

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN	Anne Couper (Applicant)
AND	CGU Insurance Limited (Respondent)
REPRESENTATIVES	Chris Eggleston, Counsel for the Applicant Rob Towner and Michael O'Brien, Counsel for the Respondent
MEMBER OF AUTHORITY	Ken Anderson
INVESTIGATION MEETING	10 April 2003
FINAL SUBMISSIONS	12 May and 3 June 2003
DATE OF DETERMINATION	8 September 2003

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

Ms Couper claims that she is entitled to be paid retrenchment benefits equivalent to 16 weeks pay being the gross sum of \$11,661.60. Ms Couper also claims compensation of \$10,000 and penalties of \$10,000 pursuant to the respective provisions of the Employment Relations Act 2000.

However, CGU Insurance Limited ("CGU") say that Ms Couper resigned of her own accord and as her position was not retrenched, she has no entitlement to the benefit that she claims. CGU also say that never at any time, until the day of the investigation meeting, did Ms Couper raise a personal grievance, hence there is no basis for the Authority to award any compensation to her.

Preliminary Issue

On the day of the investigation meeting, the matter of the compensation sought by Ms Couper was discussed. There is no record of Ms Couper, or her representative, ever raising a personal grievance with CGU. Understandably and reasonably, Mr Towner for CGU objected to the personal grievance being raised in the manner that occurred.

Furthermore, there is no mention of a personal grievance in the *Statement of Problem*, albeit \$10,000 compensation is sought pursuant to s123(a)(i) of the Act. Presumably that is supposed to be s.123(c)(i) of the Act, but regardless, I am bound to accept the objection raised by Mr Towner and conclude that as a personal grievance has not been submitted to the employer, or raised within the *Statement of Problem*, then the Authority is unable to investigate that matter. Ms Couper and

her counsel will have to decide if the matter of the alleged personal grievance will be pursued at a future date, taking into account the 90 day requirement and the other provisions of s.114 of the Employment Relations Act.

Background to the Claim for Payment of Retrenchment Benefits

Ms Couper commenced employment with CGU as a receptionist in June 1998. The identity of actual entity that employed Ms Couper requires some definition. While Ms Couper was performing duties for CGU Lenders Mortgage Insurance (CGULMI) it seems that the legal entity that was her employer was in fact, CGU Insurance Limited. The Company has its Head Office in Australia.

Ms Couper had only just arrived from England and was placed with CGU through a temping agency. On 15 March 1999, Ms Couper was employed by CGU on a fixed term contract.

Ms Couper says that she received a position description on 22 November 1999 and it is signed by Ms Couper and her Supervisor at the time Mr Blake. The position, defined as *Receptionist/Administration Officer* essentially consisted of receptionist duties, sorting mail and data entry pertaining to insurance proposals.

In September 2000, the Manager, Mr Peter Cochrane, required a new Personal Assistant and Ms Couper was offered the role which she was happy to accept. An agreement, in letter form, dated 10 November 2000, was accepted by Ms Couper on 15 November 2000. The position title was Administration Officer and her appointment was effective from 28 October 2000. Ms Couper received a salary increase to \$36,000 per annum.

The agreement set out some terms pertaining to Ms Couper's *Position and Duties* as follows:

“As with any dynamic organisation, your role and responsibilities may change over time. You may be required to undertake other duties, functions and responsibilities from time to time in addition to or as variations of the duties, functions and responsibilities of the position. As a consequence, or for other reasons, your reporting responsibility and/or position title may be altered from time to time. You may also be assigned to another position as set out in more detail below.

However, your remuneration and other benefits under this letter will not be altered without your consent, except to the extent that this letter permits. If you are assigned to another position, the terms and conditions set out in this letter will continue to apply.”

Then further into the agreement, there is a provision for *Assignment* as follows:

“You may be assigned to another position from time to time. Assignment will only occur after consultation with you, particularly as to your career development, your own circumstances and the business needs of CGU. Whilst as far as possible, we will seek to accommodate your wishes if a new assignment or position is proposed for you, CGU reserves the right to make a decision in the best interests of the CGU Group.”

Then finally, as far as the relevant provisions of the agreement apply to the claims of Ms Couper, there is a provision for *Retrenchment*:

“If your employment is terminated on the ground of redundancy, notice or payment in lieu will be given and retrenchment benefits will be paid to you in accordance with the terms and meaning outlined in the CGU Enterprise Agreement. Retrenchment benefits are calculated based on salary.”

The *CGU Insurance Limited Enterprise Agreement 2000 / 2002*, at clause 8.1, has detailed provisions for “**Redundancy, Redeployment and Retrenchment.**” I will return to those provisions in due course.

The position description pertaining to Ms Couper’s new role is undated and unsigned but sets out in some detail the main purpose of the role. That is, to provide secretarial administrative support to the Manager, New Zealand and also to the National Sales Manager – Swann, along with processing policy proposals. The key outputs for the position are also provided and relate largely to giving personal assistance to the two managers along with administrative duties including the preparation of monthly reports.

Ms Couper says that while she was taking over the personal assistant function, there were still some of the previous administrative tasks involved including the processing of open policy proposals. There is evidence from Ms Couper’s personal employment file that indicates that she performed her duties well and was highly regarded by her manager.

A letter dated 29 June 2001, was received by Ms Couper. The author, Mr Richard Nott, General Manager, CGULMI, informed Ms Couper, that CGU Insurance Limited, the parent company, was going to sell CGULMI to another company, PMI Mortgage Insurance Australia (Holdings) Pty Limited (PMI).

The letter conveyed that PMI would be offering “a substantial number of CGULMI staff roles in the integrated structure.” It was envisaged that the process would take six to eight weeks and the steps involved were set out. It was also conveyed that there would be three possible outcomes for those staff not ultimately offered permanent roles with PMI. The options were:

1. Redeployment to another role within NZI or Swann
2. A transitional role with PMI for several months, followed by redeployment or redundancy at the conclusion of the transition period.
3. Redundancy at the end of the completion period.

Ms Couper received a further letter from Mr Nott dated 13 August 2001. Ms Couper was advised that “PMI have identified the role of Customer Service Officer, which will be required in an ongoing capacity and we now seek your application for the role.”

Mr Nott explained the various steps that would take place, including training for preparing a resume and being interviewed, and then went on to convey that:

“If you are not successful in gaining a role with PMI, we will communicate with you with a view to confirming one of the three outcomes:

- A comparable transitional role within PMI will be identified and you will be invited to apply.
- You will be redeployed to another role within the CGU Group.
- Your position will become redundant at the end of the transition period.”

Ms Couper says that she looked at the key tasks for the role that was being offered and ascertained immediately that it was not comparable with her existing role. While some of the basic administration tasks remained, her principle duties as a personal assistant, no longer existed. Ms Couper said that it appeared more like a demotion from her previous role rather than being aligned with her existing role.

On 14 August 2001, Ms Couper wrote to Mr Eric Bowell, the Deputy General Manager of CGULMI. Ms Couper conveyed that she had found the position of Customer Service Officer to be “significantly non-comparable” to her current role. Ms Couper asked Mr Bowell to advise “how this

non-comparability affects my employment status with regard to PMI and/or redeployment, redundancy or retrenchment.”

Ms Couper received a response by email from Ms Angelica Pantas (now Georgaklis), the Employee Relations Manager for CGU. Ms Pantas acknowledged that the new role that had been offered to Ms Couper was not comparable with her current position, but encouraged Ms Couper to continue with the interview and selection process in order that PMI might gain a better appreciation of her strengths and abilities for a more comparable role. However, Ms Pantas went on to convey that: “if not it would be reasonable for you not to accept their customer service officer role. In this case we would continue our redeployment options within the CGU group (i.e. Swann, NZI). As per our Redeployment, redundancy & retrenchment policy, Retrenchment is at the company’s instigation and only when all redeployment options have been exhausted.”

Ms Couper then went on to have an interview with a person from the human resources department of PMI but it appears that nothing really came from that. On 30 August 2001, Ms Pantas received notification from PMI as to the CGU staff that they required to work on secondment from CGU to PMI. Ms Couper was one of those required.

On 31 August 2001, CGU staff were advised of the outcome of the interview process. Ms Couper had a conference call with Ms Pantas and Ms Wendy Moore. Ms Moore is the Remuneration Manager for CGU but also is involved with human resource issues. Ms Couper says that she was told that PMI did not have a position for her then but she was required to work in a transition role with PMI. Ms Couper says that she was also told that she would continue in her existing role “until the work ran out.”

The notes recorded by Ms Moore show that Ms Couper was told that she would be required to assist with the transition relating to the two businesses for approximately 4 months to early 2002 and that CGU would continue to look at redeployment options.

In the meantime, Mr Cochrane had been made redundant and Ms Couper was aware that the work for Swann would be finishing the next week, and she perceived that two out of the three main roles of her job would no longer exist. Ms Couper said that she was upset about the idea of having to start a new role with an entirely different company of which she knew little about.

It transpired that PMI took over CGU on 14 September 2001 and Ms Couper was required to report to Mr Nigel Blake, a person she had worked for before and who had taken a position with PMI. The further evidence of Ms Couper is that it was unclear what she was expected to do as there was no job description and no human resources input from PMI. Ms Couper received some training on the PMI computer system and she carried on with processing open policy proposals and took on some of the basic administration tasks left over from CGU staff that had been made redundant. She also did some data entry work and prepared some monthly graphs.

It was the view of Ms Couper that the tasks that she was carrying out were not dissimilar to those proposed in the Customer Service role that she had been offered and she concluded that as CGU had agreed that the Customer Service role was not comparable to her previous role with CGU, she did not see how it could be claimed that what she was doing at PMI was comparable either.

Ms Couper was clearly dissatisfied with her secondment to PMI. She sent an email to Ms Moore on 4 October 2001. Ms Couper pointed out that she had only been carrying out half her previous duties, as there were none of the personal assistant duties that she had previously performed. Ms Couper also conveyed that:

“There have been some indications that a role may be “created” in the long term which may be comparable to my previous one. I can almost certainly say for certain that I would not accept such a role if it was offered to me. I am not enjoying working for the new company and do not wish to work here long term.”

Ms Couper also asked that if she was prepared to give an assurance that she would stay with PMI for another four or five weeks, would it be possible to bring her secondment termination date forward, albeit she understood that it would be necessary to pursue any redeployment options before retrenchment could be available.

Ms Couper concluded her email by asking if CGU would “start looking at redeployment options now? Should these be unsuccessful, I would then be in a position to pursue other employment opportunities.”

However, it is obvious that Ms Couper had already pursued other employment opportunities as the evidence shows that she had received a job offer dated 3 October 2001, from her previous manager, Mr Cochrane, who was now working with another company, Australian Mortgage Securities (NZ) Limited (A.M.S.). Clearly, there had been some discussions prior to 3 October 2001. Ms Couper started with A.M.S. on 5 December 2001. Ms Couper acknowledged that given that she had accepted employment with A.M.S. and was required to take up the role there, she would not have been able to stay on until the end of January 2002, as PMI required.

During October and November 2001, it appears that there were some ongoing discussions relating to whether Ms Couper could be released from her secondment with PMI but nothing tangible came of that. Given the overall evidence, it can reasonably be concluded that due to the conditions of the Share Sale Agreement between CGU and PMI, it was not likely that Ms Couper was going to be released early from her secondment. Indeed, the evidence of Ms Georgaklis is that CGU had no option but to comply with the Share Sale Agreement and as a consequence CGU required Ms Couper to continue her secondment with PMI until 31 January 2002.

In any event, Ms Couper resigned from her employment on 13 November 2001 with two weeks’ notice, her last day of employment being 27 November 2001.

Analysis and Conclusions

It seems to me that the provisions of clause 8.1 of the CGU Enterprise Agreement are at the heart of this matter. Those provisions set out various options that may arise for employees relating to redundancy, redeployment and retrenchment.

The introduction to the provisions states that:

“..... this Agreement outlines a range of redundancy, redeployment and retrenchment provisions which will apply when a need for restructuring has been identified.

Because CGU is committed to the continuing employment of its workforce, these provisions are based on the principle that redeployment opportunities must be fully explored when positions become redundant, before retrenchment will be considered.” (My underlining.)

Applying the above statement to the circumstances that Ms Couper was faced with, it is clear that her position with CGU was effectively redundant from the time that the two managers that she provided assistance to lost their positions. From that point in time, there is no evidence at all that CGU meaningfully, and certainly did not fully, explore any redeployment opportunities for Ms Couper. It appears to me that the paramount interest of CGU was simply to ensure that sufficient staff were seconded to PMI for the transition period, consistent with the provisions of the Share Sale Agreement. While I accept that CGU had binding obligations pursuant to the Share Sale

Agreement, I cannot help but conclude that there was no intention on the part of CGU to explore possible redeployment opportunities for Ms Couper and that CGU was only interested in ensuring that Ms Couper was retained until 31 January 2002. There is no evidence that CGU had anything else in mind for Ms Couper after that date. But in any event, as of 4 October 2001, Ms Couper made it clear that she did not want to work for PMI.

Then at sub-clause 8.1.1 of the Enterprise Agreement, redundancy is discussed:

“A redundancy occurs when CGU no longer wishes to retain the position that an Employee holds and may arise as a result of re-organisation or through the adoption of changed business practices or the introduction of technology or other circumstances. Where redundancy of a position is identified, every reasonable effort will be made to avoid retrenchment. An employee will not be retrenched until all reasonable alternatives for continuing employment with CGU have been explored.

An employee whose position is redundant will not automatically be retrenched.”

Following on from my comments as above, and for the avoidance of doubt, I find that CGU no longer wished to retain the position that Ms Couper occupied, prior to the sale of CGULMI to PMI. In short, that position was redundant. I simply do not accept that the duties that Ms Couper was carrying out during her secondment to PMI, were substantially the same as those that she was carrying out prior to the departure of Mr Cochrane and Mr Caruana, the National Sales Manager for Swann, and that she was being retained by CGU in a similar position. I accept the evidence of Ms Couper on that matter. Furthermore, her evidence is largely corroborated by that of Mr Blake and I have no reason to doubt what he had to say.

Having determined that the previous position held by Ms Couper was redundant, it is then necessary to examine the provisions of the Enterprise Agreement relating to *Redeployment*. They are:

“As stipulated above, and of paramount importance, is the commitment of CGU to redeploy an employee whose position is redundant. Redeployment within CGU may be made to:

- a Comparable Position; or
 - a Non-Comparable Position
- in accordance with this agreement.

Where a Comparable Position is available, the Employee will be redeployed to that position, will not be retrenched, and will have no entitlement to retrenchment benefits as set out in this Agreement.”

The clause sets out definitions of comparable and non-comparable positions, but it is not necessary to dwell upon them, as it is clear that Ms Couper was not redeployed. Rather, she was seconded or assigned to assist with the transition of the business from CGU to PMI.

That then raises questions about whether CGU were able to do implement such an assignment and what the effect of that assignment is as far as the obligations of both parties are concerned.

CGU say that the provisions of Ms Couper’s employment agreement dated 10 November 2000 allow for the type of assignment that occurred and I accept this to be so. The position held by Ms Couper had been made redundant. In the absence of any alternative offer of employment, it seems that Ms Couper had no other option but to accept the secondment to PMI. Indeed, I accept that she went along with the secondment without protest albeit with some reservations. She was also led to believe that some form of alternative employment may reveal itself, but clearly this did not happen.

Therefore, it seems to me, that in summary, the situation that Ms Couper was faced with was as follows:

- Her position had been made redundant, she was not redeployed and there was no indication that suitable alternative employment would be available to her.
- However, she had been assigned to another position. The terms of her employment agreement provide for such assignment. It seems that Ms Couper consented to that assignment albeit it appears that she did not have any other realistic option open to her. The position that she was assigned to was quite different to what she had been doing, and upon ascertaining that this was so, Ms Couper attempted to have the period of her secondment to PMI reduced but was unsuccessful.
- In the meantime, Ms Couper obtained alternative employment at A.M.S. She did not see fit to inform CGU of the new employment, but she did attempt to give CGU some earlier notice that she was not happy with what had transpired. CGU did nothing to resolve the situation that Ms Couper had been placed in nor did anyone look meaningfully at any future alternatives for Ms Couper and one cannot blame her for looking after her own future.
- It is not difficult to understand why Ms Couper was unhappy and it is also understandable that she was frustrated about what had happened to her. Furthermore, one cannot help but have the suspicion that Ms Couper was misled to some extent in that she was seconded into the position of Customer Services Officer with PMI, a position that she had already indicated that she was not interested in.

Returning to the retrenchment provisions of the agreement, at sub-clause 8.1.3 it is provided that:

“Retrenchment is at CGU’s instigation only. Retrenchment means termination of employment as a result of redundancy.”

Then further:

“Retrenchment does not apply:

- to employees who resign from employment with CGU.”

Given those provisions, and the term of Ms Couper’s employment agreement, that effectively gives carte’-blanche’ to CGU to make a decision to assign “in the best interests of the CGU group,” then I must conclude that to attract retrenchment entitlements, Ms Couper effectively had to remain in employment with CGU up until 31 January 2002. That is when the transition arrangements between CGU and PMI would have been concluded. At that time, it most probably could be safely concluded that the services of Ms Couper were no longer required, unless of course, CGU agreed to terminate the employment of Ms Couper’s employment earlier, or she was offered comparable employment with the CGU Group. In short, I must conclude that the retrenchment entitlement would not have been available to Ms Couper until her assigned period of employment ceased.

I also note at sub-clause 8.1.3.2 of the enterprise agreement, that there is an eight week notice period pertaining to termination of employment on the ground of retrenchment. I would suggest that it would have been advisable for Ms Couper to have waited until 30 November 2001, when most probably she would have then been in a position to have required CGU to give a clear indication as to the termination of her employment. Ms Couper chose to take the offer of

employment that was available to her at the time and one can clearly understand why she would want to obtain some security as to her future, as clearly CGU were not offering any.

Unfortunately, the outcome for Ms Couper has been that by taking the new employment at the time that she did, she forfeited any possible entitlement to retrenchment payments.

I have to say that given the overall circumstances, that appears to be somewhat unfair, as Ms Couper cooperated with her employer to the fullest extent and has received little recognition of that, apart from the special payment that was made to all employees that assisted with the transition arrangements. However, that is not something that I am able to resolve.

Determination

Having examined the contractual arrangements that were in place, that is the employment agreement and the enterprise agreement, and taking into account the totality of the evidence and submissions that were made, I find that there is no legal obligation on the part of CGU to pay a retrenchment benefit to Ms Couper. It follows that I also find that there was no breach of Ms Couper's employment agreement and hence an order for a penalty can not be granted. Therefore the matters brought to the Authority by Ms Couper must be dismissed.

Costs

Costs are reserved and I would ask that the parties attempt to reach an agreement upon that issue if they can, taking into account the usual awards of costs issued by the Authority in similar circumstances. In the event that a resolution is not possible, Mr Towner is invited to file submissions with the Authority, and copy to Mr Eggleston, within 21 days of the date of this determination. Mr Eggleston will have a further 14 days to respond to the Authority and copy to Mr Towner.

Ken Anderson

Member

Employment Relations Authority