

**IN THE EMPLOYMENT COURT  
WELLINGTON**

**WC 26/06  
WRC 16/06**

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

BETWEEN FARMERS TRANSPORT LIMITED  
Plaintiff

AND NOEL KITCHEN  
Defendant

Hearing: 27 October 2006  
(Heard at Wellington)

Appearances: A M Gallie, Counsel for the Plaintiff  
G W D Manktelow, Counsel for the Defendant

Judgment: 14 December 2006

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**JUDGMENT OF JUDGE C M SHAW**

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[1] On 22 September 2003 Mr Kitchen was advised that his position as the assistant manager with Farmers Transport Limited would become redundant from 29 September 2003. He was paid 3 months' salary in lieu of notice and did not return to work after 22 September 2003. At the investigation meeting for his personal grievance, Farmers Transport Limited was represented by a lawyer although the executive chairman of the company which owns and operates Farmers Transport Limited, Mr Peter Roebuck, chose not to attend or bring witnesses. The Employment Relations Authority found that Mr Kitchen had been unjustifiably dismissed on both substantive and procedural grounds.

[2] The plaintiff challenged the Authority's determination. The challenge was heard de novo. Mr Roebuck and one of his managers attended and gave evidence. Mr Kitchen's wife also gave evidence which had not been available to the Authority.

## **The facts**

[3] Farmers Transport Limited is a road freight transport operator, operating in the area of rural freight and livestock cartage. It is based in Hastings and in 2003 had eight branch operations in the central North Island each managed by a branch manager with one or more sales representatives along with operational staff and support persons. Most of the staff at each branch were drivers. The Feilding branch had between 21 and 26 drivers.

[4] Mr Kitchen has worked for 42 years with Farmers Transport and its predecessors. He began aged 21 as a driver and worked his way through the company until he reached the position of southern area manager in 1984. In that role he supervised the Feilding branch, as well as two other branches in the Wairarapa. In 2002 the southern area manager role was disestablished but he remained Feilding branch manager.

[5] In 2002 a business review of the Feilding branch revealed a significant downturn in its efficiency and profitability. Due to a competitor setting up business in the same area, there was a need for proactive marketing. This was discussed at a meeting in October 2002 between the general manager, and Mr Roebuck and Mr Kitchen.

[6] In April 2003 Mr Roebuck made a decision to appoint another person, Alaister Gray, to the position of Feilding branch manager. Having made that decision he then called a meeting with Mr Kitchen at which he presented him with the decision as a fait accompli. Mr Roebuck told him that Mr Gray was there as a change manager because the business was in strife and that Mr Kitchen was not showing an appetite to be as aggressive in the marketplace as was required in order to survive in the industry.

[7] Mr Kitchen agreed to take on a newly created role of assistant branch manager at Feilding the purpose of which was, in part, to assist Mr Gray by introducing him to existing clients. Mr Roebuck said that Mr Kitchen had become insular and office-bound. In terms of change management and the continuation of

the branch it was not critical to have him there or even have his willingness to assist but, in spite of this, Mr Kitchen continued to be employed on his manager's salary but in a subordinate role.

[8] Mr Kitchen obviously had some concerns about the permanence of this new position because on 26 June 2003 he wrote to Mr Roebuck assuring him that he would support Mr Gray as the Feilding branch manager and confirming Mr Roebuck's assurance at the meeting in April that Mr Kitchen was not being "*thrown on the scrapheap*". The purpose of his letter was to question his future prospects once Mr Gray was fully up to speed. He asked for a meeting to discuss this important matter in person. Mr Roebuck phoned Mr Kitchen to discuss that letter and assured him that he would be treated with dignity and respect.

[9] The performance of the Feilding branch did not improve after April 2003. Mr Roebuck said there was strong competition in the marketplace and in spite of efforts to generate sales there was no real improvement in the viability of the business. He alleged that Mr Gray was not receiving the transitional support from Mr Kitchen that had been anticipated which compounded the ongoing difficulties. Mr Kitchen disputes that and said that, because Mr Gray had continued to live in Gisborne and was unable to settle in Feilding, his role as assistant manager was sometimes greater than his former full time branch manager position.

[10] On the evening of Sunday, 21 September 2003 Mr Roebuck rang Mr Kitchen at his home and told him not to go to work the next day. He said he would meet with him at the branch at a date and time to be arranged. Mr Kitchen was not told the purpose of that meeting. He waited at his home all day on Monday until, following a phone call, he was informed that the meeting was to be held at 5.30 that evening at the Feilding branch.

[11] Present at the meeting were Mr Kitchen, Mr Roebuck, and Mr Gray who had been asked by Mr Roebuck to attend as an observer. Mr Gray took no notes and no part in the meeting, however just before the meeting started Mr Roebuck spoke privately to Mr Gray. What was said between them was in dispute. Mr Gray accepted under cross-examination that Mr Roebuck told him that Mr Kitchen was to

be made redundant. He couldn't remember the exact words but Mr Roebuck had said that the branch was not doing any better in the way it had been structured. They were going to restructure it again and the assistant manager's job was no longer going to be needed.

[12] Mr Roebuck denied that he had made the decision before the meeting. Rather than telling Mr Gray that Mr Kitchen would be made redundant, he said he told him that Mr Kitchen could probably be made redundant and that looked like the most likely plan. From Mr Roebuck's point of view the decision about redundancy would not be taken until after they had gone through a discussion and invited Mr Kitchen to talk about it. He said he was trying to be particularly careful about this and had taken advice from the HR people on it.

[13] The meeting began with Mr Roebuck describing at length the state of the business and the need for change to be made. While he described that as a discussion I accept Mr Kitchen's evidence, which was supported by Mr Gray's account, that the first part of the meeting involved Mr Roebuck speaking to the meeting and that there was little or no discussion. Mr Gray said that Mr Roebuck advised Mr Kitchen that he was not happy with the viability of continuing the role of assistant manager in the light of the ongoing business difficulties. Mr Kitchen was then told that the role of assistant branch manager was not required and that a package would be put together with an offer of a job with another part of the business. Mr Kitchen said he was then advised that he was redundant and was given the opportunity to go away and discuss that with a representative.

[14] Mr Roebuck said that he advised Mr Kitchen of the state of the business and told him that redundancy was a possibility. He then offered him the chance to get some representation and he offered to stay overnight in Feilding in order to give Mr Kitchen that chance.

[15] I do not accept that evidence. Mr Kitchen adamantly denied he was ever given any such opportunity and this is confirmed by Mr Gray's evidence of how Mr Kitchen was told. I conclude that there was no proper opportunity given to Mr

Kitchen to take advice or obtain representation before he was told that he was being made redundant.

[16] Mr Kitchen was told he would be employed until 29 September 2003 but that there was no need for him to be at work up to then. While I do not find that Mr Roebuck told Mr Kitchen that he was not to return to the workplace after he was made redundant, it is also clear that he was not encouraged to return. By telling him to go and check out alternative forms of employment in another part of the company, I find that Mr Roebuck made it clear to Mr Kitchen that he was not to return. Mr Roebuck now says that:

*He was encouraged by me to use his time to best advantage to sort out what else he wanted to do with his life and he was told quite plainly that we didn't need him to be at the yard doing things and there was no need for him to work out a redundancy period. My own personal preference was that he used that time to do whatever he needed to do in his own best interests looking towards the things that he had going forward in his life.*

[17] The effect of this was that Mr Kitchen left his work at that point without ceremony or any farewell whatsoever. Mr Roebuck did himself no credit by suggesting that after he had left Mr Kitchen was invited back to a function to farewell his clients and staff. Mr Kitchen denied that there was any such invitation and I accept that it did not happen. Mr Kitchen received 3 months' salary as redundancy compensation. He checked out the other opportunity for work with a company associated with Farmers Transport but it was completely unsuitable.

[18] At about the same time as this meeting was occurring consideration was being given to a new branch manager at the Feilding branch as Mr Gray wished to move back to Gisborne to work. Mr Gray had already decided that another employee, Mr Small, would be suitable to be Feilding's branch manager. Shortly after Mr Kitchen's redundancy Mr Small was appointed to the position. From then on Mr Gray remained at the branch or on call for several months until about March 2004 to assist Mr Small in adapting from his previous position as a driver to a management position.

## The law

[19] Redundancy occurs where a position filled by an employee becomes superfluous to the needs of the employer. In *Aoraki Corp v McGavin*<sup>1</sup> Richardson J said:

*Redundancy is a special situation. The employees affected have done no wrong. It is simply that in the circumstances the employer faces their jobs have disappeared and they are considered surplus to the needs of the business. Where it is decided as a matter of commercial judgment that there are too many employees in the particular area or overall, it is for the employer as a matter of business judgment to decide on the strategy to be adopted in the restructuring exercise and what position or positions should be dispensed with in the implementation of that strategy and whether an employee whose job has disappeared should be offered another position elsewhere in the business.*

[20] The genuineness of a redundancy is not called into question by the Court where it is a matter of commercial wisdom. However the Court is entitled to enquire into whether the reasons given by an employer for the redundancy were genuine<sup>2</sup> and redundancy may not be genuine if it is found to be a camouflage to dismiss the employee for some other reason such as poor performance.<sup>3</sup> In *Rolls v Wellington Gas Co*<sup>4</sup> it was held that:

*... it follows that an employer cannot evade a need for a fair process upon matters of complaint against an employee by resorting to some kind of contractual action such as a token reorganisation. It also follows that the Court should not be slow to identify the obvious link in such and similar situations.*

[21] One of the important aspects of procedural fairness in redundancy is notice. Giving reasonable notice to an employee will give that employee the dignity of an advance warning of an otherwise unexpected end to their employment. An employee who is given adequate notice of their redundancy is able to try and find employment whilst employed, which is of itself a position of advantage.

[22] Proper notice of a redundancy is particularly desirable in cases of an older and long-standing employee. It gives the opportunity to negotiate a more dignified exit such as a retirement and to hold appropriate farewell ceremonies. The denial of

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<sup>1</sup> [1998] 1 ERNZ 601 at 618 (CA)

<sup>2</sup> *Unkovich v Air New Zealand* [1993] 1 ERNZ 526

<sup>3</sup> *G N Hale & Sons Limited v Wellington Caretakers IUOW* [1990] 2 NZILR 1079

<sup>4</sup> [1998] 3 ERNZ 122

adequate notice is in breach of the employer's obligations of fair dealing and good faith.

## **Findings**

[23] This was a blatant attempt to disguise a dismissal for performance as redundancy. It is inarguable that Mr Roebuck had concerns about Mr Kitchen's performance from at least April 2003 when he was effectively demoted although retaining his salary. There was obviously a genuine need to improve the performance of the Feilding branch and if Mr Kitchen's performance was not satisfactory that should have been dealt with in an open way. I note however that even with a new branch manager the branch performance did not improve.

[24] This was not a genuine redundancy because the position of assistant branch manager which Mr Kitchen held was not disestablished. The purpose of the position was to provide assistance to the new manager through arranging customer introductions and helping with the management of the branch. Once Mr Kitchen left and the new branch manager was installed, there was still an ongoing need for at least 6 months for another person (in this case Mr Gray) to assist the new manager.

[25] I conclude that Mr Kitchen's dismissal was substantively unjustified because his position was not surplus to his employer's needs.

[26] In considering the question of procedural fairness, I take into account the size and resources of the employer. Farmers Transport is one of a large group of companies. It has a number of branches and many staff and its executive officer had the advice of HR advisers. In those circumstances it is not unreasonable to expect that either Mr Kitchen's alleged performance problems would have been addressed appropriately or, if this were a genuine redundancy, that proper notice should have been given to him.

[27] The failure to advise Mr Kitchen of the reason for what turned out to be the dismissal meeting on 22 September 2003 was very unfair and caused significant anxiety to him. The failure to give him an opportunity to have a representative at the

meeting was also very unfair. The late reference to a representative after the decision had been made was neither appropriate nor sufficient to cure the failure.

[28] The procedure adopted was grossly unfair particularly in the light of Mr Kitchen's length of service and for that reason alone would be regarded as unjustified.

### **Remedies**

[29] Mr Kitchen received 3 months' redundancy pay when his employment was terminated. He said that the whole thing had been very hard for him. He had anticipated that because of his long years of loyalty to the company he would have been treated in a better fashion. Although he was upset not to have a job, he said his main concern was the way he was treated. He could get another job but couldn't "*wear*" what was done to him.

[30] Mrs Kitchen described Mr Kitchen's return home after his dismissal. He was in a state of shock and total disbelief. He was angry and devastated by what he had just experienced. In the weeks that followed, Mrs Kitchen who is a qualified nurse said she watched her husband's self-esteem and confidence dissipate.

[31] Because of his age and circumstances it was difficult but not impossible for Mr Kitchen to find alternative employment. Eventually he took up a contract to assist in the setting up of another transport company. This lasted 19 months and he received \$5,000 a month out of which he had to supply a motor vehicle and meet his own expenses. Since then he has received a further \$1,800 in contract work as well as national superannuation.

[32] When his employment ended he had been earning \$60,000 per annum and had the full use of a motor vehicle, petrol allowance, and a free phone. The value to him of these was not quantified in evidence.

[33] In the Authority Mr Kitchen claimed \$12,000 compensation as well as lost remuneration and costs but was awarded \$8,000 compensation because of lack of evidence about the effect on him to justify a higher award.



[34] The Authority calculated his lost remuneration at \$1,000 a month for 19 months. It said there was no way of calculating his actual loss because he had been in self-employment. There was no indication that the Authority had taken into account the 3 months' redundancy payment made to him by Farmers Transport.

[35] Mr Gallie submitted that his alternative employment was for the \$60,000 per annum that he formerly earned and, apart from the loss of a motor vehicle, he had suffered no loss of wages. Compensation for loss of income is therefore problematic in this case. There was virtually no evidence led by Mr Kitchen about that other than his gross income for the 19-month period after his employment ended.

[36] It is clear that at age 63 Mr Kitchen was not anticipating retirement. He wanted to continue to work and managed to do that full time for a further 19 months which brought him closer to 65 and national superannuation. However, there is insufficient evidence to support any award for loss of chance or reimbursement of income for him and therefore there will be no award for loss of income.

[37] The Court is, however, in a better position to assess compensation for hurt and humiliation than the Authority was. Mrs Kitchen's evidence about this was unchallenged.

[38] Mr Kitchen presented as a proud man whose pride had been significantly dented by the treatment he received. In all the circumstances, including his 42 years of service, the peremptory termination of his employment, the inability to be farewelled with dignity by his colleagues, and the evidence of his loss of self-esteem, I find he is entitled to compensation in the full amount that he sought of \$12,000.

### **Costs**

[39] Counsel asked for costs to be reserved. In the absence of agreement on this, counsel for the defendant is to file a memorandum of costs by 31 January 2007. The defendant has 14 days to reply.

**C M Shaw**  
**JUDGE**

Judgment signed at 10.30am on 14 December 2006