

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** David Wipani (Applicant)  
**AND** Spotless Services (NZ) Ltd (Respondent)  
**REPRESENTATIVES** Mike Treen, Advocate for Applicant  
Richard Harrison, Counsel for Respondent  
**MEMBER OF AUTHORITY** Dzintra King  
**INVESTIGATION MEETING** 12 April 2005  
**SUBMISSIONS RECEIVED** 12 April 2005 from Respondent  
26 April 2005 from Applicant  
**DATE OF DETERMINATION** 15 June 2005

DETERMINATION OF THE AUTHORITY

The applicant, Mr David Wipani, claims that he has not been paid redundancy compensation pursuant to his employment agreement. The respondent denies that an entitlement exists. Essentially, the matter lies to be determined on the basis of interpretation of the relevant contractual clauses. Mr Wipani also claims he suffered an unjustified disadvantage regarding a forced relocation and lack of consultation.

**Work Reorganisation**

Mr Wipani was employed as an orderly at the Spinal Unit in Otahuhu from August 12 1987 until he was compulsorily transferred to Middlemore Hospital on August 9 2004. Mr Wipani terminated his employment with Spotless pursuant to clause 33.8 of his employment agreement. Clause 33 deals with staffing surpluses. The respondent says that clause 33 was not applicable and relies upon a common law right to transfer employees. The employment agreement contains the following clause. However, Mr Bennett told me he did not rely upon it and until I brought it to his attention, did not even seem aware of its existence. Clause 14.2 reads:

*Wherever a re-arrangement of duties shall occur and an employee is transferred to another institution controlled by the same employer, such employee shall be paid any additional fares incurred in travelling backwards and forwards to his/her employment, and the additional travelling time shall be taken into account and treated as part of the employee's working hours.*

Clause 33.1 reads:

*When as a result of the restructuring of the whole, or any parts, of the employer's*

*operations either due to the reorganisation, review of work method, change in plant (or like cause), the employer requires a reduction in the number of employees, or, employees can no longer be employed in their current position, at their current grade or work location (i.e. the terms of appointment to their present position), then the options in subclause 33.5 shall be invoked and agreed on a case by case basis.*

### **Application of clause 33.1**

Spotless changed the way in which cleaners did their work by requiring them to use flat mops. Spotless had reached an agreement with the SFWU, which was concerned about the possibility of casualisation, to the effect that redundancies would not take place. It was agreed that permanent employees would be kept on and that gains would be made by dropping off the casual pool and through attrition.

The respondent says that flat mopping had no impact on orderly services. However, to retain the existing cleaning staff, as per the agreement with the SFWU, one of the cleaners was to take over the orderly duties at the Spinal Unit and Mr Wipani was to transfer to Middlemore.

I find it hard to see how this did not bring Mr Wipani within the ambit of clause 33.1. There was a restructuring of the employer's operations due to a review of work method – the change to flat mopping. That required fewer cleaning staff. In order for the employer not to breach its agreement with the SFWU Spotless decided to place the cleaner at the Spinal Unit into Mr Wipani's job. Two orderlies were not needed at the Spinal Unit. The decision was made that Mr Wipani could not continue in his current position as orderly at his current work location, the Spinal Unit, and would be redeployed to Middlemore. The felt need to change Mr Wipani's work location stemmed from the work review.

Clause 33.1 clearly requires that either a change in the current grade or the work location will suffice for an employee to come within the ambit of this clause. Clause 33.1 applies and clause 14 does not.

### **Clause 33.5**

This sets out a number of options to be applied in staff surplus situations. These are: reconfirmation in the position, attrition, redeployment, leave without pay, enhanced early retirement, retraining and severance. These options are to be agreed on a case by case basis. There was no agreement in this case as the respondent maintained that Mr Wipani did not fall within the ambit of clause 33 at all.

### **Clause 33.8 (d)**

Mr Wipani says he was redeployed without his agreement and that the provisions of clause 33.8 (d) then applied to him. This provides that when a person is redeployed to a new job at the same or lower salary in the same or new location:

*If prior to the expiry of 12 weeks a relocated employee terminates employment at the new location because the new location proves to be unsuitable, then the staff surplus options (subclause 33.5) shall be reapplied to the employee. ....*

Mr Wipani chose to resign, tendering his resignation on 28 September 2004. His resignation letter says:

*Dear Tony*

*I, David Neil Wipani am writing to advise that I tender my resignation as Orderly at Middlemore Hospital under Section 33.8 Re-Deployment Section D.*

*As previous to the expiry of twelve weeks a relocation employee terminates at the new location because the new location provides to be unsuitable staff surplus option subclause 33.5 with exemption re-deployment shall be reapplied to the employee if option of redundancy is exercised then any relocation payment that has already been made will be deducted.*

*This will take effect on Tuesday 28 September with one weeks notice to my employer. Also to follow will be a personal Grievance Application.*

*Yours sincerely*

*David Wipani*

However, as submitted by the respondent, the problem Mr Wipani has is that there would be no automatic entitlement to redundancy because the options specified in clause 33.5, with the exception of redeployment, would need to be reapplied. This did not happen. Furthermore, Mr Wipani would have needed to have established that the new location was unsuitable.

The submission of the respondent that Mr Wipani should have waited until the Authority determined whether or not clause 33 applied in the first instance is clearly sensible. Upon receipt of Mr Wipani's resignation Mr Bennett wrote saying:

*When we finally asked you to move, you agreed to do so without prejudice to your right to seek an interpretation of the employment agreement. You could have declined and sought an interpretation, but you agreed to move and resolve the issue on that basis.*

....

*We also suggested that this may be a case where the Employment Relations Authority can offer an interpretation that we can use to find a resolution.*

*There is a further option available, and that is to move you back to the Otara Spinal Unit. We would consider that if the Authority's interpretation did not favour us.*

*The reason for this letter is to let you know that we believe resigning before seeking an interpretation of the employment agreement is not helpful to finding a resolution.*

*We would like to give you the opportunity to rescind your resignation while you pursue your interpretation. Please let me know as soon as possible you wish to do that*

*Yours sincerely*

*Craig Bennett  
Divisional Manager*

## **Redundancy Compensation**

Unfortunately, Mr Wipani chose not to rescind his resignation and not to seek an interpretation. I say unfortunately because Mr Wipani has given up his job and I cannot order that he be given redundancy compensation.

I do not accept that Mr Wipani has not established to my satisfaction that the position at Middlemore was unsuitable. I accept that it was different in some respects but that in itself is not sufficient. I accept the respondent's submission that, applying the objective test in Pilgrim v Director-General, NZ Department of Health [1992] 3 ERNZ 190, the position was suitable.

Even if the position had not been suitable there would not have been an automatic entitlement to severance and the payments associated with that. That is because the options were not looked at again and no agreement was reached. On a similar point, in Sanson v Auckland Regional Council [1999] 1 ERNZ 708 where Travis J found that although the plaintiff was redundant he was not automatically entitled to compensation under the redundancy agreement because certain necessary steps had not been taken.

## **Disadvantage**

Mr Wipani says he was not consulted about the transfer prior to receiving a letter on June 16 that he would be transferring 5 days later. He also claims that discussions with Unite (his union) were terminated before any agreement was reached. I am satisfied that discussions ceased because a mediation was imminent and it was hoped the matter would be resolved at mediation. Some of the initial difficulty regarding consultation came about because Mr Wipani had changed his union from the SFWU to Unite and the employer was not aware of this. Spotless dealt with the SFWU and assumed, until Mr Wipani said otherwise, that he was still a member of that union. He had been a SFWU delegate. Once Spotless became aware they dealt with Mr Wipani's representative and had a further meeting with staff at the Spinal Unit on 12 July.

Mr Wipani claims that issues he raised regarding the relocation were not resolved prior to the relocation taking place. The respondent made efforts to resolve issues but Mr Wipani had, I accept, decided that he wanted to be made redundant and to take the compensation.

Mr Wipani did suffer a disadvantage and one which was unjustified. This was the failure of the respondent to use the provisions of clause 33. In the same way that there was an obligation on Mr Wipani to use the dispute provisions there was also an obligation on the respondent to consider doing so. Had the provisions of clause 33 been applied Mr Wipani would in all likelihood still be working for Spotless, probably at the Spinal Unit.

## **Remedies**

Mr Wipani has claimed \$5000 pursuant to s.123 (c) (i) and \$2,000 for the loss of the lump sum payment for his driver's allowance. The evidence was that no agreement had been reached that the driving allowance would be paid in a lump sum; rather, the allowance would have continued to be paid on its usual basis. I can make no award for the allowance. Mr Wipani is entitled to compensation. I set this at \$2,500.

## **Contribution**

Mr Wipani did contribute to the situation that gave rise to the personal grievance. He did this by his failure to take the matter to the Authority for determination. He was given the opportunity to

withdraw his resignation and have the dispute determined and chose not to do so. Accordingly, the remedy is to be reduced by 25%. The respondent is to pay the applicant the sum of \$1,875.

**Costs**

If the parties are unable to resolve the issue of costs the applicant should file a memorandum within 28 days of the date of this determination. The respondent should then file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King  
Member Employment Relations Authority