

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 149
5393019

BETWEEN

PETER KRAMMER
Applicant

A N D

NELSON MARLBOROUGH
DISTRICT HEALTH BOARD
Respondent

Member of Authority: M B Loftus

Representatives: Jock Lawrie, Counsel for Applicant
Paul McBride, Counsel for Respondent

Investigation Meeting: 17 May 2013 at Nelson

Submissions Received: At the investigation meeting

Date of Determination: 19 July 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is a dispute over the interpretation and application of various provisions relating to the payment of, and the employer's ability to subsequently reclaim, redundancy payments.

Background

[2] The applicant, Mr Krammer, was employed by the respondent, Nelson Marlborough District Health Board (NMDHB) as a nurse. At all relevant times he was a member of the NZ Nurses Organisation (NZNO). His terms of employment were contained in a multi-employer collective agreement to which NMDHB and NZNO were parties. These were supplemented with further terms which included NMDHB policies providing they were not inconsistent with the MECA.

[3] Clause 28 of the MECA provides:

28.0 ***Policies and Procedures***

28.1 *All employees covered by the Agreement shall comply with the employer's policies and procedures in force from time to time, to the extent that such policies and procedures are not inconsistent with the terms and conditions of this Agreement.*

28.2 *The union will be consulted regarding any additions/amendments to those policies and procedures, where such additions/amendments have a material effect on employees' conditions of employment.*

[4] The MECA contains a comprehensive provision addressing surplus staffing situations. It sought to minimise the use of severance as a means of resolution but provided for compensatory payments if severance/redundancy was unavoidable.

[5] Prior to 2009 NMDHB had a policy that precluded the reemployment of persons to whom it had made a redundancy payment for a period of twelve months following cessation.

[6] In May 2009 that policy was replaced with one entitled Staff Surplus, Redeployment, Re-employment and Redundancy Policy. It, in part, provides:

... relevant employment agreement provisions will take precedence over this policy where they conflict with this policy, otherwise these policy provisions will apply.

...

If a former employee has been paid severance and then is subsequently appointed to a new role within 12 months after payment then NMDHB may require an amount of severance to be repaid based on the time period since severance was paid and the start date of the new role.

[7] The State Services Commission also has guidelines on the issue of which NMDHB were cognizant.

[8] Until June 2011, Mr Krammer was employed in two concurrent roles, which together constituted a fulltime role. He spent 80% of his time as the Coordinator nursing workload systems, and the balance working as a Registered Nurse.

[9] Following a review, the 0.8 FTE role was reduced to 0.5 FTE. The parties discussed partial redundancy and redeployment to other roles as an alternative to redundancy/severance. No agreement was reached which led to Mr Krammer being declared redundant on 13 June 2011. His last day of duty was 16 July 2011.

[10] Mr Krammer received \$45,686.55 gross as redundancy compensation, supplemented by a further sum in lieu of accrued leave.

[11] On and from 17 July 2011, NMDHB engaged Mr Krammer as a casual nurse. Given it was a casual engagement NMDHB did not seek repayment of the redundancy compensation as possible contemplated by the relevant policy. The decision was recorded in a subsequent letter dated 1 August 2011. In part, it provides:

After a discussion with the Service Director Mental Health Services Robyn Byers and acknowledging that the current staffing situation at Alexandra Hospital is difficult due to the transition of this service, I have agreed, on this occasion, to waive the Staff Surplus policy.

[12] The formal offer of casual employment was also provided after engagement. It was dated 2 August 2011 and confirmed the above advice by stating ... *acceptance of this offer will have no affect with respect to your redundancy compensation paid to you.*

[13] Mr Krammer worked on a casual basis between 17 July and 10 October 2011. He averaged around 30 hours per week.

[14] In December 2011 Mr Krammer applied for a permanent fulltime nursing role. An offer was made but it was contingent on Mr Krammer repaying \$16,205 (which was about half of his net redundancy payment) within seven months of acceptance.

[15] The offer was discussed, with the parties and their representatives expressing differing views about the validity of a requirement to repay the amount though Mr Krammer chose to accept the offer on 20 December 2011. He commenced that day.

[16] NMDHB then sought the repayment but that is yet to occur with both Mr Krammer and his union disputing the propriety of the repayment request.

[17] The dispute is yet to resolve despite considerable correspondence and attendance at mediation and that has led to today's investigation.

Position of the parties

[18] NZNO's position is the policy is both inconsistent with the MECA and invalid as it was not subject to consultation as required by clause 28 of the MECA.

[19] Alternatively, it is argued that in making the respondent's employment offer contingent on the repayment of a portion of severance monies, the respondent was

charging a premium for employment of breach of section 12(a) of the Wages Protection Act.

[20] As a further alternative, it is claimed that the recovery of the severance monies would constitute a deduction from wages which would be unlawful given the lack of consent under section 5 of the Wages Protection Act in circumstances where the consent has effectively been withdrawn and section 6 cannot be relied upon as these monies do not fall within the limited exceptions that can be arbitrarily taken by an employer.

[21] NMDHB's prime contention is Mr Krammer agreed to the deduction. He should be required to honour his agreement.

[22] There are also a number of public policy arguments as to why it is inappropriate for someone to be paid for a loss of employment while still drawing a salary from the same source.

[23] Notwithstanding the multiple arguments I consider this matter can be determined by balancing the parties' primary contentions and the alternates need not be determined.

[24] The question is whether Mr Krammer should be required to honour an arrangement he accepted or is his agreement nullified by the fact the policy was not preceded by consultation.

[25] The MECA provides that policies and procedures may be applied provided they are not inconsistent with its terms and conditions.

[26] The MECA also provides that policies, or changes thereto, must be preceded by consultation with the union where their content has a material effect on an employees' conditions of employment.

[27] Ms Heather Smith, the Human Resources Manager for the service in which Mr Krammer was engaged accepted, when questioned, that the staff surplus policy introduced in May 2009 had the potential to materially affect the conditions of employment.

[28] That concession means consultation should have preceded introduction of the policy in May 2009 but Ms Smith accepts that did not occur. She says that was

because the new policy was a relaxation which favoured staff. Essentially the argument is that employment, albeit with reduced redundancy compensation, is more beneficial than no job at all.

[29] That may be true but I cannot accept it justifies the failure to consult. The MECA requires consultation. There is no out.

[30] That means the policy NMDHB is now trying to hold Mr Krammer to simply should not exist. He cannot, I conclude, be held to acceptance of something that should not, had the MECA been adhered to, exist. It could not, therefore, have been properly put to him – indeed there would appear to be a strong argument that including a reference to it an individual letter of offer is precluded by s.61(1)(b) of the Employment Relations Act 2000.

[31] For the above reasons I conclude NMDHB is unable to enforce the policy and recoup a portion of Mr Krammer's redundancy payment. Its application to have Mr Krammer comply, therefore fails.

[32] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority