

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 2

File Number: 5319061

BETWEEN Malcolm French
 Applicant

AND Accident Compensation
 Corporation
 Respondent

Member of Authority: Denis Asher

Representatives: Barbara Buckett for Mr French
 David Traylor for the ACC

Investigation Meeting Wellington, 21 October & 25 November 2010

Submissions Received 22 December 2010

Determination: 10 January 2011

DETERMINATION OF THE AUTHORITY

The Problem

[1] This has proven to be an evolving employment relationship problem. In his statement of problem filed along with an application for urgency on 14 September 2010, Mr French said the issue to be determined was, had he been unjustifiably disadvantaged by the respondent (ACC)? In particular, had ACC unjustifiably interpreted his contract, treated him with disparity, failed to comply with its obligations to act in good faith and deliberately conducted itself so as to coerce the applicant to resign?

[2] In final submissions received on 21 December 2010, Mr French said the matters now to be determined were, was he covered by an individual or collective employment agreement, and had the secondment agreement dated 11 November 2004 come to an end?

[3] Mediation did not resolve this employment relationship problem.

The Investigation

[4] During a telephone conference call on 4 September 2010 in respect of what, interestingly, was initially an urgent application for reinstatement, the parties agreed to a one day substantive investigation in Wellington on Thursday 21 October 2010. The reinstatement issue was subsequently dropped.

[5] Agreement was also reached on timelines for witness statements and the provision of an agreed bundle of documents. All references in this determination to documents are to those contained in the agreed bundle unless otherwise stated.

[6] As it happened, the investigation extended into a second day.

[7] Efforts by the parties during the investigation to settle this matter on their own terms were unsuccessful.

Background

[8] The respondent was formed in 1974 and is currently governed by the Accident Compensation Act 2001. ACC provides cover for injuries regardless of fault or of the cause of injury.

[9] Mr French has been employed by ACC since October 1973, being one of the original staff intake that set up the respondent's infrastructure; he currently holds the role of consultant-business opportunities.

[10] Mr French has been a member of a union, the NZ Public Service Association since 1973.

[11] By letter dated 24 May 1999 Mr French was advised that, as a result of legislative changes, it was proposed his position be disestablished and that the applicant would have an opportunity to apply for roles within an internal group, ISCO, established as a result of the legislative changes and ACC being opened up to competition.

[12] ISCO subsequently became Catalyst Insurer Services Limited (Catalyst), a wholly owned subsidiary of ACC.

[13] Mr French applied for and was appointed to a position with Catalyst as a business relationship manager; he signed an individual contract of employment with Catalyst on 6 July 1999 (doc 1).

[14] On or around 30 March 2000 Mr French was advised by letter (doc 2) that, due to further legislative change, Catalyst was being rolled back into ACC, and that a subsidiary company utilising the same name would manage commercial functions for ACC. Mr French was also advised that:

Your role will be transferred back to ACC effective April 1, 2000, however you will be seconded across to the new Catalyst commercial entity. A secondment letter is attached. ACC will continue to be your substantive employer. This has no real effect on your terms and conditions of employment.

[15] The secondment letter, dated 31 March (doc 3), confirmed Mr French's position was that of Business Relationship Manager, and:

The position is for an indefinite period commencing 1 April 2000. You will be given at least one month's notice prior to termination of the secondment. If your secondment is terminated you will return to the position of Business Relationship Manager in ACC

...

The terms and conditions of your employment remain as specified in your current contract.

(emphasis added)

[16] In mid-2004 Catalyst became Catalyst Risk Management Ltd (CRM). It remains a wholly owned subsidiary of ACC.

[17] During November 2004 Mr French agreed to an extension of his secondment to CRM and a change in role, to that of Consultant – Business & Opportunities. A letter dated 11 November 2006 (doc 4) set out an offer to which Mr French signed his agreement on 26 November. It provided for, amongst other things:

... an extension period to your secondment ... with (CRM) ...

Your new role will be Consultant – Business & Opportunities within CRM and will be reporting directly to me as Chief Executive of CRM.

*It is intended that you remain as employee of ACC subject to **your current employment agreement and conditions** until such time as:*

- 1. the position of Consultant – Business & Opportunities within CRM ceases to exist; or*
- 2. ACC discontinues ownership of CRM; or*
- 3. you choose to terminate your employment with ACC*

However, should either (1) or (2) above occur, following consultation with you, ACC may transfer you to a suitable alternative position that is in the same location or one that is within reasonable commuting distance from your residence, and is:

- 1. in keeping with your skills and experience; or*
- 2. within your capabilities with such retraining as may be provided by ACC.*

*The terms and conditions of **your employment remain as specified in your current contract**. In addition, the following details are specific to the terms of this secondment.*

(emphasis added)

[18] On 10 March 2010 CRM advised its leadership team, including Mr French, of a proposed restructuring. Feedback was sought.

[19] On 24 March CRM emailed details of proposed changes to its structure; feedback was again sought. One proposed change was that of Mr French's position reporting to the general manager sales and marketing rather than to the chief executive.

[20] On 25 March CRM's chief executive met with Mr French to discuss the proposed changes. The applicant subsequently provided written comment.

[21] On 8 April CRM advised that, as a result of his submissions, it was now intended that Mr French's position would report to the general manager consultancy and customer support, rather than the general manager sales and marketing.

[22] CRM advised staff of the final restructure by email on 14 April (doc 14).

[23] The change in reporting line was confirmed to Mr French by letter (doc 15).

[24] The applicant went on paid sick leave from 3 May 2010.

[25] Mr French raised a grievance by letter dated 4 May.

[26] Mediation took place on 30 August but resolution was not achieved.

[27] ACC referred Mr French to a specialist occupational physician on 11 October. Amongst other things the resulting assessment confirmed the applicant presented with:

...a sudden onset of psychological distress characterised both by symptoms of depression and anxiety. This onset of psychological distress appeared to be triggered specifically by the receipt of information with respect to a work restructuring which was perceived by Mr French in a negative light. From a medical perspective Mr French's situation could be described as an Adjustment Disorder ...

(par 1 of Dr David Hartshorn's letter of 12 October 2010 which is not contained in the agreed bundle)

[28] The letter went on to state:

Mr French was shocked and upset at his change in work position. He describes a perception of intense betrayal of trust. ... The primary trigger or stressor ... is that around (Mr French's) work position and issues of restructuring and subsequent mediation. Any efforts to either eliminate, substitute, isolate, or minimise this particular psychosocial stressor fall squarely within the realms of human resources management rather than within the medical sphere. Elimination or substitution in this type of context would require some form of reinstatement to a position commensurate with Mr French's previous role and status.

(par 2)

[29] And:

As he presents currently I do not believe that he is medically fit to complete the full range of duties expected in the ... consultant role. I believe that it is highly unlikely that Mr French will manage a successful return ... unless there is satisfactory resolution of the ongoing psychosocial stressor which is the prime trigger of his psychological distress at this time.

(par 3)

[30] Finally,

In identifying this stressor there is no judgement as to the severity of the stressor or whether this may be expected to cause a similar psychological effect in most people. The identification of the stressor merely identifies that for this person the stressor was the precipitant of the psychological distress.

[31] During the Authority's investigation the respondent advised that, having reflected on Mr French's concerns and other considerations, it was restoring his position to the *status quo ante*, i.e. it was restoring his position to that which existed prior to its restructuring.

[32] Because of this significant development I made several suggestions to the parties including, in light of my statutory obligations per s. 159 of the Employment Relations Act 2000 (the Act), the value of further mediation and that a fresh medical assessment of Mr French was required, particularly in light of the clear diagnosis

provided in the 11 October assessment of the link between the restructuring and Mr French's resulting condition.

[33] These suggestions were also proffered in light of the fact that, during the investigation, the employment relationship problem had acquired a new focus: in particular, the parties disagreed as to whether Mr French's terms and conditions of employment were those set out in the individual contract of employment signed in 1999 (doc 1) or those set out in a later collective employment agreement (doc 38). Amongst other differences, the redundancy provisions contained in the former are more generous than those set out in the latter.

[34] I note in a letter from the respondent to the applicant dated 21 December 2010 and copied to the Authority that the former now requires Mr French to undertake a second medical assessment on 3 February 2011.

Issues Between the Parties

[35] As noted above, in final submissions received on 21 December 2010 the applicant says the matters now to be determined are whether he is covered by an individual or collective employment agreement, and whether the secondment agreement dated 11 November 2004 has come to an end (par 1, above).

[36] These questions are advanced, the applicant says, in response to the respondent's decision to reverse its restructuring decision. It is said on Mr French's behalf that the reversal confirms the respondent "*got it wrong*" (par 40, above) and confirms the restructure had the effect of altering the applicant's position, i.e. it ceased to exist at that time thereby disadvantaging Mr French.

[37] Another argument advanced on the applicant's behalf is a claim that the reversal amounts to a "*new offer of secondment at (CRM) (with details yet unknown)*" (par 42) and that, "*The reversal only serves to offer a new secondment role to be considered by him*" (par 43).

[38] And, "*Even in the event that the role is exactly the same (as) the role previously held by Mr French it still needs his consideration and agreement*" (above).

[39] Finally (verbatim), “*Before Mr French is able to consider a return to Catalyst as secondee in this new secondment position he needs the clarity regarding the issues. Additionally he needs to know what the job description, primary terms and conditions of the secondment would be and what the terms of his employment would be*” (par 45).

Respondent’s Position Summarised

[40] ACC says that, following a restructuring process, the reporting line for Mr French’s position of consultant-business opportunities was changed. The applicant was consulted prior to the change. Other than the change in his reporting line, Mr French’s position remained the same. After reconsideration, his ‘old’ position (with its direct reporting line to the chief executive) has now been restored to him.

[41] There was no breach of contract and of good faith and no disparity of treatment. There is no evidence of ACC following a course of action with the purpose of coercing Mr French to resign.

[42] Mr French failed to constructively engage with the respondent regarding his concerns about changes to his position and his ongoing absence from work contrary to good faith. In particular, the applicant failed to follow the agreed problem resolution process (doc 17).

Discussion

The Applicant’s Position & Alleged Disadvantage

[43] I find Mr French’s position is plainly that which he held prior to the restructuring. I do not accept the arguments that the reversal of the restructuring decision is proof that his position had ceased to exist, that the applicant had thereby been disadvantaged, that he is being newly seconded to his old position and/or that his agreement is required for the restoration of the *status quo ante*. I reach this conclusion on the facts summarised above.

[44] Distressing as the experience has been for Mr French there is no evidence that the restructuring exercise was a sham or an exercise designed with the sole purpose of

driving him from the respondent's employment. The evidence is to the contrary, that it was an entirely legitimate exercise affecting more employees than just the applicant.

[45] Faced by a diagnosis resulting from its own referral, the respondent has fairly and properly backtracked: it has reversed its previous decision and instead implemented – as recommended by the medical specialist – a human resources management resolution. It has acceded to Mr French's concerns about the loss of his previous position and has restored it, in its entirety, to him.

Finding

[46] I therefore accept ACC's contention that, as Mr French's position did not cease to exist as a result of the restructure and the minor changes that were made to it have been reversed, the 11 November 2004 secondment agreement (doc 4) remains in force.

The Applicant's Terms and Conditions of Employment

[47] The ACC says, by virtue of s 56 of the Act, Mr French's terms and conditions are those set out in a collective agreement (doc 38) and – as his position subsequently became excluded from coverage by effect of the collective agreement's coverage provision – are now held by him on an individual basis.

[48] Its argument is advanced on the grounds that the 1 July 2000 to 30 June 2002 collective agreement (doc 36) contained the following, verbatim coverage clause:

This contract does not cover management or specialist positions, nor will it cover any positions which are of over 410 Hay points.

[49] Mr French's position as at 1 July 2000 was business relationship manager. Despite its title the position had no direct reports and was therefore, it is argued, not a management position. The reference is to the nature of the work, i.e. managing business relationships. Reliance is placed on the New Shorter Oxford English Dictionary definition of management:

A governing body of an organisation or business, as a board of directors; that group of employees administering and controlling an organisation, business, etc, the group or class of managers.

[50] At the time Mr French's position did not have more than 410 Hay points. This measure did not change until on or around 28 February 2006 when his position was resized and moved to 432 Hay points, at which point it no longer fell within the, by then, similar but changed coverage clause. This situation is not contemplated by the Act, but by analogy with s. 61(2), Mr French's terms and conditions of employment should be deemed to be those contained in the then applicable collective, the 2004 collective (doc 38), but now held by the applicant on an individual basis, as if the collective had expired or he had resigned from his union.

[51] Email correspondence by the applicant clearly shows he understood he was covered by the collective agreements and that he acted on that understanding (see attachments A to P inclusive, to the respondent's submissions dated 21 December 2010).

[52] Mr French was treated consistently with the applicable collective agreements.

[53] Secondment agreements between the parties dated 31 March 2000 and 11 November 2004 (docs 3 & 4) do not invoke any individual contracts of employment.

[54] The words used in the secondment agreements as to the contractual terms that applied to Mr French refer only to his current contract or his current employment agreement and conditions, and do not refer to any individual contract of employment; in any event the understanding of the parties and the wording of the secondment agreements cannot override s. 56 of the Act.

[55] Mr French disputes these arguments and, via his final submission (received on 22 December 2010) provides further argument in support of his position including a claim he managed staff, being responsible for supervision, training and performance reviews. He also says the correspondence referred to by ACC was in respect of conditions additional to his individual employment agreement, as permitted by the

ACC's applicable policies and manuals. That correspondence is not evidence, he says, of any concession the collectives applied to him.

Finding

[56] As there is no dispute about the varying Hay points assessments Mr French's position attracted and his union membership, the major contest between the parties is – per the different but similar coverage clauses – whether Mr French's position was a management or a non-management one.

[57] Having found that the 2004 secondment remains in place, it is appropriate to look at the terms and conditions of that secondment, as an aid to determining the dispute between the parties. The covering letter (doc 4) makes clear Mr French's position: it is that of Consultant – Business & Opportunities. Equally clear is that it reports directly to the Chief Executive, CRM. The attached position description (doc 5) includes the following descriptors:

Position Summary

... The key areas of work are at a strategic level to identify and quantify future business opportunities for CRM and to provide advice and guidance to CRM staff on ACC and Partnership Programme legislation and regulations.

Key Result Areas

Advice and Guidance

- * *Provide advice and guidance to CRM staff on ACC and Partnership Programme Legislation and Regulations.*

...

- * *Advise GM and other management personnel on service pricing and other contractual matters.*

- * *Pass incoming business opportunities from customers and prospects to designated marketing staff*

Business Planning & Process

- * *Management of the Department of Labour contract ...*
- * *Participate in internal strategic planning process, attend meetings, develop policy in specific identified areas as required*

Key Working Relationships

Internal

- * *CRM GM and staff*
- * *Company Accountant*

[58] Applying the dictionary definition set out above (par 49), and in particular having regard to all of the detail of the position description, I am satisfied that Mr French's position was clearly one of *that group of employees administering and controlling an organisation, business, etc, the group or class of manager*. It therefore follows that, as a manager, Mr French's position was not covered by any collective employment agreement.

Determination

[59] The answers to the questions put by Mr French (see par 34 above) are: first, he is covered by an individual employment agreement (doc 1); and, second, the secondment agreement dated 11 November 2004 has not come to an end.

[60] For completeness' sake, I record here that there is no evidence of ACC unjustifiably disadvantaging Mr French.

[61] As requested, costs are reserved.

Denis Asher

Member of the Employment Relations Authority