

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 172  
5448140

BETWEEN

NEIL MAY  
Applicant

AND

GEOTECH LIMITED  
Respondent

Member of Authority: Christine Hickey

Representatives: Jeff Goldstein, Counsel for Applicant  
Andrew Riches, Counsel for Respondent

Investigation Meeting: 3 September 2014

Determination: 4 November 2014

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**DETERMINATION OF THE AUTHORITY**

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**A. Neil May was unjustifiably dismissed through a flawed process although the decision to make him redundant was substantively justified.**

**B. Geotech Limited is to pay Neil May:**

- (i) \$7,000 in compensation; and**
- (ii) Any further amount calculated as set out in paragraph 50 of this determination.**

**Employment relationship problem**

[1] Neil May was employed as Geotech Limited's general manager on 5 June 2012. Geotech Limited (Geotech) is a geotechnical engineering company with a focus on the mining sector. Mr May was based in Westport. He says that he was unjustifiably dismissed on 5 December 2013 at a management meeting. He also says that Geotech breached its duty of good faith to him.

[2] Geotech says that it embarked on a legitimate redundancy process but Mr May resigned part way through the process. Therefore, he was not dismissed.

[3] Mr May claims remedies of lost remuneration from the date of dismissal to the date of the investigation meeting, and interest on his lost income. He also claims compensation of at least \$10,000.

[4] At the investigation meeting each of the witnesses affirmed their written evidence and answered questions. I heard from Mr May; Mrs Rere-O-Maki (Rea) May who is Neil May's wife; Perry May who is Neil May's brother; Bevan Vendt; Chris Morris, Geotech's Human Resources Manager; David Currie, Geotech's Chief Financial Officer; and Anthony Black, Geotech's sole director.

[5] As permitted by s 174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received but findings of fact and law are stated and conclusions on the issues for determination are expressed.

### **Issues**

[6] The Authority needs to determine:

- (a) Did Geotech have genuine reasons for the redundancy?
- (b) Did Mr May resign before that process had commenced?
- (c) Did Geotech follow a fair and proper process which resulted in Mr May's redundancy?
- (d) Did Geotech breach its duty of good faith to Mr May?
- (e) Whether Mr May is entitled to any remedies.

### **Factual background**

[7] Mr May was based on the West Coast but primarily engaged in managing the Canterbury Coal project and Christchurch demolition operations.

[8] Geotech says that Mr May's redundancy was necessary and came at a time when a number of other redundancies were made because it was in financial difficulties. Geotech provided its financial information for the calendar year of 2013 at the investigation meeting. Specific aspects of that information are commercially sensitive and I will not refer to the details in this determination. However, Geotech says that the main reasons it was in financial difficulty were two-fold. Its new venture of demolition in Christchurch was losing money and had done so every month since it began and Solid Energy, Geotech's largest client, was facing financial difficulties, due to the international slump in coal prices.

[9] The Solid Energy-owned Strongman coal mine was Geotech's biggest source of revenue. Geotech says that before April 2013 Solid Energy cut production in its Stockton mine and Geotech lost most of its work; it retained only 1 drill and one staff member on that site. From approximately May 2013 the income received from the Strongman mine was rapidly declining. In November 2013 Solid Energy informed Geotech it was no longer going to order any coal from Geotech.

[10] Mr Black described that as a *potentially terminal* blow for Geotech. He says a series of management meetings were held looking at how costs could be cut as much as possible.

[11] Mr May and Mr Black were present at one such meeting held in Christchurch on 28 November 2013 along with Mr Currie, Dwayne Solly, Geotech's Strongman Operations manager and John Easter, a consultant engineer. Geotech's projects were reviewed one by one in that meeting. In relation to the projects Mr May was most actively engaged in the minutes record:

*Chch operations. Essential to find a manager. Houses demolished by Durrie were viable but target remains demolition on the hill where geotechnical skills provide by Geotech would be an advantage. Action required by DS and AB to sort out the operation ASAP.*

*Canterbury Coal. NM chasing outstanding \$ ... of losses over previous 3 months. Losses cannot continue. Strip ratios exceeding 14:1 and coal not being taken at CCL instructions when exposed. Geotech overall management and site management inadequate. No profit possible from first pit. No certainty about access to second pit and the quality of the coal in the second pit. A viable arrangement needs to be agreed with Bathurst otherwise Geotech will need to pull out. NM to progress with Bathurst.*

[12] There was a further meeting involving the same people on Thursday, 5 December 2013. The minutes record:

*Canterbury ops. Required competent Christchurch based individual to run. Cannot support multiple levels of management. Currently no-one within Geotech capable of managing so will need to look out for a suitable person. In the meantime wind down operation and try and improve operation with existing staff. AB to chase up other Chch opportunities.*

*CCL NM drafted an email in the meeting (sent later in the day) to ... advising that cannot continue on current basis and would need to revert to dayworks rates on Monday 10<sup>th</sup> Dec until a suitable arrangement that is viable is agreed.*

*Staffing. Worked through schedule. DS to resolve employment with the following:*

*[list of employees, some of whom were to be made redundant]*

*Continued employment of other staff working at CCL, Canterbury Ops and Strongman dependent on keeping these projects going which will be dependent on reaching viable agreements with clients that do not require Geotech funding and putting in place effective management.*

*AB concluded review by advising NM that as the planned expansion into the Christchurch market had not been a success with the company having to minimise costs on all operations there was no longer a role for Neil as General Manager. NM and AB agreed that an orderly transition and termination would be worked through.*

[13] Mr May says that this was the first he had heard that his role was to be made redundant. He says that the minutes do not accurately record what was said by Mr Black who told him:

*You're gone. There's no job for you. It's not up for debate.*

[14] Mr May says that he tried to talk about the decision but that he was not able to do so. He left the meeting at that point. He says he does not remember whether he agreed that *an orderly transition and termination would be worked through* although he remembers that was raised as something Geotech wanted.

[15] Mr May's handwritten diary for 5 December 2013 records:

*Confronted in mgmt mtg with fete-a-complie (sic)  
No right of response – WTF  
Meeting previous night over alcohol Dwayne, Ant, David  
ChCh failing badly. Held me responsible. Challenged Ant – his reply  
No Consultation. No communication.*

[16] Mr May took legal advice the following day and was advised to keep notes both in his diary and to write notes on the computer. Mr May typed up his recollection of events at the 5 December meeting:

*At the end of the meeting, Ant said he wanted to talk about the Management and turned to me and said specifically "about you Neil". Then proceeded to say that ChCh was failing badly and that he holds me responsible. When I challenged this remark, Ant stated that he was not going to enter into a debate and that I was to go. He talked about needing to be able to hold his head up in Westport.*

*I then left the meeting. At no time was I consulted, talked to about this decision or given any right of reply.*

[17] I accept Mr May's evidence that Mr Black was unwilling at the meeting to discuss the termination of Mr May's role as general manager.

[18] On Saturday, 7 December 2013 Mr May emailed Mr Black at 11.50am:

*Hi Ant,*

*I do understand your position in needing to be able to look the community in the eye as it were. I also wish to remain in the community. In an effort to have an amicable parting as per your wishes, will you allow me the dignity to offer my resignation with the normal one month notice for salaried positions?*

*I also have spoken with Richard Tacon re CCL, he phoned me last night. He is requesting a meeting on site at CCL early next week. I would like to see an agreement on this project one way or another before I leave.*

[19] Mr Black's individual employment agreement did not contemplate that he would be given or have to give one month's notice, rather two weeks' notice was specified.

[20] At Mrs May's suggestion Mr and Mrs May went to visit Mr May's brother, Perry, on his farm at Springs Junction on Saturday, 7 December, arriving between 1pm and 2pm and returning home on Sunday, 8 December. Mr and Mrs May's evidence is that prior to leaving for Springs Junction Mr May did not leave the house and so he could not have been to talk to Mr Black that day.

[21] Mr Black says that on 7 December 2013 either earlier in the morning,<sup>1</sup> before 10 am, or in the afternoon<sup>2</sup> Mr May came to his house. Mr Black was in his vehicle about to

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<sup>1</sup> Ant Black's Brief of Evidence.

<sup>2</sup> Statement in Reply

go out and he invited Mr May to sit in the vehicle.<sup>3</sup> They either remained seated there<sup>4</sup> or went for a drive<sup>5</sup> and Mr May said that he would like the dignity of resigning rather than face redundancy or retrenchment. Mr May wrote:

*I further agreed to allow him the time to complete the [Canterbury coal] contract and allowed him a further 2 weeks over the 2 week notice period in his contract.*

*I took Neil at his work and took him as having resigned. With this issue resolved I moved onto other more pressing business facing the company and focussed on that.*

*Neil has now rejected this meeting over the weekend occurred. I am adamant that this happened ... We spoke for perhaps 20 minutes in the vehicle. It was an amicable conversation.*

[22] Mr May denies having any face-to-face discussion with Mr Black about his future with Geotech and absolutely denies resigning. He says he sent the email on the Saturday morning as a way of exploring how he and Mr Black might come to some mutually satisfactory way to end his employment. However, he says his email did not amount to a resignation and instead was a way of opening up negotiation.

[23] There were other in person and email exchanges between the parties including an email from Mr Currie to Mr May on 16 December stating that Mr May's verbal resignation to Mr Black on 7 December was accepted and that therefore his last day would be 4 January 2014.

[24] Mr Morris emailed Mr May the following day asking what was going on and stating that he had heard two versions of why Mr May was leaving Geotech; one being that he had resigned, which Mr Black told him, and one being that he had *got the boot* which Mr Solly told him.

[25] Mr May did not respond to that by email but on 18 December telephoned Mr Currie and discussed his unhappiness with the situation. Mr May says that he denied that he had resigned during that telephone call. Mr Currie says that Mr May did not deny that he had resigned but said he no longer wished to resign.

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<sup>3</sup> Ant Black's Brief of Evidence.

<sup>4</sup> Ibid.

<sup>5</sup> Statement in Reply.

**Did Mr May resign?**

[26] There is a disagreement about whether Mr May was made redundant or resigned once a redundancy process had begun. If Mr May resigned then, unless he was constructively dismissed (which has not been argued), his claim of unjustified dismissal must fail.

[27] Geotech says that on 7 December 2013 at Mr May's instigation Mr Black and Mr May had a conversation during which Mr May asked to be given the dignity of being able to resign rather than being dismissed. Geotech says Mr Black verbally accepted Mr May's resignation that day. According to Geotech Mr May then also sent the email asking for the dignity to be able to offer his resignation with one month's notice.

[28] For the following reasons I do not consider that Mr May actually resigned or that Mr Black accepted what he understood to be Mr May's resignation on 7 December on Geotech's behalf. Instead, I consider that Mr May was dismissed on 5 December although he was not given any period of notice on that day:

- The meeting minutes of 5 December do not record that a redundancy process was being entered into but that a decision had been made - *there is no longer a role for NM as general manager*. That is sufficient for Mr May to understand that he had been dismissed by way of redundancy.
- The phrase *an orderly transition and termination will be worked through* does not easily bear the meaning that a process whereby a proposed redundancy will be considered and feedback sought and then a final decision made. Instead it appears to focus on Geotech's need for an orderly transition and end Mr May's employment.
- In addition, the fact that Mr May had been dismissed was communicated outside those who had been at the meeting. For example, Mr Solly understood that Mr May had been given *the boot* and conveyed that understanding to Mr Morris.
- That led to Bevan Vendt's evidence that on Friday 6 December while being told about his own redundancy he was told that Mr May was *gone* by which he understood that Mr May had already been made redundant.

- I give weight to Mrs May's evidence that she was with Mr May all day on 7 December and that he did not leave the house to meet with Mr Black.
- I also give weight to Mr Lester May's evidence that in the early afternoon of 7 December Mr May told him he had been *sacked*.
- If Mr Black had already verbally accepted Mr May's resignation in a face-to-face meeting on 7 December it would be unusual for Mr May to have sent the email he sent that day using the wording that he did. He would have been more likely to have confirmed his resignation and Mr Black's acceptance of it and the conditions which they had agreed to.
- The 7 December email did not amount to an actual resignation because it was couched in terms of questions which required answers, including whether if Mr May resigned he would be entitled to give one month's notice and whether he could complete work on the CCL contract before he left.
- Mr Black's evidence of the timing of the alleged conversation, whether in the morning or the afternoon, has been inconsistent.
- If Mr Black had accepted Mr May's resignation in person on 7 December then Mr Currie would not have had to accept Mr May's resignation in writing on 16 December.
- The email to Mr May from Mr Morris on 17 December asking what was happening and stating that he had heard two different versions; from Mr Black that Mr May had resigned and from Mr Solly that Mr May had *got the boot*.

### **Was the redundancy genuine?**

[29] It is established law that an employer is entitled to make its business more efficient by the introduction of cost saving steps, including reducing the numbers of employees by way of redundancy. The Authority is not able to substitute its own judgment for the employer's judgment on whether it would have made the employee redundant or not, but must consider the issue objectively.<sup>6</sup>

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<sup>6</sup> *GN Hale & Sons Ltd v Wellington Caretakers IUOW* [1991] 1 NZLR 151 (CA)

[30] Chief Judge Colgan stated in *Rittson-Thomas trading as Totara Hill Farms v Davidson*<sup>7</sup> that:

*Section 103A does require the Court to inquire into a decision to declare an employee's position redundant and to ... dismiss that employee, if the personal grievance alleges those acts by the employer were unjustified. ... Rather, [the Authority] must determine whether what was done, and how it was done, were what a fair and reasonable employer [could] have done in all the circumstances at the time. So the standard is not the [authority's] own assessment, but, rather, its assessment of what a fair and reasonable employer ...could have done and how. Those are separate and distinct standards.*<sup>8</sup>

[31] The burden of proving a redundancy was genuine and justified is on Geotech. I am satisfied that there were genuine financial reasons for a number of redundancies at Geotech and that the particular projects Mr May was involved with were legitimate areas for Geotech to decide it no longer needed a manager at Mr May's level based on the West Coast. The general manager's role has not been filled and Geotech has no plans to engage a general manager. It was open to Geotech to decide that it required a manager for the Christchurch demolition work to be based in Christchurch, and that such a manager possibly required different skills to the general manager position that Mr May was undertaking. However, as covered below it would have been fair to offer Mr May that role or at least discuss with him whether he had the skills needed and wanted to be based in Christchurch.

**Was the way the decision was made reasonable in all the circumstances? Were there breaches of Geotech's duty of good faith?**

[32] Even if a redundancy is decided upon for genuine business reasons, if the justification for the redundancy is challenged by an employee, the employer must be able to prove to the Authority that the decision made and how that decision was reached were what a fair and reasonable employer could have done in the circumstances that existed at the time.<sup>9</sup>

[33] Genuine consultation with an affected employee and a fair process for deciding to make a position redundant is required in order for there to be a justified dismissal by way of redundancy.

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<sup>7</sup> [2013] NZEmpC 39, at paragraph [53]

<sup>8</sup> Ibid, at paragraph [53]

<sup>9</sup> Section 103A Employment Relations Act 2000.

[34] In addition to considerations under s103A of the Act, s 4 of the Act is relevant. It addresses the requirement for parties to the employment relationship to deal with each other in good faith. Both parties have a duty to be active and constructive in maintaining a productive employment relationship in which they are responsive and communicative.

[35] In addition to a general mutual duty of good faith set out in s 4 of the Act, s 4(1A)(c) imposes a special duty of good faith on an employer when there is a proposed redundancy. It 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 employees' employment, about the decision; and*
- (ii) *an opportunity to comment on the information to their employer before a decision is made*

[36] While Mr May, as the general manager, had access to financial information about Geotech and had been involved in the management meetings leading up to his redundancy he was not given any opportunity to assess that information in the light of his own position being made redundant or given any opportunity to comment on that information or the proposal to appoint a Christchurch based manager in the light of his own position becoming redundant.

[37] I have considered the possibility that Geotech did intend to embark on a fair redundancy process in relation to the general manager's position but that Mr Black put a stop to that once Mr May wrote the email of 7 December which Mr Black took as a resignation.

[38] I do not accept that Geotech proposed to undertake a fair process of consultation with Mr May before deciding to make the position of general manager, and thereby Mr May, redundant. A properly run redundancy process requires two decisions to be made by an employer. The first is that a position is surplus to its requirements. Secondly, after seeking input and feedback from the potentially affected employee, there must be a subsequent decision that confirms the position is redundant and that the incumbent cannot be retained and must be dismissed.

[39] The minutes of the 5 December meeting, which were not written by Mr May but are in line with his understanding, confirm that the decision to make the position

redundant and to dismiss Mr May had already been made – *there was no longer a role for Neil as general manager ... an orderly transition and termination would be worked through.*

[40] The fact that Mr May knew that the firm was in difficulty is one thing, but he must also have been told in the clearest terms that his own position was at risk and be given the opportunity to offer alternatives for the employer to consider which might have saved the position.

[41] Mr May's input on the "proposal" to make the general manager's position redundant was not sought at all and Geotech did not signal to him in that meeting, or after it, that it was still only a proposal and his input was sought. I accept Mr May's evidence that if Geotech had signalled that to him he would have proposed taking a pay cut. It is impossible to know whether that would have resulted in his being employed for longer, but it may have.

[42] The possibility of Mr May being engaged in any other role that Geotech might have had available at the time was not explored by Geotech. Geotech should have discussed the Christchurch based manager's role it wished to fill with him. However, it is likely that Geotech did not consider Mr May had the skills it needed for the Christchurch based role and Mr and Mrs May's evidence was clear that they wished Mr May to remain employed on the West Coast if possible and not to be based in Christchurch.

[43] At the investigation meeting Mr Black said that, in addition to a Christchurch based manager for the demolition operations, there had been a vacant maintenance manager's position situated on the West Coast. Geotech never explored with Mr May whether he had the relevant skills and was interested in that role; it should have done so. Mr May considers that he could have undertaken that role.

[44] The breaches of fair process and good faith were not minor and resulted in Mr May being treated unfairly. Consequently, it is clear that Mr May's dismissal was procedurally unjustified in a significant way and that he is entitled to remedies as a result.

### **Remedies**

[45] Having established that Mr May was unjustifiably dismissed I must consider what remedies are owed to him. Mr May did not seek reinstatement.

*Lost wages*

[46] Section 123(1)(b) of the Act allows me to provide for the reimbursement by Geotech of the whole or any part of wages Mr May lost as a result of his grievance. Section 128(2) of the Act provides that I must order Geotech to pay Mr May the lesser of a sum equal to his lost remuneration or to 3 months' ordinary time remuneration.

[47] In addition, s 128(3) gives the Authority discretion to order an employer to pay an employee a sum of lost remuneration greater than is compulsory under s 128(2); that is, for more than thirteen weeks.

[48] I am satisfied that Mr May made reasonable efforts to mitigate his loss and to seek other work. By 17 February 2014 Mr May was employed at Reefton Crane and Construction although on a much lower rate of pay.

[49] It is appropriate to consider how long a fair process would have taken during which Mr May would have been in receipt of his normal pay as general manager. I consider a period of two weeks would have been sufficient for a consultation process that would have allowed Mr May to have his say on the proposal to disestablish the position and for Geotech to have considered that input and made its decision on redundancy.

[50] I consider that Mr May should have been paid from 5 December, when the proposal was raised with him until 19 December and from then onwards he should have been paid for two weeks of notice as set out in his contract at his usual salary. The fact that Mr May has proved that he did not resign means that Geotech was not bound to offer him the month's notice that it did in its 16 December 2013 letter. However, what Mr May should have been paid under this determination is probably the same as the amount that Mr May has been paid. If it is not exactly the same amount I do not consider it reasonable that Geotech recovers any amount already paid to Mr May. If Mr May considers that Geotech owes him any further pay Geotech should pay him that. But if the parties fail to agree on the quantum of what is owed or should have been paid Mr May has leave to return to the Authority, although I note that any differential is likely to be slight.

[51] The further question remains whether in light of the fact that the redundancy was substantively justified whether there should be any lost remuneration awarded.

[52] I am satisfied that even if a fair process had been carried out it is inevitable that the position of general manager would have been found to be redundant and that therefore Mr May would have lost his job as general manager. Because of that I do not think it is appropriate that Mr May should be entitled to reimbursement for lost wages.

*Compensation*

[53] Mr May has also claimed compensation of \$10,000 under s 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to his feelings. I note that I cannot consider compensation for any humiliation, loss of dignity and injury to his feelings attached to the loss of his role as general manager which I have found was substantively justified and was a 'no fault' dismissal. Instead I can look at compensation for the effect on Mr May of the manner of the loss of his job.

[54] I accept that the sudden announcement at the meeting on 5 December that Mr May was to be made redundant was shocking and embarrassing for Mr May, particularly as it was in front of a number of other employees/contractors. Although a redundancy is by definition a no fault process through which an employee loses his employment I accept that the refusal of Mr Black to enter into discussion at the meeting about the termination of the general manager's role increased Mr May's distress as the discussion at the meeting conveyed Mr Black's dissatisfaction about how Mr May had managed the Christchurch demolition operation. Mr May also felt embarrassed about the sudden ending of his role in the very small and close knit community Mr May and Mr Black lived in.

[55] Mrs May's evidence was that Mr May was upset, angry, withdrawn and quick tempered when at home, drained and agitated.

[56] I do not consider that I can take into account the fact that there was gossip and speculation about the reason for Mr May losing his role as it has not been proved that any public rumours about it being due to any fault on Mr May's part are attributable to anything Geotech caused to be said.

[57] Geotech submits that any compensation should be at the lower end of the scale and not as high as the \$10,000 or more claimed by Mr May. The Court of Appeal decision in

2000 of *New Zealand Fasteners Stainless Limited v Thwaites*<sup>10</sup> is relevant to my consideration of quantum of compensation. In *Thwaites* the Court found an award of \$10,000 was appropriate compensation for distress and humiliation suffered by a finance manager who had thought his position was secure but received abrupt news that he would no longer have a job in a restructuring of his work section after 8 years with the company. That case was also about circumstances where the business decision to disestablish the position was not unjustified but the manner of carrying it out was. I have taken into account the reasoning in *Thwaites* and the length of time Mr May was employed for. I consider that an award of compensation of \$7,000 is appropriate in this case.

### *Contribution*

[58] Having determined Mr May has a personal grievance s124 of the Act requires me to consider whether he contributed to the situation which gave rise to his dismissal and if so reduce remedies accordingly. While Mr Black and Geotech may have laid some of the blame for the lack of profit in the Christchurch operations at Mr May's door there was never a process whereby that was fairly explored and put to Mr May for his response. Mr May suspects that Geotech had mixed motives for deciding to make him redundant, although that was not proved. There was no evidence available to conclude that any behaviour from Mr May contributed to Geotech's decision to make him redundant and so his behaviour cannot be taken into account and remedies are not to be reduced on the grounds of contribution.

### **Costs**

[59] Costs are reserved. Generally the successful party can expect a contribution towards their reasonable legal costs.

[60] The Authority usually awards costs on a daily tariff approach of \$3,500 for a full day of hearing. This hearing took one day and so would usually attract a contribution of \$3,500 in legal costs plus reimbursement of the filing fee of \$71.56.

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<sup>10</sup> [2000] 1 ERNZ 739

[61] I invite the parties to reach agreement on costs. Otherwise any party seeking costs should file a memorandum with the Authority within 28 days of this determination and the other party should file a memorandum in response within a further 14 days.

Christine Hickey  
Member of the Employment Relations Authority