Determination Number: CA 120/05
File Number: CEA 299/04

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY**
**CHRISTCHURCH OFFICE**

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| **BETWEEN** | Carolyn Margaret Osborne (Applicant) |
| **AND** | Crop and Food Research Institute Limited (Respondent) |
| **REPRESENTATIVES** | John Fitchett and Andrew Challis, Counsel for Applicant<br>Linda Penno, Counsel for Respondent |
| **MEMBER OF AUTHORITY** | Paul Montgomery |
| **INVESTIGATION MEETING** | 25 January 2005 |
| **DATE OF DETERMINATION** | 8 September 2005 |

DETERMINATION OF THE AUTHORITY

***Employment relationship problem***

[1] The applicant, Ms Osborne, had been employed by the respondent as a Microbiology Research Associate in the respondent's Nelson operation. As a result of a review undertaken by the respondent, her position was eventually declared surplus to requirements. The applicant alleges in her statement of problem that her redundancy was both substantively and procedurally unjustified.

[2] Ms Osborne sought reinstatement to her position, lost remuneration, compensation for hurt and humiliation and a penalty for the respondent paying her contractual entitlements *early*.

[3] The respondent maintained it had met its obligations to the applicant under the collective employment agreement, had gone the extra mile to ensure she was interviewed for a vacancy in the respondent's Auckland operation, had offered support in the redundancy setting and curriculum vitae preparation assistance. The respondent says it has done all expected of it at law and in respect of its duties under the collective agreement.

[4] In closing submissions, the respondent sought a penalty for breaches of good faith by the applicant.

[5] The parties attempted to resolve their differences in mediation but were unable to do so.

***What caused the problem?***

[6] The applicant was employed by Crop and Food Research Institute Limited ('Crop & Food') for a period of approximately 10 years, her most recent position being that of Microbiology Research Assistant. Research positions such as this are dependent on the respondent securing funding for projects undertaken by its staff. Funding is provided either by the government agency,

The Foundation for Research Science and Technology, or from private sector companies with a specific requirement for research in an area of commercial interest.

[7] When the respondent began preparing the 2004-2005 budgets in May 2004, the ability to sustain Ms Osborne's position came into question as only a few small commercial tasks were in the offing for her in Nelson. Following discussions between Mr Terry Chadderton, the team leader of the Seafood and Marine Extracts Unit, and Dr Prue Williams, General Manager Research, it became clear that in order to sustain Ms Osborne's role, Crop and Food needed to secure a large research contract through a planned seafood industry consortium. This did not eventuate.

[8] In January 2004, Mr Chadderton issued a memo to Dr Williams and to Ms Carson, General Manager Human Resources, requesting that a business operations review needed to be undertaken to decide whether his recommendation to disestablish the Nelson position was to be accepted or whether other options were available to support the position held by the applicant. Following some delays, the recommendation put forward was approved.

[9] A meeting was arranged to discuss the proposed disestablishment of the position and to review other opportunities that might be available to Ms Osborne within the respondent's organisation. That meeting took place on 23 June 2004. Attending were the applicant accompanied by Mr Fitchett, Mr Chadderton and Mr Mark Bray, Human Resources Advisor. The meeting did not go well. Shortly after beginning to explain the proposal, Mr Chadderton says he was interrupted by Mr Fitchett whom he says made it plain that the purpose of the meeting was to discuss the applicant's transferring to a newly advertised position in the respondent's Auckland operation. In an email to the applicant dated 21 June 2004, Mr Chadderton had said …*I confirm that we would like to meet with you at 4pm on Wednesday to discuss disestablishing your role in Nelson and opportunities for you to apply for other roles in C&FR…. You have said that you may be interested in the new 04/42 Science Technician position that we have recently advertised for our Auckland site….*

[10] There can be no dispute as to Mr Chadderton's intentions in calling the meeting. However, given the apparent refusal of the applicant's solicitor to allow Mr Chadderton to fully explain the situation, and to receive Ms Osborne's feedback on the proposal, the meeting was aborted.

[11] Following the respondent's instructing Ms Penno, a second meeting was arranged and took place on 1 July 2004. Again, in the course of this meeting, Mr Fitchett stated that what would resolve the situation for his client was a transfer to Auckland and a position there for a period of two years. Also, Ms Osborne confirmed that if a redeployment position was able to be found, she would be prepared to locate to any of the respondent's sites.

[12] There was also considerable discussion over the technician vacancy in Auckland. However, Mr Chadderton pointed out that the respondent would not be in a position to make a final decision about the disestablishment of Ms Osborne's role until she had provided it with her feedback on the situation. Mr Fitchett agreed to provide that feedback by 16 July 2004 as he was to be out of the office in the week following the meeting.

[13] In fact, no feedback was received from the applicant and Mr Fitchett advised Ms Penno of this in a letter dated 13 July 2004. Ms Penno wrote to Mr Fitchett on 30 July 2004 again requesting the applicant's feedback. Ms Penno indicated that this was required by 5pm on Monday, 2 August 2004 because the respondent required it prior to the next phase of the process in which Mr Chadderton's recommendation to the Chief Executive Officer was to take place on 3 August 2004. As no further feedback was received, Mr Chadderton, assisted by Mr Bray, tabled his recommendation that the position held by the applicant be disestablished.

[14] With the disestablishment of the Nelson position, the respondent then turned its mind, as it was required to do under the collective agreement, to other positions which may be available within the organisation. There were none and having advised Ms Osborne at the 1 July meeting that the respondent was of the view that the Auckland vacancy did not fall within the reconfirmation or reassignment options, because the applicant's skill set did not match the requirements of that position, it began to consider the next step in the process.

[15] In fact, Ms Osborne had applied for the technician's role in Auckland and although of the view that the applicant was unsuited for this position, the respondent ensured that she was in the list of applicants to be interviewed.

[16] On 4 August 2004, Ms Carson wrote a letter to the applicant which was forwarded through Ms Penno's office. The letter confirms the disestablishment and states *…this letter serves as three months notice, from Monday, 9 August 2004, that your employment will terminate on Tuesday, 9 November 2004, unless I require or agree to an earlier exit. Upon termination of your employment, we will pay you redundancy compensation as outlined in section 64 of the Crop & Food Research Collective Employment Agreement. An estimate of this has been calculated and is attached for your information….* While the letter was unsigned by Ms Carson, a covering note from Ms Penno stated clearly *…I confirm on Crop & Food's behalf that I am authorised to send it as constituting notice.*

[17] In a letter dated 13 August 2004, Mr Fitchett wrote to Ms Penno advising that his client would be forwarding a copy of her curriculum vitae to Ms Penno. Several weeks later, a copy was received by Ms Penno and in his letter Mr Fitchett advised that Ms Osborne now wished the respondent to continue to explore other suitable employment opportunities.

[18] Mr Bray circulated a memo which attached Ms Osborne's curriculum to Research Team Leaders to double check that there were no other opportunities within the organisation at the time. No appropriate vacancies were found to be available.

[19] Ms Osborne's last day of work was 18 August 2004 and a round of correspondence between Mr Fitchett and Ms Penno in relation to payment of the applicant's entitlements ensued.

***The issues***

[20] In this case, the Authority is required to determine the following issues:

- Was the respondent entitled to declare the position held by the applicant surplus to its requirements based on a shortfall in funding?
- Did the respondent engage in a full consultation process with the applicant?
- Was the consultation process in accord with the collective agreement to which the applicant was a signatory?
- Given that the applicant's position was declared surplus, did the respondent follow the procedure set out in the collective agreement to protect the applicant's rights under that agreement?
- Was the declaration of the applicant's position as surplus to requirements predetermined by the respondent?
- In the event that the Authority finds for the applicant, what remedies are due to her?

- Was the applicant entitled to be considered a preferential employee for the vacancy in the Auckland operation?

- What is to be made of the allegations of each party in respect of breaches of good faith obligations?

***The investigation meeting***

[21] At the investigation meeting, I heard evidence from Ms Osborne on her own account and from Mr Bray and from Mr Chadderton. In particular, the Authority would like to express its appreciation for the clear evidence of Mr Chadderton in regard to the funding of research projects and how this led to the business operation review.

[22] In some respects, this was an unusual investigation in that, despite her statement of problem, Ms Osborne accepted that the lack of funding for the position she held justified the respondent declaring that position surplus to its requirements. Essentially, Ms Osborne thereby abandoned her claim that her dismissal on the ground of redundancy was substantively unjustifiable.

[23] That acceptance was established when I asked her, *So Crop and Food was entitled to withdraw the role you were doing?* The applicant's response was, *Absolutely*.

[24] I would like to express my appreciation to those who gave evidence in front of the Authority. All were open and honest and the investigation meeting proceeded in a constructive and cooperative manner.

***Discussion and analysis***

[25] As noted above, Ms Osborne conceded at the investigation meeting that the respondent was entitled to withdraw the position she held in Nelson. That conclusion is an acceptance that the termination of her employment in that role was substantively justified. The issues remaining are the applicant's claim that the matter was predetermined and that she was entitled to be a preferred employee, not merely a preferred candidate, for the vacancy in the Auckland operation.

[26] On the issue of predetermination and the claim of procedural unfairness, I have to pay particular attention to s.61 of the collective agreement. I have considered the submissions of the representatives on these points. It appears to me that the respondent was entitled to proceed with a *business operations review* as the process is well established and set out in the collective employment agreement. The applicant was employed in a business operation and the process was appropriate in the circumstances. Mr Fitchett urged me to find the process inapplicable in his client's situation because the document uses the plural form of *employee* and collective nouns. The principle as set out in s.33 of the Interpretation Act 1999 makes it clear that *words in the plural include the singular* is the appropriate principle to apply in determining the meaning of a formal legal document such as a collective employment agreement.

[27] The assertion by the applicant that the respondent predetermined Ms Osborne's redundancy and in effect targeted her position is not borne out by the evidence put before the Authority. The inability of the respondent, despite extensive efforts, to find alternative sources of funding for the Nelson position, clearly signals that the role could be at risk of being found redundant. Mr Chadderton's evidence was clear that the applicant was well aware of the difficulties he was experiencing in sourcing suitable funding to ensure the continuation of that role. In the light of that evidence, which was unchallenged, a claim of predetermination would struggle to succeed.

[28] In regard to the claim that the respondent breached its obligations under the processes set out in the collective agreement, I have considered the steps set out in that document and have analysed the respondent's attempt to adhere to those steps.

***Determination***

[29] This was a case rendered more complex than necessary by a series of interlocutory matters. It is about whether the respondent met its objectively established obligations under the collective agreement in regard to the applicant. It is also about whether the respondent's declaring the applicant's position surplus was justified on the basis of lack of funding for the position. Having established that, a fact acknowledged by Ms Osborne's response to the Authority, the sole ground of complaint lies with the process adopted by the respondent.

[30] I find that the position held by the applicant was justifiably declared surplus on the basis of a lack of ongoing funding. This was accepted by the applicant in her evidence. That acceptance on the part of the applicant effectively abandoned her claim for reinstatement and lost remuneration.

[31] I find on the basis of the evidence put before the Authority that the respondent set out to follow the appropriate procedure as set out in the collective agreement in order to deal with the disestablishment of a position. Curiously, Ms Osborne refused, through her counsel, to provide the feedback she had agreed to as part of the consultative process. Asked for her feedback a second time, Ms Osborne declined to put her views forward. Essentially, I find Ms Osborne withdrew from the process set out in the collective agreement.

[32] I find the respondent did not predetermine the disestablishment of the applicant's position. The respondent at every move sought to ensure it could secure funding for the role and I accept that, given the lack of ongoing funding in relation to the position, it was highly probable that short of funding becoming available that that position would become surplus. I am satisfied on the basis of the evidence that the applicant was well aware of this prior to the respondent implementing the review. That is a considerable step from predetermination.

[33] The collective agreement sets out at s.61.3 the options open to an employee whose position has been disestablished. Section 61.3.1 states:

> *61.3.1* *If a surplus staffing situation exists the options as listed in this Clause will be followed. In each situation a structured process will be implemented which will include an assessment of the available options. These options, which will be assessed in the following order, will include but will not be limited to:*
>
> *61.3.2* *Reconfirmation. If possible employees will be reconfirmed in a similar position in preference to being declared redundant.*
>
> *61.3.3* *Reassignment. If possible employees will be offered the opportunity reassigned or relocated in preference to being declared redundant.*
>
> *61.3.4* *Retraining. Employees may be given the opportunity to be retrained then assigned to a different position in preference to being made redundant.*
>
> *61.3.5* *Surplus exchange.….*
>
> *61.3.6* *Leave without pay.….*

*61.3.7 Redundancy. Where the option of redundancy is to be made available, payment will be made in accordance with provisions outlined in 64 and 65 below.*

[34] At clause 61.4.2 the agreement sets out the criteria for reconfirmation:

*61.4.2 The criteria for reconfirmation shall be as follows:*

- *the new job description is the same (or very nearly the same) as the work the employee currently performs,*
- *the salary for the new position is the same,*
- *the new position has terms and conditions of employment (including career prospects) which are not less favourable, and*
- *the location of the new position is the same.*

[35] In this particular case, the applicant, prior to her position being declared surplus, had, at her own initiative, applied for vacancy 04/42. In short, Ms Osborne was prepared to put her hat in the ring with all aspirants to that position. Notwithstanding the circumstances, the respondent accorded Ms Osborne an interview for the vacancy despite its considered view that her skills did not match those required. Ms Osborne accepted in her evidence that she could not hit the ground running if her application was successful, saying she thought she would need some six months to come to terms with the role.

[36] I find that Ms Osborne was not entitled to preferred employment in this role as the match between the role and her skills was considerably deficient.

[37] I find on analysis of the facts put before me that the respondent investigated every option available to it in an attempt to find an alternative position for the applicant prior to declaring her position redundant.

[38] Once the applicant's position was declared surplus, I find the respondent was entitled to pay the applicant her statutory and contractual entitlements promptly. Clause 63.1 requires the respondent to give three months' notice of termination. Clause 63.2 states that the respondent may elect to pay or part of the notice period as pay in lieu of notice. In this case, the respondent elected to pay Ms Osborne under this clause. It follows that such a payment does not and cannot constitute a breach of the terms of the collective agreement.

[39] I find the applicant does not have a personal grievance and the Authority is unable to assist her further.

[40] I need now to address the issue of whether the applicant breached the principles of good faith by withdrawing her agreed feedback to the respondent as part of the consultative process. I cannot imagine why, having given her undertaking to participate fully in the consultative process set out in the collective agreement, Ms Osborne twice refused to provide her input to that process. If she did so under advice, then that advice could only be described as inadequate.

[41] I find this to be a breach of her obligations of good faith. That said, however, I decline to award the respondent a penalty because I am firmly of the view that Ms Osborne adopted this position in reliance on inappropriate advice. I believe it would be wrong to penalise her for this misplaced confidence in that advice.

***Costs***

[42] Costs are reserved. The representatives are to attempt to resolve this issue between themselves. Should this not be possible, Ms Penno is to lodge and serve a memorandum no later than 21 days from issue of this determination. Mr Fitchett is to lodge and serve his memorandum in reply no later than 14 days thereafter.

Paul Montgomery
Member of Employment Relations Authority