

**YOUR ATTENTION IS DRAWN TO  
THE NON PUBLICATION ORDER  
ON PAGE ONE OF THIS  
DETERMINATION**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 115/08  
5091725

BETWEEN

ROSS TAYLOR  
Applicant

AND

JUST WATER NEW ZEALAND  
Respondent

Member of Authority: Vicki Campbell

Representatives: Kevin Muir for Applicant  
Lorne Campbell for Respondent

Investigation Meeting 17 January 2008 at Auckland

Submissions Received 25 January 2008 from Applicant  
29 January 2008 from Respondent

Determination: 28 March 2008

---

**DETERMINATION OF THE AUTHORITY**

---

**Prohibition on Publication**

[1] I order, by consent, that commercially sensitive information relating to the respondent's budgets, referred to in witness statements and documents in evidence, not be published. This order is made pursuant to clause 10 of Schedule 2 of the Employment Relations Act 2000.

**Employment Relationship Problem**

[2] Mr Ross Taylor was employed on 14 June 2006 as General Manager for Just Water New Zealand ("JWNZ") a division of Just Water International Ltd ("JWIL").

[3] Prior to Mr Taylor's appointment the organisational structure provided for two positions to lead JWNZ. These were the National Sales Manager, Mr Brian

Simpson, and the Finance Manager, Mr Marlon Bridge. Both positions reported to the Chief Operating Officer of JWIL, Mr Michael Fann.

[4] At the time it was expected that either Mr Simpson or Mr Bridge would demonstrate the necessary leadership and other skills to become the General Manager for JWNZ. This never eventuated.

[5] The structure was not successful, employees were confused and there was no single leader in the organisation. It was decided to appoint a single General Manager, with the view that the incumbent would eventually take on the National Sales function, as well as undertake the general management role.

[6] Mr Taylor was the successful candidate for the newly established, General Manager's job. Unfortunately after 5 months, Mr Taylor was dismissed by reason of redundancy.

[7] Mr Taylor says that dismissal was unjustifiable. Mr Taylor says the redundancy was a sham and seeks remedies. JWNZ denies the claims.

[8] It was common ground that Mr Taylor did not raise a personal grievance within 90 days of the dismissal. Mr Taylor says that was because he only became aware that his redundancy was a sham on 30 March 2007. After seeking advice and undertaking some research, he raised his personal grievance on 11 May 2007.

[9] I have dealt with the issues relating to the 90 day period first. The questions with regard to the 90 issue are:

- When does the 90 period start in respect of Mr Taylor's claim for personal grievance?
- Was Mr Taylor's grievance raised within 90 days?

[10] If I find Mr Taylor's grievance was raised within the statutory 90 day period I am then required to scrutinise NST's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

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 considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[11] The test of justification does not change the longstanding principles about justification for redundancy (see *Simpson Farms v Aberhart*, unreported, Employment Court, Colgan CJ, [2006] 1 ERNZ 825).

[12] The Authority must be satisfied on two general points – that the business decision to make a position redundant in this case was made genuinely and not for ulterior motives; and that the respondent acted in a fair and open way in carrying out that decision – particularly, did it consult properly about the proposal to make Mr Taylor redundant and otherwise act in a way that was not likely to mislead or deceive him, that is in good faith?

### **Raising of the personal grievance**

[13] Section 114 of the Employment Relations Act 2000 requires personal grievances to be raised within 90 days:

Beginning on the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later ...

[14] An employee wishing to raise a personal grievance must raise it within 90 days to enable it to be addressed and resolved promptly. The 90 day period begins to run when the employee has the knowledge necessary to initiate the grievance. That is when the employee has sufficient information to form a belief on reasonable grounds that the employer has acted in an unjustifiable manner.

[15] It has been acknowledged by the Employment Court that there may be occasions when the actions of the employer may seem justifiable at the time, but have been undertaken in circumstances not immediately apparent to the employee. If the circumstances in which the action was taken are an essential element of the personal grievance then the 90 day period begins when the employee becomes aware of those circumstances to the extent necessary to form a reasonable belief that the employer's action was unjustifiable. (*Wyatt v Simpson Grierson (A Partnership)*, unreported, AC 45/07, 20 July 2007).

[16] Mr Taylor was dismissed by reason of redundancy on 10 November 2006 but says he did not have any knowledge at that time that his position was not genuinely redundant. Mr Taylor says he did not become aware that his redundancy might have been a sham until March 2007.

[17] On 30 March 2007 Mr Taylor read an advertisement for a Regional Sales Manager on the Seek website requesting applicants to apply to Brian Simpson, General Manager of Just Water. After reading this advertisement Mr Taylor says he then secured a copy of the respondent's annual half year report dated 31 December 2006 which listed Mr Simpson as General Manager.

[18] It was common ground that Mr Simpson's role as General Manager incorporated the functions of both General Manager and National Sales Manager. He took on the role and responsibilities of General Manager following Mr Taylor's dismissal and was provided with some coaching by Mr Falkenstein.

[19] When Mr Taylor was appointed as General Manager, it was always the intention, that in addition to his duties as General Manager, he would also take on the functions of the National Sales Manager role.

[20] It was the knowledge that Mr Simpson had been appointed as General Manager, which came to Mr Taylor's notice on 30 March. Being satisfied your position is genuinely redundant is an essential element of dismissals by reason of redundancy. The knowledge that his job was being undertaken by Mr Simpson led Mr Taylor to believe his position was not redundant after all and that he had been unjustifiably dismissed.

[21] Following the decisions in *Wyatt and Tippins v Trust Bank New Zealand Ltd*, unreported, AEC19/94, Travis J, 4 May 1994, I find that the 90 day period commenced on 30 March 2007. Mr Taylor raised his personal grievance 41 days after the personal grievance came to his notice, which is within the requisite 90 day period.

[22] I have found Mr Taylor's personal grievance was raised within the statutory 90 day period and have consequently gone on to determine the substantive merits of his employment relationship problem.

### **Employment terms and conditions**

[23] Mr Taylor was subject to an individual employment agreement which provided for Redundancy in the following way:

The Employer operates in a competitive market and if business is not maintained at a sufficient level, employees may be made redundant. Redundancy may also arise in other circumstances where the position filled by the Employee is, or will become surplus to the needs of the Employer.

In the event of redundancy, you will be entitled to two week's notice, or pay in lieu thereof, and shall also be entitled to an additional one days pay for each complete year of service. There shall be no pro rata payment for part years of service.

Notwithstanding the foregoing, you shall not be entitled to redundancy compensation in the event that you are offered alternative employment, on substantially the same terms and conditions, either by the Employer or by any other company, or other entity to whom the business or assets, or part thereof, may be sold.

### **Genuiness of the Redundancy**

[24] The Employment Court in *Simpsons Farms* reiterated the right of an employer to make genuine commercial decisions relating to how its business operations will function including decisions to make positions or employees redundant.

[25] To justify the reasons for the redundancy, JWNZ must show that the work being done by the holder of the position is no longer needed. The enquiry is not as to whether there is merely a rearrangement or renaming of functions but whether the work to be performed has disappeared. The mix of activities making up the job content may alter but if the work is still there and needs to be done, it cannot be said that the incumbent is redundant. Whether a job is the same with a change of focus or emphasis or is a different position, requiring different work, different skills or a different kind of worker, is a question of fact and degree to be determined (*McCulloch v NZ Fire Service Commission* [1998] 3 ERNZ 378).

[26] The test developed by the Courts to assist in making this assessment asks the question:

Would a reasonable person, taking into account the nature, terms and conditions of each position and the characteristics of the [worker], consider that there was sufficient difference to break the essential continuity of employment?  
(*Auckland Regional Council v Sanson* [1999] 2 ERNZ 597)

[27] A genuine redundancy is determined in relation to the position, not the incumbent (*NZ Fasteners Stainless Ltd v Thwaites* [2000] 1 ERNZ 739). The integrity of a restructuring scheme, even where motivated by genuine operational requirements, may be compromised by its application to particular individuals for reasons other than that their jobs have gone. Where the selection of an employee for redundancy is "tainted by some inappropriate motive" and the redundancy is "masking another and different reason", the worker will have a valid grievance (*Savage v Unlimited Architecture Ltd* [1999] 2 ERNZ 40).

[28] Further, where the Authority finds mixed motives (that is genuine business reasons but with underlying performance concerns) the employer bears the burden of persuading the Authority that the redundancy was both genuine and the predominant motive for dismissal. If the predominant motive was a genuine commercial decision, the dismissal will be justified if carried out in a fair manner. However, if the predominant motive was for another reason, the dismissal will be unjustified. (*Nelson Aero Club Inc v Palmer*, unreported, J Shaw, 7 March 2000, WC10A/00; *Forest Park (NZ) Ltd v Adams* [2000] 2 ERNZ 310)

[29] Mr Taylor was employed to ultimately replace two positions. This was made clear to Mr Taylor at the time of his appointment. He was told that the role of General Manager was to incorporate the functions of the National Sales Manager's role. To that end, there were already plans afoot to put Mr Simpson into an alternative position within the group.

[30] Mr Fann says by October 2006 he had serious concerns about the financial performance of JWNZ which was operating 10% behind its budget. Mr Fann did not attribute the financial difficulties to Mr Taylor, however, he was concerned that something needed to be done to remedy the situation.

[31] Concurrently with those concerns, during the first four months of Mr Taylor's employment, employees had made comments to Mr Fann about Mr Taylor. The minutes taken of a Board Meeting on 26 October 2006 records:

Discussion occurred over staff resistance re new JWNZ General Manager. MF to continue with strong coaching role.

[32] Mr Fann didn't discuss any specific concerns with Mr Taylor following this meeting, but he did tell Mr Taylor that he had to do more walking around the business. Mr Fann says he told Mr Taylor this to help him increase his visibility to staff. Mr Fann told me this was the extent to which he provided "coaching" to Mr Taylor.

[33] The instruction to Mr Fann from his Board was to provide "coaching" to Mr Taylor was, as Mr Fann indicated at the investigation meeting, a directive to change the situation between Mr Taylor and the employee's perception of him. Coaching requires an element of instruction and training. Advising someone to "walk around" more and be more visible, in my opinion, falls short of the obligation of Mr Fann, as directed by the Board, to provide training and instruction for Mr Taylor.

[34] There is no indication in either Mr Fann's October report to the Board or the Minutes of the October meeting that a restructuring was imminent or that the financial situation of JWNZ was such that it could no longer sustain the position filled by Mr Taylor.

[35] Surprisingly then, on 2 November 2006 Mr Taylor was invited to a meeting with Mr Michael Fann. He was advised that he was entitled to have a support person with him. As Mr Taylor was not aware of any issues to be discussed he suggested Mr Fann start the meeting so Mr Taylor could determine whether a support person was going to be necessary or not. Mr Taylor indicated that he would stop the meeting if he felt uncomfortable.

[36] Mr Fann advised Mr Taylor that the position of General Manager was to be disestablished. Mr Fann invited Mr Taylor to present ideas on how he could remain in the organisation without the position of General Manager. Mr Fann says this meeting was the first meeting where he consulted with Mr Taylor about a proposed structure which would not include the position of General Manager.

[37] That evening Mr Taylor developed a proposal to establish a new position of Group Marketing Manager, and disestablished the position of National Sales Manager. This proposal was discussed with Mr Fann on Friday 3 November 2006.

[38] Mr Fann listened to Mr Taylor's proposal and requested further information. Mr Fann then discussed the proposal with two members of the Board, to see if they agreed with Mr Fann, that the proposal did not address the need make cost savings. The fact that Mr Fann did not believe the proposal addressed the cost savings need, was never discussed with Mr Taylor.

[39] As requested, Mr Taylor expanded on his proposal to include timeframes, potential income avenues and further information regarding the new position. This second proposal was discussed with Mr Fann on Monday 6 November 2006. During that meeting, which was a lengthy one, many other issues were also discussed.

[40] At the end of that meeting, despite Mr Taylor's efforts to identify a new role for himself in JWNZ, Mr Fann advised him that he was redundant. Mr Taylor was handed an undated letter confirming his redundancy with effect from 10 November 2006.

[41] I accept the business was facing genuine commercial pressure and that achievements against budgets were under close scrutiny. However, that does not automatically amount to a genuine reason for redundancy.

[42] Mr Taylor says the position to which he was appointed and the position undertaken by Mr Simpson were the same position. I agree with him. Mr Fann was very clear in his oral evidence at the investigation meeting that when Mr Taylor was employed, his role included both the general management component and the national sales management components.

[43] Mr Taylor's uncontested evidence was that his first task on commencing employment was to review and improve the systems within JWNZ. Mr Taylor had been told Mr Simpson was doing a good job in sales, so he should focus firstly on making sure all business systems were working and being maintained. This was a particular area of strength for Mr Taylor.

[44] Mr Taylor had been working in Just Water for five months before his dismissal. For the majority of that time he had been acquainting himself with the business and sorting out business systems. He had not yet had the time to take on the functions undertaken by the National Sales Manager.

[45] I have concluded that by November 2006 Just Water found itself with the same situation it had prior to Mr Taylor's appointment. That is, it had two managers undertaking two separate roles, whereas, Just Water wanted one person undertaking the two roles. Either Mr Taylor or Mr Simpson needed to go. Mr Fann decided that person would be Mr Taylor.

[46] I have no doubt that what Mr Fann says is correct, that from his point of view the redundancy was motivated by a desire to seek cost reductions. However, there was neither discussion at board level about such a need or concerns, nor evidence of any analysis completed by the respondent which would support his contention. In fact Mr Fann, in his monthly reports to the Board for August and October 2006, signifies that most indicators were improving.

[47] Further, Mr Fann consistently held throughout the investigation meeting that Mr Taylor had failed to "step up" to the combined role of General Manager/National Sales Manager. This suggests some performance issues which needed to be dealt with by JWNZ.

[48] I find that the combined role of General Manager/National Sales Manager was the role Mr Simpson was appointed to in February 2007. I am supported in my conclusions by the evidence of the respondent witnesses that from 10 November 2006 when Mr Taylor was dismissed for redundancy, Mr Simpson did "step up" and was indeed, being coached in the general management responsibilities which he took over on an informal basis until his appointment.

[49] It was also the clear evidence of the respondent witnesses, that JWNZ did not need both Mr Taylor and Mr Simpson leading the organisation. Mr Fann told me that the intention was that once Mr Taylor took over the national sales roles Mr Simpson would be moved out of that role, probably into a national sales role with Aqua Cool, another division of JWIL.

[50] JWNZ wanted to alter its Management structure. That was the reason for Mr Taylor's appointment. Once Mr Taylor took over the all the functions of the new role, Mr Simpson was to be moved to another subsidiary of JWIL. I find that what motivated JWNZ to make Mr Taylor redundant, was not the financial performance or other genuine commercial reasons, but the fact that Mr Taylor hadn't stepped up to the plate early enough and taken on the National Sales Manger's functions, together with the adverse comments from staff. That was the real reason for Mr Taylor's redundancy.

### **Consultation**

[51] In *Simpsons Farms* the Employment Court reiterated the longstanding principle that consultation requires more than a mere prior notification and must be allowed sufficient time. Further, it is to be a reality, not a charade and is never to be treated perfunctorily or as a mere formality.

[52] The Court went on to state:

Genuine efforts must be made to accommodate the views of the employees. It follows from consultation that there should be tendency to at least seek consensus. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done. The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and event start anew.

[53] The decision to terminate Mr Taylor's employment must be carried out fairly and sensitively. The Employment Relations Act 2000 obliges the parties to act towards each other in good faith and additionally, the law implies in all contracts of employment a duty of fair and reasonable treatment. These are duties which both parties owe to each other.

[54] The parties are also obliged to deal with each other in good faith. Section 4 of the Act required JWNZ to provide to Mr Taylor access to information relevant to the continuation of his employment as well as an opportunity to comment on the information before the decision was made.

[55] I am satisfied Mr Fann never raised or discussed with Mr Taylor, Mr Fann's perception that Mr Taylor was not taking over the national sales role as anticipated when he was appointed.

[56] Mr Taylor says he was told on 2 November that his position was surplus and that prior to this there had been no discussion or indication that he may be facing redundancy. Mr Fann says, the discussion on 2 November centred on a "proposal" to disestablish the general managers position, and he denies he told Mr Taylor that the general manager position was to go.

[57] I prefer Mr Taylor's evidence on this point and conclude that on 2 November 2006 Mr Fann advised him that his position was to be disestablished and that what was to be discussed from then on was whether there was an alternative position for Mr Taylor in the organisation. I am supported in my conclusions by the proposals then put together by Mr Taylor, which focussed, not on how the general manager role could be retained, but on a completely new role to keep Mr Taylor employed in the organisation.

[58] The actions of JWNZ and how it acted in regard to Mr Taylor's redundancy were not what a fair and reasonable employer would have done.

**I find Mr Taylor's dismissal by reason of redundancy to be unjustified.**

### **Remedies**

#### *Lost wages*

[59] Mr Taylor provided evidence as to the steps he had taken to mitigate his loss following his dismissal. Mr Taylor eventually obtained employment in August 2007. He is seeking lost of wages of nine months.

[60] Section 128(2) of the Employment Relations Act provides for the mandatory award of three months' lost wages. Any award for a loss greater than that is discretionary. On balance I find that there is no justification for awarding Mr Taylor more than three months wages.

[61] I am satisfied that the list of jobs which Mr Taylor says he applied for are not all within his immediate area of expertise. Mr Taylor is a very experienced sales manager and regional manager. The majority of positions Mr Taylor applied for are general management roles as opposed to sales management.

[62] Three months salary equates to \$30,000. From that \$22,700 must be deducted as this was money paid to him following his dismissal. I have not included the value of Mr Taylor's vehicle in this calculation but have preferred to deal with it under compensation for lost benefit. Neither have I included any amount for bonuses or incentive payments. There was no evidence that Mr Taylor was entitled to receive any such bonus or incentive payments.

**Just Water New Zealand Ltd is ordered to pay to Mr Taylor the sum of \$7,300 gross lost remuneration pursuant to section 128 of the Employment Relations Act 2000.**

*Compensation*

[63] Mr Taylor seeks compensation for hurt, humiliation and injury to feelings in the sum of \$25,000.

[64] I have read and considered the submissions of the parties in this regard. I have also had regard to the circumstances surrounding Mr Taylor's dismissal. Mr Taylor gave compelling evidence to the effect the knowledge that Mr Simpson had been put into his role soon after he was dismissed for redundancy had on him. However, it was that knowledge that caused his distress, not the dismissal per se.

[65] Mr Taylor is entitled to an award to compensate him for the hurt and humiliation suffered as a consequence of his dismissal.

**Just Water New Zealand Ltd is ordered to pay to Mr Taylor the sum of \$7,000 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.**

*Compensation for loss of benefit*

[66] Mr Taylor is also entitled to an award of compensation for the loss of his company vehicle. This formed part of Mr Taylor's claim under the lost remuneration head, however, I have preferred to deal with it pursuant to section 123(1)(c)(ii).

[67] The benefit to Mr Taylor of having the use of a company vehicle was valued at \$18,000 per annum. I have awarded three months value to Mr Taylor.

**Just Water New Zealand Ltd is ordered to pay to Mr Taylor the sum of \$4,500 pursuant to section 123(1)(c)(ii) of the Employment Relations Act 2000.**

*Contribution*

[68] The Authority is bound by section 124 of the Act to consider the extent to which the actions of Mr Taylor contributed towards the situation that gave rise to his personal grievance, and if those actions so require, to reduce the remedies. I am satisfied Mr Taylor has not contributed to the actions giving rise to his personal grievance. It follows that the remedies awarded to Mr Taylor will not be reduced.

**Costs**

[69] Costs are reserved. 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 parties may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell  
Member of Employment Relations Authority