lowe was doing jobs required and requested of him. Mr Lowe acknowledged not doing work requested by dispatchers from time to time. However, Mr Lowe says this was because he had scheduled work for the digger and was sometimes not able to do the requested work.

29 October 2012 discussion

[25] On 29 October 2012, Mr Wright came into the yard and was asked by one of the dispatchers, Mr Ken Steen, if he could drive the cattle truck. Mr Wright knew the digger work was quiet and asked Mr Steen why Mr Lowe was not doing the truck driving duties. Mr Steen told him that Mr Lowe had refused to do the work. Mr Wright was unhappy about the situation and with this in mind, went to where Mr Lowe was in the workshop and spoke to him about his ongoing employment as a digger driver.

[26] Mr Wright's recollection is that he told Mr Lowe "*this isn't working*" and offered to sell him the digger and told him he would support him with any contract work.

[27] Mr Lowe says Mr Wright came into the workshop, without warning, and in front of two co-workers told him, "*I am making you redundant. It is uneconomic to run the machine. I am giving you three weeks' notice*".

[28] Mr Lowe says he was upset by the way in which Mr Wright had treated him after more than 20 years of employment and embarrassed that he had been dismissed in front of his workmates, Mr Brodie Lundberg and Mr Keith Griffin.

[29] Mr Wright says Mr Lundberg and Mr Griffin were in the workshop but were working at a distance from where he talked to Mr Lowe and would not have heard the conversation. Mr Lundberg and Mr Griffin both acknowledge being in the workshop at the time Mr Wright spoke to Mr Lowe on 29 October 2012 but say they did not hear the conversation. Both workmates say it was not unusual for Mr Wright to come in to the workshop to talk to them.

[30] It is my view, on the evidence, that Mr Wright intended and did give Mr Lowe notice of redundancy on 29 October 2012. I do not accept that either Mr Lundberg or Mr Griffin heard the conversation nor do I accept that Mr Wright acted in a manner which embarrassed or humiliated Mr Lowe. The conversation was part of an ongoing discussion between Mr Lowe and Mr Wright during 2012 about the declining digger work.

[31] Mr Lowe told Mr Griffin after his discussion with Mr Wright, that he was finishing up because of the lack of digger work. Mr Lundberg says he heard later that Mr Lowe was leaving because there was a shortage of digger work.

[32] I find there was a shortage of digger work and that Mr Lowe was primarily employed to drive the digger. I find that Mr Wright was frustrated by Mr Lowe's failure to do work requested of him when the digger work was quiet and was frustrated by not reaching an agreement with Mr Lowe to buy the digger and contract his services to Wright Transport. Mr Wright informed Mr Lowe on 29 October 2012 that the employment relationship was no longer working and gave him 3 weeks' notice of redundancy.

Notice of redundancy- 5 November 2012

[33] After the meeting in the workshop, Mr Wright sought legal advice and confirmed the decision to terminate Mr Lowe's employment, in writing, on 5 November 2012. The letter stated:

Dear Johnny,

To confirm our conversation on Monday the 29th of October 2012, as of Monday the 19th of November 2012 we will no longer have a permanent digger operating. As you agreed its maintenance has become to [sic] high for the return and to replace it with a new one there is just not the work available.

If you should decide to hire a digger or buy one and operate it on your own I would put what work I could your way, but as of the 19th of November 2012 your employment regrettably has been made redundant with Graeme Wright Transport Ltd.

I wish you the best in your future endeavours.

*Yours sincerely,
Graeme Wright
Graeme Wright Transport Ltd*

Genuineness

[34] Mr Lowe worked out his period of notice before finishing at Wright Transport on 19 November 2012. Mr Lowe claims that there was no genuine reason for his redundancy, the digger was not sold and Wright Transport continued undertaking digger work. It appears to be accepted by both parties that there was a shortage of digger work during 2012 and insufficient for a fulltime position.

[35] Mr Wright says the cost of continuing to repair the digger combined with the declining work for the digger made it uneconomic for him to retain a fulltime digger driver. After Mr Lowe was made redundant Mr Griffin did the digger work which occupied him no more than about 2 days a week, along with the workshop repair work.

[36] The Court of Appeal's statement of law regarding the genuineness of a redundancy in *GN Hale & Son Ltd v. Wellington Caretakers IUOW*¹ was that:

An employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, reorganisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have a right to continued employment if the business can be run more efficiently without him.

[37] However, since *Hale* was decided, the test for justification for dismissal is now as stated in s.103A of the Employment Relations Act 2000 (the Act) as being:

¹ [1991] 1 NZLR 151

- (1) *For the purposes of s.103(1)(a) and (b), the question of whether dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- (2) *The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[38] The test of justification requires that the employer act in a manner that is substantively and procedurally fair. An employer must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[39] The Employment Court has issued reasonably recent decisions in this area which have re-examined the statement of law as set out in *Hale* in light of s.103A of the Act. In *Michael Rittson-Thomas t/a Totara Hills Farm v. Hamish Davidson*², the Court referred to its previous comments about *Hale* in *Simpsons Farms Ltd v. Aberhart*³.

[40] His Honour Chief Judge Colgan considered that the Court cannot impose or substitute its business judgment for that of the employer taken at the time, however:

[54] *... the Court (or the Authority) must determine whether what was done and how it was done, were what a fair and reasonable employer would (now could) have done in all the circumstances at the time. So the standard is not the Court's (or the Authority's) own assessment but rather, its assessment of what a fair and reasonable employer would/could have done and how. Those are separate and distinct standards.*

[41] In *Rittson* the Court was critical of the lack of information provided to the employee and how the employer had not adequately explained why the moneys saved by the disestablishment of the employee's position justified the position being made redundant. The Court found, upon analysis, that the employer had been mistaken in concluding that there would be a wage saving of 10% per annum, when in fact it was 6%. This threw into doubt the genuineness of and, therefore, the justification, for dismissal.

² (Unreported) [2013] NZEmpC 39, 20 March 2013

³ [2006] ERNZ 825

[42] In *Brake v. Grace Team Accounting Ltd*⁴, Travis J firmly endorsed *Rittson*, finding in that case that although the employer claimed that its financial position had deteriorated over the six months the employee had been employed requiring a reduction in salaries, in fact analysis by the Court concluded that the employer's figures were incorrect and there had been no sudden deterioration. On this basis, it was held that the employer's justification for the dismissal was mistaken, with the consequence that the dismissal of the employee was unjustified.

[43] Counsel for Wright Transport submits that the Authority:

... must not substitute its view for the view of the respondent except that it is insufficient for an employer to simply assert it made the decision for genuine commercial reasons.

[44] Counsel goes on to argue that the substantive reason for Mr Lowe's redundancy was financial. While it is accepted that there had been a decline in the digger work and that the repairs to the digger were making its operation uneconomic, there had been no analysis by Mr Wright that pinpointed the operation of the digger as the reason for Wright Transport's decision to terminate Mr Lowe's position on the grounds of redundancy. The evidence given by Wright Transport's accountant was general evidence about the fluctuation of the business fortunes of Wright Transport which, as with many businesses, has been affected by the ups and downs of the economy. There was no discussion between Mr Wright and his accountant concerning Wright Transport's financial situation or the digger operation which could lead to redundancies.

[45] On the evidence, I accept that the digger business had declined during 2012 and the digger itself was costing Wright Transport more than it had in the past. However, Mr Wright did not analyse his business as a whole to determine whether the declining digger business and the increasing cost of operation of the digger were sufficient for him to conclude that there may need to be redundancies. Rather, on 29 October 2012, following discussions about the future of the digger and Mr Lowe's refusal to drive the cattle truck, Mr Wright made an immediate decision that he was going to make Mr Lowe's position redundant.

⁴ [2013] NZEmpC 81, 13 May 2013

[46] I find that there was no genuine reason to do so, based on the information that was available to Mr Wright at the time. The dismissal for redundancy was not genuine.

[47] It is my view that a fair and reasonable employer could not in the circumstances determine that to reduce costs, Mr Lowe's position was to be made redundant. Mr Lowe correctly, in my view, points to mixed or ulterior motives, namely his performance, which played a part in his dismissal for redundancy. Mr Wright accepts he did not address any performance issues with Mr Lowe. However, it is clear this was taken into account in his dismissal of Mr Lowe. Following his redundancy, Mr Griffin undertook the digger work which Mr Lowe had previously undertaken.

[48] The answer to the second issue is "no".

Third Issue

Did Wright Transport follow a fair and proper process when dismissing Mr Lowe?

[49] An employer who is proposing to terminate an employee's position for redundancy must not only have genuine reasons for doing so, but must follow a fair procedure.

[50] Section 4 of the Act addresses the requirement for parties to an employment relationship to deal with each other in good faith. Section 4(1A)(c) is particularly relevant to a redundancy situation and requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee to provide to the employee affected:

- (i) *Access to information, relevant to the continuation of the employee's employment, about the decision; and*
- (ii) *An opportunity to comment on the information to the employer before a decision is made.*

[51] In a redundancy situation, a fair and reasonable employer must, if challenged, be able to establish that it has complied with statutory obligations of good faith

dealing in s.4 of the Act. His Honour Judge Couch in *Jinkinson v. Oceana Gold (NZ) Ltd*⁵ noted at para.[40] that:

Subsection (1A)(c) is particularly significant in cases involving restructuring such as this. It emphasises the need for full and open communication by the employer and the provision of a properly informed opportunity for the employee to participate in the process.

[52] His Honour Chief Judge Colgan in *Simpsons Farms* noted that this compliance with good faith dealing includes consultation “*as the fair and reasonable employer will comply with the law*”⁶.

[53] During the course of 2012, there were a number of discussions between Mr Lowe and Mr Wright about the digger business and the cost of running the digger. However, these were discussions only and there was no financial information provided by Wright Transport to Mr Lowe during the course of these discussions. Mr Wright did not ever discuss or consult with Mr Lowe the possibility that he may lose his job.

[54] I understand Mr Wright has never in his lengthy working life ever made anyone redundant. Mr Wright believed he was acting in “*good faith*” by suggesting that Mr Lowe may be interested in purchasing the digger and contracting his services back to Wright Transport but that proposal was a discussion only and was not taken seriously by Mr Lowe. Mr Wright did not discuss or consult with other members of staff his concerns about the ailing digger business and what, if anything, should be done to alleviate this.

[55] Rather, Mr Wright had general discussions with Ms Snodgrass and with Mr Lowe which were based on the light work schedule for the digger during 2012, rather than providing any concrete financial information. When Mr Lowe did not accept work from Mr Steen on 29 October 2012, Mr Wright accepted at the investigation meeting that he took this into account when making his decision that Mr Lowe’s employment was to be terminated for redundancy. As mentioned above, Mr Lowe was not given the opportunity to address this concern with Mr Wright because Mr Wright did not raise it with him.

⁵ [2010] NZEmpC 102

⁶ Ibid para.[40]

[56] Counsel for Wright Transport accepts the inadequacy of the consultation process and invited the Authority to consider a number of factors including that:

- the business was a small business in a very rural area,
- Mr Wright treated his employees in “*an old fashioned way*”,
- Wright Transport did not have any “*in house HR expertise*”, and
- Mr Lowe was aware for a number of months that the digger work was insufficient and Mr Lowe was not willing to do other work.

[57] I accept all these points made by Counsel. However, as an employer, Wright Transport has legal obligations to its employees that must be complied with. A fair and reasonable employer is required to comply with the law.

[58] With regard to the fact that Wright Transport has no “*in house HR expertise*”, Mr Wright has an accountant and has had a lawyer for more than 30 years. Mr Wright consulted briefly with his lawyer by phone, before issuing Mr Lowe the letter of dismissal.

[59] It is my view that Mr Lowe was not given access to information relevant to the continuation of his employment with Wright Transport, and he was not given an opportunity to provide feedback before the decision was made about the continuation of his employment. The consultation process was not open and did not allow Mr Lowe the opportunity to participate in it.

[60] On Mr Lowe’s last day of work, Mr Wright deliberately chose not to be at work. This, Mr Wright says was because he was very upset that Mr Lowe had canvassed Wright Transport’s clients while still employed by it and was working for the competition. Mr Wright says he did forgive a \$500 loan owed to him by Mr Lowe but did not have a farewell function for him. Mr Lowe says this was very upsetting given his long period of service for Mr Wright and Wright Transport.

[61] I find Wright Transport failed to follow a fair process in making Mr Lowe redundant. The answer to the third issue is “no”.

Fourth Issue

What remedies are available?

Loss of wages

[62] Mr Lowe's employment terminated on 19 November 2012 and he commenced employment with Mr Steve Barker on 20 November 2012 at a higher hourly rate. Mr Lowe remains in employment with Mr Barker.

[63] Mr Lowe's representative accepts there is no loss of wage claim under the Act.

Compensation for hurt and humiliation

[64] Counsel for Wright Transport submits that there is no evidence of actual hurt and humiliation suffered by Mr Lowe in support of his claim for compensation pursuant to s123(1)(c)(i) of the Act. I disagree with this submission. Mr Lowe made a number of statements in his witness statement and during the investigation meeting about his hurt and humiliation, including:

- *I am very upset about the way in which I have been treated by Graeme. After 20 years of working for the same person, you develop a relationship with them. I have known Graeme since I was a small boy. Graeme and other workers were like members of my family. I feel a real sense of loss in the way Graeme has treated me. Some of Graeme's customers became like friends to me. I felt I lost a lot more than a job when Graeme terminated my employment.*
- *This feels very personal. Graeme's actions have been hurtful and disappointing and I am still experiencing a sense of loss over my dismissal.*
- *Graeme was not at work on my last day. I felt gutted that on my last day of work with Graeme, after 20 years of working for him, that he was not there to say good bye to me. Nor did Graeme offer me a reference...*

[65] Mr Lowe's partner, Ms Rachel Unsworth, echoed Mr Lowe's sentiments in her witness statement to the Authority.

[66] I am of the view that compensation of \$15,000 under s123(1)(c)(i) of the Act is appropriate in the circumstances.

Fifth Issue

Did Mr Lowe contribute to his dismissal?

[67] Due to the mandatory language of s.124 of the Act, I am required to consider whether there was any conduct by Mr Lowe which contributed to the situation that gave rise to the grievance. If I find there was contributory behaviour, then I am bound to reduce remedies accordingly.

[68] Counsel for Wright Transport submits that Mr Lowe's "*behaviour was both causative of the outcome and blameworthy. There was a wealth of evidence that the applicant picked and chose what work he wanted to do*".

[69] There was evidence that dispatchers were frustrated that Mr Lowe refused to take instructions and take work from them. Mr Lowe accepted this to be the case but only because he had work scheduled for the digger and was unable to undertake the work requested.

[70] Mr Wright was frustrated by Mr Lowe apparently not taking instructions from the dispatchers and this led to the discussion on 29 October 2012 during which Mr Lowe was made redundant. If Mr Wright had concerns about Mr Lowe accepting instructions for work or "*picking and choosing*" then he should have raised these with Mr Lowe so they could be addressed. Mr Wright did not do so and admits to this. This is not a situation of contributory conduct in my view. Mr Lowe had a legitimate reason for not accepting the work and Mr Wright took no steps to check with Mr Lowe whether his reasons were valid or not. I am not prepared to reduce the compensation award.

Breaches of s4(1A)(b) and(c) and/or s4(4)(e) of the Act

[71] Mr Lowe seeks a penalty of \$10,000 for alleged breaches of good faith by Wright Transport when making his position redundant. I accept the submission by Counsel for Wright Transport that on the facts of this particular case "*issues of good faith are fundamentally intertwined with the unjustified dismissal issue and should not*

sound in a separate remedy". Accordingly, no penalty is awarded against Wright Transport for the alleged breach of good faith.

Breaches of good faith and implied obligation of fidelity by Mr Lowe to Wright Transport

[72] Mr Lowe accepted that prior to concluding his employment with Wright Transport, he visited a number of Wright Transport's clients in the vehicle provided to him by Wright Transport in order to obtain work for his new employer, Mr Barker. Mr Lowe says it was a condition of his employment with Mr Barker that he bring work with him and as he had been made redundant he did not consider it to be an issue. Mr Lowe acknowledged that he did not speak to Mr Wright about this.

[73] This conduct did, in my view, constitute a breach by Mr Lowe of his obligations of good faith to Wright Transport. Under s.4 of the Act parties to an employment relationship are to "*deal with each other in good faith*".

[74] Section 4(1A) makes it clear that this duty of good faith is:

... wider in scope than the implied mutual obligations of trust and confidence ... and requires the parties ... to be active and constructive in ... maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative ...

[75] While Mr Lowe was understandably upset by his redundancy, he had an obligation while still an employee of Wright Transport to act in good faith towards it. By canvassing Wright Transport's customers in a vehicle provided to him by it and not speaking to Mr Wright about it, Mr Lowe breached his obligation of good faith. A penalty is appropriate. I consider a penalty of \$1000 to be appropriate.

[76] In the circumstances rather than a payment of the penalty by Mr Lowe to Wright Transport, Mr Lowe's award of \$15,000 compensation is to be reduced by \$1000 to take this penalty into account.

[77] I order Wright Transport to pay Mr Lowe \$14,000 distress compensation within 21 days of the date of this determination.

Costs

[78] Parties are encouraged to agree costs between themselves. If they are not able to do so, Mr Lowe has 14 days from the date of this determination to file a memorandum as to costs. Wright Transport has 14 days from receipt to file a memorandum as to costs in reply.

Anna Fitzgibbon
Member of the Employment Relations Authority