IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 125
5340817

	BETWEEN	YVONNE TAIA-HEKA Applicant
	AND	CARTER HOLT HARVEY LIMITED Respondent

Member of Authority:	Dzintra King
Representatives:	Helen White, Counsel for Applicant David France, Counsel for Respondent
Hearing:	7 March 2012
Determination:	11 April 2012

DETERMINATION OF THE AUTHORITY

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[1] The applicant, Ms Yvonne Taia-Heka, says she has been unjustifiably dismissed by the respondent, Carter Holt Harvey Limited ("CHH" or "the company"). The applicant claims compensation and the payment of a redundancy benefit. She wants to be reinstated to her previous position.

[2] The respondent denies the applicant has been dismissed or made redundant.

[3] Ms Taia-Heka commenced employment with CHH in March 1985 and since then has worked in the Packaging Division. Until August 2010 she worked as a Sample Maker, a job she had been doing for about fifteen years. It was paid at the rate of $18.81 per hour and Ms Taia-Heka was a permanent dayshift worker.

[4] In July 2011 CHH discussed making the position redundant. She was told that the work she was doing would be shared among the existing staff.

[5] Ms Tai-Heka did not want to lose her job. She was offered a new role on the nightshift by way of letter dated 14 July 2010. It was at a reduced hourly rate but there were shift allowances that meant there would not be an overall loss of pay but it was a more basic position with the disadvantage of working nights.

[6] Ms Taia-Heka accepted the position.

[7] She believes that the role of Sample Maker has continued as another worker, Mr Charles Cyfert, is working completing the factory orders and pallet processing that she was doing and doing all the sample making she was doing. She claims he does the sample making part of the role as overtime and that instead of the work being shared by other employees it has simply been given to Mr Cyfert.

[8] Mr Michael Guy, the General Manager of CHH's Paper Bag Division, said that in July 2010 the company carried out a restructure of the Paper Bag business and a number of employees were made redundant.

[9] There were three key elements to the sample making role: sample making, production services and training. Sample making involved making samples, production services involved distributing production orders to the factory and training also included induction.

[10] Since 2008 there had been a reduction in the number of samples required in the paper bag business. In 2010 an average of three were made per week. That averaged out at 1.5 hours per sample and one hour of work a day for a Sample Maker over a five day week. The duties of reviewing production orders and collection of samples occupied three to three and a half hours a day. CHH already employed training staff and there was no identifiable need for training to be done by a Sample Maker. The functions were to be redistributed amongst existing staff.

[11] The proposals were set out in a consultation pack provided to the applicant on 7 July 2010.

[12] Following receipt of that, the company received a request from the Northern Amalgamated Workers Union ("the Union") seeking details of the estimated

redundancy calculation for Ms Taia-Heka. The applicant was advised that if she was unsuccessful in obtaining another position the redundancy payment would be $62,766.00.

[13] On 11 July CHH received feedback regarding the proposal. No alternatives were suggested.

[14] On 12 July Mr Guy met with Ms Taia-Heka to discuss the feedback she had provided. Present at the meeting were Mr Ray Bianchi, the Union Secretary, Mr Roger Reid and Ms Lindi Anderson, both union delegates, and the Human Resources Manager at the time, Ms Rachel Devlin.

[15] Mr Guy explained that Mr Cyfert and Mr Quenten Brown who were employed on the day shift and were already doing some of the sample making responsibilities would carry them all out once the Sample Maker position was disestablished. Mr Cyfert was employed as a trainer and was also doing sample making because of his technical knowledge and Mr Brown was employed as a packaging technologist. Production services was going to be automated and distributed by an existing employee and the company already had full time trainers: My Cyfert and Mr Shaun Palaneippan. Ms Taia-Heka was advised that a decision had been made to disestablish the role.

[16] She said she did not want to be made redundant and asked if she could be considered for a vacancy she was aware of on the night shift. Mr Bianchi advised that the role was a Machine Attendant Bundler ("MAB") role. The fact that it would be at a lesser rate of pay was discussed. Ms Taia-Heka was interested in the role.

[17] Mr Bianchi asked whether if she was transferred to the MAB role and was made redundant within a five year period the redundancy calculation could be based on her current rate of pay.

[18] On 12 July Mr Guy wrote to Ms Taia-Heka setting out the pay for the night shift role and confirmed that the Sample Maker role was to be disestablished. He asked that she indicate her interest in the night shift role by 9am on 14 July.

[19] Ms Taia-Heka advised she was interested.

[20] Mr Guy wrote a letter headed *"Variation to Employment Agreement"* confirming that she had accepted the night shift role. He acquiesced to the Union's request regarding the five year period should a redundancy occur. The start date was to be 15 August.

[21] She was invited to take independent advice and advised that before the transfer to the new role could take place she would need to sign her agreement to the terms set out in the letter.

[22] The signed letter was returned on 19 July by her husband.

[23] On 20 July Mr Bianchi wrote saying that the applicant had accepted the role without prejudice and that CHH could not reduce her basic hourly rate.

[24] On 23 July Mr Guy wrote to Mr Bianchi saying he did not accept the without prejudice basis or that there was any issue with the applicant taking on her new role. He said Ms Taia-Heka could have another week to decide whether or not she would accept the job on the terms discussed.

[25] Ms Taia-Heka did not advise that she no longer wanted the job.

[26] However, on 18 August a further letter was received from the Union claiming that the reduction in salary was in breach of the Collective Agreement and that Ms Taia-Heka had been required to agree to the terms contained in the 14 July letter under duress. Mr Guy emailed Mr Bianchi saying CHH did not accept those claims.

[27] Clause 41 of the CEA provides *"Subject to clause 40.3 no employee will have their hourly rate reduce through the introduction of this agreement."*

[28] The applicant says her position still exists with the majority of the tasks being carried out by Mr Cyfert from her former office. She says she could have met a need for flexibility. Sample making had not been the only component of her role for some time.

[29] The applicant says that if the redundancy is genuine she is entitled to the payment of redundancy compensation

[30] Ms Taia-Heka claims remedies for a personal grievance alleging that the redundancy was not genuine. However, the respondent says Ms Taia-Heka has not raised a personal grievance.

[31] A personal grievance is referred to in the Statement of Problem. It is said to be an unjustified action due to being treated as redundant by the respondent but no redundancy compensation being paid according to the redundancy provisions of the collective agreement. The Statement of Problem also claims that the former position continued and no genuine redundancy arose. At no stage in the Statement of Reply does the respondent say that a personal grievance has not been raised.

[32] Mr Bianchi's letter of 20 July 2010 does not refer to a personal grievance but claims that the company's actions are contrary to clause 41 of the CEA and refers to a dispute. His 18 August 2010 letter refers to a dispute under s129(1) Employment Relations Act, being a dispute about the interpretation, application or operation of an employment agreement.

[33] The respondent gave implied consent to the personal grievance: *Phillips v Net Tel Communications Ltd* [2002] 2 ERNZ 340.

Was the Sample Maker position disestablished?

[34] The applicant's view is that the position still exists as other employees are carrying out the role. It is evident that there was no full time position as Sample Maker. The evidence was that the Sample Maker responsibilities averaged out at three samples a week or one hour a day over a five day period. The other work done by her including reviewing production orders; and the distribution and collection of samples provided for between three and three and a half hours a day. Those responsibilities were to be automated and distribution would be done by an existing employee. Any training was being conducted by other employees employed as trainers.

[35] At the hearing the applicant raised for the first time the issue that she should have been permitted to compete for the role. It is clear that other employees are performing the duties that were Ms Taia-Heka's. However, that does not mean that the role of Sample Maker still exists.

[36] Ms Taia-Heka was not competing with anyone for a "*new position*". There was no new position. There was a reallocation of duties.

Is Ms Taia-Heka entitled to redundancy compensation?

[37] Ms Taia-Heka was not made redundant. She was not surplus to requirements. The intent of the agreement is that the parties agree that it is preferable that individuals are encouraged to remain in relocated employment rather than be paid redundancy pay.

[38] No notice was given to Ms Taia-Heka. Pursuant to clause 3b all redundant workers are to be given 6 weeks' notice.

[39] Appendix A clause 1 refers to "*relocated employment*". The applicant seeks to rely on the provisions of Appendix A. Clause 4 refers to alternative employment within the Printpac-UEB Group. That provides for transfer to a suitable alternative position in another company with the agreement of the employee and provides that that the wages and minimum conditions shall be no less favourable. There are express provisions in Appendix A relating to transfer to another company but no redeployment provisions within the company. The fact that such provisions were not negotiated is unfortunate.

Was Ms Taia- Heka entitled to be paid at the hourly rate of the disestablished role upon transfer to the night shift?

[40] The applicant contends that the reduction of her salary contravenes clause 41. This provides:

> *41. <u>Savings</u>*
> *41.1 Subject to clause 40.3 no employee will have their ordinary hourly rate of pay reduced through the introduction of this agreement.*

[41] Clause 40.3 provides:

> *Provided at least 70% of those employees whose conditions of employment are to be varied agree to the variation the relevant clause or clauses of this agreement shall…*

[42] The applicant's hourly rate of pay was not affected by the introduction of the CEA; nor was it caused by the introduction of the CEA.

[43] The agreement to alter her salary was a result of an individual negotiation between Ms Taia-Heka and her employer and Ms Taia-Heka was represented by her union and a very experienced union advocate throughout the process. There was no variation of the terms of the CEA.

Was Ms Taia-Heka subjected to oppressive behaviour?

[44] The Statement of Problem at para 2f states that *"The Respondent unreasonably required the Applicant to accept a less attractive and lower remunerated position as an alternative to being made redundant."* At para 2k it is claimed that the bargaining was unfair as she was induced to enter into the agreement by means that were oppressive, included duress and provided for undue influence.

[45] It is clear that Ms Taia-Heka was caught in an unpleasant and difficult situation. Either she accepted a lower paid night shift position or she would be made redundant and paid redundancy compensation.

[46] While I readily acknowledge that Ms Taia- Heka felt she had very little choice, nonetheless there was a choice and she was the person who made it.

[47] Ms Taia-Heka herself raised the possibility of a move to the nightshift position at the meeting of 12 July 2010. A negotiation followed which included an agreement by the respondent to pay redundancy compensation at the previous rate of pay were she made redundant from the night shift position within the next five years.

[48] Ms Taia-Heka's position was disestablished and the disestablishment took place after due consultation during which the applicant had the assistance of her

union. The duties were reallocated among other staff and Mr Cyfert is not doing Ms Taia-Heka's job.

[49] Ms Taia-Heka does not have an entitlement to redundancy compensation as she was not made redundant. Her position was, but she agreed to transfer to another position within the company.

[50] Ms Taia-Heka does not have a personal grievance.

[51] There has been no breach of the CEA.

[52] The respondent did not engage in oppressive behaviour nor did it apply undue influence or use duress.

Costs

[53] If the parties are unable to agree on costs the respondent is to file a costs' memorandum within 28 days of the date of this determination. The applicant is to file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King
Member of the Employment Relations Authority