

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 266/07
5096970

BETWEEN JEANETTE VAN HEERDEN
 Applicant

AND FONTERRA CO-OPERATIVE
 GROUP LIMITED
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Helen White, Counsel for Applicant
 Garry Pollak, Counsel for Respondent

Investigation Meeting: 24 August 2007

Determination: 29 August 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Several employment relationship problems have arisen for the applicant Ms Jeanette van Heerden out of business restructuring being carried out by her employer Fonterra Co-operative Group Limited (Fonterra). Ms van Heerden is particularly affected by the reorganisation of laboratory services provided at various dairy factories in the upper half of the North Island, including the Waitoa site where she has worked for 5 years.

[2] Ms van Heerden has raised a personal grievance and she has invoked the statutory disputes procedure under the Employment Relations Act 2000 (the Act). She also claims that she was not paid at the correct level in the position of Panel Leader she has performed at Waitoa.

[3] Fonterra has now disestablished that position, although Ms van Heerden is able to remain in it until other arrangements have been made and implemented for her redeployment or redundancy.

[4] The dispute raised under the procedures of the Act is about the application and operation of the employment agreement between Fonterra and Ms van Heerden, insofar as it expressly provides for redeployment to any other available positions within the company in a redundancy situation. Associated with that is the personal grievance, which is a claim that Ms van Heerden has been unjustifiably disadvantaged in her employment because of the way Fonterra has so far handled her redeployment. The dispute and grievance uncovered the issue of the correct grading for Ms van Heerden's position, but that problem is otherwise separate from the dispute and the grievance.

[5] Further, an application has been made on behalf of Ms van Heerden for an order of compliance from the Authority, requiring Fonterra to observe the redeployment provisions contained in her employment agreement.

[6] It has been agreed by the parties that the personal grievance can be put on hold for now to allow the dispute to be immediately addressed. The claim as to the correct level of pay is a matter that the parties are still discussing and may yet resolve themselves.

[7] At the request of the parties an investigation meeting was held with urgency by the Authority.

The affects of the restructuring

[8] The evidence of Ms Tania Watt, Fonterra's Regional Laboratory Manager who led the review of laboratory services, was that a new structure was decided upon in May 2007 and all employees affected by the changes were informed. Ms van Heerden was one of those. Ms Watt said that although Ms van Heerden's role as Panel Leader is now redundant she has not been dismissed from her employment with Fonterra and it has been agreed that she will continue working as before while this dispute is being resolved.

Fonterra Dairy Workers Collective Agreement

[9] There is no dispute that the Panel Leader position Ms van Heerden has performed for the last few years and retains for now, falls within coverage of the Fonterra Dairy Workers Collective Agreement 2006/2007. The union party to that Collective Agreement is the New Zealand Dairy Workers' Union Inc (the DWU). Ms van Heerden has continued her membership of the DWU, which has strongly supported her in this dispute.

Panel Co-ordinator position at Waitoa

[10] The review of laboratory services established a new position at Waitoa called Panel Co-ordinator. It is a matter of difference between the parties and also the DWU as to whether Panel Co-ordinator is in substance the same as the Panel Leader position which has been disestablished.

[11] The Panel Co-ordinator will have responsibility for "hiring, firing and disciplinary" in relation to the team of Panellists to be managed by the incumbent. That position also has responsibility for outcomes, meeting Key Performance Indicators, planning in the medium to long term range and managing a budget of some \$500,000. The leadership role is stated to extend beyond the Panel and into the wider Fonterra management, with a range of internal and external relationships required.

[12] By contrast, the Panel Leader Waitoa has had no hiring and firing responsibilities, has been responsible for planning in only the short to medium term range and it has not been a role extending beyond the management of the panellists. The range of relationships required to be maintained within the wider Fonterra management has been a relatively narrow one.

[13] For the purposes of this dispute, I am satisfied that the two positions described in the written material are different in concept.

[14] Ms van Heerden wishes to take up the position of Panel Co-ordinator at Waitoa and Fonterra has been considering her for appointment to it.

[15] The "hiring and firing" component of the Panel Co-ordinator position has given rise to a further matter of significance in this dispute. Under Clause 2.4.1 of

the Collective Agreement, which applies to Ms van Heerden and her Panel Leader position, certain types of work and groups of workers are excluded from coverage. The exclusions expressly extend to “Managers who are responsible for the employment and dismissal of workers.” On that basis the Panel Co-ordinator position is excluded from coverage by the Collective Agreement.

Selection of appointee to new Panel Co-ordinator position

[16] As well as Ms van Heerden, another employee affected by the recent restructuring has notified Fonterra of a wish to be appointed to the position of Panel Co-ordinator at Waitoa. That employee (B) has been a Panel Leader at another Fonterra dairy factory, located some distance from Waitoa. Although performing the same or very similar role to Ms van Heerden, B has not been a member of the DWU and therefore has not been employed under the terms and conditions of the Collective Agreement.

[17] There is no dispute that the appointment of either Ms van Heerden or B to the new position would in the ordinary sense of the word be a redeployment of the appointee.

[18] For Ms van Heerden it has been submitted that her redeployment to the new position is a matter of right under the Collective Agreement, because the prescriptive provisions of clause 10 of the agreement lead to that result.

[19] B’s Individual Employment Agreement, a copy of which was provided by Fonterra upon the direction of the Authority, does not contain anything like the comprehensive provisions that are set out in the Collective Agreement at clause 10 under the heading “Redeployment and Redundancy.” The provisions of B’s Agreement that apply in the event of redundancy require the giving of a certain period of notice and the payment of a specified amount of compensation to B in the event of redundancy. The provisions also exempt Fonterra from having to give notice and pay redundancy compensation to B in circumstances where B has been offered suitable alternative employment, provided that is on terms and conditions generally no less favourable than B’s existing terms and conditions.

[20] In addition to the express terms of B’s Individual Employment Agreement, there is a written Fonterra policy on redundancy which has been published to all staff. It provides that where reorganisation results in positions becoming surplus to

Fonterra's needs, consideration will be given to alternatives to redundancy such as retraining, redeployment or the transfer of employees within the company. It also provides;

Where redeployment is feasible, permanent employees will be offered suitable alternative employment with appropriate training. Where redeployment and other options are not feasible, permanent employees concerned will be made redundant.....

[21] The terms and conditions of employment of Ms van Heerden and B in a redundancy situation as written in their respective agreements are obviously not the same and are not necessarily reconcilable. Fonterra, in the spirit of the Collective Agreement, the Individual Employment Agreement and the general Redundancy policy, views redundancy as a last resort and has been actively engaged in trying to redeploy both Ms van Heerden and B. Since they both wish to be appointed to the Panel Co-ordinator position at Waitoa, Fonterra has required them to submit to a selection process for that position. The process is the same for both. This is because Fonterra regards even-handedness as necessary to avoid preferring one employee over the other in the retention of their employment and thereby breaching the prohibition against preference at s 9 of the Act.

[22] Fonterra has also suspended the operation of the Collective Agreement provisions as they apply to Ms van Heerden in a redeployment situation. The issue at the heart of this dispute is whether Fonterra is able to do that.

Application of Collective Agreement to Ms van Heerden

[23] I find that Fonterra has not approached the question of redeployment of Ms van Heerden correctly. In considering opportunities for her continued employment with Fonterra, what is required is for the company to focus on the express terms and conditions of the Collective Agreement as they apply to the circumstances of Ms van Heerden. In relation to B, the company must do the same except that it is the provisions of B's Individual Agreement and the Fonterra staff policy that are to be focused on. There is no general overriding principle of equality of treatment, unless it happens that the Collective Agreement and the Individual Agreement contain identical provisions, which in this case they do not.

[24] Fonterra has apparently acted under the belief that to apply Ms van Heerden's provisions in relation to redundancy and redeployment will confer on her a preference in retaining employment, and Fonterra believes that this will be because she is a member of a union.

[25] While preference given for that reason is a breach of s 9 of the Act, s 9(2) makes it clear that there is no breach of the Act "simply because an employee's employment agreement or terms and conditions of employment are different from those of another employee employed by the same employer."

[26] I consider that it is not the fact that Ms van Heerden has chosen to belong to a union, the DWU, which has led to her terms and conditions of employment being different from B's in relation to redeployment. The difference arises because Ms van Heerden's particular terms and conditions were negotiated for her by her union, whereas B is assumed to have negotiated her own. Ms van Heerden's status as a union member gives her access to those terms and conditions negotiated by the union (and agreed to by the employer). Any betterment to Ms van Heerden from her terms and conditions is a product of bargaining rather than simply recognition of her union membership.

Clause 10 – Redeployment and Redundancy

[27] Fonterra has acknowledged that when it announced to Ms van Heerden that she was affected by the review or restructuring, she fell within at least the introductory provisions of the Redeployment and Redundancy section of the Collective Agreement. In particular the company acknowledges that at that time it was bound to have regard to clause 10.1.3, which provides:

.....whenever ... changes occur that displace the jobs or substantially affect the terms and conditions of employment of any workers to the worker's detriment, then every endeavour must be made to redeploy the workers to an alternative position in accordance with the redeployment clause set out below.

[28] The company accepts that as soon as Ms van Heerden became affected by the restructuring, it was required to make every endeavour to redeploy her to an alternative position, in accordance with clause 10.1.3.

[29] Clause 10 does not stop at sub-clause 1 but extends over 3 further sub-clauses. Clause 10 in its entirety provides for a process which may entail a number of steps to

be taken by the employer incrementally over a period of time. These steps include giving consideration to particular alternative possibilities for redeployment, and conducting trial appointments to positions of redeployment.

[30] Ms van Heerden is entitled to have the Redeployment and Redundancy provisions of the Collective Agreement applied to her fully and not just partly, according to their true meaning and intent and for as long as they sensibly have application to the circumstances. This is made clear by clause 9.4 of the Collective Agreement which under the heading of Redundancy provides:

Matters concerning redundancy or redeployment of any worker(s) covered by this Collective Agreement shall be dealt with in accordance with clause 10.

[31] Fonterra has suspended the operation of clause 10 at sub-clause 10.1, because it is exploring with Ms van Heerden her wish to be appointed to the Panel Co-ordinator position. Fonterra's view is that because the Panel Co-ordinator position is not covered by the Collective Agreement then the redeployment provisions cannot continue to operate beyond clause 10.1 while the selection process is underway. Fonterra requires Ms van Heerden and B to submit to a uniform selection process.

[32] The company argues that clause 10.2 and the succeeding clauses of the Collective Agreement only apply where any prospective position of redeployment is within the coverage of the Collective Agreement. There is no dispute that the Panel Co-ordinator position is expressly excluded from that coverage.

[33] The Authority is unable to interpret the provisions in the way Fonterra has. The company has acknowledged that although Ms van Heerden's position of Panel Leader is redundant, she has not been dismissed but continues to perform that role in the meantime, pending resolution of this dispute. I find that as she is yet to be appointed to any other position she has not been suspended in limbo or left in a no-man's land between employment agreements but remains for now subject to the terms and conditions of employment that are provided in the Collective Agreement. These must continue to be applied to her, at least until she is appointed to any other position. If that position is not one covered by the Collective Agreement, the terms and conditions of employment of the new position will take effect on an individual basis at that point, but they cannot be applied in anticipation of appointment so as to exclude her from the rights and entitlements she currently has.

Consultative Committee

[34] I find that the provisions of clause 10 relating to the formation and role of the Consultative Committee, comprising representatives of the employer and the DWU, does not detract from the effective application of clause 10 in its entirety to Ms van Heerden. It is argued for Fonterra that if Ms van Heerden was to be appointed to the Panel Co-ordinator role by an application of clause 10.2 of the Collective Agreement, the Consultative Committee would cease to have a proper function in relation to supervision of her performance in that position.

[35] I accept that if Ms van Heerden was given that role, at the moment of her appointment her terms and conditions of employment would be adjusted with immediate effect and she would no longer be performing a position within the coverage of the Collective Agreement. The Consultative Committee is given a function to review the performance of redeployed workers at various intervals – one, two and approximately three months. Clearly in that event those reviews could not be carried out by a group of people purporting to be the Consultative Committee convened under clause 10.1.4 of the Collective Agreement, but in my view there is nothing to prevent the same group of people carrying out the same function *extra* the Collective Agreement, especially if that is done with the consent of Fonterra and Ms van Heerden.

[36] If, after appointment to the Panel Co-ordinator position, for some reason Ms van Heerden became dissatisfied with the DWU and resigned her membership, she could if she wished validly object to being reviewed by the Consultative Committee as constituted under clause 10. This eventuality would not, however, leave Fonterra without a means of carrying out a performance review. Generally an employer is entitled at any time to appraise the performance of its employee, provided it acts reasonably. It would be perfectly reasonable for Fonterra to simply conduct its own review of Ms van Heerden's performance, if she objected to union participation in that process.

[37] Equally, Ms van Heerden could be redeployed under clause 10.2 to a position within coverage of the Collective Agreement but then at that point for some reason resign her union membership. She could then validly object to the Consultative Committee reviewing her performance. This would not prevent Fonterra conducting a performance appraisal of some sort using a differently constituted review panel. I

find that the provisions of clause 10.2 are not unworkable in a situation where the position of Panel Co-ordinator is one that she could be redeployed into.

[38] I find that Clause 10 is to be fully applied to Ms van Heerden by Fonterra when considering her for redeployment to the Panel Co-ordinator position. It is quite clear from the words of the introductory clause, 10.1.3, that Fonterra must make more than just some endeavour to redeploy Ms van Heerden; it must make every endeavour, although recognising that ultimately redeployment may not prove to be attainable.

Employer's discretion as to how it redeploys

[39] Ms White for the DWU acknowledged that under clause 10.2.1 Fonterra, in making every endeavour to redeploy, has been given a discretion as to how it does this. Provided the position of redeployment remains on the same site or factory complex in which Ms van Heerden has been employed, the company may alter her duties, or it may redeploy her to a position in keeping with her level of skill, or it may redeploy her to an upgraded position while providing training to enable her to acquire new skills. The proviso overall is only that her terms and conditions of employment are not to be substantially changed to her detriment.

[40] I do not consider that the position of Panel Co-ordinator is obviously or necessarily outside the contemplation of clause 10.2.1 as being a position that could be the subject of the exercise by Fonterra of its discretion. The term "upgraded position" where used in clause 10.2.1.3, need not be given a narrow interpretation. It is a matter of degree as to whether the position of Panel Co-ordinator represents an upgrading from the position of Panel Leader. The upgrading may be a rise of more than one level while leaving common to both positions their essence as leadership or supervisory roles, although with the new position having significantly more (upgraded) responsibilities. Fonterra must however consider whether it can provide sufficient training to Ms van Heerden to enable her to upgrade her skills to perform the duties of the Panel Co-ordinator. Ample means of checking her progress in this regard is provided by clause 10.2.2, which gives the employer an opportunity release Ms van Heerden from the position if, after "approximately" three months, she is found not to be coping with the redeployment.

[41] Alternatively, Fonterra is required to consider whether Ms van Heerden has a level of skill that she has not necessarily been required to use in practice as a Panel Leader, but which is commensurate with the requirements of the Panel Co-ordinator position. If she has that skill then the company may in its discretion under clause 10.2.1 redeploy her to that position.

[42] I do not accept that the position of Panel Co-ordinator, or any other, must be given to Ms van Heerden “as of right.” Fonterra has a discretion as to how it may redeploy her, although the company has agreed under clause 10.1.3 to go the extra mile as it were, when considering the placement of Ms van Heerden in a position of redeployment. It is relevant that the Panel Co-ordinator position is also at Waitoa where Ms van Heerden works, as Clause 10.2 seems to have a particular object of preserving, where possible, a workers employment at the same worksite.

[43] I note the evidence of Ms Watt that Ms van Heerden has been found to be a suitable candidate who is eligible for the Panel Co-ordinator position. Further, Ms Watt has stated that she regards Ms van Heerden a willing able and competent applicant. Ms Watt finds though that she is torn between selecting Ms van Heerden and B, who is considered to be equally suitable, eligible and competent, for the Panel Co-ordinator role.

Determination

[44] It is therefore determined by the Authority that Fonterra will need to start afresh and consider again Ms van Heerden as a potential appointee to the role of Panel Co-ordinator, or to any other positions that she might appropriately be redeployed into. It is determined that the Panel Co-ordinator position is not precluded from being a position the subject of Fonterra’s discretion under clause 10.2.1 of the Collective Agreement. Fonterra must take the requirements of clause 10 fully into account. This applies whether any position available for redeployment is inside or outside of Collective Agreement coverage. The fresh approach will require Fonterra to keep at the front of its mind the requirement to make every endeavour to redeploy Ms van Heerden and to be strongly conscious of the possibility that training or upskilling will overcome any areas of doubt there may be with regard to Ms van Heerden’s redeployment to any position.

Compliance order

[45] Ms White for the DWU sought a compliance order against Fonterra to require it to observe clause 10.2. The DWU, perhaps with some cause, has complained that the goal posts for Ms van Heerden were shifted from time to time by Fonterra during the review exercise, but I am not required to make any finding about that. I decline to order compliance at this stage, as it seems to me the employer must be left unhindered to exercise its discretion under clause 10.2. in whatever reasonable way it can. There is nothing to prevent Fonterra from confirming the availability of a level 6 or level 7 or any other level position at Waitoa that would be suitable for Ms van Heerden, provided the company does not create a position as an act of bad faith to defeat Ms van Heerden's claim to a particular position. The company has erroneously thought that the operation of clause 10.2.1 could be suspended and now it needs to consider alternatives afresh and present any that are available to Ms van Heerden, as an exercise of the discretion under clause 10.2.1.

[46] Leave is reserved for the personal grievance of Ms van Heerden to be determined by the Authority in the future, if necessary. In that event directions will need to be obtained for the resumption of this investigation.

[47] The question of costs will be reserved for discussion between the parties. Application can be made if that is considered necessary.

[48] Leave is also reserved for the parties to apply at any time for further directions in relation to this determination of the dispute.