

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Suzanne Peterson (Applicant)  
**AND** The Ministry of Education (Respondent)  
**REPRESENTATIVES** David Beck, Counsel for Applicant  
Rob Davidson, Counsel for Respondent  
**MEMBER OF AUTHORITY** Philip Cheyne  
**INVESTIGATION MEETING** 30 September 2003  
**SUBMISSIONS RECEIVED** From the applicant on 30 September 2003  
From the respondent on 17 October 2003  
From the applicant on 24 October 2003  
**DATE OF DETERMINATION** 28 October 2003

DETERMINATION OF THE AUTHORITY

***Employment Relationship Problem***

[1] Suzanne Peterson says that she has been unjustifiably disadvantaged and/or paid less salary than she was entitled to and/or subjected to breaches of good faith by her employer.

[2] Ms Peterson is a registered psychologist. Her evidence is that before her registration, she studied with the benefit of a Department of Education study award, then worked for Specialist Education Services as an intern psychologist based at Birkenhead between January 1991 and December 1991. Once registered, she worked as a psychologist for Specialist Education Services based at Manukau South between January 1992 and December 1993. In December 1993, Ms Peterson was offered and accepted a position as a psychologist with the Special Education Service in Ilam, Christchurch. She took up that position in January 1994.

[3] I am told that Specialist Education Services and Special Education Services are earlier names for crown services that are now part of the Ministry of Education. The statement of problem identified the Ministry as the respondent and no issue was made of that in the statement in reply although properly it would be the Attorney-General on behalf of the Secretary for Education. Ms Peterson's complaints predate the integration of SES into the Ministry but the respondent accepts that it is liable for any findings against the predecessor organisation. I will refer to the respondent (and its predecessors) as SES.

[4] Ms Peterson's problem centres on the ending of SES's role as a provider of the Parents as First Teachers scheme (PAFT) in July 2001. Part of Ms Peterson's work for SES involved managing

SES's PAFT contract in the Canterbury region. SES did not treat her situation as falling within the contractual surplus staffing provisions and that is said to amount to a breach of contract entitling her to remedies. Alternatively, it is alleged that there was a genuine redundancy enacted in an unfair manner and compensation for distress is sought. Thirdly, it is alleged that Ms Peterson was properly covered by the Service Leaders collective employment agreement rather than the Field Staff collective employment agreement as a result of which she would be entitled to wage arrears of an amount to be specified.

### ***Raising of a Grievance within 90 days***

[5] There is no dispute that the latest date by which any grievance could have arisen or come to Ms Peterson's attention is around the end July 2001. Nor is there any dispute that the earliest date on which Ms Peterson's concern was raised with SES is 10 December 2001 when SES received a letter dated 6 December written on behalf of Ms Peterson by her union, NZEI-Te Riu Roa. Ms Peterson can only raise a grievance with leave, SES having declined to consider her grievance.

[6] In her statement of problem, Ms Peterson says *After consulting her union in July 2001, [she] instructed them to raise an employment relationship problem regarding the manner in which her management position had been disestablished.* Ms Peterson did not formally seek leave to raise a grievance out of time based on exceptional circumstances, but both the Authority and SES knew that such was her contention because of correspondence and discussions prior to the investigation meeting.

[7] I did not hear evidence from anyone from NZEI-Te Riu Roa. However, they advised that an organiser held a meeting with PAFT staff on 30 July 2001 but they had no record of Ms Peterson asking them to raise a grievance with her employer. They further say that Ms Peterson contacted them on 23 October 2001 and a meeting (with her) was arranged for 1 November 2001. That meeting was postponed until 13 November 2001 when the organiser agreed to seek legal advice from the National Office. That culminated in the 6 December 2001 letter mentioned above.

[8] In her statement of evidence lodged before the investigation meeting, Ms Peterson did not give evidence to support the contention that she had instructed NZEI-Te Riu Roa to raise her grievance. I asked her about her discussions with the union organiser in July 2001. Ms Peterson's evidence was that she asked where she stood with the cessation of PAFT, that the organiser told her that she should be entitled to an equalisation allowance payable in surplus staffing situations and that she (the organiser) would check that out with the union lawyer and get back to Ms Peterson.

[9] Ms Peterson also told me that she asked the organiser what was happening once or twice when the organiser happened to be visiting the workplace after then on other business and was told that the organiser was working on it. Ms Peterson gave evidence that during the phone call to the organiser in October, said she that SES had stopped paying her the \$3,000.00 pa *allowance* (as PAFT manager) in August. They arranged to meet but that meeting was postponed until 13 November 2001.

[10] There is no reason to doubt Ms Peterson's evidence. On her account, the earliest time at which she could have made reasonable arrangements for NZEI-Te Riu Roa to raise her grievance is at the meeting on 13 November 2001. That is after the expiration of 90 days from the end of July 2001. The phone contact in October to first arrange and then postpone a meeting for 1 November did not include any arrangement that NZEI-Te Riu Roa would raise a grievance. Similarly, the original discussion in late July 2000 was no more than an arrangement that NZEI-Te Riu Roa would provide further advice to Ms Peterson about her rights given the discontinuation of SES's contract

for PAFT. Ms Peterson's evidence about the incidental contact with the organiser between July and the 23 October phone call was not that she made arrangements for NZEI-Te Riu Roa to raise her grievance.

[11] Accordingly, I find that there are no exceptional circumstances that might justify granting Ms Peterson leave to raise a grievance outside the 90 day limit. Despite that finding, it is necessary to deal with the merits of Ms Peterson's claims because of the alternative bases on which they were advanced.

### **Background**

[12] Immediately before her involvement with PAFT, Ms Peterson was employed full-time as a registered psychologist pursuant to a collective employment contract for SES Field Staff (Field Staff CEC). While engaged as a full-time employee, Ms Peterson had in fact been working part-time after her return from her first period of parental leave.

[13] SES gained a contract for the provision of the PAFT scheme. SES wanted to appoint someone to manage its contractual obligations in the Canterbury region. Ms Peterson applied, was interviewed and was offered that role. There is a letter dated 10 December 1996 which says *...I wish to offer you this contract additional duties position until the end of 1998. This position carries with it a time allocation of 0.2 (1 day per week) and I will need to meet with you to discuss the effect of this on your current employment situation. I am also offering you an additional duties allowance of \$1,500.00. ...I look forward to working with you as the PAFT manager and member of management team.* In submissions, counsel for Ms Peterson pointed to some evidence to suggest that SES established a part-time position as PAFT Manager. That is inconsistent with the clear words of the agreement between SES and Ms Peterson that she was assuming additional duties within the context of her continuing role as an educational psychologist.

[14] The Field Staff CEC required SES to internally advertise opportunities to undertake additional responsibilities and provided for extra remuneration for undertaking tasks additional to an employee's core job. After Ms Peterson accepted the role, SES made payroll arrangements for her to receive a \$1,500.00 *higher duties allowance*. The letter also records that Ms Peterson was to be paid 70% of a full-time salary from 27 January 1997, presumably reflecting an agreement about her hours of work in accordance with the 10 December 1996 letter.

[15] There was also a national policy applicable at the time. It required SES areas to have a policy on the process for appointments/selections to undertake additional responsibilities to ensure *...it is clear tenure will usually be for one or two years*. SES complied with the policy by taking the steps mentioned above. The policy did not prohibit employees being appointed/selected for *additional responsibilities* for periods longer than one or two years.

[16] Ms Peterson took a second period of parental leave in 1998. During that leave, she sent an undated letter to SES indicating her wish to return to work from 7 December 1998 but to a permanent 0.6 part-time position. She indicated her wish for *Point 3 of this position [to] be the resumption of the PAFT Manager commencing January 1999* and mentioned that *it was agreed that the allowance for this position of responsibility will increase from \$1,500 per annum to \$3,000 per annum*. Ms Peterson received a response dated 15 December 1998 confirming that her employment had changed to a .6 permanent position, that her duties included .3 as PAFT Manager and .3 within the Early Intervention Strand and *In addition to your base salary, I have requested that your salary include a Position of Responsibility allowance of \$3000 per annum*. SES then made the payroll arrangements for Ms Peterson to be paid a *higher duties allowance of \$3000 per annum*.

[17] It should be noted that the December 1996 offer was for a fixed period until the end of 1998. That reflected the duration of SES's PAFT contract. There was no mention of a fixed period in the December 1998 correspondence although both Ms Peterson and SES were aware of SES's PAFT contractual situation at the time of their employment arrangements. The PAFT contract was renewed to expire in June 2001.

[18] SES underwent a restructuring in 1997/1998. SES employees were organised into service groupings called strands, each under the leadership of a Service Leader. Subject to contractual obligations to reconfirm some employees, the Service Leader positions were advertised (at least internally). This did not affect the work done by Ms Peterson as PAFT Manager.

[19] NZEI-Te Riu Roa and SES negotiated a collective employment contract (Service Leaders CEC) to cover Service Leaders with a term from 1 July 2000 until 30 September 2001. Ms Peterson was not named as a party to that contract.

[20] SES documented Ms Peterson's delegations in documents dated 20 January 1999, 17 September 1999, 20 March 2000 and 14 August 2000. Some of those documents refer to her as a Service Leader. Mr Murray Roberts (Area Manager) gave evidence for SES to the effect that these were template documents, created with word processing mail merge functions, drafted and principally used for those people who were appointed as Service Leaders. There is no reason to doubt that evidence.

[21] On 7 October 2000, Ms Peterson wrote to SES to request a reduction in her hours of work for personal reasons. She wanted to reduce her work as a registered psychologist from 0.6 to 0.4 but continue 0.3 as *Strand Service Leader Paft*. SES wrote back on 25 October 2000 and gave approval for reduced hours subject to the conditions set out in the letter. It included *PAFT Management Role This additional duty will continue as a fixed term contract and will expire on 29 June 2001. The reason that it is fixed term is that the contract between SES and EDC expires at the end of June 2001*. Ms Peterson was asked to sign and return a copy of the letter to signify her acceptance of the terms set out therein.

[22] SES was not able to produce a copy signed by Ms Peterson. The copy produced by SES is marked *FILE COPY*. Mr Roberts' evidence is that the original (and a copy), once signed by him, would have been sent to Ms Peterson via post. The letter is properly addressed to Ms Peterson's home address at the time. Ms Peterson's evidence was that she *did not recall receiving the letter*. Her evidence is that there had been some problem with correspondence (not from SES) not being delivered to her.

[23] Ms Peterson did reduce her hours of work in accordance with her written request and the approval indicated in the 25 October 2000 letter.

[24] On 3 April 2001 SES sent Ms Peterson a letter advising that some of its PAFT contracts were due for re-negotiation. SES advised that the funder (ECD) had indicated that some contracts (including those managed by Ms Peterson) would be extended to 31 January 2001 and promised to keep staff apprised of developments.

[25] At a later point, the reintegration of SES into the Ministry of Education came to be seen as an obstacle to renewing SES's PAFT contracts given that the Ministry would be both funder and provider. A decision was therefore made that the SES PAFT contract would not be renewed but it was extended for a month until the end of July 2001. Ms Peterson was kept apprised of these events as she managed SES's wind down of PAFT within her region and the handover to other

providers. Ms Peterson's role included dealing with redundancies for PAFT workers that she had managed.

[26] Throughout her work as PAFT manager, Ms Peterson also worked as a registered psychologist. By July 2001, she was part of the Behaviour Strand. As the work of winding up SES's involvement with PAFT diminished, Ms Peterson made arrangements with her Service Leader so that she increased her psychologist duties to fill the spare time. Hence the wind-down of PAFT work did not cause a reduction in her days and hours of work. Ms Peterson's evidence was that she approached the Service Leader because as a permanent part-time worker she had spare hours. She could not recall being told by Mr Roberts to contact the Service Leader. Mr Roberts on the other hand recalled telling Ms Peterson to discuss her return to the Behaviour Strand with the Service Leader. There is no reason to disbelieve Mr Roberts' evidence.

[27] On 31 July 2001 SES ceased paying Ms Peterson the \$3,000.00 per annum payment referred to in the December 1998 and 25 October 2000 correspondence. Ms Peterson was adamant that *getting the payslip with change of pay was the first I knew that I was losing the \$3,000*. However, she acknowledged that she and the NZEI-Te Riu Roa organiser had discussed the payment of an equalisation allowance. It is implicit in such a discussion that Ms Peterson recognised that she might lose the \$3,000.00 allowance as a result of the ending of her PAFT Manager responsibility. I accept however that SES did not formally forewarn Ms Peterson about when it would cease the payment.

[28] Ms Peterson still works for SES as a registered psychologist.

### ***Issues***

[29] The case was partly advanced on the basis that Ms Peterson was properly covered by the Service Leaders CEC rather than the Field Staff CEC.

[30] There is no dispute that Ms Peterson was properly covered by the Field Staff CEC applicable immediately prior to January 1997 when she started performing her duties as PAFT Manager. That and the subsequent Field Staff CECs apparently list all existing employee parties in an appendix but the copies of those CECs given to me did not include that appendix. It is reasonable to assume that Ms Peterson was included in the appendices if they exist. In any event she was clearly an original party because as an educational psychologist she came within the category of employees identified as original parties: see clause 1.1 (b) of the 1996/1997 CEC. It was not suggested that undertaking the role of PAFT Manager necessarily removed her from coverage by the Field Staff CEC.

[31] The first Service Leaders CEC came into force on 1 July 2000. It applied to the employees listed in an appendix and to other Field Service Leaders who not being original parties were joined as additional parties under clause 1.2. Ms Peterson is not one of the 53 original employee parties listed in the appendix.

[32] Clause 1.2 of the Service Leaders CEC required the employer to offer all new Field Service Leaders who come within the coverage of the contract the opportunity to join it as a party.

[33] Ms Peterson never applied for or was appointed as a Service Leader in respect of her role as PAFT Manager. The argument advanced by Ms Peterson is that she believed herself to be a Service Leader because as PAFT Manager she had responsibilities analogous to those of a Service Leader such as staff management, budget responsibility and reporting. In addition she was referred to as PAFT Service Leader. Her evidence is that she assumed the role of PAFT Service Leader from about mid 1999.

[34] As mentioned above, Ms Peterson was not an original party to the first Service Leaders CEC which was negotiated and came into force after the date by which Ms Peterson believed herself to be a Service Leader. She was not joined as a later party to that CEC under clause 1.2 because she was not a *new* Service Leader at any time during which the CEC applied. If the parties had intended that Ms Peterson would be bound by the Service Leaders CEC she would have been included as an original party when it was first negotiated to apply from 1 July 2000.

[35] There was some dispute between the parties about whether Ms Peterson's responsibilities as PAFT Manager were as significant as those of a Service Leader, but I do not need to resolve that matter. There was an argument put that it was inequitable and unfair for Ms Peterson's responsibilities not to be recognised as (at least) the equivalent of a Service Leader. I am not able to approach a decision on that footing. The Employment Contracts Act 1991 allowed her and her employer to negotiate terms of employment. As a result, Ms Peterson was covered by the Field Staff CEC. In theory, Ms Peterson and SES were free to negotiate other contractual arrangement such as coverage by the Service Leaders CEC. They did not and I am unable to impose on them, in reliance on notions of fairness and equity, contractual arrangements that they did not agree to: see *Principal, Auckland College of Education v Hagg* [1997] ERNZ 116 at 123.

[36] I was also given a copy of a collective employment agreement negotiated by NZEI-Te Riu Roa and SES that covered PAFT educators and co-ordinators from December 2000 until August 2002. Counsel for Ms Peterson submitted that it established a clear disparity of treatment. The terms in that collective agreement are not relevant because Ms Peterson was bound by a collective contract that remained in force despite the introduction of the Employment Relations Act 2000: see section 243. NZEI-Te Riu Roa and SES were entitled to negotiate different terms under the new act for the PAFT educators and co-ordinators and the fact that they did so is not relevant to Ms Peterson's situation.

[37] Being bound at the relevant time by the Field Staff CEC, it was open for Ms Peterson and SES to agree on individual terms that were not inconsistent with the CEC: see section 19 (2) Employment Contracts Act 1991. Ms Peterson accepted in evidence that prior to her parental leave in 1998, her position was as a registered psychologist with additional responsibility as PAFT Manager for a fixed period for which she was paid an allowance under the Field Staff CEC. Her claim is that there was a change as a result of the exchanges that preceded her return to work in December 1998. She says that it was agreed then that hers became a permanent part-time position as a psychologist and a PAFT Manager.

[38] The agreement is to be found in the exchange of correspondence. In determining the legal substance of the agreement, I should have regard to surrounding circumstances to understand the setting but not to contradict or vary the meaning of the words used by the parties: see *Selu v Spotless Services (NZ) Ltd* [1998] 3 ERNZ 57. I consider that there are three aspects of the surrounding circumstances that are particularly relevant. First, SES and Ms Peterson knew that the SES PAFT contract either had been or probably would be renewed for a fixed period of time. Another part of the background is the clause in the Field Staff CEC which provided an extra payment where SES required an employee to perform *tasks additional to the core job* and that SES and Ms Peterson had applied that clause from 1997 until 1998. The third aspect of background that assists is the history of both parties accommodating one another about the days and/or hours of work that suited at any particular time.

[39] In her letter, Ms Peterson proposed changing her then full-time position to a permanent part-time position. She then addressed the duties by saying that point 3 of the position would be a resumption as the PAFT Manager with an increased allowance for *this position of responsibility*. She then detailed other agreed duties. In its response, SES confirmed the part-time permanent

position, referred to the two types of duties and agreed to the increased *Position of Responsibility allowance*. The only fundamental change was from full-time to part-time. Ms Peterson and SES did not agree to make her position that of permanent PAFT Manager. That is clear from the words used in the exchange and is confirmed by an understanding of the background.

[40] There was a further change in the work hours in October 2000 initiated by Ms Peterson. The letter dated 25 October 2000 referred to Ms Peterson's PAFT Manager role as a fixed term and gave the reason for that presumably to comply with section 66 of the Employment Relations Act 2000. Ms Peterson's evidence is that she did not recall receiving the letter but I accept it was sent and that she probably did receive it. Ms Peterson's employment was never for a fixed term in the sense that the employment would terminate (wholly or partly) by effluxion of time. The letter described (rather than changed) the existing basis on which Ms Peterson was performing the PAFT Manager duties – for a period of time limited to the duration of SES's contract. It is unimportant that Ms Peterson did not sign and return a copy of the letter.

[41] Under the Employment Contracts Act 1991, SES and Ms Peterson could negotiate individual terms provided they were not inconsistent with the Field Staff CEC. The provisions in the Field Staff CECs regarding *Additional Responsibilities* are not identical but at whatever point in time one looks, the individual terms agreed by SES and Ms Peterson were not inconsistent with the applicable CEC. The first CECs provided a list of responsibilities but made it clear that they were examples only. The simplified provision in the subsequent CECs also covered the arrangement described by SES as a *Position of Responsibility allowance* in December 1998. Conversely, Ms Peterson's suggestion that the \$3,000.00 merged with and became indivisible from her salary is inconsistent with the CECs' provision of specific salary scales.

[42] The parties did not treat Ms Peterson's employment as surplus to the needs of SES nor should they have done so when the PAFT Manager role ended. All, rather than part, of Ms Peterson's time became devoted to performing duties as a psychologist. The surplus staffing provisions (including the equalisation allowance) of the Field Staff CEC did not apply in that situation. It is unfortunate that Ms Peterson developed an expectation that she might receive the equalisation allowance but in her situation she never became entitled to it.

[43] Having paid Ms Peterson an allowance as provided in clause 3.5 of the Field Staff CEC while she performed the additional responsibility of PAFT Manager, SES was entitled to cease making that payment once that responsibility ended. That is all that happened here and I find that SES did not breach any obligation owed to Ms Peterson by ending the payment. SES (and Ms Peterson) put different labels on the payment at different times but that did not change its character as a payment made pursuant to the Field Staff CEC while Ms Peterson was performing additional responsibilities.

[44] While Ms Peterson knew in July 2001 that the allowance would end, part of her complaint is that she was not formally advised until she received the relevant pay slip. Information provided after the investigation meeting suggests that it might not have been until early September that she received the relevant payslip. Arguably, a grievance claim on that basis was raised within 90 days of it coming to Ms Peterson's attention. However, that complaint cannot constitute an unjustifiable disadvantage personal grievance because the cessation of the allowance derived solely from the application or operation of the Field Staff CEC: see section 103 (3) of the Employment Relations Act 2000.

### **Conclusion**

[45] For the foregoing reasons, I dismiss Ms Peterson's claims.

[46] Costs are reserved. If Ms Peterson and SES cannot agree, SES may lodge and serve a memorandum within 21 days and Ms Peterson may lodge and serve a reply within a further 14 days. I will then determine costs. Both counsel commented about costs in submissions but at this point I am not persuaded of the cogency of those comments.

Philip Cheyne  
Member of Employment Relations Authority