

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2012] NZERA Wellington 3  
5355606

BETWEEN                      ROCHELLE LEAHY  
   Applicant  
  
AND                              TERTIARY EDUCATION  
   COMMISSION  
   Respondent

Member of Authority:        James Crichton  
  
Representatives:              Susan Hornsby-Geluk, Counsel for the Applicant  
   Alastair Sherriff, Counsel for the Respondent  
  
Investigation Meeting:        21, 22, 23, and 24 November 2011 at Wellington  
  
Determination:                16 January 2012

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**DETERMINATION OF THE AUTHORITY**

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**Non Publication Order**

[1] Pursuant to Schedule 2, clause 10 (1) of the Employment Relations Act 2000, the Authority makes the following non-publication order:

- (a) all references [whether in written or oral evidence, and including documentary evidence] to the names/expressions “Tsu” and “Tsunami”; and
- (b) the other emails referred to by Mrs Peacock directed at Mrs Peacock, which will include, inter alia:
- (c) paragraph 212 of the Statement of evidence of Sue Peacock
- (d) exhibits R42-R53; and
- (e) the evidence in reply of Ms Leahy dated 18 November 2011 paragraphs 129-137.

**Employment relationship problem**

[2] The applicant (Ms Leahy) alleges that she was unjustifiably dismissed from her employment by the respondent (the Commission). The Commission resists the claim on the footing that Ms Leahy's position had been disestablished as a consequence of a restructure, that she was offered reconfirmation to a different role which offer was never accepted. In the result, the Commission says that the offer of renewed employment was withdrawn after three months.

[3] Ms Leahy was employed as Chief Financial Officer/Group Manager Finance in July 2009, having previously worked in a number of other capacities at the Commission on and from March 2007.

[4] In January 2011, the Commission began a large restructure. Initially, there was some uncertainty about the effect this restructure would have on Ms Leahy's role. In the first two phases of the restructure, the Commission's conclusion was that Ms Leahy's role would not significantly change. However, on 19 April 2011, Ms Leahy was advised that her role was to be disestablished. Ms Leahy protests that there had been no consultation with her in relation to this decision and the advice of this sudden change came as a complete shock. The Commission's principal witness, Ms Peacock, in her evidence to the Authority made clear that Ms Leahy was the only member of staff Ms Peacock spoke to who "*became very agitated and angry at the news*" of the disestablishment of her role.

[5] As part of the package the Commission supplied with the notification of 19 April, there was an intimation that affected staff could provide feedback on the proposed role descriptions before they were confirmed. Ms Leahy took advantage of that proposal and, amongst other things, met with the Acting Chief Executive, Dr Webb, on 28 April and subsequently completed a submission to Dr Webb dated 2 May 2011.

[6] On 11 May 2011, Ms Leahy received notification that she was reconfirmed in the new structure in the new position of Group Manager Finance-Chief Financial Officer. She was confirmed as continuing on her current terms and conditions of employment but a copy of a new changed role description was attached.

[7] The fulcrum of the dispute between the parties revolves around the nature of the decision that the Commission communicated to Ms Leahy on 11 May, how that

decision was communicated, and what Ms Leahy was supposed to do about that decision. Because the means by which the decision was communicated to Ms Leahy is so important, it is appropriate to set out in full the relevant parts of that letter:

*I advise that you have been reconfirmed to the changed role of Group Manager-Finance (CFO) following the consultation process with you on 19 April 2011. This role is confirmed on your current terms and conditions of employment following an independent sizing of the role. A copy of the new role description is attached.*

*If you wish to accept, please sign and return a copy of this letter to HR by no later than Monday, 16 May 2011.*

*You are reminded that you can apply for any new or vacant positions which will be advertised on the TUIA from 13 May 2011. If you are interested in any of these positions, an application form will be available on TUIA on the same day. Applications for these positions will close on 27 May 2011.*

[8] Although there was some confusion about whether or not Ms Leahy had accepted the reconfirmed role in writing on some sort of conditional basis, it became clear during the investigation meeting that there was no written confirmation of the acceptance of the new role, or at least none could be produced for the Authority to inspect. Certainly, Ms Leahy denied ever having sent such a written reconfirmation and although the Commission was less clear, on balance, the Authority's view is that Ms Leahy's recollection of events is right and that there was no written acceptance of the new position, on any basis.

[9] Ms Leahy was supposed to have accepted the new role by 16 May 2011 but as the Authority has just determined, for whatever reason, that did not happen. Ms Leahy did, however, make clear that she sought changes both in the remuneration structure for the new position and in the role description. In the latter regard, Ms Leahy met with John Pine, a consultant human resources adviser who worked with the Commission during the restructuring phase. Mr Pine encouraged Ms Leahy to do a "red pen" exercise on the role description provided and there was a subsequent meeting between those two individuals on 25 May at which, among other things, Ms Leahy presented her proposed alterations. Mr Pine undertook to refer those to Ms Peacock who would have been Ms Leahy's head of department in the new structure.

[10] It is common ground that Ms Leahy and Ms Peacock met together on a number of occasions from Ms Peacock's return from annual leave at the beginning of

June 2011, down to the termination of the employment on 22 August 2011. The Commission says that Ms Leahy's issues in respect of the role description and the remuneration for the reconfirmed position were the subject of regular discussion between the parties during those regular meetings. Ms Leahy, on the other hand, says that discussion about either of the matters that were of concern to her were infrequent and unhelpful. While Ms Leahy habitually took notes of the meetings that she attended, those notes could perhaps charitably be referred to as cryptic; conversely, Ms Peacock's practice was to take few if any notes of what were, for her, ordinary management exchanges. However, both parties' notes seem to confirm that at a meeting between them on 14 July 2011, the role description was discussed and that conclusion is rather confirmed by the fact that a new revised role description prepared by the Commission issued on 24 July 2011.

[11] There was a further meeting between the parties on 29 July 2011 at which Ms Leahy confirms that she was told by Ms Peacock that there would be no further changes to the role description. Ms Leahy seems to have formed the view that it might be possible to get further changes to the role description using a third party, despite her evidence Ms Peacock had closed the door on further changes.

[12] Although Ms Leahy denies "*becoming confrontational*" at the meeting on 29 July, Ms Peacock's evidence is that this was a very difficult meeting which ended with Ms Leahy walking out of the internal meeting room, turning off the light and closing the door behind her, leaving Ms Peacock alone in the darkened room. Both women agree that one of the things that happened at that meeting was that Ms Leahy said that the role description and salary were by negotiation and that she had not agreed to either. By contrast, both women also agree that Ms Peacock confirmed at this meeting that there would be no further changes, either to the salary or to the role description.

[13] Despite the intimation that the Commission would not make any further amendment to the role description, it did in fact provide another final version on 2 August 2011 under cover of an email which referred to it as "*the final version of your job description*" and then followed that with a request for a set of draft objectives for the area under Ms Leahy's control. There was no requirement in this document by way of emphasis or otherwise, that any formal acceptance was required.

[14] On 19 August 2011 (a Friday) at 3.30pm, Ms Peacock emailed Ms Leahy in the following terms:

*Dear Rochelle,*

*On 11 May 2011 you received a letter signed by the Acting CE Dr Colin Webb reconfirming you into the changed role of Group Manager Finance/CFO with a new role description, on your current terms and conditions and attaching a copy of the new role description. The letter from the Acting CE asked you to return a signed copy of the offer letter. The offer was made following consultation with you on 19 April 2011 about the changed role that was independently sized for remuneration purposes.*

*When you returned the signed letter of offer, you stated that you did not agree to the revised job description for the role. You have also raised the issue of remuneration for the changed role. Subsequent to this you have had discussions about the role description with both John Pine HR consultant and me on several occasions.*

*The new structure and responsibilities of the organisation commenced 1 July.*

*On Tuesday 2 August 2011, I emailed you attaching the final version of your role description, and asked you to prepare your KPIs for 2011/2012 based on the new role description and return them to me by Friday 9 August 2011. (This email is attached.) By close of business Friday 9 August you had not replied to me. I still have not had a reply from you this week.*

*I need to confirm staff numbers by 9am Monday morning before a discussion with the executive team. If I have not received confirmation that you accept the new role description for the changed role at the remuneration offered, I will consider the offer withdrawn.*

*Please confirm to me in writing before 9am Monday 22 August 2011 what your decision is.*

[15] Ms Leahy sought an extension of time to consider her position but that was refused and Ms Leahy was given until noon on 22 August 2011 to respond or Ms Peacock “would consider me no longer a part of the establishment”. Having not received the requested confirmation, the Commission proceeded to terminate Ms Leahy’s employment by letter dated 22 August 2011. In essence, the Commission’s conclusion, as expressed in the letter, was that Ms Leahy had “declined to accept the role of CFO, following lengthy consultation”. The following day, Ms Leahy raised a personal grievance and the parties attended mediation after a direction to do so by the Authority but were unable to resolve their differences by agreement.

**Issues**

[16] It will be convenient if the Authority considers the following matters in reaching a determination on Ms Leahy's claim against the Commission:

- (a) What does reconfirmation mean;
- (b) What constituted acceptance of the role;
- (c) What else could Ms Leahy do;
- (d) Did Ms Leahy ever commence the new role;
- (e) Did the Commission fail in its obligations;
- (f) Does Ms Leahy have a personal grievance and if so what remedies ought to apply?

[17] When Ms Leahy initially filed her proceedings in the Authority, there were in effect two separate but interlinked claims, one involving the termination of the employment allegedly on an unjustified basis, and the other involving an allegation of bullying by Ms Peacock. In the run up to the investigation meeting, Ms Leahy withdrew the bullying allegation from the Authority's investigatory process such that the only matters for substantive investigation in the present proceeding relate to the allegations of an unjustified dismissal. However, there are two provisos to that. The first is that Ms Leahy has maintained her right to bring on that bullying allegation for hearing again at some subsequent date and, more importantly for present purposes, as Ms Leahy is seeking permanent reinstatement to her role, the relationship between the remedy of reinstatement and the as yet uninvestigated bullying allegations, must be addressed by the Authority, if Ms Leahy is successful in her claim.

**What does reconfirmation mean?**

[18] Reconfirmation is a term of art. That is to say, it has a legal meaning including the one ascribed to it by the documentation which governs the relationship between the parties. The change management protocol generated by the Commission is incorporated as a term of the applicant's employment agreement. At p.3 of the protocol, reconfirmation is defined in the following terms:

*Reconfirmation is where a staff member's position in the current structure is deemed to exist in the same form in the new structure, and the staff member holding that position is confirmed as the incumbent.*

[19] Further on, at p.5 of the protocol under the generic heading of “*process*”, there is further material as to how reconfirmation works in reality. The essence of this additional material is to confirm that reconfirmation occurs where the duties of the new position are the same or nearly the same, the remuneration is the same, and the terms and conditions of the employment are the same or no less favourable and the location is itself the same.

[20] But significantly, the protocol does not spell out whether reconfirmation requires a formal acceptance (legally, whether the offer made by the employer must be formally accepted by the employee). Ms Leahy says this is because, in common parlance and ordinary usage within the business and management community, reconfirmation to a role by its very nature does not require any action of her. She simply continues the work that she was previously doing on the same salary, the same terms and conditions, and a role description which is broadly similar to the role previously occupied. It is said that, by its very nature, reconfirmation involves the employer simply accepting by executive fiat that the status quo will continue. It follows, so the argument goes, that there was nothing required of the employee.

[21] But is that an end of it? The dictionary definition of “*reconfirm*” is to “*confirm, establish, or ratify anew*”. But that does not help much. The question is at whose instigation, for present purposes, must the confirmation, establishment or ratification happen? Furthermore, Ms Leahy’s interpretation of events as well as relying on a conclusion that it is the employer who takes the reconfirmation step and that nothing more is required of the employee, also relies on the various facets of the reconfirmation process that are set out in the protocol. On the face of it, not all of those steps are made out. It will be remembered that the protocol referred to the remuneration being the same and the terms and conditions of the employment being the same and the new job description being the same, “*(or very nearly the same)*”. Ms Leahy was protesting the remuneration (in effect saying the new role did not pay enough relative to the old), and was also arguing about the terms of the job description.

[22] It seems to the Authority to follow that even if reconfirmation as a process leaves the onus on the employer to simply propose the continuation of the status quo,

the factual position in the present case does not fit the bill. Whereas reconfirmation in terms of the protocol requires a job description that is the same or nearly the same, and remuneration and terms and conditions of employment which are the same, neither of those factors can be true in the present case because both of them were the subject of disputation between Ms Leahy and the Commission with the former protesting about the basis on which the latter was offering the position. At its heart, there seems to be a logical difficulty with Ms Leahy's position. On the one hand, she seeks to make changes to the remuneration and the Role Description for the new position and on the other, she pleads that the new position is "not substantively different from her existing position": Statement of Problem 1.1 a i .

[23] What is more, even if in the normal course of events it can be said that reconfirmation does not usually require any action by the employee, this cannot have been such a case because the letter of offer asks for a response. Despite some equivocation, it seems common ground that no response was ever given; certainly, that is Ms Leahy's evidence.

[24] Accordingly, even if it can be argued that reconfirmation in the normal course would not require any action from an employee, the present factual matrix does not suggest that this is an ordinary case. First, this is not a simple reconfirmation involving an acceptance of remuneration, terms and conditions of employment and a role description which is nearly the same and second, this is a situation where the employer party deliberately sought a response.

[25] The Authority concludes that the reconfirmation in the present case required an affirmative acceptance by Ms Leahy of the role, either on the terms offered or at least on a basis which is sufficiently clear for the Commission to be able to decide whether it is able to contemplate the changes proposed. In the present case, it seems that matters were left firmly in the ether and neither party was sure of the position. The Authority's view is that, even if in the normal course of events it can properly be argued that reconfirmation does not require anything further of the employee, the particular circumstances of this case did require something more of the employee, namely a definitive response in writing to the proposal put by the employer, as the employer requested.

**What constituted acceptance of the role?**

[26] Ms Leahy advances the proposition that although she did not formally accept the position, she did not need to. The Authority has already rejected that argument in the previous section. Ms Leahy was asked for a response and she failed to provide one. Reconfirmation in terms of the protocol which formed part of Ms Leahy's terms and conditions of employment refers to a situation where the job description is substantially the same as in the previous position, and the terms and conditions of employment and the remuneration are the same. Ms Leahy protested about all of those aspects and so there can hardly be said to be a meeting of the minds in relation to the Commission's offer.

[27] But could Ms Leahy accept the position by performance? Could she, by performing the role dutifully and engaging in the normal responsibilities of the employment, be deemed to have accepted the position? The Authority's conclusion is that Ms Leahy could not be deemed to have accepted the position by performance in circumstances where the parties were not at one on either the remuneration or, more particularly, the actual span of the duties. What was it that Ms Leahy was performing? What the Commission says is that Ms Leahy was continuing to fulfil the obligations of her original role or of some transitional role and that notwithstanding that the original role actually came to an end on 1 June 2011, it was that role or a variant of it that she continued in until the termination of the employment. The Authority is attracted by that argument, if only because it is difficult to see how Ms Leahy could have been performing some other role when she so self-evidently was endeavouring to make changes to the responsibilities of the position. This construction of events is further supported by the evidence around Ms Leahy's objection to the Role Description. The Commission say she thought that the new position was not capable of being performed. Ms Leahy rejects that contention but does claim the Role Description made her "*accountable for things outside (her) control.*" It follows that even on Ms Leahy's evidence, it is extremely unlikely she was performing the new role given that position.

[28] Accordingly, the Authority is not persuaded that Ms Leahy accepted the new role by performance.

**What else could Ms Leahy do?**

[29] The letter of offer to Ms Leahy dated 11 May 2011 made absolutely plain that Ms Leahy was offered the new role on the current terms and conditions of employment but with a new role description attached. She was asked to accept the position by a certain date if she wished to take it. She never did that.

[30] Also, the letter makes clear that Ms Leahy was entitled to apply for new or vacant positions which became available within the organisation so she could also have done that if she wished.

**Did Ms Leahy ever commence the new role?**

[31] The Authority is not satisfied that Ms Leahy ever commenced the new role. The terms and conditions under which that role were to be performed were never settled and, as a consequence, it seems implausible to imagine that Ms Leahy would have been in a position to commence the new role. As the Authority has noted already, Ms Leahy's view was that the new role made her responsible for things outside her control and on that footing it seems unlikely that she would have been engaged in the performance of the role. This is even more the case if the Commission's evidence is to be preferred. Mr Pine and Ms Peacock, who both gave evidence for the Commission, both claim that actually Ms Leahy said the role could not be performed.

[32] Moreover, the Commission was very clear that the role that Ms Leahy continued to fulfil in the organisation was the role that she had previously held in the old structure or a variant of it.

[33] The Authority is satisfied then that Ms Leahy did not commence duties in the new role.

**Did the Commission fail in its obligations?**

[34] The significant failure made by the Commission was in its complete failure to require a response to the letter of offer of 11 May 2011. Until the eleventh hour, the Commission simply let the matter run on without putting the matter on a proper formal footing. An offer was made on 11 May 2011 and on the Authority's analysis of the position, that offer was available for acceptance until 16 May 2011 and when it

was not accepted by 16 May 2011, the Commission ought to have followed the matter up promptly and made clear what its expectations were in the matter.

[35] It did not and instead it engaged in, on its evidence anyway, a lengthy series of exchanges with Ms Leahy to try to get her “*buy in*” to the new arrangements, but without success.

[36] In the result, and at the eleventh hour, clearly tempers became frayed and patience evaporated and Ms Leahy was finally put on notice that she had to either accept the role or accept the alternative which was that the offer, conditional as it was, would be withdrawn.

### **Is there a personal grievance?**

[37] The Authority is not satisfied there is any basis for complaint by Ms Leahy. She was made an offer on terms and conditions which she failed to accept. While it would have been better if the Commission had followed up her failure to respond in a timely fashion, the Commission says it attempted to get her to buy in to the new arrangements by a series of engagements with her after the offer was made, but in the result even the Commission lost patience with that arrangement and eventually gave her an ultimatum which again she chose not to respond positively to.

[38] The Authority does not accept Ms Leahy’s view that the Commission’s case rests squarely on whether there was proper consultation around the concerns that Ms Leahy had about, in particular, the job description and, to a lesser extent, the remuneration package. The Authority’s analysis of the position is that, by then, the horse had already bolted. The Commission made Ms Leahy an offer which she did not accept, either immediately or at any time subsequently. She continued to protest the job description in particular until the end of the employment relationship, so there was never any meeting of the minds on the new role going forward. Ms Leahy’s reliance on reconfirmation as a concept is, in the Authority’s view, on these facts, quite misplaced.

[39] Because the Authority is not persuaded that Ms Leahy has a personal grievance, the question of remedies does not arise. There were some subsidiary matters which were pleaded. Ms Leahy claimed to have been docked two days’ pay which ought to have been allowed to her as bereavement leave and, in addition, she claims back payment on the footing that an increase which applied to others ought to

have applied to her as well. Both those matters were commented on by Ms Peacock on behalf of the Commission and she gave contrary evidence which was unchallenged. On that basis, the Authority is not minded to take those matters any further.

**Determination**

[40] For the reasons already advanced, Ms Leahy's claim fails in its entirety.

**Costs**

[41] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority