

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2012] NZERA Auckland 328  
5368831**

BETWEEN VICKI SPANHAKE  
Applicant  
AND TRANZNORTH LIMITED  
Respondent

Member of Authority: Eleanor Robinson  
Representatives: David Flaws, Advocate for Applicant  
Murray Broadbelt, Advocate for Respondent  
Investigation Meeting: 15 August 2012 at Whangarei  
Submissions received: 21 August 2012 from Applicant  
22 August 2012 from Respondent  
Determination: 20 September 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Ms Vicki Spanhake, was employed as Office Administrator by the Respondent, Tranznorth Limited (Tranznorth), until her employment was terminated on the basis of redundancy on 4 August 2011.

[2] Ms Spanhake claims that she has been unjustifiably dismissed on the basis that the restructuring under which her position was disestablished was not a genuine restructuring exercise. Ms Spanhake also claims that she has been unjustifiably disadvantaged in her employment.

[3] Tranznorth denies that Mrs Spanhake was unjustifiably dismissed or disadvantaged and claims that the redundancy was genuine and a fair process was followed.

**Issues**

[4] The following issues require determination, whether:

- a. Ms Spanhake's position was disestablished as a result of a genuine restructuring exercise.
- b. Tranznorth followed a fair procedure in disestablishing Ms Spanhake's position of Office Administrator.
- c. Ms Spanhake suffered any disadvantage in employment.

### **Background Facts**

[5] Tranznorth is a freight company specialising in temperature controlled transport for delivery of chilled and frozen products throughout Northland.

[6] Ms Spanhake commenced employment as Office Administrator with Tranznorth in April 2004. Ms Spanhake said she reported to Mr Scott Massey, director and joint shareholder with his wife, and her duties included all office administration, reception and data entry. At that time, apart from Mr Massey and Ms Spanhake, Ms Spanhake said there were approximately 8 drivers working at Tranznorth.

[7] Ms Spanhake said prior to Mr Simon Standing's appointment, she and Mr Massey had a good working relationship despite the fact there were many heated arguments between them on occasion.

[8] Mr Massey said that on or before April 2010 Ms Spanhake had had a hernia operation which resulted in her having 12 weeks absence from work although the original time estimate for her absence had been 3 weeks. As a consequence, Mr Massey explained that when Ms Spanhake had informed him that she was to have an operation on her knee which would require her to have 3 weeks away from work, he had anticipated that a longer absence might result.

[9] In anticipation of this event which he had thought to be imminent on the basis that Ms Spanhake had informed him that she had been moved on to the private patient waiting list, Mr Massey had offered Mr Standing, an independent contractor, employment in the office to understudy her work in order to be able to provide cover during the period she would be absent.

[10] Although Mr Standing had initially applied for work as a driver, Mr Massey said he believed Mr Standing had the ability to understudy Ms Spanhake's job role and provide cover for her whilst she was away on sick leave.

[11] Mr Massey said he had asked Ms Spanhake to show Mr Standing all aspects of her job role; however she had refused to show Mr Standing how to complete the Excel spreadsheets she had to complete for Tranznorth's accountants on a monthly basis.

[12] Ms Spanhake stated her refusal had been attributable to the fact that she felt her job security was being threatened by Mr Standing.

[13] Mr Massey explained that although he considered he could have taken disciplinary action against Ms Spanhake for this incident, and indeed on the many other occasions when she had been argumentative and abusive towards him, he made allowances for her behaviour and had not taken disciplinary action because he was aware that Ms Spanhake found it difficult having her mother living with her and her health was not good. Mr Massey said he had also taken into consideration the fact that Ms Spanhake had a good knowledge of the freight industry.

[14] Mr Standing said he had had a good relationship with Ms Spanhake initially and whilst he had not understood why Ms Spanhake refused to show him the Excel spreadsheet completion process, he had not been unduly concerned as he had significant Excel experience himself and was confident he could manage the process.

[15] Ms Spanhake said that on or about May 2010 the planned surgery on her knee had been cancelled and when she had advised Mr Massey of this he had instructed her to take annual leave. Mr Massey said Ms Spanhake had a considerable amount of outstanding annual leave entitlement which he had wanted her to take and as Mr Standing had been trained to cover for her during the anticipated sick leave absence, it had been possible for her to take some of the outstanding annual leave entitlement.

[16] Ms Spanhake said she and Mr Massey had argued over his instruction that she had to take annual leave. Ms Spanhake said she had been unhappy at having to take annual leave because she had saved annual leave entitlement in order to cover for the unpaid period of absence she would have needed to take for the knee surgery and recovery; however Mr Massey had offered to give her an extra week's paid sickness leave should she eventually need this. Ms Spanhake confirmed that she had agreed to take the annual leave.

[17] Mr Standing explained that in the period prior to Ms Spanhake taking annual leave he had been working on developing a website for Tranznorth as there had not been sufficient administration work for both him and Ms Spanhake.

[18] Mr Standing said that while Ms Spanhake was away on annual leave he had free time between 11.00 a.m. when he had finished the initial administration work of the day, and 3.00 p.m. when he had actioned the manifest entry work, to discuss new methods of operation with Mr Massey

[19] Mr Standing said that one new method discussed had been to ensure the Tranznorth website had functionality for customers to enter their own jobs for collection and delivery through secure access and also to find their own Proof of Delivery signatures online.

#### *Sapphire Software*

[20] As the development costs for this would have been high, Mr Standing said he had researched the 'off-the-shelf' packages which were available and had identified the Translogix software package 'Sapphire' as being suitable.

[21] Ms Spanhake said that when she had returned to work after the annual leave absence Mr Standing had been installing the Sapphire software, however neither he nor Mr Massey would discuss what was happening in respect of it, and Mr Standing refused to show her how to operate it.

[22] Mr Standing said both he and Mr Massey had discussed Sapphire with Ms Spanhake upon her return from annual leave and had explained what it could offer the business and how it could save her time in her tasks.

[23] Ms Spanhake said she had complained to Mr Massey that the training she had received on operating the software had been inadequate.

[24] Mr Massey agreed that Ms Spanhake had complained to him about the inadequacy of the training; however Mr Massey stated that on two occasions Ms Spanhake had received a full day of training from the Translogix technicians in addition to a substantial amount of training provided by Mr Standing.

[25] Mr Standing confirmed that Translogix had provided training to Ms Spanhake, and invoices produced from Translogix which highlighted that training had been provided

specifically to Ms Spanhake on 4 October and 30 November 2011 supported Mr Massey and Mr Standing's evidence.

[26] Mr Standing further explained that he had invested many hours in providing training to Ms Spanhake. Mr Standing produced in evidence 48 pages of a 100 page User Manual for Sapphire which he had compiled, these 48 pages having been compiled specifically for Ms Spanhake's use.

[27] Mr Standing explained that following Ms Spanhake's complaint that she found the manual difficult to read and preferred to make her own handwritten notes, he had taken her slowly through the Sapphire system operation in respect of her tasks in order that she could make handwritten notes.

#### *Events post-May 2010*

[28] Mr Massey said that when Ms Spanhake had returned from annual leave she had been checking the bank statements and had asked to what an invoice from a company called 'Outstanding Services Ltd' related. When he had informed her that it was in relation to Mr Standing's services as a contractor, Ms Spanhake had been annoyed to learn that Mr Standing was being paid more than she earned.

[29] Ms Massey said he had explained that Mr Standing was an independent contractor and had observed that Ms Spanhake could have the same rate of pay if she became GST registered and operated as an independent contractor; however she would not in that case receive annual or sick leave entitlement. Mr Massey said Ms Spanhake had responded by saying that she did not want to become self-employed; but she did want to be paid more than Mr Standing.

[30] Ms Spanhake said she had been angry when she found out that Mr Standing was being paid more than she had been paid and said that she had informed a Tranznorth driver about Mr Standing's rate of pay.

[31] Mr Massey explained that he had always allowed Ms Spanhake to take paid time off work during the working day to attend doctor's visits for both herself and her mother, however on or about August/September 2010, this had become excessive and there had been no explanation provided. Mr Massey said he was also aware of a telephone conversation from which he had ascertained that Ms Spanhake was arranging to attend a job interview.

[32] Mr Massey explained that as a result of his concerns he had asked Mr Standing to record the times that Ms Spanhake was absent from work. Mr Massey said he had not asked Ms Spanhake about the additional time away from work as he had wanted to await the outcome of Mr Standing's investigation.

[33] Mr Standing said he realised on checking Ms Spanhake's computer that she was not only attending doctor's appointments, but also attending job interviews and carrying out job searches during the working day

[34] Ms Spanhake said she had become aware that Mr Standing was recording the hours when she was attending work, and had found this insulting. Ms Spanhake said she had made her views known to Mr Massey, and during the ensuing heated discussion, Mr Massey had asked her if her remuneration had changed and when she replied that it had not, he had advised her not to worry.

#### *Merger with Penguin*

[35] Mr Massey said in February 2011 he had started negotiations with Mr Dave Walters of Penguin Cold Freight (Penguin) about his purchasing the Penguin business, and he had asked Mr Standing, Ms Spanhake and another employee, Mr Chris van Blommestein, Tranznorth Operations Manager, to sign confidentiality agreements.

[36] Mr Standing explained that as he had previous experience of business merger, he and Mr Massey had held discussions about logistics, driver runs, freight volumes, IT systems and as Penguin also had the Sapphire software, merging the two Sapphire databases. Mr Standing said that none of these discussions impinged on Ms Spanhake's role.

[37] Mr Standing said during the latter part of June 2011 he had been in discussions with Mr Massey about a possible change in his employment status from independent contractor to employee which had been prompted by advice from Tranznorth's accountant.

[38] Mr Standing said he had been asked by Mr Massey to draft up an employment agreement for himself, however as he had not felt comfortable about doing so, he had asked Mr Massey if he could obtain some advice and Mr Massey had agreed.. Mr Standing said he had contacted Employers Assistance Limited (ESL) for advice.

[39] Mr Standing said he had been appointed General Manager for Tranznorth on 1 July 2011 following which he and Mr Massey had discussed issuing written employment

agreements to all the employees. Mr Standing had asked, and Mr Massey had agreed, that he should obtain assistance from ESL

[40] Ms Spanhake said she had become concerned when she became aware that the job descriptions which Mr Standing was preparing for the Transport Manager and Operations Manager positions covered parts of her job responsibilities. Ms Spanhake said she had discovered the job descriptions which had been in a folder on Mr Standing's desk, and she had noted that they covered substantial parts of her job responsibilities. As a result she had asked Mr Massey to provide her with an employment agreement.

[41] Mr Massey said that on 13 July 2011 Ms Spanhake had demanded an employment agreement from him, and he had informed Mr Standing of the request. Mr Standing said he had telephoned Ms Wendy Silver at ESL who had advised him that with effect from 1 July 2011 employees were entitled to have a written employment agreement. Accordingly Mr Standing said he had stopped work on the other employment agreements he was in the process of drafting, and had made the drafting of an employment agreement and job description for Ms Spanhake a priority.

[42] Mr Standing said he had duly prepared the written employment agreement and job description for Ms Spanhake, and had given these to Mr Massey to read that same day. The following day, 14 July 2011, Mr Massey said he had given the draft employment agreement and job description to Ms Spanhake and informed her that she could seek advice on them.

[43] Ms Spanhake said she had written to Mr Massey that same evening and had advised him that she did not agree with some aspects of the job description and the employment agreement.

[44] In particular Ms Spanhake said she had objected to clause 6.1 of the employment agreement which read: "*Full-time hours of work with an obligation to perform overtime as necessary but without extra payment*" which she had requested be altered to read: *.to receive time in lieu for overtime hours worked*". Ms Spanhake said she had also wanted it specified in the job description that she did not have to undertake cleaning or lunchroom laundry duties.

[45] Mr Massey said that the requests made by Ms Spanhake had been for new and more advantageous terms and conditions of employment than those which had applied to her current employment; however he had discussed these requests with Mr Standing, and subsequently asked him to amend the documents accordingly. This had been actioned by Mr Standing and the amended job description given to Ms Spanhake.

[46] Mr Standing said that whilst writing Ms Spanhake's job description he had realised that many of the daily tasks involved in the administration role which Ms Spanhake currently performed, could be more efficiently undertaken by other employees once the merger with Penguin took place.

[47] In particular Mr Standing explained that the transport management system in Sapphire, the operation of which comprised the majority of Ms Spanhake's working day, could be carried out by the Transport Manager, Operations Manager and truck drivers accessing the system directly, and taking calls and orders without the necessity of channelling the data through the office administrator first. However Mr Standing said this would require a person to complete the manifesting entry throughout the night.

*Friday 15 July 2011*

[48] Mr Massey said on Friday 15 July 2011 the merger with Penguin had been finalised and he had discussed with Mr Standing the planned move from the existing Hewlett Street premises to new premises located at Port Road.

[49] Mr Standing explained that because only his laptop was configured to connect to both the server and the domain, he needed to configure another desktop PC and ensure this was operating correctly prior to configuring the other desktop PCs. Consequently he had suggested to Mr Massey that it would be best if Ms Spanhake remained at the Hewlett Street premises while the office at Port Street was organised.

[50] Ms Spanhake said she had not been informed about the details of the move to the new premises but had assumed that she would be working there with effect from Monday 18 July 2011. However on Friday 15 July 2011 Mr Massey had informed her that she would not be moving to the new premises on 18 July 2011, but instead she was to remain behind to sort out the paperwork and decide what needed to be retained, and what could be packed up and disposed of.

[51] Ms Spanhake said she had been shocked and had asked why she had not been informed of the decision that she was to remain behind earlier, to which Mr Massey had responded by saying: "*You didn't think you were coming down here with us did you?*". Ms Spanhake said she was shocked and had left the office.

[52] Mr Massey stated that Ms Spanhake had been aware of the date of the office move and he denied having said: "*You didn't think you were coming down here with us did you?*" to

Ms Spanhake whom he described as having left the Hewlett Street office in a “*barrage of swearing and cursing*” and having ‘stormed’ out of the office.

[53] Mr Massey and Mr Standing said they had worked over the weekend of 15-17 July 2011 organising the new premises and at that time Mr Standing had discussed his view of the administration role with Mr Massey and how the duties would be most efficiently performed.

[54] Ms Spanhake said she had attended the Hewlett Street premises on Monday 18 July 2011 and had sorted out the paperwork, deciding what needed to be kept and what could be destroyed. Whilst there, Ms Spanhake said the post lady had delivered the mail which had not yet been redirected to the Port Road premises.

*Meeting with ESL on 19 July 2011*

[55] On Tuesday 19 July 2011 Mr Massey and Mr Standing had attended a meeting with Ms Silver and Mr Murray Broadbelt at ESL’s offices to discuss Ms Spanhake’s position. Ms Silver said Mr Massey and Mr Standing had discussed with her the fact that once Ms Spanhake’s tasks were listed out, it was apparent that many of the tasks she currently fulfilled would no longer be required following the merger took place.

[56] Mr Standing said he had explained the situation to Ms Silver, citing as an example that many of the telephone calls Ms Spanhake answered during her working day were concerned with freight following which Ms Spanhake had to obtain a response to the customer queries from Mr van Blommestein before she could advise the customer. On this basis it would be more efficient and a better service to customers if Mr van Blommestein answered the calls directly and immediately.

[57] Mr Standing said that he and Mr Massey had learned that that was how Penguin had been operating for many years, and they had wanted to emulate Penguin’s success and improve Tranznorth’s efficiency and profitability in light of the merger.

[58] Ms Silver said there had been a lengthy discussion about which of Ms Spanhake’s tasks would be affected using Ms Spanhake’s job description as a base document. Against each of the itemised duties Ms Silver said a note had been made as to whom Mr Massey and Mr Standing thought could carry out that duty.

[59] Ms Silver said they had also discussed whether there were any other positions which could be offered to Ms Spanhake to mitigate the potential loss of her full-time role; and Mr Massey and Mr Standing had also identified a potential vacancy for the Transport Manager

position. Ms Silver said she had advised that in the interest of transparency, that role should be discussed with Ms Spanhake.

[60] Ms Silver explained she had advised Mr Massey and Mr Standing that before anything further was discussed or decided upon, Ms Spanhake needed to be advised that the merger would affect her position and be given an opportunity to comment on the proposed changes.

[61] Ms Silver said Mr Massey and Mr Standing had asked her to attend the proposed meeting with Ms Spanhake as they were apprehensive in regards to Ms Spanhake's possible reaction.

[62] Later that day Ms Spanhake said she had texted Mr Massey to tell him she had finished sorting the paperwork at the Hewlett Street premises and to seek further instructions. As she received no reply, Ms Spanhake said she had telephoned Mr Massey.

[63] Ms Spanhake said Mr Massey had asked her if she had signed the employment agreement. Ms Spanhake said she told Mr Massey she had agreed to the amended job description but she would not sign the employment agreement unless clause 6 was amended, and Mr Massey had agreed to this.

[64] Ms Spanhake said she had asked Mr Massey what she was to do next and Mr Massey had informed her that as there was currently no separate female lavatory at Port Road she was to take a few days paid leave, and because he had to be in Auckland the next day, Wednesday, he would meet her on Thursday 21 July 2011 at the Hewlett Street offices.

[65] Mr Massey explained that he had not realised there was only one lavatory at the Port Street premises until the weekend of the office move on 15 to 17 July 2011, and as this was used by the drivers, he did not consider it suitable for use by Ms Spanhake or indeed any woman. Mr Massey said he had however entered into negotiations to purchase adjacent premises which had several toilets and this purchase had been completed two weeks later.

*Wednesday 20 July 2011*

[66] Ms Spanhake said the following day, Wednesday 20 July 2011; she had decided to take the mail to the Port Road premises. When she arrived, Ms Spanhake said Mr van Blommestein had been sitting at a computer and she had asked him if he was doing her job. When Mr van Blommestein had replied in the affirmative, Ms Spanhake said she had gone to the next office to find Mr Standing.

[67] Ms Spanhake said she had behaved badly during the discussion with Mr Standing who had issued her with a verbal warning and asked to leave and she had done so. Mr Standing said he had reported the incident to Mr Massey

[68] Ms Spanhake said she had met Mr Massey at the Hewlett Street premises on Thursday 21 July 2011 and they had argued virtually immediately. Ms Spanhake said Mr Massey had asked her to carry boxes down the stairs; however Mr Massey said this had been a jocular comment only as he knew it was beyond Ms Spanhake's physical capabilities.

[69] Ms Spanhake said Mr Massey had presented her with the amended employment agreement and asked her if she would sign it. Ms Spanhake said she had been feeling concerned about the security of her position and so she had asked Mr Massey for a guarantee that her position would not be made redundant for a 12 month period.

[70] Mr Massey said he had responded to Ms Spanhake's request by informing her that it would not be possible to agree to her request due to the fact that businesses changed and no employer could offer such a guarantee. Mr Massey had also advised Ms Spanhake that there would be a meeting the following day to discuss her position and how it would fit into the new merged business.

#### *Meeting 22 July 2011*

[71] On Friday 22 July 2011 Ms Spanhake said she had arrived for the scheduled meeting and had been surprised and shocked to meet Ms Silver whom she had not been aware would be attending the meeting.

[72] Ms Spanhake said that when Mr Massey and Mr Standing had arrived, Ms Silver had begun to talk to her about the Tranznorth merger with Penguin and the consequent restructuring of the Tranznorth business.

[73] Ms Silver said she had explained Tranznorth's views regarding the full-time Office Administrator position; specifically that it appeared there would not be sufficient work for a full-time, day-time position.

[74] Ms Silver said she had explained to Ms Spanhake that there could be a casual or contractor's position available, and there was a possibility of a Transport Manager position being available, but this would require the person appointed to have logistics experience, to work late at night, and to drive a truck if so required.

[75] Ms Silver said she had asked Ms Spanhake if she could drive a truck, to which Ms Spanhake had responded that she could, and commented that both Mr Massey and Mr Standing knew that her knee problems made this impossible..

[76] Ms Silver said she had asked Ms Spanhake if she was prepared to consider part-time or night work from 6 p.m. onwards and Ms Spanhake had responded “No”.

[77] Mr Massey and Mr Standing said that Ms Spanhake had become angry during the meeting, and she had stated that she did not understand why Mr Standing had been appointed or why the status quo could not be maintained.

[78] Ms Silver said she had shown Ms Spanhake the job description for her position with the proposed changes written next to each of her current tasks.

[79] Ms Spanhake agreed that she had become upset during the meeting and had asked: “*Are you making me redundant?*”. Ms Silver said she had responded by making it clear to Ms Spanhake that it was just a proposal at that stage and nothing had been decided as Tranznorth wanted her to think about what had been discussed and to provide them with ideas and suggestions to be discussed at a later stage.

[80] Ms Spanhake said she had asked why she had not been advised to bring a representative with her to the meeting. Ms Silver said she had explained that it was not necessary for Ms Spanhake to have had a representative at the meeting as the meeting was just to explain the situation; however Ms Spanhake was invited to bring a representative to the next meeting.

[81] Mr Massey said it had been made clear to Ms Spanhake that she was not being made redundant at this stage and that further discussion was needed, however the meeting had ended abruptly when Ms Spanhake had become hostile and stormed out of the meeting swearing.

[82] On 22 July 2011 Mr Massey wrote to Ms Spanhake advising her that there would be a further meeting on 27 July 2011 at which she was to present any “*ideas, suggestions, alternatives or concerns*”, and to which she was invited to have representation. The letter referred to the meeting on 22 July 2011 and stated:

*At the meeting we explained the company's current view is that many of your duties will probably be absorbed by others, leaving insufficient work to sustain a full-time salaried administrative person.*

*We pointed out that there may be a position for a casual person or contractor to complete some of the accounting on a monthly basis, as well as a data entry person to work late nights, possibly from 6pm through to 2 am, but that the data entry person would also be required to handle the freight logistics and be able to drive a truck should the need arise.*

*Meeting on 27 July 2011.*

[83] The meeting on 27 July 2011 was attended by Mr Massey, Mr Standing, Ms Silver, Ms Spanhake, Ms Hayley Koop, Ms Spanhake's daughter, and Mr David Flaws as representative for Ms Spanhake.

[84] Ms Silver stated that the meeting on 27 July 2011 had commenced with Mr Flaws initiating a 'without prejudice' discussion and suggesting a sum to settle the matter.

[85] Ms Silver explained that Mr Massey and Mr Standing had been taken aback by some of the comments Mr Flaws had made, in particular the comment that they had pre-determined intentions to make Ms Spanhake redundant and that the Tranznorth restructure was a sham. As a result Ms Silver had called for an adjournment.

[86] Following the adjournment, Ms Silver said Tranznorth made a counter-proposal which was rejected and thereafter the formal meeting resumed.

[87] Ms Silver said the speed of the process had been raised as an issue by Mr Flaws and this had been discussed. Ms Silver said she had explained that it was fair and reasonable that an employee be notified as soon as possible that their job might be affected as a result of an impending restructure

[88] Ms Silver said following this discussion she had asked Ms Spanhake for any suggestions she might have to make, however Mr Flaws had responded by stating that Ms Spanhake wanted to be retained as the full-time administrator and to maintain the status quo. Ms Silver said she had asked Ms Spanhake what she wanted, to which Mr Flaws had responded that Ms Spanhake wanted full-time work.

[89] Ms Silver said that knowing there would be accounting work to be carried out, she had asked if Ms Spanhake would consider part-time work, however Mr Flaws had replied that

Ms Spanhake did not want part-time work, that she was prepared to be flexible, and was willing to negotiate a change to her hours.

[90] Ms Silver said she asked Ms Spanhake if she was prepared to work nights doing data entry, but Mr Flaws replied “No”. Ms Silver said that there had been a discussion about the reason why the data entry needed to be carried out at night.

[91] Mr Standing said he had explained to Ms Spanhake that Tranznorth had only been manifesting approximately half of the work for the next day’s deliveries, whereas Penguin had been manifesting 99% of the following day’s work by performing data entry at night. As a result there would be obvious benefits to Tranznorth to operate in the same manner.

[92] At the Investigation Meeting Ms Silver said she had not explained to Ms Spanhake that the two part-time jobs could be combined as she had considered they were two separate jobs, however she did not consider that this would have made any difference on the basis that both Mr Flaws, who had replied on behalf of Ms Spanhake, and Ms Spanhake personally had responded “No” when asked if she would do part-time or data entry work.

[93] Mr Standing said the meeting had been concluded by Mr Flaws stating that Ms Spanhake had difficulties with the way she had been treated, and the meeting was adjourned to consider what Ms Spanhake had said.

[94] Ms Silver said that she, Mr Massey and Mr Standing had discussed the situation over the next few days and had concluded that Ms Spanhake was not prepared to consider any alternative employment and had not provided any suggestions or alternatives which Tranznorth could consider.

[95] Ms Silver said in that situation the decision had been reached to make Ms Spanhake’s position as Office Administrator redundant, and to terminate her employment. Accordingly she had telephoned and emailed Mr Flaws to advise him of Tranznorth’s preliminary decision to terminate Ms Spanhake’s employment, and invited feedback from himself and Ms Spanhake on the decision before it came into effect on 3 August 2011.

[96] As no feedback was received, Ms Silver said on 4 August 2011 she had advised Mr Massey to confirm in writing to Ms Spanhake that her employment was terminated by reason of redundancy effective 3 August 2011. Mr Massey had done so by letter dated 4 August 2011.

## Determination

### Was Ms Spanhake's position disestablished as a result of a genuine restructuring exercise?

[97] The Court of Appeal in *GN Hale & Son Ltd v Wellington Caretakers IUOW*<sup>1</sup> clarified that:

*An employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, re-organisation 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.*

[98] The onus of proving that there were genuine commercial grounds for redundancy rests upon the employer.

[99] Tranznorth underwent a process of a business merger with Penguin. As a result of this merger, some, though not all, of the duties undertaken by Ms Spanhake were to be absorbed into the duties carried out by other employees.

[100] The evidence of Mr Standing was that the possibility of the redistribution of duties had occurred as a result of an analysis of the Penguin operation and re-evaluating the way in which Tranznorth operated.

[101] The outcome of this re-evaluation process was the redefinition of certain aspects of the Tranznorth business to increase efficiency which resulted in the assessment that the position of full-time Office Administrator was no longer required and superfluous to requirements.

[102] There has been no evidence provided to indicate that the position of full-time Office Administrator has been replaced following the termination of Ms Spanhake's employment, although two aspects of that position, being the night-time data entry and the day-time accounting duties remained. These were part-time options which had been offered to Ms Spanhake to consider and which had been rejected by her.

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<sup>1</sup> [1991] 1 NZLR 151

[103] I determine that Ms Spanhake’s position of full-time Office Administrator was disestablished as a result of a genuine restructuring exercise on commercial grounds

**Did Tranznorth follow a fair procedure in disestablishing Ms Spanhake’s position of Office Administrator?**

[104] The test of justification in s103A Employment Relations Act 2000 (the Act) states:

***S103A Test of Justification***

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- ii. 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.*

[105] Other provisions of the Act govern questions of justification for dismissal and, in particular, by reason of redundancy. Section 4 of the Act addresses the requirement for parties to the employment relationship to deal with each other in good faith. Section 4(1A)(c) in particular is 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 employees’ employment, about the decision; and*

*(ii) an opportunity to comment on the information to their employer before a decision is made.” s4 (1A)(i) and (ii).*

[106] In a redundancy situation a fair and reasonable employer must, if challenged, be able to establish that he or she has complied with the statutory obligations of good faith dealing in s4 of the Act. His Honour Chief Judge Colgan in *Simpsons Farms Limited v Aberhart*<sup>2</sup> noted that this compliance with good faith dealing includes consultation “*as the fair and reasonable employer will comply with the law*”<sup>3</sup>

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<sup>2</sup> [2006] ERNZ 825,842

<sup>3</sup> Ibid at para [40]

[107] Ms Spanhake said at the Investigation Meeting that she had understood the reasons for the decision that her position as Office Administrator was redundant, and that she had appreciated that there would be changes as a result of the merger between Tranznorth and Penguin, however she had not appreciated that her own employment would be directly affected until the meeting on 22 July 2011.

[108] Mr Standing had started to prepare job descriptions for the Transport Manager and the Operations Manager positions at the beginning of July 2011. Shortly after this, Mr Standing had prepared a job description for Ms Spanhake, and said he had realised that her duties could be carried out more efficiently by other employees following the merger with Penguin.

[109] Mr Standing and Mr Massey's evidence was that they had not discussed the administration role until the weekend of 15 – 17 July 2011 which was immediately after the merger was finalised with Penguin on 15 July 2011. The meeting with ESL to discuss the situation regarding Ms Spanhake's position had taken place on Tuesday 19 July 2011.

[110] Whilst Mr Standing had realised in early July that Ms Spanhake's position could be carried out more efficiently by other employees if the merger was concluded, I accept that due to the merger process, he had not had the opportunity to discuss the situation with Mr Massey until the weekend of 15 – 17 July 2011.

[111] I also accept that whilst Mr Massey might have thought about the implications of the merger in regards to Ms Spanhake's role as Accounts/Administrator, he failed to do so and did not apply his mind to the question. This might have been insensitive of him, but I do not accept it implies pre-determination on the part of Tranznorth to make Ms Spanhake's position redundant.

[112] In a similar vein, whilst I find the failure to communicate with Ms Spanhake about her delayed move to the Port Road location was insensitive, I do not accept it shows evidence of pre-determination.

[113] On the contrary, I observe that whilst Ms Spanhake was at times disrespectful in the manner in which she interacted with Mr Massey, and that she

[114] used offensive language towards him; he had been extremely tolerant of this, and had made allowances for her behaviour on the basis of Ms Spanhake's personal and health situation, and to the value her logistics experience added to the Tranznorth operation. On this

basis I find support for my view that there was no pre-determination on the part of Tranznorth to terminate Ms Spanhake's employment.

[115] Ms Spanhake was advised on 21 July 2011 that there would be a meeting the next day to discuss her position. Although this meeting was to explain the situation to Ms Spanhake and therefore there was no requirement that Tranznorth advise her that she could have representation, it is clear that Mr Massey and Mr Standing expected Ms Spanhake to be upset. In that situation I consider that the fair and reasonable employer would have advised Ms Spanhake that she could have a representative with her at the meeting.

[116] At the meeting two alternative options to the termination of her employment were discussed with Ms Spanhake, one of these was a part-time accounting position, and one was a part-time night data entry role.

[117] In *Cammish v Parliamentary Service*<sup>4</sup> His Honour Judge Goddard observed:

*“Consultation is to be a reality, not a charade. The party to be consulted must be told what is proposed and must be given sufficiently precise information to allow a reasonable opportunity to respond.”*

[118] I do not find that it was explained satisfactorily to Ms Spanhake at the first meeting held on 22 July 2011 that truck driving, although an ideal requirement for the night-time data entry position, was not a mandatory pre-requisite, or that the combination of the two positions might result in her being able to work the equivalent of full-time hours.

[119] As a result Ms Spanhake was left with the impression that she was being offered only a part-time role. The follow-up letter dated 22 July 2011 from Mr Massey in which he confirmed that the person to be employed in the area of data entry would also have to be able to physically drive a truck did not alter this impression on the part of Ms Spanhake.

[120] There was no evidence that it had been explained to Ms Spanhake that the driving requirement was not mandatory for the part-time data entry position, and Ms Silver confirmed in questioning that she had not advised Ms Spanhake that the two part-time positions could be combined.

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<sup>4</sup> [1996] 1ERNZ 404

[121] It is possible that providing this information to Ms Spanhake may not have impacted upon the eventual outcome, however given Ms Spanhake's insistence on having full-time employment, I consider that the full disclosure of information should have been provided to her for consideration.

[122] I find that whilst the consultation could not be considered to be a sham, Tranznorth did not provide sufficiently precise information relating to the positions available to Ms Spanhake in order to allow her to make a reasoned decision. As such, I find that Tranznorth did not comply with the statutory good faith requirements as regards consultation, and that this constitutes a more than minor procedural defect.

[123] I determine that Ms Spanhake was unjustifiably dismissed by Tranznorth.

### **Did Ms Spanhake suffer any disadvantage in employment?**

[124] Ms Spanhake has not specified any particular area in which she felt she had been disadvantaged. However there were two distinct areas of complaint made by Ms Spanhake. One of these is in relation to her having been asked to take annual leave on or about May 2011 about which she had felt aggrieved, and the second was in relation to the Sapphire software training which Ms Spanhake claimed was inadequate..

[125] To be successful in a claim for unjustifiable disadvantage, pursuant to s 103(1)(b) of the Act, an employee must show:

*That the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment) is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer*

[126] There are two limbs to the test for unjustifiable disadvantage as set out in s 103(1)(b): firstly there must be an unjustifiable action by the employer, and secondly that action must have caused disadvantage to the employee.

[127] Mr Massey's evidence was that at the time Ms Spanhake's knee surgery had been cancelled in May 2011, Ms Spanhake had an accumulation of annual leave. Pursuant to s 19 of the Holidays Act 2003, an employer may require an employee to take annual leave providing 14 days notice are given to the employee. As such the requirement for Ms Spanhake to take annual leave was not an unjustifiable action on the part of Tranznorth.

[128] Ms Spanhake agreed to take the annual leave and there was no evidence that she had been disadvantaged as a result, especially as Mr Massey had offered her an additional week of sick leave entitlement should she require this at the time of her knee surgery.

[129] In respect of the Sapphire software, there was evidence provided to support the contention that Ms Spanhake had received training on the use of the software from Translogix on 4 October and 30 November 2011. In addition Mr Standing's assertion that he had spent many hours training Ms Spanhake himself was supported by the production of the 48 page user manual at the Investigation Meeting.

[130] I find no unjustifiable action on the part of Tranznorth in respect of the training provided on the Sapphire software and no evidence that Ms Spanhake had been disadvantaged as a result.

[131] I note further that there is no evidence that Ms Spanhake raised a personal grievance in relation to either of these matters within the 90 day notification period pursuant to a 114 of the Act.

[132] I determine that Ms Spanhake had not been unjustifiably disadvantaged in her employment by Tranznorth.

## **Remedies**

### *Lost Wages*

[133] Ms Spanhake's employment at Tranznorth was terminated on the basis of redundancy. I have found Ms Spanhake was dismissed on the grounds of a genuine redundancy. Consequently no remedy can be awarded for the loss of a job<sup>5</sup>.

[134] Ms Spanhake was paid two weeks' notice period and two weeks' redundancy compensation in accordance with her Employment Agreement.

### *Compensation for Hurt and Humiliation under s 123 (1) (c) (i).*

[135] Ms Spanhake said that she had been distressed about the loss of her job, and she had consulted a doctor due to the adverse affect on her health. Ms Spanhake is entitled to compensation for humiliation and distress.

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<sup>5</sup> *Aoraki Corporation Limited v McGavin* [1998] 1 ERNZ 601

[136] I order Tranznorth to pay Ms Spanhake the sum of \$3,000.00, pursuant to s 123(1) (c) (i) of the Act.

### **Costs**

[137] Costs are reserved. Given the extent to which both parties have been successful, I am of a mind that costs should lie where they fall. However in the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any rely submissions by the Respondent to be lodged within 14 days of receipt. I will not consider any application outside that timeframe.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**