

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2022] NZEmpC 114
EMPC 278/2021**

IN THE MATTER OF a challenge to determination of the
Employment Relations Authority

BETWEEN STL LINEHAUL LTD
Plaintiff

AND LEO WATERS
Defendant

Hearing: 2 and 3 June 2022
(Heard at Auckland, via AVL)

Appearances: Q Haines, advocate for plaintiff
L Anderson, advocate for defendant

Judgment: 28 June 2022

JUDGMENT OF JUDGE J C HOLDEN

[1] Mr Waters was dismissed for redundancy by STL Linehaul Ltd (STL) by letter dated 21 October 2019. The Employment Relations Authority (the Authority) found that dismissal to be unjustifiable and awarded Mr Waters \$17,000 as compensation for humiliation, loss of dignity and injury to Mr Waters' feelings pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) (distress compensation).¹

[2] In a costs determination, the Authority also ordered STL to pay Mr Waters \$9,000 as a contribution to his representation costs, along with \$71.56 for the

¹ *Waters v STL Linehaul Ltd* [2021] NZERA 304 (Member Craig).

Authority's filing fee.² The \$9,000 represented a \$2,000 uplift on standard costs for an investigation of the length here.

[3] STL filed challenges to both the substantive and the costs determinations. In closing submissions before the Court, however, STL conceded that there were flaws in the process leading up to Mr Waters' dismissal such that distress compensation is payable. It also says its challenge to the costs determination can be "put to one side", effectively conceding that the \$2,000 uplift to costs was not such as to warrant reconsideration of the costs determination.

[4] STL's principal submission is that the distress compensation awarded by the Authority was excessive. It also submits that any award ought to be reduced for contribution pursuant to s 124 of the Act.

Mr Waters was not employed by STL for long

[5] Mr Waters commenced employment with STL as an Administration Assistant based in Auckland on or about 28 August 2019.

[6] Prior to Mr Waters' employment, STL had five employees serving in administration roles in its Auckland office. Shortly before Mr Waters started, one person went on parental leave. That leave, together with a projected growth in work, led STL to employ Mr Waters as a permanent full-time employee and another person on a part-time basis.

[7] Not long after Mr Waters commenced his employment, however, the circumstances of the employee on parental leave changed, and they returned to work early.

[8] The evidence of STL was that the return of this employee, together with a lower than expected growth of its business, meant it was overstaffed.

² *Waters v STL Linehaul Ltd* [2021] NZERA 350 (Member Craig).

[9] It seems that there was some general discussion at team meetings of the economic trading conditions and about how STL could operate more efficiently, but no formal process was put in place to consider a possible restructuring.

[10] The only supporting evidence STL produced of its concerns over staffing levels were comments in two emails between the Administration Manager in Auckland and the Office Manager based in Christchurch. Those emails, sent on 15 October 2019, were discussing gossip that was said to be taking place within the Auckland team. The Office Manager in Christchurch says in her email:

If peeps have time to talk about confidential thing's then we really must be top heavy and no I am not just talking about Auckland. It's duly noted everywhere sadly.

[11] The response from the Administration Manager in Auckland to this comment was “We are top heavy here in Auckland at the moment and are trying to oversee-manage the team so that we can justify the numbers and wages.”

[12] The evidence also is that, at some point, Mr Waters went on a trip with an STL storeman on one of STL's trucks. Mr Waters' recollection was that this happened about the second week of his employment. He says he assisted the truck crew but also acknowledged that one of the purposes of going out on the truck was to see if that was something he would like to do.³ The Administration Manager's recollection was that the trip was later in Mr Waters' employment. She did not, however, suggest it happened as part of STL's consideration of staffing levels or a possible restructuring.

[13] During his employment, STL raised some issues with Mr Waters about his performance, and Mr Waters also had concerns over some staff's treatment of him, which he perceived as bullying. Mr Waters understood that one of his colleagues had raised a concern about how Mr Waters was treated. STL disputed that any such concerns had been raised. An email sent on 14 October 2019 from the HR Administrator, with whom the complaint was allegedly raised, suggests otherwise.

³ Mr Waters had previously worked as a truck driver.

Her email to the Administration Manager, which was also copied to the Office Manager, relevantly reads:

In the meantime please treat Leo with respect and any discussion with him should be in private and kept confidential.
It is out of line for any other admin staff to rebuke him as they do not have the remit to do so.

We do not need a bullying counter claim to complicate the process that's all.

[14] STL's performance concerns were raised with Mr Waters and were being documented. At the time of Mr Waters' dismissal, that process was still ongoing.

[15] In contrast, there was little if any process around the restructuring/redundancy situation. The Administration Manager suggested in her evidence that she had a meeting with Mr Waters, but the evidence shows that the only individual meeting with Mr Waters was the one concerning performance issues.

[16] Rather, after discussing matters between themselves, the STL managers determined that Mr Waters should be made redundant. It seems the principal reasons that led to the decision to choose Mr Waters to be made redundant were his performance issues and his short tenure with STL. STL also says that it took into consideration that other staff were interested in diversification and becoming trained in other areas whereas Mr Waters was not. However, that was not discussed with any staff, including with Mr Waters in the context of a possible redundancy. There was certainly no selection criteria identified to potentially affected employees, and there was also no proper selection process.

[17] On 21 October 2019, Mr Waters did not come into work as he was unwell. He advised the Administration Manager of this before his shift was due to start. She replied, thanking him for texting in advance of his shift and advising him to take care.

[18] When Mr Waters checked his emails at around 7 pm that evening, he found the letter sent at 3.25 pm that day terminating his employment.

[19] The termination letter advised:

It is with regret that we must inform you that during the last few months we have faced a decline in our business, and due to current economic conditions, the only way forward is to look at reducing staff numbers in order to reduce payroll expenses. We have looked at our staff payroll expenses throughout the country in order to make cuts where necessary.

The Auckland depot is one area that stands out as to the number of staff on board overall, particularly in the office administration area and which is not compatible with the revenue being generated currently.

It is with great regret therefore; I have to inform you that we are disestablishing your role and we do not have any other roles available for you at this time.

This will be effective immediately. You will be paid 2 weeks in lieu of notice plus your accrued holiday and final pay over the next 2 weeks.

We will be sorry to lose you and thank you for your service and wish you all the best for the future. We will be happy to provide a verbal or written reference for you if required to assist you in gaining employment elsewhere.

[20] It was signed by Mr Robert Pearson, who is one of the shareholders of STL.

[21] Mr Waters says that, as a result of receiving that letter, he felt angry and shocked. He says that when he was made redundant, he suffered from stress and pressure, and he worried about getting new employment and paying bills and living expenses. He says that the redundancy took a significant hit to his confidence and that it was a difficult time for him, particularly as his parents and other family were overseas at the time and unable to provide support.

[22] Mr Waters says that he thought about the way he had been treated for at least a month and that losing his job so suddenly without any good reason played on his mind and was very upsetting to him. He spoke to other impacts on his wellbeing. He says he felt worthless. He also says he was “really angry about how this had all happened and in such a short amount of time with the overtime [he] had put in and the flexibility of working days [he had given] them”. Because there was no real process or explanation, he thought that redundancy was not the real reason why he lost his job; rather, he thought it was due to discrimination.

[23] Fortunately, Mr Waters obtained new employment not long after his employment with STL ended.

[24] Mr Waters acknowledged that he would have also felt stressed about having to find another job if he had been justifiably dismissed. He also acknowledged that gaining new employment meant his mental struggles lasted a finite period of time. Having said that, Mr Waters maintained that if he had known the reasons behind his termination, and felt he had done everything he could, he would have expected to feel differently to how he felt.

[25] Mr Waters gave straightforward evidence and made appropriate concessions. It remains clear that the lack of process led to him feeling particularly upset by the termination and, as noted, to him questioning the reasons behind his dismissal. That is unfortunate, especially as there was no indication that discrimination played a role in STL's decision-making.

Employers must comply with the Employment Relations Act 2000

[26] An employer must act as a fair and reasonable employer could have done in all the circumstances at the time dismissal or action occurred.⁴ It also must act in good faith.⁵

[27] An employer seeking to make an employee redundant must have genuine reasons for doing so.⁶ When such a dismissal is before the Court, the Court does not substitute its view of how an employer is to run its business, but it would need to see evidence of a genuine and proper evaluation by the employer of its business situation, and of the options available to the employer, to establish that a dismissal for redundancy is justifiable.⁷

[28] An employer considering possible redundancies also must follow a fair process and be constructive and communicative. The employer must let potentially affected

⁴ Employment Relations Act 2000, s 103A.

⁵ Section 4.

⁶ *Grace Team Accounting v Brake* [2014] NZCA 541, [2014] ERNZ 129 at [85].

⁷ At [94].

employees know what is proposed. It must provide those employees with access to relevant information about the situation and give them a reasonable opportunity to provide their views before any decision is made.⁸ The obligation to provide information is not absolute; an employer may withhold information where that is necessary to maintain confidentiality (for example, to avoid unreasonable prejudice to the employer's commercial position).⁹ The employer must genuinely consider the employees' views before deciding what steps to take; this means that, while it is entitled to have working plans already in mind, the employer must have an open mind and be ready to change its plans and even start anew.¹⁰

[29] A dismissal or action does not, however, become unjustifiable solely because of defects in the process followed by the employer if the defects were minor and did not result in the employee being treated unfairly.¹¹

[30] Further, the Court is able to find that the personal grievance is of a different type than that claimed; for example, if an employee frames their personal grievance as an unjustifiable dismissal, that will not prevent the Court finding instead that it was an unjustifiable action causing disadvantage.¹²

[31] Whatever form the personal grievance takes, one of the remedies available to the Court is the payment of compensation, including distress compensation, which is all that was sought here.¹³

Justification not established

[32] The evidence is that there were five full-time employees before Mr Waters was employed and six full-time employees plus one part-time employee after he was employed and the person on parental leave returned.

⁸ Section 4(1A).

⁹ Section 4(1B)(c).

¹⁰ *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825 (EmpC) at [62].

¹¹ Section 103A(5).

¹² Section 122.

¹³ Section 123(1)(c)(i).

[33] STL has asserted that increases in fuel costs and minimum wage obligations plus a less than expected increase in business meant it had more staff than it needed. STL readily acknowledged, however, it had provided no financial information to its potentially affected staff. None was provided to the Court.

[34] While there may have been genuinely confidential information that STL could legitimately have withheld, considerably more information on the pressures STL says it was facing and the options it was considering to deal with those pressures should have been provided here.

[35] It is noteworthy that STL decided Mr Waters was surplus to its requirements less than eight weeks after he started. It nevertheless may have had good reasons to consider a reduction in staff, but the Court simply has insufficient evidence on which to reach that conclusion.

[36] In addition, and as accepted, there was no proper process leading up to Mr Waters' redundancy. The defects in process were not minor; fundamental obligations were entirely omitted.

[37] In summary, as has been conceded, STL did not act in a way that a fair and reasonable employer could have done in the circumstances at the time the restructuring and termination occurred.

[38] The dismissal of Mr Waters was unjustifiable.

Compensation is due

[39] As acknowledged by STL, distress compensation is due to Mr Waters.

[40] In this case, Mr Waters has given evidence of the distress caused to him. He fairly conceded that some distress would have resulted even if the dismissal had been justifiable. He also acknowledged that the short period of unemployment following his dismissal meant the extent of his distress was reduced. Nevertheless the distress he experienced was exacerbated by STL's failure to engage with him on the staffing issues and on the reasons behind his redundancy.

[41] While assessing distress compensation is an inexact science, I am satisfied that the evidence puts this case in the category of cases involving mid-range damage. The Authority's award of \$17,000 is in the bottom half of Band 2 for distress compensation, as identified in *Richora Group Ltd v Cheng*.¹⁴ It is a reasonably modest award for an unjustifiable dismissal and fairly represents the distress caused to Mr Waters by STL's unjustifiable actions. I see no reason to depart from the Authority's assessment of the appropriate award.

No deduction for contribution

[42] STL says compensation should be reduced for contribution. It submits that, but for the discussions about Mr Waters' performance issues occurring simultaneously, Mr Waters may not have been the individual who eventually was made redundant.

[43] Section 124 of the Act, however, refers to the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. Mr Waters did not contribute to the redundancy situation, nor did he contribute to STL's process failures. No deduction is warranted.

[44] Accordingly, STL is ordered to pay Mr Waters \$17,000 for compensation under s 123(1)(c)(i) of the Act. That payment is to be made within 21 days of this judgment.

No change to costs in the Authority

[45] STL effectively abandoned its challenge to the costs determination. No basis for reducing the amount of costs awarded has been shown. The costs award of \$9,000 together with \$71.56 for the Authority filing fee remains payable and also must be paid within 21 days of this judgment.

Costs are reserved

[46] Mr Waters is entitled to costs on this proceeding on a Category 2B basis. Those ought to be able to be agreed.

¹⁴ *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337 at [67].

[47] If that does not prove possible, Mr Waters may apply for costs by filing and serving a memorandum within 21 days of the date of this judgment. STL is to respond by memorandum filed and served within 14 days thereafter, with any reply from Mr Waters filed and served within a further seven days. Costs then would be determined on the papers.

J C Holden
Judge

Judgment signed at 3 pm on 28 June 2022