

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2018] NZERA Christchurch 55  
3016332; 3016733; 3016732; 3016751

BETWEEN                    CATHERINE MCLEOD  
                                  DENISE GRANT  
                                  PAULA WILSON and  
                                  SUZANNE TEMPLAR  
                                  Applicants

A N D                        THE SOUTHERN DISTRICT HEALTH  
                                  BOARD  
                                  Respondent

Member of Authority:     Peter van Keulen

Representatives:         Peter Cranney and Catherine McNamara, Counsel for Applicants  
                                  Cassandra Kenworthy, Counsel for Respondent

Investigation Meeting:    1 February 2018 at Invercargill

Submissions Received:    1 February 2018 for Applicant  
                                  1 February 2018 for Respondent

Date of Determination:    30 April 2018

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**DETERMINATION OF THE AUTHORITY**

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- A.     The Southern District Health Board must pay Catherine McLeod, Denise Grant, Paula Wilson and Suzanne Templar severance payments pursuant to clause 2.8 of the Otago employee’s terms of employment or clause 31.12 of the Southland terms of employment, contained in the PSA Collective Agreement for 1 October 2013 – 30 September 2015.**
- B.     I reserve costs with a timetable set for submissions if required.**

## **Employment relationship problem**

[1] The Southern District Health Board employed Catherine McLeod, Denise Grant, Paula Wilson and Suzanne Templar in various roles in its Breast Screening Unit.

[2] In 2014, the Health Board disestablished its Breast Screening Unit as it had decided not to renew the contract it had with the National Screening Unit. As a result the staff employed by the Health Board in the Breast Screening Unit became surplus to requirements.

[3] Ms McLeod, Ms Grant, Ms Wilson and Ms Templar were all offered redeployment with the Health Board but they all declined the offers as not being suitable. The Health Board then terminated their employment.

[4] Ms McLeod, Ms Grant, Ms Wilson and Ms Templar all claim that because of the termination of their employment they are entitled to severance payments. The Health Board has refused to pay these severance payments as it says all four had declined redeployment made on terms no less favourable and in the same capacity as their previous roles – a situation which disentitled them to the severance payment under the applicable collective agreement.

[5] Ms McLeod, Ms Grant, Ms Wilson and Ms Templar all issued claims in the Authority seeking payment of these severance payments. Whilst these employment relationship problems were expressed as personal grievances and breach of contract claims in the statements of problem, Mr Cranney submitted that I should deal with them as wage arrears claims under s 131 of the Employment Relations Act 2000 (the Act). This seems appropriate to me, as the only remedy sought is the severance payment.

[6] Pursuant to s 131 of the Act, I can order payment of money payable to an employee under an employment agreement, if there has been a default in payment by the employer.

[7] The Health Board has refused to pay the severance payments, as it says the payments are not due to the employees i.e. there is no default on its part. It says, the severance payments are not due if there have been offers of redeployment made that are on terms no less favourable than the existing terms of employment and in the same capacity as the existing employment, which have been refused.

[8] Ms McLeod, Ms Grant, Ms Wilson and Ms Templar say the offers of redeployment were not valid offers as the applicable terms of their employment were not followed when the offers were made and, if they were valid offers then they were made on less favourable terms so they could refuse them and the severance payments remained due.

[9] So, the resolution of these employment relationship problems turns on two issues:

- (a) Were the offers of redeployment complying offers within the terms of the employment; and if so
- (b) Were the offers of redeployment on terms no less favourable than the existing terms of employment and in the same capacity as the existing employment?

### **Preliminary matter**

[10] In a case management conference on 14 September 2017, I discussed with counsel the possibility of hearing all four claims together.

[11] It appeared to me that whilst the offers of redeployment and the reasons for refusal differed, the process by which the offers were made and the employment was terminated were similar. And the reason for refusing to pay the severance pay was identical. In my view, this meant the evidence I would need to consider would be, in part, repetitive between the claims and issues to be answered in order to resolve the claims would be the same. In short, it made sense to deal with Ms McLeod, Ms Grant, Ms Wilson and Ms Templar's claims together in terms of my investigation and determination.

[12] Counsel agreed with this and these matters proceeded on that basis.

## Complying offers

### *Relevant terms of employment*

[13] All four applicants were employed under the PSA Collective Agreement for South Island Clerical/Administrative employees for 1 October 2013 – 30 September 2015 (the Collective Agreement) and this contains provisions relating to staff surplus.

[14] Ms McLeod was employed in Southland and the staff surplus terms applicable to her employment are set out in a separate section of the Collective Agreement to the other three employees, who were employed in Otago.

[15] The staff surplus provisions for Otago employees include:

31. **STAFF SURPLUS**

31.1 When as a result of the restructuring of the whole, or any parts, of the employer's operations; ... then the options in subclause 31.4 below shall be invoked and negotiated on a case by case basis between the employee representative and the Employer.

31.2 ...

31.4 **Options** – The following are the options to be applied in staff surplus situations:

- (a) Reconfirmed in position
- (b) Attrition
- (c) Redeployment
- (d) Leave without pay
- (e) Enhanced early retirement
- (f) Retraining
- (g) Severance

Option (a) will preclude employees from access to the other options. The aim will be to minimise the use of Severance. When Severance is included, the provisions in subclause 31.12 will be applied as a package.

31.5 ...

31.12 Severance – Payment will be made in accordance with the following:

(a) ...

(k) Nothing in this agreement shall require the Employer to pay compensation for redundancy where as a result of restructuring, and following consultation, the employee's position is disestablished and the employee declines an offer of employment that is on terms that are

- the same as, or no less favourable, than the employee's conditions of employment; and
- in the same capacity as that in which the employee was employed by the employer, or
- in any capacity in which the employee is willing to accept.

[16] The Staff Surplus provisions for Southland employees includes at clause 1.9 a reference to the provisions being applied where there may be surplus positions and then the “options in sub clause 2.1 being invoked and negotiated on a case by case basis between the union and the Employer”. Sub clause 2.1 is then similar to clause 31.12 above, listing the various options available for consideration and negotiation, including severance.

[17] Severance is then set out in clause 2.8 and again this is similar terms to the Otago section with 2.8(f) providing an identical exception to payment of severance pay as in clause 31.12(k) above.

[18] What this means is that the same process was to be invoked for all four employees in a staff surplus situation and the same exception applies to all four for the payment of severance on redundancy.

*Process adopted by the Health Board*

[19] As outlined above, the disestablishment of the Health Board's Breast Screening Unit in 2014 meant the Health Board staff employed in the unit became surplus to requirements.

[20] On 9 May 2014, the Health Board wrote to each of Ms McLeod, Ms Grant, Ms Wilson and Ms Templar. All four letters contained the following:

We are now in a position to confirm that your position with the DHB Breast Screening Service will continue through until the DHB's [Breast Screening Aotearoa] contract ends (which we are assuming will be 1 August 2014), unless you accept a position with [Pacific Radiology] with an earlier start date. [Pacific Radiology] will be undertaking its recruitment campaign for staff in its breast screening service in May, and intends to confirm to applicants whether or not they have been successful on 13 June 2014. We will meet with staff in June, once [Pacific Radiology] have advised they have completed their initial recruitment phase, to work through the "staff surplus" options contained in the employment agreement. **The DHB will be seeking to redeploy staff who do not have employment with [Pacific Radiology]. ....**

[Emphasis added]

[21] On 19 June 2014 the Health Board wrote to each of Ms McLeod, Ms Grant, Ms Wilson and Ms Templar stating:

Further to our letter of 9 May 2014, I am writing to confirm that the National Screening Unit and the DHB have agreed to role of the [Breast Screening Aotearoa] contract until 31 July 2014.

Your position with the Screening Unit will therefore be surplus from 1 August 2014. **As advised in our letter of 9 May, we will work through the staff surplus options contained in your employment agreement, should you not by that time have employment with [Pacific Radiology].**

[Emphasis added]

[22] Ms McLeod, Ms Grant, Ms Wilson and Ms Templar all applied for and accepted roles with Pacific Radiology on identical terms to their employment with the Health Board, in June 2014. Their employment with Pacific Radiology commenced on 1 August 2014.

[23] Despite this, on 27 June 2014 the Health Board purported to commence negotiation over staff surplus options with Ms McLeod, Ms Grant, Ms Wilson and Ms Templar. In an email of 27 June, the Health Board requested each employee provide a copy of their updated CV to an HR advisor and complete a Candidate Information form, so that it could identify suitable redeployment options within the Health Board.

[24] The Health Board then made offers of redeployment to Ms McLeod, Ms Grant, Ms Wilson and Ms Templar in July 2014.

*Does this process meet the requirements of the relevant terms of employment?*

[25] Clause 31.1 of the Otago employee's staff surplus provisions and clause 1.9 of the Southland employee's staff surplus provisions both require the Health Board to invoke and negotiate on a case by case basis the staff surplus options set out.

[26] The issue of whether the offers of employment were complying offers for the staff surplus section of the Collective Agreement is about whether the steps taken to invoke the staff surplus process and negotiation over the options complied with the relevant terms of employment.

[27] Mr Cranney's submission is that when it came to staff surplus issues the Health Board failed to invoke the procedure correctly and then failed to negotiate appropriately on a case-by-case basis for each applicant as the Collective Agreement required.

[28] Mr Cranney submits that the Health Board advised each applicant that it would seek to redeploy staff who failed to obtain employment with the new provider of breast screening services, Pacific Radiology Group. As each applicant did obtain employment with Pacific Radiology, Mr Cranney submits that this means each of them became part of the group of employees for whom redeployment would not be invoked – their new employment effectively ending the need to negotiate over this staff surplus option and the other non-severance options. This means the Health Board could not and therefore, did not, invoke the staff surplus procedure in relation to the redeployment option and this left the Health Board with only severance as a staff surplus option to be applied.

[29] I agree with these submissions. The correspondence from the Health Board encourages employees to take up employment with Pacific Radiology and it does so because the Health Board recognised there was likely to be less redeployment options available than would be required if all of the Breast Screening staff were to be considered for redeployment. The Health Board advances this option over any of the prescribed options in clause 31.4 (clause 2.1 for Otago employees).

[30] It follows then that once an employee obtained employment with Pacific Radiology there were only two options in relation to staff surplus that could be invoked and negotiated – attrition and severance. In the case of Ms McLeod, Ms Grant, Ms Wilson and Ms Templar attrition did not become an option because they did not resign before 31 July 2014 when the Health Board terminated their employment.

[31] In these circumstances, the only option applicable for the staff surplus situation for Ms McLeod, Ms Grant, Ms Wilson and Ms Templar was severance. And the Health Board's attempt to engage the redeployment option did not comply with the applicable terms of employment.

### **Refusal of offers**

[32] Notwithstanding this conclusion I will still analyse the offers of redeployment and consider whether they were made on terms no less favourable than the then current terms of employment for Ms McLeod, Ms Grant, Ms Wilson and Ms Templar and in the same capacity.

#### *Ms McLeod*

[33] On 22 July 2014, the Health Board offered Ms McLeod employment as a Booking Administrator in Orthopaedic Services. This role required experience in medical typing, experience Ms McLeod did not have as her then current role did not require this. For this reason she refused the role.

[34] As the new role required medical typing and Ms McLeod's then current role did not require this, the new role was not in the same capacity.

[35] Ms McLeod's refusal did not disentitle her to the severance payment, as she did not decline redeployment that was on terms no less favourable than her existing terms of employment and in the same capacity as her existing employment.

*Ms Grant*

[36] On 22 July 2014, the Health Board offered Ms Grant a role as an Administration Officer in the Referrals Centre. This role was for the same number of hours (20 hours per week) as Ms Grant's then current role but the shifts were different from her then current shift pattern of 8:00 am until 12:00 pm. The hours of work for the new role were 10:00 am until 3:30 pm.

[37] This shift pattern was not suitable for Ms Grant as she had a second part time job in the afternoons. For this reason she refused the new role.

[38] The offer of redeployment was on less favourable terms – the shift pattern was not suitable for Ms Grant and, I accept she was entitled to refuse the offer.

[39] Ms Grant's refusal did not disentitle her to the severance payment, as she did not decline redeployment that was on terms no less favourable than her existing terms of employment and in the same capacity as her existing employment.

*Ms Wilson*

[40] On 22 July 2014, the Health Board offered Ms Wilson a role as an Administration Officer in the Drug and Alcohol Specialist Service, Forensic, Te Korowai MHU. This role was for the same number of hours (54 hours per fortnight) as Ms Wilson's then current role but the shifts were different from her then current shift pattern – Ms Wilson worked seven days per fortnight, three days one week and four the next. The hours of work for the new role were spread over five days each week.

[41] This shift pattern was not suitable for Ms Wilson as she lived in Winton, requiring a 68 kilometre return trip for each shift. This was economically viable for seven shifts spread over two weeks but became less viable for the offered ten shifts over two weeks. For this reason she refused the new role.

[42] The offer of redeployment was on less favourable terms – the shift pattern was not suitable for Ms Wilson and, I accept she was entitled to refuse the offer,

[43] Ms Wilson's refusal did not disentitle her to the severance payment as she did not decline redeployment that was on terms no less favourable than her existing terms of employment and in the same capacity as her existing employment

*Ms Templar*

[44] On 22 July 2014, the Health Board offered Ms Templar a role as Administration Officer/Receptionist in Radiology. This role was for the same number of hours (72 hours per fortnight) as Ms Templar's then current role but rather than working nine days per fortnight the offer was for ten days per fortnight.

[45] This shift pattern was not suitable for Ms Templar, as she required every second Friday off to support a disabled family member. For this reason she refused the new role.

[46] The offer of redeployment was on less favourable terms – the shift pattern was not suitable for Ms Templar and, I accept she was entitled to refuse to accept the offer,

[47] Ms Templar's refusal did not disentitle her to the severance payment as she did not decline redeployment that was on terms no less favourable than her existing terms of employment and in the same capacity as her existing employment.

## **Conclusion**

[48] So, to answer the two issues I identified at the outset:

- (a) Were the offers of redeployment complying offers within the terms of the employment – No.
- (b) Were the offers of redeployment on terms no less favourable than the existing terms of employment and in the same capacity as the existing employment – No.

[49] This means the Health Board did not correctly invoke and consult over redeployment and could not rely on it to say severance payments were not due to Ms McLeod, Ms Grant, Ms Wilson and Ms Templar. And, in any event, if the offers of redeployment were complying, the refusal to accept them by Ms McLeod, Ms Grant, Ms Wilson and Ms Templar did not disentitle them to severance payments.

### **Determination**

[50] The Health Board must pay Ms McLeod, Ms Grant, Ms Wilson and Ms Templar severance payments pursuant to clause 2.8 of the Otago employee's terms of employment or clause 31.12 of the Southland terms of employment.

[51] I understand from counsel that the amounts of the severance pay should not be in dispute, and consequently I did not hear any evidence on quantum. I therefore leave it to the parties to calculate the amounts payable to each of Ms McLeod, Ms Grant, Ms Wilson and Ms Templar. If there is any problem with this, then any party can apply to the Authority for further resolution concerning quantum.

### **Costs**

[52] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[53] If they are not able to do so and a determination on costs is needed, any party seeking costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen  
Member of the Employment Relations Authority