IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA190/10
5293715

	BETWEEN	ALAN WESTERN Applicant
	A N D	IDEA SERVICES LIMITED Respondent

Member of Authority:	Philip Cheyne
Representatives:	Tim Oldfield, Counsel for Applicant Paul McBride, Counsel for Respondent
Investigation Meeting:	16 August 2010 at Blenheim
Date of Determination:	7 October 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Alan Western worked full time for Idea Services Limited (ISL) (and its predecessor) in Blenheim as a Community Support Worker (CSW) from about 1980 until the employment ended in January 2010. Mr Western says that he was dismissed as redundant and is entitled to redundancy compensation in accordance with the applicable collective employment agreement. ISL says that it did not dismiss Mr Western but that he left the employment of his own accord for employment elsewhere.

[2] There are some contested facts to be determined, but mostly the problem concerns the interpretation and application of the employment agreement to the facts. I will start by explaining the context in which the problem arose before assessing the evidence about the termination of Mr Western's employment and considering the collective employment agreement.

Alan Western's employment

[3] Mr Western started work with IHC NZ Inc in June 1980. ISL is a company wholly owned by IHC and has provided community support for intellectually disabled

people for about five years. Staff who, before ISL commenced, had been employed by IHC doing that work, were able to transfer to work for ISL. Mr Western did so. He carried forward his service.

[4] Except as mentioned below, throughout the employment, Mr Western worked at a facility in Blenheim called Ra Maru, a vocational day base where service users would come during the day to work and later on simply to be involved in activities. The change from work to activities resulted from a new model for the care of people with intellectual disabilities. Despite the change, Ra Maru remained a non-residential facility and Mr Western worked Monday to Friday during ordinary business hours.

[5] By about 2000, Mr Western was a level 5 CSW. He had no management responsibilities but was regarded as the senior employee at Ra Maru in charge on a day-to-day basis. He and the other CSWs there were managed by a Community Services Manager (CSM) who was frequently present but not actually based at the Ra Maru facility.

[6] Under the collective employment agreement, levels 1 and 2 are recruitment and development levels, level 3 is for trained and competent CSWs and levels 4, 5 and 6 are *positions so designated by the employer, recognising the additional responsibilities required for the position*. Although the collective employment agreement provides that such additional responsibilities will be specified in writing and form part of the employee's job description, that does not appear to have been done in the case of Mr Western; or if it was done, it is no longer available.

[7] In late July 2009, the facility at Ra Maru was closed temporarily to allow for construction work on a new residential home on the same site. The service users and staff were temporarily transferred to another ISL facility in Blenheim called Riverside, but otherwise continued working as before.

The termination of Mr Western's employment

[8] Originally, ISL had intended service users and staff to return to Ra Maru after the construction work on the site ended. Joanne Farrell is ISL's area manager. She developed a proposal to close the day base at Ra Maru and for service users to attend Riverside instead. On 16 November 2009, Ms Farrell sent a memorandum to Mr Western and other affected employees setting out the reasons for the proposal, the process and a timeline. Under the heading *Process*, the memo says:

> *This proposal impacts on the staff who have hours based at Ra Maru and we will therefore be following the process laid down in clause 15 of the CEA.*

[9] Clause 15 is headed *Consultation/Redundancy/Protection of employees*. The application of the detailed provisions in clause 15 is at the heart of this problem.

[10] There is a disagreement between Mr Western and Ms Farrell about what was said when she gave Mr Western this memorandum. Mr Western's evidence is that he asked what it meant for him and where it left him to which he received an answer referring him to clause 15 of the collective employment agreement whereupon Ms Farrell left. Ms Farrell agrees that Mr Western wanted to know how it affected him personally to which she responded that she wanted to meet staff as a group to discuss the proposed closure. Ms Farrell clarified that ISL would follow the process in clause 15 and the conversation ended. It is not necessary to resolve the difference in emphasis.

[11] There was a meeting on 20 November involving the affected staff, a union representative and Ms Farrell. At the meeting, the focus for staff was on what, if any, effect there would be for their employment while Ms Farrell wanted to limit the exchange to discussion about accommodating the Ra Maru service users at Riverside. No decisions were made or announced at this meeting.

[12] Mr Western's daughter-in-law is a lawyer. He instructed her to write to Ms Farrell, which she did on 26 November 2009. To summarise, the letter mentioned the lack of information provided about the potential range of impacts on staff and referred to s.4(1A)(c)(i) of the Employment Relations Act 2000 in particular; it noted that the lack of information meant that Mr Western was not able to meaningful contribute to the consultation process about the closure proposal; and confirmed Mr Western's interest in meeting to discuss the impact on him of the proposal.

[13] Ms Farrell replied to this letter on 1 December 2009. She referred to changes in the timeline and offered to meet with Mr Western and his representative after the general staff meeting scheduled for 8 December 2009. She also noted that ISL was proceeding in accordance with clause 15 of the collective employment agreement which provided for redeployment as a first priority.

[14] The general meeting with staff occurred on 8 December 2009. Present were Mr Western, Neville Donaldson (a union official), other affected staff, Ms Farrell and

Dennis Carr (ISL's HR consultant). There is some dispute about what was said at this meeting. This is problematic because it is common ground that Mr Donaldson had a discussion with Ms Farrell and Mr Carr away from the others but introduced by Mr Donaldson as being on a *without prejudice* basis without any objection from the ISL managers. Mr Donaldson has therefore limited his evidence about that discussion while Ms Farrell and Mr Carr have given evidence of the exchanges, presumably in reliance on *Bayliss Sharr & Hansen v. McDonald* [2006] ERNZ 1058. I will return to the supposedly *without prejudice* exchanges later if need be. For present purposes, it is sufficient to note that Mr Western was offered redeployment to a part time L4 CSW position at Roger Street (70 hours per fortnight) which he did not accept. He was told that this was the only redeployment option. This was work with a single client at the client's residential address.

[15] Ms Farrell wrote to Mr Western on 18 December 2009. The letter reads:

> *Alan Western*
> *Idea Services*
> *Blenheim*
>
> *Dear Alan*
>
> *This letter follows the discussions we had at the Area Office on 7 December. You were represented by Neville Donaldson SFWU.*
>
> *I can confirm that the decision has been made to close the Ra Maru day base. This letter provides you with four weeks' notice of the closure that will take effect from 15 January 2010.*
>
> *This decision means that your position of L5 at Ra Maru is disestablished from that date. In terms of clause 15 of the CEA the first priority in such cases is to consider the options other than redundancy. I can therefore offer you the position of L4 at 6A Roger Street vocational service with effect from 18 January 2010. This position is full time 70 hours per fortnight.*
>
> *The current policy precludes payment of L5 for positions that do not have responsibility for more than one facility.*
>
> *Payment based on the calculation set out in clause 15.7 will be made for the difference between the current salary rate of L5 and the new rate of L4 as well as the reduction of hours from 80 to 70. This approximate calculation is $7,132.54.*
>
> *Please indicate if you would like to accept this offer. If you would like to discuss it further please contact me so that we can arrange a time.*
>
> *Yours sincerely,*
> *(signed)*

Joanne Farrell
Area Manager
IDEA Services
Nelson/Marlborough

[16] There followed correspondence between the Union's legal officer and Ms Farrell. On 21 December, the Union asserted that the offer of the L4 position at Roger Street for 70 hours per week was not the same or substantially the same as Mr Western's existing employment and asked whether ISL would pay redundancy compensation if it was not accepted by Mr Western in light of the Union's view that Mr Western was entitled to such payment. Ms Farrell responded on 22 December 2009 saying that the position was the same and that ISL was offering redundancy based on reduction of hours from 80 to 70 per fortnight. Reference was made to clause 15.3 of the collective employment agreement giving priority to redeployment in such situations.

[17] The Union wrote on 11 January 2010 again asking whether ISL would pay full redundancy compensation if Mr Western did not accept the offer and pointing out differences between Mr Western's existing role and that offered. That drew a response on 11 January 2010 asserting the substantial similarity of the two roles and confirming that *given we can offer Alan an alternative position in terms of clause 15 of the CEA we will not be offering Alan redundancy should he refuse the position offered*. On 13 January 2010, the Union sent an email to Ms Farrell confirming that Mr Western did not accept the position offered, asserting that ISL had given notice ending Mr Western's employment on 15 January 2010, asking for payment of his final pay, raising a dispute about Mr Western's entitlement to redundancy compensation and proposing mediation.

[18] Ms Farrell responded by email on 14 January 2010. She said that ISL had not terminated Mr Western's employment and characterised the Union's email as advice *that Alan has decided to end his employment, and has asked IDEA to attend at mediation*. Ms Farrell repeated ISL's view that a reasonable alternative had been offered with ISL wanting to discuss and address any concerns. She stated that Mr Western's non-return to work would be regarded by ISL as a resignation. Ms Farrell offered to attend mediation as soon as practicable, to pay Mr Western on his same rate and hours as previously with him performing work as per the offer, and an additional 10 hours work at another location. Ms Farrell asked for acceptance of this proposal or confirmation of Mr Western's resignation by midday.

[19] The Union responded on 14 January 2010 asserting that ISL had terminated Mr Western's employment, denying that he had resigned and declining the offer to continue his pay and hours pending mediation because *Alan has secured alternative employment starting on 18 January 2010*.

[20] Finally, Ms Farrell responded on 15 January confirming that ISL would process the termination of Mr Western's employment because of Mr Western's request for it to do so.

[21] I should note several other matters. First, Mr Western was on sick leave and some pre-arranged annual leave from December until 15 January 2010. Ms Farrell knew nothing of Mr Western's alternative employment until that was mentioned in the Union correspondence of 14 January 2010. Mr Western's evidence is that he did not accept the alternative position until after 15 January 2010. That evidence is inconsistent with the statement in the Union's 14 January 2010 letter. The documents also establish that Mr Western was offered this other employment by letter dated 14 December 2009. It is likely that someone in Mr Western's position would have accepted such an offer without delay, at least verbally.

Collective employment agreement

[22] It is common ground that clause 15 applied to the situation. Clause 15.1 required ISL to advise the Union prior to the commencement of any review likely to result in significant changes to organisation, structure, staffing or work practices affecting employees. Clause 15.3 then provided:

> *15.3 If as a result of the review the employer has staffing surplus to requirements, the following applies:*
>
> *15.3.1 Implementation of the staffing surplus situation should be well planned and discussions should involve both management and the union prior to the employees being given notice. Sufficient time shall be given for the discussions to be completed.*
>
> *15.3.2 A priority in these discussions shall be looking at other options for surplus employees other than redundancy. These may include redeployment and/or retraining for positions with the employer.*
>
> *15.3.3 Redeployment is the transfer of an employee to another position with the employer. Should the position involve a lower income for the redeployed employee compensation shall be paid to the employee based on the formula in 15.7*

> *and 15.8 on a pro rata basis in respect of the reduction of hourly rate.*

[23] The other relevant clause is 15.4 which provides:

> *15.4 At the conclusion of the process detailed in 15.3 above, at least one month's notice of redundancy/redeployment/ retraining or other options shall be given in writing to employee(s) filling surplus positions.*
>
> *In the case of redeployment/retraining or other options the notice period may be reduced by mutual agreement.*

[24] ISL says that it was entitled under the terms of the employment agreement to compulsorily redeploy Mr Western, which it attempted to do by its letter of 18 December 2009 and subsequent communications. ISL also says that it never gave notice of termination of employment to Mr Western but merely advised him of the disestablishment of his original position. I am referred to *NZ PSA v Land Corporation Ltd* [1991] 1 ERNZ 741 (LC) in support of the proposition that no employee has the right to insist on being made redundant.

[25] By closing Ra Maru, ISL had *staffing surplus to requirements* as envisaged by clause 15.3. Specifically, it no longer required a fulltime L5 CSW. As a result, sub-clauses 15.3.1 – 15.3.3 regulated the parties' rights and obligations. The implementation had to be well planned and the discussions had to involve the union prior to employees being given notice. There is no dispute that the implementation was well planned and involved discussions with the union. A priority had to be looking at options other than redundancy for surplus employees such as redeployment. The evidence is that both ISL and Mr Western considered redeployment. A single redeployment option was offered but was not accepted. There is no suggestion that other redeployment options could have been offered but were not; or that other options were available.

[26] Redeployment was defined as *the transfer of an employee to another position with the employer*. Clause 15.3.3 then provided for pro-rata compensation if the position involved less remuneration. There is nothing in any of these words to indicate that the employer could redeploy the employee against the employee's wishes. They also need to be understood in the context of the clause overall. There would hardly be need for planning and discussions, much less sufficient time for their completion, if the employer was entitled as of right to transfer an employee to another position. The purpose of the requirement for sufficient time to complete discussions

was to facilitate the reaching of an agreement about other available options. On the facts here no agreement was reached between Mr Western and ISL.

[27] The word *notice* in clause 15.3.1 can only refer to notice under clause 15.4. When Ms Farrell wrote to Mr Western on 18 December 2009 she marked the conclusion of the process governed by clause 15.3 by giving one month's notice of the closure of Ra Maru and the disestablishment of Mr Western's position. It was open for Mr Western to accept the repeated redeployment offer. Unless he did accept it his employment with ISL was at an end. That was the termination of his employment as a fulltime L5 CSW at the employer's initiative as a result of the staffing surplus situation. Mr Western was therefore entitled to redundancy compensation in accordance with clause 15.7 of the collective employment agreement.

[28] Some employment agreements state that an employee who in a staffing surplus situation declines redeployment to a similar position is not entitled to redundancy compensation otherwise payable. Here, there is such a provision expressed to apply in transfer of undertaking type staffing surplus situations, but not in the present case. Because the parties limited the effect of this exclusion to transfer of undertaking situations they must be taken as intending no exclusion of redundancy compensation entitlements in the present circumstances. This supports the conclusion mentioned above.

[29] The case for ISL was also advanced on the basis that ISL simply wanted to move Mr Western from one site to another as it was entitled to do; in response to which Mr Western declined to accept that change, obtained other employment, absented himself from his employment with ISL and claimed redundancy compensation.

[30] There principal difficulty with this characterisation of the problem is that it is not what happened. From the outset, ISL treated the matter as falling within clause 15 of the collective agreement rather than simply telling Mr Western (and other staff) that the service in which he had worked would henceforth be based permanently at Riverside. Ms Farrell decided to disestablish Mr Western's fulltime L5 CSW position because it was apparently superfluous to ISL's requirements at Ra Maru or Riverside and she gave him clear notice to that effect. Ongoing employment on the same terms and conditions was never offered to Mr Western. What was offered was redeployment to another position at a lesser grade, with a lower rate of pay, for fewer

hours each week, performing different work and at a different location. At best for ISL the work and alternative location might be thought to fall within the ambit of Mr Western's previous terms and conditions of employment but that does not equate to an offer of continuing employment of the same terms and conditions. Then just before the end of the notice period, in the face of a claim for a substantial sum of redundancy compensation and without prejudice to its previously advised views, ISL offered to continue Mr Western's pay rates and hours of work as previously pending mediation. However, Mr Western elected to stand by the notice already received by him since he had obtained other employment.

Summary

[31] Mr Western's employment was terminated by ISL because of a staffing surplus situation. As a result Mr Western is entitled to redundancy compensation calculated in accordance with the collective agreement. Leave is reserved in case of dispute about quantum.

[32] Interest is sought. Mr Western should have received the redundancy compensation with his final pay. To compensate him for the delay in payment he must be paid interest at the rate of 5% from the date of his final pay until he is paid the redundancy compensation in full.

[33] Costs are sought. It might be thought that the matter was essentially a dispute and that the parties should met their own costs. However, if Mr Western does wish to claim costs he may lodge and serve a memorandum within 28 days the ISL may then lodge and serve a memorandum in reply within a further 14 days.

Philip Cheyne
Member of the Employment Relations Authority