

department. In October 2006 a draft restructuring proposal was presented to staff. Under this proposal positions within the theatre would be disestablished and three new positions would be created in the Logistics Department. Following feedback from the affected employees the Board confirmed its decision to proceed with a new structure and advised Mr Batistich and other staff of the recruitment process for the new positions and the selection criteria that would be used for appointments.

[3] In late November Mr Batistich informed the Board that he considered that the new positions were not substantially different from the existing positions but went ahead and applied for two of the new positions. Following an interview he was advised, on 20th of December 2006, that he was unsuccessful in his application(s)

[4] Despite discussions regarding redeploying Mr Batistich to alternative positions these discussions proved fruitless and his employment with the Board ended on 28 February 2007.

Mr Batistich's grievances

[5] Mr Batistich says that the termination of his employment was unjustified because one of the positions created in the new structure was, for all intents and purposes, his previous position in theatre, he was not seriously considered for appointment to the position and the Board had not genuinely attempted to redeploy him.

The "new" position

[6] According to the Board's draft *management review of the theatre procurement/purchasing processes* the previous structure of procurement staff involved in providing service to the theatre included the employment of three clerical staff; a *sterile stockroom/imprest supply clerk* reporting to a team leader in the Logistics Department and two *theatre stores clerks* reporting to the charge nurses in theatre. Mr Batistich occupied one of these latter positions. The review recommended that all of the necessary services to theatre be provided from the Logistics Department and that three new positions be created; a *theatre procurement officer*, a *theatre clerk* and a *theatre assistant*. It is the position of *theatre assistant* that Mr Batistich says equates to his position in the old structure.

[7] In comparing the two positions Mr Batistich, as the person performing the duties, says that the change in those duties from the “old” to the “new” position was substantially less than 20%. He says that he had the experience and ability to carry out all of the duties in the “new” job description and that the changes made were not substantial enough to claim it was a new job. He pointed out that both job descriptions contained statements to the effect that they were not definitive or restricted and *may need to be modified to meet changing needs*. He suggests that the new theatre assistant job description is merely a metamorphosis from his old job.

[8] In response to Mr Batistich's assertion that one of the new positions was in effect his old position the Board says that they had done a careful analysis of the respective positions and came to the clear conclusion that the position created was a new position. The project manager who undertook the review said in her evidence:

The work of the three existing positions were compressed into the two other new positions, except for the work taken off the orthopaedic instrument assistant and the Theatre Clerk positions and absorbed by nursing staff, orderlies and the central sterilising unit. This compression demanded a significant change in the way the work was done. In particular it demanded a high level of teamwork and collaboration. The duties overlap. This contrasts with (Mr Batistich's) position where he undertook some of (the other clerk employed in theatre) duties when she was on leave.

Non appointment

[9] The Board argues that it interviewed Mr Batistich along with other applicants for the new position and came to the conclusion that another interviewee, S., was the best applicant. Mr Batistich believes that the interview panel had prejudged the applicants and had failed to take account of his experience in what was in effect a job he was already performing.

[10] During the course of my investigation it emerged that the successful applicant, S., was a temporary employee who had been employed in part to cover the work of another employee who, due to incapacity was unable to fulfil the full range of her duties. The Board argued that S. was entitled to equal consideration, as an internal applicant, and that the decision to appoint her was based on the premise that the best applicant should be appointed.

Lack of redeployment opportunities

[11] Shortly after being advised that he had not been successful in his application for one of the new positions, Mr Batistich was offered a position in the store. He declined to accept this position because it was not a clerical job, the constant physical requirements would make it unsafe for him and he felt insulted by being offered what was in effect the position of the person who had been appointed to “his” position. He was also offered a “temporary” position assisting in payroll which, after some consideration he also declined because, at the time he had to make this decision, he was sick. In addition to these positions it was suggested to Mr Batistich that he monitor the internally advertised positions (on the Board’ intranet) and apply for any positions he was interested in.

[12] It is the Boards position that the job options it offered Mr Batistich, and the discussions it had with him and his then representative, were genuine attempts to fulfil its obligations to attempt to find him suitable redeployment. Mr Batistich says that he believes that *no genuine redeployment (efforts) were undertaken.*

Legal considerations

[13] The Employment Relations Act, (the Act) at section 103A, requires that the Authority must, when determining whether a dismissal or other action of an employer was justifiable, consider:

...whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

While it is necessary to look at the various steps the Board took leading to Mr Batistich's redundancy, it is also necessary, in this instance, to consider whether overall the Board's actions were *what a fair and reasonable employer would have done*. It may be that on analysis the individual steps taken may have had fulfilled the Board's strict legal and contractual obligations, but when taken together they were unfair.

[14] Mr Batistich's conditions of employment are contained within the *Northland District Health Board clerical and administrative staff and logistics staff Collective Employment Agreement* (the CEA). The CEA includes no specific requirements regarding appropriate consultation in event of proposed restructuring but conditions relating to redundancy are set out in clause 5.7 of the CEA. These include the following relevant provisions:

- *The employer will advise the affected employees and employees representative at least one month prior to the date that the notice specified by clause 5.4 is to be given to the redundant employee of the termination of their employment. The period of advance notice is to be used by the employer, the employees and the employees' representative to discuss and decide the applicability of attrition, redeployment, early retirement or retraining as preferred alternatives to terminating each affected employee's service through redundancy.*
- *Definition:*
 - (1) *"Redundant employee" means an employee whose employment is terminated as being surplus to existing requirements by reason of the closing down or reorganisation of the whole or part of the employer's operations or by an amalgamation of the employer's operation with the operation of another employer.*
 - (2) *An employee shall not be deemed to be redundant if:*
 - (a) *immediately prior to the termination the employee is employed on a temporary basis;*
 - (b) ...

Subclauses 5.7c., d., and e., set out details of compensation and payment of notice and unused holidays to be paid in the event an employee is made redundant. Subclause 5.7f. sets out the conditions under which a redundant employee can be redeployed and, where appropriate an *equalisation allowance* paid.

[15] Other than the comment in clause 5.7b(2) of the CEA, the Board has no particular policies addressing the status of temporary employees with regards to employment protection in the event of restructuring.

Discussion

Was the “new” position the same as Mr Batistich’s “old” position?

[16] It is not possible to set out any hard and fast rules regarding what level of change is required before a particular position becomes a “new” position. Each case must be considered on its own merits having regard to such issues as the specific duties, the reporting structures, the interrelationships, delegated authority's etc. In this instance the Board have assured me that the new position required *a significant change in the way the work was done*. There was undoubtedly some differences between the list of duties of the two positions. In this instance I have concluded that the new position was not the same as the position in which Mr Batistich was previously employed. There are sufficient differences, albeit by a small margin to support the Board's view that the old position was disestablished and a new position created. In terms of the CEA Mr Batistich was genuinely a *redundant employee* because his *employment was terminated as being surplus to existing requirements by the ... reorganisation of the employer’s operations ...*

Should Mr Batistich have been appointed to the “new” position?

[17] There is no provision in the CEA or in terms of Board policy that required the Board to appoint Mr Batistich to the newly established position of *theatre assistant*. However in considering Mr Batistich’s application it was incumbent on the Board to do *what a fair and reasonable employer would have done*. The Board accepts that many of the duties of a new position are the same as those Mr Batistich had undertaken in his previous position. The Board advised Mr Batistich that he was welcome to apply for all of the new positions and said:

The selection criteria will primarily focus on experience, skills and personal attributes as specified in the job description, with particular emphasis (on) the following:

- *ability to work as part of a team.*
- *Ability to work under limited supervision.*
- *Proven interpersonal skills.*
- *Ability to work under pressure and meet deadlines.*
- *Customer services focus including an ability to form and maintain links with relevant staff and clients.*

[18] In their statements of evidence to the Authority, members of the interview panel made comments such as:

I was not overly impressed with (Mr Batistich's interviews). He was a laid-back and seemed overconfident.

(Mr Batistich) did not present himself as a team leader... he did not appear to grasp what we were trying to do. He didn't seem to understand the need for change. He was quite fixed in his views on what the job was about.

Compared to the successful applicants, (Mr Batistich) did not perform well in the interviews. He showed no enthusiasm.

... his answers surrounding his ability to work as part of a team were weaker than those of the successful applicants.

(Mr Batistich's) performance in the interview was consistent with my knowledge of him in the workplace.

(Mr Batistich) did not impress me in the interviews. B. and S. gave much better answers (S. was subsequently appointed to the "new" position of theatre assistant)

S. was able to discuss the changes that were needed. She came across as bright, communicative and positive. I could see a lot of potential in her as a future team leader. I was confident that she would be a stronger contributor in a team environment and (Mr Batistich)

[19] While some of the Board's witnesses indicated that Mr Batistich performance in the past had been less than ideal, the Board conceded that he had not been subject to any formal disciplinary process and there were no formal warnings on his employment record. The members of the interview panel were adamant that S. was the best applicant for the position and was therefore the appropriate appointee. They were aware that S. was on a temporary contract but believed that she had the skills, potential and personality to undertake the position. They indicated that the fact that Mr Batistich was a permanent employee, with a number of years service, and would be likely to be made redundant if S. was appointed to the position, was not a major consideration. I do not accept the Board's position in this regard. Even if S. was clearly the best applicant for the position she was a temporary employee. Prior to the restructuring she had no expectation of permanent employment. The CEA makes it clear that she was not a "redundant employee" where as Mr Batistich very clearly was. The Board had an obligation to Mr Batistich, in terms of the CEA, *to discuss and decide the applicability of attrition, redeployment, early retirement or retraining as appropriate alternatives to terminating each affected employees service through redundancy.* They had no such obligation to S.

[20] Even without the clear implication in the CEA that Mr Batistich, as a permanent employee, should have been given preference over a temporary employee for appointment to the "new" position, I find that a *fair and reasonable employer* would have given much more weight to Mr Batistich permanent status and years of service than the Board did on this occasion. Mr Batistich clearly could do the job. He had done most, if not all the duties previously. The Board chose to assume, based on one interview and their assessment that his past performance that he could not, with supervision improve his performance and make the changes they required. The actions of the Board in not appointing Mr Batistich were not *what a fair and reasonable employer would have done in all the circumstances.* Mr Batistich has a personal grievance in this regard.

Did the Board take adequate steps to redeploy Mr Batistich?

[21] the Board did make genuine efforts to redeploy Mr Batistich. Regrettably his reaction to being told that he was not to be appointed to a position that he sincerely believed was his “old” position, was such that he was not open to considering the options suggested. In the end he believed that he had no option but to accept the redundancy and pursue his grievance. Putting aside my finding that a fair and reasonable employer would have appointed Mr Batistich to the position of theatre assistant, taking into account all of the circumstances, I find that the Board did take appropriate steps to attempt to redeploy Mr Batistich.

Determination

[22] For the reasons set out above I find that:

- the new position of theatre assistant was not the same position as that previously occupied by Mr Batistich, and
- the Board made reasonable efforts to redeploy Mr Batistich.

However I have also found that **the Board's actions in not appointing Mr Batistich to the new position were not the actions of a fair and reasonable employer and that Mr Batistich has a personal grievance in this regard.**

Remedies

Contribution

[23] In terms of section 124 of the Act I am required to consider, in determining the nature and extent of any remedies to be awarded to Mr Batistich, the extent to which his actions contributed towards the situation that gave rise to his personal grievance. Mr Batistich simply applied for a position which he genuinely believed was the one he had been performing for a number of years. He cannot be said to have contributed in any way to the situation that gave rise to his grievance.

Recovery of wages

[24] As a consequence of his redundancy (effective from the end February 2007) Mr Batistich received the equivalent of some five months salary, including 4 weeks salary in lieu of notice, by way of redundancy compensation. Over the next few months he applied for a number of jobs and was eventually successful in obtaining a part time position (16 hours per week) in early September 2007. The hours of employment were increased to 22 per week from late October 2007. He also undertook several short computer courses in an attempt to make himself more employable.

[25] I am satisfied that Mr Batistich has made extensive efforts to mitigate his losses. While the redundancy compensation he has received goes some way to offsetting the losses he has sustained, this falls somewhat short of what is appropriate. In my assessment Mr Batistich is entitled to recover the equivalent of 7 months wages, less any redundancy compensation already paid and any wages he received from other employment during that period i.e. **NDHB is ordered to pay Mr Batistich:**

- **7 months salary from the date his redundancy became effective (28 February 2007 to 30 September 2007,**
- **less the amount he has already been paid by way of redundancy compensation, and**
- **less any wages Mr Batistich received from other employment prior to 30 September 2007**

[26] Mr Batistich is to advise the Board, within 7 days of the date of this determination, of any wages he received from other employment prior to 30 September 2007. The Board will then calculate and pay Mr Batistich the outstanding amount and provide him with a detailed calculation of the amount paid. If the parties are unable to agree on the correct calculation they should submit all of the relevant information to me for determination.

Compensation for hurt and humiliation

[27] Mr Batistich was clearly surprised and humiliated by his redundancy. As a consequence of that redundancy he suffered a good deal of financial embarrassment and emotional distress. He is entitled to compensation for the hurt and humiliation that the actions of his employer have caused him. **In terms of section 123(1)(c)(i) of the Act the Northland District Health Board is ordered to pay Mr Batistich \$3000, without deduction.**

Costs

[28] Costs are reserved in the hope that the parties can agree this matter between themselves. I note that Mr Batistich represented himself during the Authority's investigation and is unlikely therefore to be entitled to an award in respect to costs. If either party wishes to pursue the question of costs they should seek to settle this matter with the other party in the first instance. If they are unable to reach agreement the party seeking costs should file and serve submissions within 28 days of the date of this determination. The other party will then be given 14 days in which to file and serve a response.

James Wilson
Member of the Employment Relations Authority