



employment agreement and its redundancy and redeployment policy. If the offer was within time, there was a secondary question of whether the role offered was comparable to Ms Forsythe's previous job so that refusing it would mean she was not entitled to the compensation.

## **Investigation**

[2] By agreement between the parties this matter was investigated and determined "on the papers". These papers comprised:

- (i) Ms Forsythe's statement of problem; and
- (ii) the Bank's statement in reply; and
- (iii) three further statements from Ms Forsythe, headed "witness statement", "reply statement" and "submissions"; and
- (iv) affidavits from four Bank representatives: Auckland training manager Vanessa Hughes, acting learning and development manager Raewyn Eastwood, human resources consultant Charlotte Mather, learning and development manager Tim Horgan; and
- (v) the Bank's submissions; and
- (vi) relevant background documents including the Bank's redundancy and redeployment policy and correspondence to or from Ms Forsythe.

[3] In preparing this determination I reviewed those papers but, as allowed for under s174 of the Employment Relations Act 2000 (the Act), I have not recorded here all evidence and submissions received but state findings of facts and law and express conclusions on the issues for determination.

## **How the problem arose**

[4] Ms Forsythe worked for the Bank from September 2005. In July 2008 the Bank's management reviewed the structure of her department. Proposals for change included disestablishing her position as a specialist trainer. After consulting Ms Forsythe about the proposal, the Bank confirmed on 14 August 2008 that the position would be disestablished.

[5] At that time Ms Forsythe was due to go on parental leave. The Bank proposed

that the redeployment period provided for in the Bank's redundancy policy start eight weeks before the day designated for her return from that leave. Ms Forsythe agreed to that arrangement and began her parental leave as planned.

[6] The arrangements were confirmed in a letter to Ms Forsythe dated 27 August 2008 from the Bank's learning and development manager Tim Horgan. The following passages from that letter are important:

*We confirm that your parental leave will commence on 03 October 2008 for the duration of approximately 52 weeks, returning to work no later than 03 October 2009. ...*

*Returning to work*

*As you are aware, [...] your Specialist Training Manager role has been disestablished.*

*You are entitled to consideration for other suitable positions through the Bank's redeployment process. However, as you are about to commence parental leave, your two week redeployment period will begin eight weeks before your proposed return to work on the 6<sup>th</sup> (sic) of October. This process involves both you and the Bank taking steps to identify alternative employment with ANZ National Bank.*

*If you are offered a comparable position during redeployment, this offer will be made in writing and you will be given a seven day period (14 days if the offer is to a different geographic location) to consider the opportunity. You should be aware that declining a directly comparable redeployment position during the formal redeployment process will affect your entitlement to redundancy compensation and you should discuss this with your Human Resources Representative.*

*If you are unsuccessful in being offered an alternative position in the redeployment period you will be given six weeks notice of redundancy. You may continue to participate in the redeployment process during this time. If no alternative position is able to be found by the end of the notice period your employment will conclude due to redundancy and you will be entitled to redundancy compensation as set out in your employment agreement.*

...

[7] There is no disagreement in the evidence and submissions that the letter fairly expressed the terms of the Bank's policy on redundancy and redeployment and that the policy set the particular terms of employment on such matters for Ms Forsythe. For that reason I need not set out the clauses of that policy but I did notice one relevant point of difference. The policy does not set a time limit on what is described as the redeployment period. However Mr Horgan's letter states that period would be

for two weeks – and that is to be taken as agreed term because Ms Forsythe signed her initials on an acceptance clause and returned the letter.

[8] Consequently the scheme adopted for dealing with Ms Forsythe's circumstances was that the eight week period before the date on which she was required to return to work would have two phases – firstly, a two week period in which the focus was on taking steps to identify alternative employment with the Bank and, secondly, a six week period of notice of redundancy if no alternative position was offered during the redeployment period. Attempts to arrange an alternative job could continue during that notice period but if none was found, her employment would end due to redundancy and she would be eligible for redundancy compensation.

[9] Mr Horgan's letter does contain one inconsistency which is important – he refers at one point to a return to work date of 3 October 2009 (which was a Saturday) and 6 October 2009 (which was the following Tuesday). Ms Forsythe took some approved annual and family leave prior to starting her parental leave but her final day at work before officially starting the parental leave was referred to in Mr Horgan's letter as 3 October 2008 (which was a Friday). Logically, after concluding a year's parental leave, she would be due back at work on Monday, 5 October 2009. However that was not the date in the letter and Ms Forsythe took the sensible step of checking when she was expected to return to work. She spoke with Ms Hughes in early August 2009 who confirmed that the return to work date was to be no later than 3 October 2009. The reasoning was that the return had to be on a working day not a Saturday. Ms Forsythe responded with an email on 3 September 2009 confirming she would return to work on Friday 2 October.

[10] Ms Forsythe had contacted Ms Hughes because Mr Horgan had moved to a different role in the Bank. However Ms Hughes was due to be away on annual leave during the latter half of September and her manager, Ms Eastwood, was asked to deal with Ms Forsythe's situation. On 15 September 2009 Ms Eastwood sent Ms Forsythe an email advising there was a possibility of a trainer's role in Auckland.

[11] By 25 September Ms Forsythe had heard nothing more and sent Ms Eastwood an email asking what steps she needed to take should she "*not be able to find a*

*suitable role to come back to*". Three days later Ms Eastwood advised Ms Forsythe that one of the Bank's human resources consultants was "*to advise next steps forward from here for everyone involved with your situation*". That consultant was Ms Mather.

[12] Ms Mather's affidavit evidence confirmed that in the latter part of September 2009 she had got a copy of Mr Horgan's letter recording the arrangements made when Ms Forsythe had gone on parental leave and had begun internal inquiries on whether a vacant role of Training Facilitator, based in Auckland, was suitable to be offered to Ms Forsythe.

[13] However it was not until a meeting on the morning of Friday 2 October 2009 that Ms Mather and two other colleagues analysed job descriptions and reached a tentative conclusion that this facilitator or consultant role was comparable with Ms Forsythe's previous and now redundant position.

[14] Throughout that afternoon aspects of the role and Ms Forsythe's skills and experience were checked and a letter of offer drafted. Ms Mather deposed that by 4.51pm she had the final version of a letter of offer ready to send Ms Forsythe, offering a consultant role at the same salary as her previous role. Ms Mather had the letter converted to a PDF format that could be attached to an email. Although Ms Mather had Ms Forsythe's email address, she did not send the letter then because she wanted to talk with Ms Forsythe first. Ms Mather did not have Ms Forsythe's mobile phone number but had a postal address for her in Whangarei and a landline number. Ms Mather left two voicemail messages on the landline number.

[15] On the afternoon of Saturday 3 October Ms Forsythe sent Ms Mather a text message asking her to call on the landline number. Ms Mather spoke to her shortly after and told her of the proposed role in Auckland.

[16] Ms Forsythe was upset by the proposal. During her parental leave she had moved to Whangarei where her partner had taken up a farming contract and she hoped to remain in that area because her father-in-law was ill and, with two young children, she did not want to travel to work in Auckland.

[17] Ms Mather arranged for the conversation to continue by telephone on Monday 5 October. On that day Ms Mather sent a copy of the letter of offer by email and on Tuesday 6 October also sent a copy of that letter by courier to a Northland address provided by Ms Forsythe. Ms Forsythe did not have access to her email on 5 October and did not receive the couriered copy of the letter until Friday, 9 October.

[18] The letter, dated 2 October, stated the position of training consultant was considered comparable with Ms Forsythe's previous role. It reminded her that "*declining a directly comparable position during the formal redeployment process will affect your entitlement to redundancy compensation*". It also stated the commencement date for the position as 5 October 2009.

[19] In the following weeks there were a number of conversations and emails between Ms Forsythe and Ms Mather about what had happened and whether Ms Forsythe was required to accept that role or, if not, lose any entitlement to redundancy compensation.

[20] Evidence from the parties also canvassed at least four additional and disputed points: (i) whether Mr Horgan had told Ms Forsythe she would have a choice between an alternative position or redundancy compensation; (ii) whether the role eventually offered by the Bank was truly comparable with the previous role (which I have called the secondary question); (iii) whether the Bank had increased the salary offered in that role in order to make it comparable and avoid an obligation to pay redundancy compensation; and (iv) whether only an Auckland role was offered because the Bank knew Ms Forsythe wanted to stay in Whangarei. The disputes on those points need not be resolved because of the conclusion I have reached about the Bank's failure to meet its obligations by 2 October 2009.

### **Determination**

[21] In an email to Ms Forsythe on 13 October 2009 Ms Mather summarised the Bank's position on what I have called the primary question in this way:

*In relation to your complaint that the Bank making an offer on the day you were due to return to work, and the lack of contact leading up to the offer, I can confirm that the offer still stands as it was made*

*within the required timeframe. While we appreciate that it would have been preferable to have offered you the role earlier, the position had only just become vacant so we were not in a position to offer it you any sooner. In addition, we attempted to contact you on the Friday but you were not contactable.*

[22] It was a position that, I find, was incorrect in every important aspect. Banking is a business involving many time-sensitive transactions, including aspects of a bank's employment relationships. Failure to meet requirements on time can result in additional costs. This is one such occasion. What was done was too little, too late.

[23] The position was not offered to Ms Forsythe "*within the required timeframe*". Ms Mather had a copy of Mr Horgan's letter that set out the required timeframe and to which Ms Forsythe had agreed. The time to offer her a position for redeployment was in the eighth and seventh weeks before her return to work date. That was not done and at that time Ms Forsythe should have been given notice of redundancy.

[24] During the subsequent six-week notice period further efforts could be made to find an alternative position for her. The Bank's policy, and Mr Horgan's letter based on that policy, is ambiguous as to whether an alternative position offered in that notice period could be declined without compromising an entitlement to redundancy compensation, however that is not an issue for determination here. Rather, what happened was that Ms Forsyth was not offered a position in time for her return to work date on Friday, 2 October – a date she had confirmed with Ms Hughes in August as being when she was due to start back at work. However Ms Forsyth could not 'return to work' if there was no work for her, given the disestablishment of her previous position. The Bank's normal business hours began at 8.30am on 2 October – and by that time her period of notice had expired without the Bank identifying a role for her that could have negated its previous advice she was otherwise surplus to its needs. And it was not until 4.51pm that day that the Bank was ready to offer Ms Forsyth an alternative position. It was already too late.

[25] A further flaw is that the terms of Mr Horgan's letter, and the Bank's policy, required any offer of redeployment to be in writing. Neither Ms Mather's voice mail message of Friday, 2 October nor her subsequent telephone conversation with Ms Forsythe on Saturday, 3 October were consistent with that requirement. At best the offer was not put to her in writing until the 5 October email – again too late.

[26] I find that by 8.30am of Friday 2 October 2009 the Bank had not been able to offer Ms Forsyth redeployment to an alternative role. By that time, at the very latest, she had become entitled to redundancy compensation under the Bank's policy.

[27] I further find that Ms Forsythe had throughout August and September 2009 complied with her good faith obligations to actively communicate with the Bank about what was happening about the prospects for her return to work. She contacted Ms Hughes and Ms Eastwood and made appropriate follow-up enquiries. Ultimately this matter was not about the Bank missing a deadline by some hours. It was about not having done enough in the preceding days and weeks. The Bank's difficulty was caused by internal confusion – about who was responsible for dealing with the matter and then doing so in a timely way – not by Ms Forsythe.

### **Orders**

[28] The Bank now needs to attend to paying Ms Forsythe the redundancy compensation due to her on Friday, 2 October 2009. She has been denied the benefit of the use of that money since then and an award of interest is appropriate for the period from that date until the date at which the money due is paid. The Authority has a discretion to order interest at a rate of up to the 90-day bill rate at the date of this determination plus a further two percent. I order interest to be paid at the rate of five per cent, which is within that range.

[29] Ms Forsythe represented herself in this matter so no order for costs is required but the Bank should reimburse her for the fee paid for lodging this matter in the Authority. I so order.

[30] Leave is reserved for the parties to revert to the Authority for further orders if there are difficulties in calculating the amounts due under these orders.

Robin Arthur  
Member of the Employment Relations Authority