IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 135/07
5081051

	BETWEEN	Gary Redward Applicant
	AND	Adams Transport Limited Respondent

Member of Authority:	Denis Asher
Representatives:	John McDowell for Mr Redward Graeme Mansfield for the Company
Investigation Meeting	Napier, 18 September 2007
Submissions received:	From the parties by 5 October 2007
Determination:	8 October 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In his statement of problem filed in the Authority on 12 March 2007 Mr Redward said he had been unjustifiably dismissed for redundancy because there was enough suitable work to keep him employed. He sought reinstatement, compensation of $15,000 for humiliation, etc, lost income and costs.

[2] In its statement in reply filed in the Authority on 23 March the Company said Mr Redward was terminated because there was insufficient suitable work and the dismissal was carried out in a legally correct manner.

[3] The parties underwent mediation following the filing of the statement of problem but were unable to settle their employment relationship problem.

[4] The parties subsequently agreed to a one day investigation in Napier on 18 September. They usefully provided witness statements in advance of the investigation. Efforts by the parties during the investigation to settle the matter on their own terms were unsuccessful. A timetable for filing submissions was agreed.

Background

[5] There are few if any significant disputes between the parties as to relevant facts and events.

[6] Mr Redward is now aged 66. He has worked as a truck driver since he was 18 years of age. Mr Redward worked almost all of the last 15 years for his predecessor employer, John Adams Cartage Limited, until it was bought by the respondent on 1 May 2006. At that time the respondent required all employees, including Mr Redward, to sign an individual employment agreement. A copy of the agreement is attached to Mr Redward's statement of problem. It is dated 26 May 2006. It is signed off for the Company by Mr Alex Merrie, its operations manager. The employment agreement clearly describes, in several places, the applicant's job as a driver. Appendix A of the agreement sets out Mr Redward's day to day duties: they are to *"undertake all forms of transport work on site as directed* (and operate) *plant and machinery* (and) *truck driving"*.

[7] Mr Merrie says that, while it was originally intended for Mr Redward to work as a truck driver, *"*(i)*t was later discovered that he was a 'paint and panel' man who was called in to drive trucks as a driver of last resort"* (par 7 of Mr Merrie's witness statement). The applicant does not accept this description.

[8] Mr Merrie said Mr Redward *"was made redundant because the Company did not have sufficient 'paint and panel' work to justify retaining his services"* (par 9 above). Mr Merrie also said in evidence that the applicant was also made redundant because there was insufficient driving work.

[9] Mr Redward's termination was effected by Mr Merrie approaching the applicant on Monday 22 August 2006 and telling him that there was no job for him. The applicant was given oral and written notice and told to work out the next two weeks. Mr Redward worked out the two weeks notice and was then required to work another two days.

[10] The written notice from the Company (signed off by Mr Merrie) to the applicant is attached to the statement of problem. It is dated 22 August. It says:

This letter is to formerly notify you that your employment with Adams Transport Limited is to come to an end.

Hence 14 days notice is formerly given.
We presently do not have enough suitable work to be able to keep you employed.

We would like to thank you for your service over the last 3 ½ months and wish you all the best for the future.

[11] Mr Merrie attempted to say, in his oral evidence and after hearing from the Authority as to some of the obligations on a good employer in a possible redundancy situation, that he consulted with Mr Redward on 22 August by explaining why he was being let go, before terminating his employment. Mr Redward says there was no consultation. For the reasons set out below I am satisfied Mr Redward's version of events is the correct one: there was no consultation as claimed by Mr Merrie and the Company had already determined on making the applicant redundant before he spoke to the applicant. The conversation between the two men only extended to Mr Merrie telling the applicant the reasons why he was being laid off.

[12] Mr Merrie gave evidence both in writing and orally to the effect that Mr Redward's performance was inadequate, that there were health and safety concerns about his driving and fears he could cause an accident, and that he had been spoken to regarding poor performance and damaging Company equipment. Mr Redward denied all of these claims. None of these claims are referred to in the letter of 22 August terminating Mr Redward's employment. Mr Merrie accepted there were no written records in support of his claims and that the respondent at no time provided Mr Redward with performance improvement specifics nor had the responded provided the applicant with any training so as to improve his performance.

[13] Mr Merrie said his concerns were never recorded in writing as he was *"trying for a relaxed atmosphere"* and that he did not believe the applicant was retrainable *"because of his age – it was not realistic"* (oral evidence). Again, Mr Redward did not accept these claims. Mr Merrie says he did not make clear his views about Mr Redward being unable to retrain because he thought it obvious and did not want to humiliate the applicant.

Parties' Positions

Respondent's Position

[14] In its submission filed on 26 September, and amongst other points, the Company properly concedes that since the hearing it has had further consultation with its counsel, Mr Mansfield, and it acknowledges *"… there were procedural deficiencies in the redundancy process and that the requirements set forth in Section 4 (1A) of the Employment Relations Act 2000 were not met* (and) *did not satisfy the test set forth in … Simpsons Farms Limited* v *Aberhart AC 52/06"* (par 2).

[15] The Company says it mitigated the effect of Mr Redward's termination by arranging ongoing paint and panel work as well as his current employment. It also describes the applicant's efforts to find ongoing work as cursory and almost casual.

[16] The Company invites the Authority to have regard to its size and the absence of any sophisticated organisational structure including a human resource division with which to keep abreast of employment law developments, including the 2004 amendment to the Act. It continues to assert, however, per *Simpsons Farms* (above) that no continuing employment was available to Mr Redward and that it acted genuinely, not out of ulterior motives and by way of a business decision.

[17] The submission concluded with an open settlement offer.

Applicant's Position

[18] Because of the respondent's (partial) concession and because of my findings it is unnecessary that I summarise the applicant's arguments received on 28 September and 5 October.

Discussion and Findings

[19] As a result of the Authority's investigation, and bearing in mind the respondent's subsequent partial concession, I am satisfied that Mr Redward was unjustifiably dismissed both procedurally and substantively for the following reasons.

[20] It is trite to observe the respondent carries the burden of justifying Mr Redward's dismissal, including in claimed redundancy situations: *Simpsons Farms* (above) [2006] 1 ERNZ 825.

[21] The Company's claim that it had insufficient paint and panel work for the applicant is in conflict with the clear evidence of Mr Redward's employment agreement that clearly records he was employed as a driver.

[22] Other than an assertion it no longer had any paint or panel work and insufficient driving duties for the applicant the Company has not provided any objectively measurable evidence that Mr Redward was surplus to its requirements. While some accounts were produced that appeared to show the Company making a profit for 2006 but a loss since then, no analysis was provided in respect of those records or the respondent's implied claim that they supported its decision to terminate the applicant's employment. There is any way no correlation attempted by the Company of those account to its decision to dismiss Mr Redward as redundant.

[23] The claims advanced by the Company after Mr Redward's dismissal, that there were performance issues and his driving was dangerous, are not credible as they do not appear in his termination letter of 22 August 2006, are not supported by any written record as matters raised with the applicant during his employment, are denied by the applicant, and – in respect of the health and safety claim – is contradicted by Mr Redward's log book that shows the respondent was willing to employ him as a driver, including on long trips out of the region, before and during his termination notice period.

[24] I am satisfied that, despite its long established obligation to do so (*Trotter* v *Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 659, etc), the Company failed to put the concerns it clearly had (as advanced in the Authority's investigation) about Mr Redward's performance to him but nonetheless relied on those strongly negative views of the applicant in coming to its decision to dismiss him. Mr Merrie attempted to justify the Company's position by saying – as I understood his explanation – that it would have been cruel to put its concerns to Mr Redward as they were as a result of his age, that the applicant would have been aware of it, and it was inappropriate for the respondent to make the connection: I do not accept that claim as the respondent clearly felt able to articulate the same publicly during the Authority's investigation.

[25] The Company is in fundamental breach of long established good employer obligations to raise performance concerns with employees so that they might address and attempt to resolve any actual shortcomings. This obligation is all the greater in this employment relationship problem given the respondent's admitted view that it saw Mr Redward as a health and safety risk, including on the road while in control of large and powerful vehicles.

[26] I am also satisfied the Company also discriminated against Mr Redward: s. 105 (1) (i) of the Act. I reach that conclusion because of the respondent's failure to provide evidence in support of its view (as articulated by Mr Merrie) that the applicant's performance was related to his age, as well as its failure to communicate its concerns to Mr Redward and to attempt any remedial steps.

[27] The Company's breach of its obligation under s. 4 (1A) of the Act is profound. The Company, as it concedes, not only completely failed to communicate to Mr Redward its evident concerns in respect of his performance, but it also failed similarly to communicate in advance to Mr Redward its proposed decision that would adversely effect the continuation of his employment: s. 4 (A) (c) (i) & (ii) of the Act. There was clearly no consultation in respect of the Company's intention to make the applicant redundant.

[28] Finally, it has failed to meet the requirements of s. 103A of the Act in that, objectively measured, it is unable to justify its actions as what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. No evidence was presented to the Authority of any down turn in work or significant loss of profitability, or of why the applicant should be selected as the employee to be made redundant. I am therefore satisfied that Mr Redward was not dismissed because of a genuine redundancy.

Remedies

[29] While having found fresh employment Mr Redward seeks reinstatement. Despite it being the primary remedy I am satisfied it is not practicable to reinstate the applicant as the attitude of the Company leaves me with no confidence that similar or related employment relationship problems would no reoccur in the near future. Having found a new driving position Mr Redward is better placed to continue in his new employment.

[30] Mr Redward also seeks lost remuneration of $12,191.10 and compensation of $15,000 for humiliation, etc. During the investigation Mr Redward gave oral, uncontested and compelling evidence as to his vigorous efforts to find employment, following his dismissal. He sought out paint and panel work, driving jobs and other employment. Mr Redward says his efforts to find work were limited by a lack of enthusiasm for his services when he made his age known, but he was eventually successful – after 4 months – in finding further driving work. It is clear from the Company's view of the applicant it would have been of limited value in recommending him to potential employers. The circumstances of his termination therefore posed greater problems in respect of Mr Redward's efforts to find fresh employment.

[31] The applicant did earn some money during that period, from casual employment. Bearing the above in mind, I am satisfied Mr Redward should be compensated $12,191.10 less those earnings for that period: ss. 128 (3) of the Act applied. Any disagreement between the parties as to this amount can be referred back to the Authority.

[32] Mr Redward's wife, Ms Lynette Sykes gave compelling evidence as to the impact on the applicant of his dismissal. I do not intend to reproduce the detail in this determination as it is sufficient to say that it was uncontested and graphic. I am therefore satisfied that because of this evidence and given the complete failure to consult with the applicant, and the highly critical claims advanced by the Company after the termination in an unmeritorious attempt to justify the termination, that the impact of this unjustified dismissal

on Mr Redward is such full payment of the compensation sought for humiliation, etc is appropriate: s. 123 (1) (c) (i) of the Act applied.

Contributory Fault

[33] There is no evidence of any actions by Mr Redward contributing to the situation that gave rise to his personal grievance.

Determination

[34] For the reasons set out above I find in favour of all of Mr Redward's claims against the Company other than that he be reinstated and direct the respondent to pay to the applicant:

a. Lost wages of $12,191.10 less any income earned during that period; and

b. Compensation of $15,000 for humiliation, etc.

[35] Costs are reserved. Subject to the respondent's views I record here my preliminary view that costs in the order of $2,500 would be appropriate bearing in mind costs advised by the applicant to the investigation and costs arising out of the preparation of subsequent submissions, etc.

Denis Asher
Member of the Employment Relations Authority