

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 261A/08
5100170

BETWEEN IAN BREEZE
Applicant

AND BAY OF PLENTY DISTRICT
HEALTH BOARD
Respondent

Member of Authority: Dzintra King

Representatives: Phillip Bartlett, Counsel for Applicant
Shima Grice and Mark Beech, Counsel for Respondent

Investigation Meeting: 17/18 September 2008 at Tauranga

Submissions Received 22 and 25 September 2008 from Applicant
22 and 25 September 2008 from Respondent

Determination: 6 October 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Dr Ian Breeze, was a consultant general surgeon at Tauranga Hospital. The Bay of Plenty District Health Board (the “BOPDHB” or the “DHB”) is the respondent. The sole issue to be determined in this case is whether the respondent gave Dr Breeze undertakings or alternatively created a reasonable expectation that it would support him in progressively credentialing him back to general surgery at Tauranga Hospital; and whether the DHB also gave an undertaking or, in the alternative, created a reasonable expectation that it would allow him to resume his former role as a general surgeon employed by it on an 8/10ths basis on completion of a retraining programme in accordance with the New Zealand Medical Council requirements.

[2] A number of complaints were made about Dr Breeze.

[3] From July 2003 to March 2004, Mr Ron Dunham, the Chief Executive, negotiated with the applicant regarding his ongoing employment. A proposed new employment agreement was first sent to Dr Breeze in July 2003. The proposed contract provided for Dr Breeze to reduce his hours from 8/10ths to 5/10ths and to work solely as a skin surgeon, not a general surgeon.

[4] This was followed by extensive discussions and correspondence between the parties and their representatives. The applicant was legally advised throughout, first by Simpson Grierson and then by Harry Waalkens. These discussions culminated in a meeting in December 2003 attended by Dr Breeze, his wife and Dr Ian Taylor, and Mr Dunham and Dr Paul Malpass on behalf of the respondent.

[5] Dr and Mrs Breeze say that Mr Dunham gave the impression that it was the respondent's intention to re-engage Dr Breeze at the end of his retraining on an 8/10ths basis as a consultant general surgeon at Tauranga Hospital. Mr Dunham denies giving such an assurance, and says that he only made a commitment to assisting Dr Breeze in his retraining and to providing the financial support for him to do so.

[6] Mr Dunham says he did not give Dr Breeze any assurance that he would be able to resume his position as a consultant general surgeon as Mr Dunham was not in a position to give such an assurance. This was due to unknown factors such as the time needed to retrain, the outstanding Health and Disability Commission investigation, ongoing media scrutiny and issues of public confidence that would need to be considered in relation to Dr Breeze's possible return.

[7] The respondent says that while there may have been a hope that Dr Breeze would return, there was no promise from Mr Dunham that he would do so.

[8] Dr Malpass' recollection is that the message conveyed to Dr Breeze was that the intention was to support the applicant in his retraining and re-credentialing but no promise was given to re-engage him as a consultant general surgeon.

[9] On 9 February 2004 Mr Dunham sent a letter to Dr Breeze enclosing copies of the proposed new employment agreement. In the letter he stated:

As mentioned to you I am prepared to review your tenths in six months (1 August 2004). We will need to have in place your re-skilling plan which needs to be developed in conjunction with the Chief Medical Director.

At the six months review point the following will be taken into account:

- *Progress against plan*
- *Findings of HDC investigation and review*
- *Finding/progress of Medical Council competency review.*

By signing the agreement it is agreed that your issues with the extant employment process are resolved on a full and final basis. Furthermore the entry into the employment agreement will be without prejudice to the Board's right to take employment action if the outcome of the HDC review and/or the Medical Council review requires the same.

[10] On 25 February, Dr Breeze replied by letter to Mr Dunham. He made a number of points:

2. *It is essential that the hospital put in place a process to progressively re-credential me back into general surgery during the next 12-24 month as you stated was your intention during our meeting in December 2003. Obviously this will have to be referred to on the contract. I will leave it to you to incorporate this.*
3. *At the meeting in December 2003, attended by myself, my wife, and assisted by Dr Ian Taylor, with you and Dr Malpass, I raised the issue of redundancy payment to reflect the reduction and loss of 3/10ths of my existing contracts. I was appreciative of your assurance that redundancy was not an issue because I would not be losing the 3/10ths on a permanent basis. I accept your reassurance about this, but confirm this has been an important influence in my not pursuing a redundancy or other compensation entitlement. It is only fair this be confirmed, given the hospital's requirement that its proposal is otherwise on a full and final basis.*
4. *In your letter, you state that you will review my tenths in six months. It is obviously important that you identify what the performance indicators will be against which this review will take place. I believe that we should get together at the outset, to determine the performance indicators so we both know the targets, identify the process and specify the measurement.*

5. *With respect to the reskilling process, progress is dependent not only on my performance, but also on that of the hospital, in implementing it. I would be grateful to receive a written framework and timeline to consider.*

[11] On 2 March, Mr Dunham replied to Dr Breeze's letter. He said:

I will respond to the points you raised in the order outlined in your letter of 25 February 2004.

2. *The BOPDHB will support you in progressively credentialing you back to general surgery (in accordance with the restrictive practice imposed by the Medical Council). The Chief Medical Director is attempting to plan this with the help of Waikato DHB and in conjunction with the Medical Council's expectations. I understand that the Medical Council has written to you in this regard, suggesting that they (the BOPDHB) and yourself work together to incorporate the competence programme as ordered under s.62 of the Medical Practitioners Act 1995.*
3. *I can confirm that if you wish to take redundancy for the 3/10ths, I would not be re-establishing those tenths in the future. If redundancy is not taken, then any progression in tenths must be in accordance with the credentialing programme in point 2 above.*
4. *Review of those tenths will match the credentialing programme.*
5. *As with point 2, the Chief Medical Director is attempting to establish that now.*

[12] There is a confusing reference to redundancy in these communications. When I asked the parties about this at the hearing, they were agreed that redundancy did not mean redundancy per se but was intended to be a synonym for financial compensation.

[13] The final paragraph of this letter reads:

In the previous communication to me you requested that I not make statements to the press. Ian, while your employment future with us is unsettled, I have an obligation to ensure that public confidence in Tauranga Hospital is not questioned. Despite your desire to move on, there will be issues of confidence and in the future, concerns about informed consent if you re-enter the workforce as a surgeon which we must manage. This will not go away. For me to be able to support you, I need your employment status confirmed.

[14] In an email to Mr Dunham on 12 March, Dr Breeze says:

Do I assume paragraphs 2, 3, 4, 5 and 6 will be incorporated in my contract, or do I assume that your letter is sufficient documentation?

[15] On the same day, Mr Dunham replied saying:

The covering letter is a legal document and the conditions part of your contract offer. That should be sufficient.

Applicant's Submissions

[16] Mr Bartlett says that, on an ordinary language approach to the letters of 25 February and 2 March, they clearly evidence an agreement which was:

- (a) For the DHB to support Dr Breeze in progressively re-credentialing him back into general surgery;
- (b) That this was necessarily to be at Tauranga, otherwise the point about not losing the 3/10ths on a permanent basis would be meaningless;
- (c) That the restoration of those tenths would be dependent on Dr Breeze's progress through the credentialing programme;
- (d) That the programme itself was to be very closely allied with the Medical Council's requirements and expectations.

[17] Mr Bartlett says that the passage at the end of Mr Dunham's 2 March 2004 letter supported Dr Breeze's understanding rather than the understanding contended for by the DHB. That was because the third sentence gave significant insight into Mr Dunham's thought processes at the time.

[18] At the investigation meeting, Mr Dunham accepted that informed consent was an issue which arose in relation to general surgery as distinct from the minor skin surgery that Dr Breeze had been undertaking in the previous three years. Mr Dunham also indicated that by underlining *we*, he was making the point that this was something that both Dr Breeze and the DHB had to jointly manage. In making the

reference to re-enter the workforce as a surgeon, Mr Dunham must have been thinking about a re-entry at Tauranga. The issue of managing informed consent could only be of potential concern to Mr Dunham on the hypothesis that Dr Breeze would be resuming general surgery there. It makes no sense to suppose that Mr Dunham would concern himself about jointly managing the issue of informed consent if Dr Breeze got a job at, for example, Dunedin Hospital or Southern Cross.

[19] The exchanges between Dr Breeze and Mr Dunham are not the only ones that evidence a clear intention on both sides for Dr Breeze to be able to return to general surgery following successful completion of a retraining programme.

[20] Dr Malpass was present at the December 2003 meeting so any contemporaneous record or understanding is also relevant. Mr Bartlett said that in that regard a very explicit statement appeared in a letter that Dr Malpass wrote to Mr Campbell at Waikato Hospital on 12 February 2004. One of the points Dr Malpass made was:

The BOPDHB has directed that Ian should undergo a retraining programme before he returns to the full spectrum of general surgery. This programme is to ensure that he has the appropriate skills by a piecemeal and ongoing process.

[21] Dr Malpass' words "*before he returns to the full spectrum*" are significant. Dr Malpass did not use language which indicated that the DHB was retaining a discretion such as, "*before we give further consideration to a return to the full spectrum*". Furthermore, in referring to Dr Breeze's prospective return to general surgery in that passage, Dr Malpass could only tenably have been referring to a return to Tauranga. I accept that this is the correct interpretation.

[22] Mr Bartlett submitted that it was central to the arrangement that Dr Breeze was not paid compensation for the reduction in tenths. That was in recognition that he would not be losing the tenths permanently; and his expectation that they would be reinstated on his returning to his previous role as a general surgeon on successful completion of the retraining programme required by the Medical Council. The non-payment of compensation was the quid pro quo for the DHB supporting Dr Breeze in credentialing him back to general surgery and restoring him to his previous role if the retraining was accomplished successfully.

Respondent's Submissions

[23] There was no disagreement between the parties that the assurances set out in paragraphs 2 to 6 of the letter of 12 March 2004 were incorporated in Dr Breeze's contract and are legally enforceable. Dr Breeze was covered by a collective employment agreement and these terms and conditions constitute additional terms and conditions of employment pursuant to s.61(1) Employment Relations Act 2000.

[24] Mr Beech and Ms Grice said in their submissions that the assurances given by Mr Dunham to Dr Breeze in his letter of 2 March 2004 were intended by the parties to have contractual effect and to be incorporated by reference into Dr Breeze's individual employment agreement. This is because it is exactly what they agreed as evidenced by their email exchange on 12 March 2004.

[25] The issue for the respondent is the meaning of the assurances given by Mr Dunham in his 2 March 2004 letter.

[26] The respondent says that the 2 March letter does not expressly state that on completion of the credentialing programme the respondent would re-employ the applicant in his former role. The respondent submits that it is not appropriate or necessary to imply such an obligation. To do so, the Authority would have to read words into the correspondence that are simply not there.

[27] The respondent acknowledges that the correspondence allows for the possibility that the applicant's tenths may be increased and that he may return to full general surgery at some point in the future. However, this could only occur if the applicant still wished to return and the issues of confidence, informed consent, HDC investigation, Medical Council performance assessment and retraining were dealt with to the respondent's satisfaction.

[28] The respondent says it was not legally able to put the applicant back into his former role as a general surgery until he had passed the credentialing process, both internal and external, and the Medical Council had removed the current restrictions on the applicant's current practising certificate as to his permitted scope of his practice. The current annual practising certificate which remains in force until 30 November 2008, restricts his general surgery practice to skin surgery at Tauranga Hospital.

Therefore, satisfactory completion of the credentialing programme is a condition precedent to the DHB being obliged to undertake its review of the applicant's role.

[29] Mr Beech submitted that support for re-credentialing did not imply a promise of a job. It was simply to equip Dr Breeze with everything necessary for him to be employed as a consultant general surgeon, wherever that might be.

[30] Mr Beech said Dr Breeze's decision not to claim compensation meant that he was eligible for a review upon the successful completion of the credentialing programme. It was not a guarantee that he would have the 0.3 FTE restored. The respondent says that the contractual obligation is to:

- (a) Support Dr Breeze through the credentialing programme; and
- (b) Undertake a review of his employment situation on the successful completion of the credentialing programme.

[31] The respondent did not promise, guarantee or agree that the applicant would be re-employed in his former role as a consultant general surgeon on completion of the credentialing programme. The satisfactory completion of the credentialing programme was a necessary, but not a specific condition, for Dr Breeze to be re-employed in his former role. In conducting the review when the time for doing so arises, the respondent is entitled to take into account all relevant factors in deciding whether or not to employ the applicant as a consultant general surgeon. The problem for the respondent is that the correspondence, which became the terms of the employment agreement, does not say that.

[32] Mr Beech said the DHB could not be under an obligation to employ Dr Breeze as a consultant general surgeon until such time as the DHB was legally able to employ him in that role, which would require an amendment to the conditions attaching to his annual practising certificate.

[33] He now seeks to take up the position at Tauranga Hospital so that the Medical Council is in a position to make the appropriate changes to his annual practising certificate.

The Applicant's Current Situation

[34] As Mr Bartlett submitted, the DHB's argument that it cannot be under an obligation to employ Dr Breeze as a general surgeon until such time as the DHB is legally able to employ him in that role is a catch-22 argument. Dr Breeze can only progress matters before the Medical Council when he is in a position to provide the Council with an employment offer that meets the requirements referred in the letter dated 3 May 2007 and updated in the letter of 17 September 2008. In order to provide such an employment offer he is dependent on the DHB honouring its commitment to progressively re-credential him back to general surgery.

[35] Mr Henry Stubbs, a senior industrial officer of the Association of Salaried Medical Specialists, said he was approached in May 2007 to assist Dr Breeze in his efforts to return to surgery on an 8/10ths basis at Tauranga Hospital. He sought assistance from the Association following the decision of the Medical Council to his request that it review the conditions it had previously imposed on his scope of practice. The Medical Council was willing to consider Dr Breeze's return to work as consultant at specialist level if he was able to meet certain requirements. Those requirements are detailed in a letter dated 3 May 2007 from the Registrar of the Medical Council to Dr Breeze.

[36] In a letter of 3 May 2007, the Medical Council placed four conditions that needed to be addressed in order for the Council to approve Dr Breeze to work at consultant level. These requirements were reiterated in a letter from the Medical Council dated 17 September 2008. They were:

- (a) Dr Breeze must work in a supportive environment;
- (b) Dr Breeze's employer must be made aware of his history;
- (c) A prescribed written mechanism must be put in place which would determine when, how and to whom Dr Breeze refers complex secondary or tertiary cases to other colleagues within the Surgical Department or externally;
- (d) Dr Breeze does not practice in isolation, either publicly or privately.

[37] The Medical Council said the reason for its decision was based on Professor Pat Alley's final report to the Council dated 2 February 2007 where Professor Alley stated that at that time, the unanimous opinion was that Dr Breeze was a competent surgeon at the level of an advanced trainee and was perfectly suitable for elevation to consultant status depending on the environment in which he worked. The Council went on to say that it would consider a comprehensive proposal from Dr Breeze and/or his employer or prospective employer to practise surgery at consultant level. The Council would need to be satisfied in all respects of the proposed arrangement, including the capacity that a performance assessment could be accommodated in due course.

[38] Dr Breeze subsequently wrote to Mr Dyer, Chief Operating Officer of the Bay of Plenty District Health Board on 18 June requesting his support to resume general surgery in Tauranga Hospital and giving detailed reasons for the request. Dr Breeze and Mr Stubbs subsequently met with Mr Dyer. Mr Stubbs asked Mr Dyer to lift the Board's restrictions on Dr Breeze's clinical practice and to agree in principle to his immediate return to full general surgical duties.

[39] Mr Stubbs and Mr Dyer discussed the fact that any return to full clinical duties might need to be phased in by way of a staged process. There was also a possibility that the Medical Council might impose conditions on Dr Breeze's practice that would need to be accommodated as part of the phasing in process.

[40] At the end of that meeting, Dr Breeze left and Mr Stubbs was alone with Mr Dyer because he and Mr Dyer had other matters to discuss. In the course of that discussion, Mr Dyer indicated that there was some internal resistance to Dr Breeze's return to full surgical duties with the DHB.

Decision

[41] I am satisfied that there was an agreement that once Dr Breeze's retraining had been completed the DHB would have him back and go through the credentialing process to enable him to re-enter the workforce as a surgeon at Tauranga Hospital. Dr Breeze has completed his retraining.

[42] I do not agree that the undertaking was intended to enable Dr Breeze to apply for jobs generally once he was retrained to return to general surgery. I agree with Mr Bartlett that no such intention is recorded in any of the correspondence in early 2004.

[43] The undertaking had to be for a return to Tauranga Hospital otherwise there would have been no point in the agreement about the ability to pick the relinquished three tenths.

[44] It may be that the parties now wish to return to mediation to discuss their problem.

[45] An issue that arise during the hearing was that medical staff would resist Dr Breeze returning to the hospital. Medical staff, be they doctors or nurses, who are employees have the same legal obligations to carry out lawful and reasonable instructions as do employees in other occupations.

[46] Costs are reserved. If the parties are unable to resolve the matter of costs, they should agree a timetable for the filing and exchanging of memoranda and notify the Authority of that timetable.

Dzintra King
Member of the Employment Relations Authority