

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 127
5400029

BETWEEN LUDMILA SOBIECKA
 Applicant

A N D CANTERBURY DISTRICT
 HEALTH BOARD
 Respondent

Member of Authority: G J Wood

Representatives: Caroline Mayston for Applicant
 Penny Shaw for Respondent

Investigation Meeting: 7 May 2013 at Christchurch

Submissions Received: 5 May 2013 from Applicant
 7 May 2013 from Respondent

Date of Determination: 28 June 2013

DETERMINATION OF THE AUTHORITY

[1] The applicant, Ms Lud Sobiecka, claims that she was unjustifiably disadvantaged by a breach of contract by the respondent (the Board or the DHB) when it failed to pay her redundancy compensation when her employment ended in 2012. The Board claims that Ms Sobiecka was not entitled to redundancy compensation because she had declined an offer of employment that was on terms that were no less favourable than her existing conditions of employment, and were in the same capacity as that in which she was employed by the Board.

[2] The parties were subject to a multi-employer collective employment agreement negotiated between the Board, other Boards and Ms Sobiecka's union, the PSA. There were comprehensive clauses dealing with the management change under

the collective agreement. A number of options were provided for in the event of a restructuring. The options constituted reconfirmation of a position/reassignment; attrition; redeployment; leave without pay; retraining; enhanced early retirement and severance. Amongst other things the parties were obliged to “*use their best endeavours to reach agreement on which is the most appropriate option. The aim of all parties is to minimise the use of severance*”. Severance was thus to apply where “*the employer is not able to exercise any of the above options*”. In the case of severance, redundancy compensation would be paid according to a 6+2 formula.

[3] Clause 1.13 of the agreement states:

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.*

[4] Ms Sobiecka is a remarkable immigrant to New Zealand. Now aged 64, she lived most of her life behind the Iron Curtain. She was born and educated in Russia. While at University obtaining an economics related degree, she met her husband, who was Polish. She left Russia soon after gaining her degree to live with her husband in Poland, even though she could not speak or write Polish. She learnt to write and speak Polish in Poland but still managed to obtain and hold down senior jobs in Poland before immigrating with her husband to Australia in 1985. Again she moved to a country with no formal teaching in the language.

[5] Ms Sobiecka was divorced in 1988 with her husband returning to Poland. She was to bring up two children on her own. She then shifted to New Zealand in 2001 where she got a job at the Canterbury DHB. She later became a permanent part-time employee working in the Clinical Records Department. While there Ms Sobiecka utilised her planning skills to successfully reorganise a significant part of the way the records system operated in the DHB. However, Ms Sobiecka’s evidence was that she

was never confident speaking English and had little contact with patients or other medical staff.

[6] Ms Sobiecka was employed as a Clinical Records Clerk. She was required to have functional relationships with people in her Department, all hospital services and staff, all persons requesting clinical records and external service providers. Her job description contained the following principle objectives and key performance tasks:

To provide a complete clinical record, or part thereof, when requested to facilitate in the provision of patient care, research and audit.

PERFORMANCE TASKS

- a. Provide retrieval and supply of clinical records to health care providers in a timely and efficient manner;*
- b. Maintenance and storage of the clinical record;*
- c. Communicate effectively both within team and externally;*
- d. Maintain own levels of skill and effectiveness in relevant areas;*
- e. Assist in staff training, both existing and new staff;*
- f. Contribute to effective departmental management and work effectively within the team;*
- g. Quality and administration;*
- h. Minimise duplicate registrations.*

[7] Her core tasks in her job description consisted of filing, sorting, record pulling, record making, reception and record delivery collection. However, Ms Sobiecka's two main roles while employed by the DHB were sorting the mail and filing, if no-one else was available to do the filing. She did answer phone calls from time to time. No concerns were ever raised to her about her telephone skills, although she did feel deficient in that area.

[8] For the last 7 years Ms Sobiecka's manager was Ms Karen Comber, the Manager of Clinical Records. Ms Sobiecka was a good performer and Ms Comber never received any complaints from anyone in or outside the team about her communication skills, or for any other reason.

[9] In 2012 the DHB decided to restructure the operation of the Clinical Records Department so that all staff would be required to work the full range of duties in their job descriptions, as well as full time over a 24/7 roster. Consultation over this proposal took place in August/September 2011. Ms Sobiecka made no submissions about the proposals. However when the decision was made that 8 hour rotating shifts would be brought in, Ms Sobiecka indicated that she could not work those hours for personal reasons. This was not surprising given that she had only ever worked 20 hours per week for the District Health Board.

[10] The DHB called a meeting with Ms Sobiecka and she was given the option of working five 8 hour shifts per fortnight, or to seek redeployment over the course of the next three months. Ms Sobiecka elected to seek redeployment, but wanted the period for that search to take place to be extended to five months. The DHB did not agree and advised that the three month period would commence from 28 November 2011. Ms Sobiecka also sought severance if an alternative position could not be found for her. Even though Ms Sobiecka had been offered a redeployment offer, namely half time hours, the DHB agreed to severance in the event that she could not be redeployed.

[11] It was later agreed in a meeting with Ms Sobiecka on 27 November 2011 that that period would end on 29 February 2012.

[12] At a meeting on 14 December 2011 Ms Sobiecka confirmed that the end date for redeployment options would be 29 February, even although Ms Comber had offered to extend that period until 14 March. This process was repeated on 4 January 2012, when Ms Sobiecka informed Ms Comber that she was having to have back surgery and would not be able to return to work until the end of the redeployment period. Again, Ms Sobiecka declined the DHB's suggestion that the timeframe could be extended given her absence for surgery, but Ms Sobiecka did indicate that she could attend work to discuss any opportunities that may arise even although she was away on sick leave.

[13] By 10 February 2012 the DHB had organised a new redeployment opportunity for Ms Sobiecka to consider. The role identified was to be worked Monday to Friday, 20 hours per week, as was Ms Sobiecka's existing job. The job was as a *Double Registration Clerk* for a fixed term period ending in 2014. The focus of the job was on investigating and managing duplicate NHI registrations. The Ministry of Health

had identified for each different Health Board a number of potential double registration numbers for patients, which it wanted the Boards to resolve, usually by merging the two patient records where they related to the same person. There was a significant backlog of work required on these lists in the Canterbury District Health Board.

[14] The key tasks of the job were to:

- *Complete the investigation and merge of all duplicate NHI numbers;*
- *Ensure robust reporting systems to monitor status of double registrations and monitor impact of remedial work are up to date;*
- *Provide support to the data integrity coordinator as directed by the Clinical Records Manager.*

[15] The relationships required to be had with other people were broad based. Essential qualifications and experience included clinical records experience and excellent written, verbal and inter-personal communication skills.

[16] Ms Comber rang Ms Sobiecka and explained the position to her in basic terms. Ms Sobiecka indicated that the role was not suitable because it was fixed term and she wanted to retire when she reached 65 in August 2013. Her attitude did not change even when Ms Comber advised her that the contract end date could be fixed to the same date she wanted to retire.

[17] Because of her surgery Ms Sobiecka was unavailable for a meeting about this role until 27 February. At that meeting another role was suggested for her as well. However that role was unsuitable, because it was only for 16 hours per week instead of 20.

[18] At the meeting on 27 February Ms Sobiecka declined the 0.4 role because of insufficient hours, and she refused to consider the fixed term role because she wanted a permanent position. That was her only reason for declining the position.

[19] At the meeting Ms Comber gave Ms Sobiecka a bunch of flowers from the staff, together with a card, because of her surgery. As Ms Sobiecka's last day of employment was only two days later, she and Ms Comber took the opportunity to fill in her leaving form, and also the necessary details for the calculation of severance.

[20] The next day managers in the DHB considered Ms Sobiecka's position and sought to amend the half time job offer it had previously made, by making the duplicate records clerk a permanent position, to be titled "Data Integrity Clerk". Having considered the degree of the backlog and the likelihood of duplicate registration remaining an on-going issue, the DHB believed there was a sustainable case for the need of such a position – demonstrated to be true in the ensuing year, with two full time redeployed records staff continuing to successfully carry out the work.

[21] The other change to the previous position was that excellent written verbal and interpersonal communication skills had been shifted from essential qualifications and experience to desirable ones.

[22] Ms Comber rang Ms Sobiecka to talk about these changes and Ms Sobiecka's response was she thought she had finished up already. She was informed by Ms Comber that the redeployment period did not conclude until the 29th, and asked her to a meeting. This meeting was confirmed by email, but Ms Sobiecka was not sent the relevant amended job description. Ms Sobiecka was unable at such short notice to get representation for the meeting, but it proceeded anyway without complaint by her.

[23] Prior to the meeting she went to an advisor in Human Resources and told her that her redeployment should have finished on 18 February, even although she had agreed to 29 February and had previously sought a longer period. She also said that as she had done her exit form and collected her flowers, the 27th had been her last day of employment. She was advised that 29 February had been agreed and was noted on the exit form as her last day of work, which Ms Sobiecka accepted.

[24] At the meeting the job descriptions for both positions were made available to Ms Sobiecka, but I accept that she did not read them at that meeting. She once again refused the job in the respiratory department because it was only 16 hours per week. Ms Sobiecka also declined the full time data integrity role because telephone work and writing reports were beyond her, because of her difficulties with the English language. Ms Comber confirmed that report writing had been removed from the previous job description and that the DHB could look at removing the need to make telephone calls. Ms Sobiecka remained adamant that she could not accept this redeployment opportunity. Ms Comber responded that she would be given training in the areas she had not done before, and Ms Sobiecka was also again told that the telephone component could be taken out.

[25] Ms Sobiecka maintained that she could not do a job of that nature and was declining the offers of a position. She was then advised if she chose to decline redeployment, she would be deemed to have resigned and not be entitled to severance. Ms Sobiecka was also advised that she did not have to make a decision immediately and that her employment would be extended to give her time to consider the offers.

[26] Ms Sobiecka responded by email the next day that she could not do the position, because of the requirements for excellent written verbal and interpersonal communication skills and for liaison with various other people, due to her English language problems.

[27] The District Health Board responded on 2 March advising her that the opportunities remained on offer until 7 March, but that if she chose to decline the opportunities she would be deemed to have resigned and not be entitled to severance. Ms Sobiecka remained adamant that she would not accept the positions.

[28] Ms Sobiecka raised an employment relationship problem through the PSA, which has remained unresolved despite mediation and other efforts to resolve the matter.

[29] The key for interpreting the management of change clause is its aim, which is to minimise the use of severance. Redeployment is a significant option and it provides for training where there may be any skill deficiencies amongst the staff affected by change. It also can even apply where a lesser salary is involved. Severance only applies where "*the employer is not able to exercise any of the above options*", which obviously includes redeployment. This aim is supported by clause 1.13 whereby the DHB is not required to pay compensation for redundancy when an employee declines an offer 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.

[30] Ms Sobiecka clearly had the skills and ability to do the job of a part-time data integrity clerk. She has never disputed that and a simple analysis of her life history shows that she is a competent employee who is also highly adaptable, flexible and able to take on new challenges. Thus while she may not have had specific experience in the specific role of data integrity, she was quite capable of doing that work and she acknowledged the same.

[31] It was not a condition of Ms Sobiecka's employment that she did not have to deal with other members of staff, or even people outside of the DHB in her old role. It was clear that she was not required to do written reports in the proposed new role and I am satisfied that her communication skills were quite satisfactory for the new role, particularly if further training was provided and undertaken, for all the reasons given above, and in particular her work and personal history.

[32] There is no doubt that the new 0.5 records role was effectively in the same capacity as Ms Sobiecka's existing job. She would have remained in the same department and would still have been a clerical officer in the records area. These conclusions are underpinned by the success that the other two people redeployed into it have made of the job. In summary, Ms Sobiecka's terms and conditions of employment were not going to be made less favourable to her, and it is my objective assessment that she was more than capable of adjusting to any changes in the role which was in the same capacity.

[33] There is an issue about the lateness of this job offer, veritably made at the eleventh hour, namely three hours before she was due to finish employment and two days after what she had expected to have been her last physical day at work. However, I accept that the DHB is under a duty to pursue redeployment options right throughout the redeployment period, and for it to do otherwise would constitute a serious breach of duty to any employee who is entitled to consideration for redeployment. I accept that Ms Sobiecka was thrown by this last minute offer, in the sense that she had already made her mind up that she had finished work. However, that does not obviate the obligations on both parties to minimise the use of severance, and redeployment is a major option in this regard.

[34] I accept accordingly that Ms Sobiecka was, as a result of the above, adversely affected by a lack of time to get a representative for the final meeting (although she did not ask for one), that she had only had a matter of two or three hours to accept or reject the offer, and that the DHB was not entitled to unilaterally extend her redeployment period to resolve that issue.

[35] In all the circumstances of this case, however, I conclude that these deficiencies were not sufficient so as to lead to a lack of justification of the employer's actions, being actions that in the circumstances of things, if wrong, were minor and did not result in Ms Sobiecka being treated unfairly. Furthermore, the

DHB's actions were not in breach of the parties' employment agreement. Ms Sobiecka had been well aware since 10 February of the effective nature of the proposed 0.5 position. Since then it had been converted to a permanent position as she had requested, and her concerns about communication, which ironically had not been communicated to the DHB until the last minute, had been taken into account by the shift of communications skills from essential to desirable qualifications. In addition, the DHB had offered to look at whether Ms Sobiecka would need to contact people regularly as part of the job.

[36] Despite all this, and notice that Ms Sobiecka stood to lose her entitlement to severance as a result of her decision; she rejected the job straight away. For all the reasons given above, she was not entitled to do that. I therefore dismiss her claims.

Costs

[37] Costs are reserved.

G J Wood
Member of the Employment Relations Authority