

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Ms Laurel Kellerhals (Applicant)  
**AND** Christchurch City Council (Respondent)  
**REPRESENTATIVES** Peter D Lawson, Advocate for Applicant  
Susan Hornsby, Counsel for Respondent  
**MEMBER OF AUTHORITY** Paul Montgomery  
**INVESTIGATION MEETING** 16 December 2004  
17 December 2004  
**DATE OF DETERMINATION** 15 August 2005

DETERMINATION OF THE AUTHORITY

*Employment relationship problem*

[1] The applicant, Ms Kellerhals, says she has been unjustifiably dismissed and unjustifiably disadvantaged following a restructuring of the service centre in which she was employed by the respondent.

[2] Ms Kellerhals asks that the Authority find:

- That she was entitled to be placed, without needing to apply or undergo a capability assessment, into a Subject Matter Expert (SME) position;
- That the respondent breached the terms of section 6.2.2 of the Collective Employment Agreement (CEA) in respect of redundancy notice. She seeks a penalty of \$5,000 in respect to this alleged breach, which penalty she asks to be paid to her;
- The applicant also seeks that the Authority order the respondent to reinstate her as an employee into a SME position or into another position no less advantageous than had she been placed in a SME role;
- That the applicant is entitled to lost remuneration as a result of her grievances;
- That she be awarded compensation for hurt and humiliation resulting from the respondent's alleged actions.

[3] Ms Kellerhals was employed under the respondent's Salaried Staff Collective Agreement.

[4] The respondent denies these allegations saying that the applicant had been accorded all her entitlements under the CEA. The respondent therefore declines to meet Ms Kellerhals' claims.

[5] The parties attended mediation. However, they were unable to resolve their differences.

***What gave rise to the problem***

[6] On 16 July 2004 the respondent issued an 8 page draft proposal regarding the customer service aspects of its operations. The document proposed a reorganised structure and a plan for implementation of the changes. Essentially, the document was for consultation purposes and the Union was closely involved in that process.

[7] The applicant had been employed by the respondent as Customer Services Officer in the Water Services Unit in August 1996, and had, in the course of a restructuring in May 2000, been appointed directly, that is without interview or assessment, to a Customer Services Representative (CSR) position.

[8] In September 2001 a Ms Julie Burgess was Customer Services and Support Manager in the applicant's Unit. Concurrently, Ms Burgess also held the position of Team Leader for the Essential Services Customer Centre which frequently took her away from her managerial responsibilities in Ms Kellerhals' Unit.

[9] In September 2004, the applicant was seconded to a role called Senior Customer Service Representative (SCSR) and was confirmed as permanent in that role about 12 months later. The purpose of this position was to provide Ms Burgess and the CSR team with support for dealing with day to day management issues when Ms Burgess was attending to other duties. As the applicant was paid a bonus in 2003 it is clear that her performance was not in question. The position now held by the applicant commanded a higher salary than that of a CSR.

[10] The role was something of an orphan, although there was a role in the Financial Services Customer Unit which had the same SCSR title. However, the elements of this position appear to have been significantly different.

[11] Upon confirmation that the restructuring was to proceed, it was clear that Ms Kellerhals' SCSR position was to be disestablished. The CSR positions were to remain and a total of six new SME positions established. This brought the management of change provisions in the CEA into effect in respect to the applicant.

[12] In mid July 2004 Ms Kellerhals received a letter from the respondent advising her of a meeting on 19 July 2004 in which meeting the respondent wished to discuss the effect the proposed change might have on the applicant's position. The letter stated that there was *no position that is the same or similar to the duties you currently perform. However, I would welcome your application for any of the new positions.*

[13] The letter goes on:

*Should you elect not to apply, or you apply and are unsuccessful, redeployment to other parts of the business would be explored. Should this be unsuccessful, notice of redundancy would be issued.*

[14] The applicant saw the SME role as the position closest to the SCSR role she held and on that basis sought direct appointment to a SME position. The respondent took a different view of the matter and made it clear that an interview or assessment process was to be undertaken.

[15] When the applicant, supported by the Union, continued to press for direct appointment to a new SME position, the respondent put a proposition to her which was, that given the applicant's

view that she could meet the requirements of the new role, the respondent would undertake an accelerated interview process specifically for her to enable Ms Kellerhals to demonstrate her capability to perform the duties required.

[16] Under this proposed approach Ms Kellerhals would undergo an in-house interview to establish her capability, and if able to demonstrate this, would be assured of one of the new roles. The applicant declined this offer, standing her ground on her right to direct appointment.

[17] On 13 September 2004 the respondent, following a period of discussion with Ms Kellerhals removed some of her managerial duties, although continuing to pay her at her SCSR salary. Ms Kellerhals says this was an agreement that she would, under the new structure, work as a CSR but on her SCSR salary. The respondent says this was definitely not agreed.

[18] The removal of these senior responsibilities appeared to the applicant as discrimination against her because she had declined to apply for a SME position and declined the accelerated interview process, preferring to pursue the SME role by way of direct appointment. In an attempt to resolve the difficulties the parties attended mediation which, unfortunately, failed to resolve the impasse.

[19] On 13 September 2004 Mr Dally, the respondent's Customer Services Manager, sent a letter to the applicant which is set out below:

*Dear Laurel*

**CUSTOMER SERVICES REPRESENTATIVE – SENIOR DUTIES**

*As part of your current role, you have specific duties as a senior customer services representative. You were appointed to this position because Julie Burgess was in the team leader role for half her time, and thus backup on a day to day operational level was required. Now that we have a full-time team leader who is settled in the role, there is no longer the requirement for you to carry out these duties.*

*Therefore, with immediate effect these duties will cease to be required. Note this change will have no effect on your salary.*

*Thank you for your contribution and support of the essential services team that you have provided in your senior customer services representative role for the past three years.*

*Yours sincerely,*

*David Dally*

[20] On 16 September 2004 Ms Watson on behalf of Ms Kellerhals replied as below:

*Dear David,*

*In your letter to Laurel dated 13 September, you stated that "...now that we have a full time team leader who is settled in the role, there is no longer the requirement for you to carry out these duties" (ie Senior Duties). You go on to state that "...with immediate effect these duties will cease to be required. Note this change will have no impact on your salary."*

*We would like to record that we accept your proposal, the effect of which is that*

*Laurel will be an ordinary Customer Services Representative paid at her current salary.*

*Yours sincerely*

*Angela Watson*

[21] It appears that this letter was sent as an email attachment or hand delivered as at 4.30pm on the same day Mr Dally replied by email. It simply said, *Thanks, Angela.*

[22] On 21 September 2004 at 10.20am Mr Tonner sent an email to Ms Watson which read:

*Angela thank you for your letter of 16th of September.*

*The effect of the change in Laurel's duties is that she no longer is required to undertake those duties of the team leader. Her position remains that of a senior CSR without change in salary. A senior CSR position is disestablished in the reorganisation.*

*Laurel has not applied for a CSR position and was not included in the ring fencing for those new positions.*

*Laurel is at liberty to apply for one of the CSR positions if she so chooses when they are advertised.*

*Joe Tonner*

[23] The following day Ms Watson emailed Mr Tonner as follows:

*Joe*

*re your email yesterday.*

*David Dally wrote to Laurel on 13 September 2004 and advised her that her senior duties were no longer necessary as they had a full time team leader who was settled in the role. As I wrote in my response dated 16 September the effect of that was that Laurel was an ordinary CSO paid at her current salary. As there is a shortage of CSO's we accepted his proposal on the basis that this would be her new position within the customer centre. David accepted this proposal by his confirmation email dated 16 September 2004 saying "Thanks, Angela".*

*Furthermore, it must have been intended to be such an offer, otherwise it would be a further disadvantage to Laurel. Laurel's senior role was disestablished in the Customer Centre reorganisation. Her senior duties would cease at the time when she was either directly appointed to another position, successful in applying for another position or made redundant. It was not necessary or even possible to remove her duties in any other circumstance. If that was not the intention of the letter, then it could only be retaliation at her seeking mediation assistance for her employment relationship problem.*

*Angela.*

[24] I will return to this exchange of correspondence later in the determination.

***The issues to be determined***

[25] The issues at the heart of the matter are:

- Was the process involved in the removal of the senior duties of the applicant fair and in accord with the CEA? and
- Was the applicant entitled to direct appointment to an SME position under the terms of the CEA? and
- Was the offer of a *capability assessment* a reasonable offer by the respondent? and
- Was the respondent at any time in breach of its obligations to the applicant under the terms of the CEA? and
- In the event that the Authority finds the applicant to have been unjustifiably disadvantaged by an action of the respondent and/or unjustifiably dismissed, what appropriate remedies should be applied?

### ***The relevant sections of the CEA***

[26] The relevant change provisions are as follows:

#### ***E5.2 Reorganisations***

*From time to time the Council will want to review its organisational structures, a result of which may be that the position/s of employee/s will be disestablished and/or alternative position/s created.*

*It is desirable that the employees concerned and the Union should be kept fully informed of any such proposal, and given input into the decision making process. But in any event, no decision shall be made to disestablish any position in which an employee covered by this Agreement is employed until the employee/s concerned and the Union have been consulted.*

*However it is recognised that if it is not possible to reach agreement during the consultation process, the final decision regarding the changes to be effected will be made by the Chief Executive Officer.*

#### ***E5.3 Vacancies Do Not Require Advertising in Certain Situations***

*E.5.3.1 In reorganisation or redundancy situations where one or more positions are disestablished, the first priority is to endeavour to provide on-going employment to the displaced employee/s into positions that they are capable (and willing) of filling satisfactorily. In such circumstances it shall be permissible by agreement between the Council and the Union within the guidelines that follow to manage the change process by making direct appointments to vacant positions, or limiting the employees who will be considered for specified vacant positions.*

*E5.3.2 Where in a reorganisation situation position/s are disestablished and alternative positions are created:*

- *An employee whose position has been disestablished shall have the right to be directly appointed without advertising the position to the closest newly created position in terms of role and function to the position the employee previously held; provided a new position is one the employee is capable of performing. (Note: where there is a reasonable doubt whether the employee is capable of performing the duties of such new position, the provisions of Clause E5.7 “Redeployments” will apply unless otherwise agreed.)*

- *Direct appointments should not be made to positions of a higher grading unless through exceptional circumstances.*
- *Where two or more employees may reasonably have claim to a position as being the closest position (including situations where the new position has a higher grading) applications for such vacancy are to be “ring-fenced”, and restricted to such employees.*
- *Where as a result of a reorganisation that takes place after the date of signing this agreement an employee accepts a new position at a lower salary the employee shall be compensated for the loss of salary calculated as a partial redundancy payment. (i.e. The difference in the weekly pay multiplied by the number of weeks redundancy compensation the employee would be entitled to if he/she was made redundant.) (Refer also Clause E6.1).*

*E5.3.3 Where there is a redundancy situation, by agreement between the Council and the Union and the employee/s involved, in order to reduce the number of surplus employees to be made redundant, direct appointments without advertising may be made to any vacant position, provided that the appointment does not result in an employee being placed in a higher graded position.*

[27] It needs to be noted that in the course of the implementation of the provisions for the management of change, the respondent as a local body is required to operate within the provisions of the Local Government Act 2002 and any amendments.

### ***The investigation meeting***

[28] The Authority was assisted by Ms Kellerhals and Angela Watson on behalf of the applicant. For the respondent, the Authority heard evidence from Mr Tonner, Mr Dally, Ms Burgess and Mr Doll. I record my thanks to each for the contribution and for maintaining a cordial atmosphere in the course of the investigation.

### ***Analysis and discussion***

[29] The CEA provides the essential agreed basis on which to assess the issues in this case. It defines Ms Kellerhals’ rights as an employee just as it defines the Council’s obligations to her.

[30] It is clear from the evidence heard that the respondent sought to retain the applicant’s services and her knowledge acquired over the years of service. This was not an attempt by the respondent to rid itself of a poorly performing employee. Two facts assure me of this. The first is that the respondent made three attempts to persuade Ms Kellerhals to accept its offer of an *enhanced interview process*, and should she establish her capabilities for an SME role, would be appointed before those positions were advertised. The second is that, even upon giving her the required four weeks notice of redundancy, given that Ms Kellerhals had applied for no position in the new structure, the respondent, in that same letter of notice, continued to offer her a CSR position.

[31] The applicant took a stance that she was entitled to be directly appointed to an SME role as that was the closest to her SCSR role; a role that was clearly to be disestablished.

[32] At the heart of this particular issue was a conflict between Ms Kellerhals, who maintained that 50% of the SCSR role equated to that required of an SME, and the respondent’s view that there was a match of 20-25%. While I accept Ms Kellerhals right to her point of view, I need to balance that against the evidence that the respondent undertook a detailed comparative process to evaluate the

skills required for every position in the new structure in order to evaluate whom, among existing employees displaced by the restructuring, was capable of filling those roles. In short, it sought to evaluate transferable and matchable skills and to appoint on that basis. I think it more probable that the respondent's evaluation is the more accurate.

[33] In her evidence, the applicant raised what she said was the direct appointment of the SCSR in the Financial Services Customer Centre. Mr Dally, in his evidence, said that this was incorrect in that this person was not directly appointed to a new role but was rather confirmed in her existing position although with some minor changes and a different title. He made the point that while the titles were the same, they each in fact performed substantially different roles. As Mr Dally was working with all affected personnel and departments, I think it more likely he has a fuller understanding of what took place and how each appointment was in fact made.

[34] I return to the exchange of communications between Ms Watson (on behalf of Ms Kellerhals) and the respondent which began on 13 September 2004 with Mr Dally's letter. That letter was written within the context of the by then confirmed disestablishment of Ms Kellerhals' SCSR role.

[35] This letter does not constitute a letter of offer nor of appointment. It does not advise of any change to the respondent's restructuring plans. It simply advises that as the respondent had now appointed a *full time team leader* there was no longer a requirement that the applicant undertake those duties she had previously performed. In spite of Ms Kellerhals not needing to continue to perform these *senior duties*, she continued to be paid at her existing rate. Significantly, the letter does not require acceptance of the change in status as would be expected if the letter was nailing down a position in the altered structural setting.

[36] It is sufficient to say that Ms Watson's letter of 16 September 2004 draws a thoroughly incorrect inference in that she, on behalf of the applicant, accepts the position as set out in Mr Dally's letter as applying to the new structure. Nothing in Mr Dally's letter refers to the new structure.

[37] It may have been wise for Mr Dally to add a phrase such as *in the interim* or *until the restructure*, but that does not detract from the fact that, as was known to both parties **at the time**, these communications were firmly in the context of a restructuring process in which Ms Kellerhals' position was definitely going to be disestablished.

[38] None of the respondent's correspondence indicates any change to the restructuring implementation. For Ms Watson to take Mr Dally's reply of *Thanks, Angela* as confirmation of a permanent CSR position on her existing salary for Ms Kellerhals is far too cute. I say this because, given the context, Ms Watson had the opportunity to clarify the situation with Mr Dally in her letter of 16 September 2004 as to whether this was a permanent redeployment of Ms Kellerhals on her existing salary or otherwise. She did not take this opportunity.

[39] Mr Tonner, on 21 September 2004, made it clear to Ms Watson that the applicant's SCSR position *is disestablished in this reorganisation*. The clear message was that Ms Kellerhals' continued salary at SCSR level was to remain in place until the position held by the applicant was disestablished.

[40] In spite of this clear communication, the applicant persisted in her assertion that she had been appointed to the SCSR role in the new structure, while maintaining her existing salary and also her entitlement to direct appointment to a SME role. To put it squarely, the applicant wanted to retain her SCSR salary while continuing to press for direct appointment to an SME position. In respect of the latter, she refused the respondent's offer of an enhanced process to establish her capability to undertake such a role – a process the respondent was not obliged to offer – but an offer Ms

Kellerhals refused to accept.

[41] On the basis of the evidence before the Authority, it seems that principles overrode pragmatic offers made by the respondent to ensure the applicant's continued employment. It is also clear that the applicant, based on her principles, declined to apply for any position although clearly advised that she was able to.

[42] I also note the evidence of Ms Burgess who said that it is important to note that no one was directly matched to the SME roles in the new structure and that all of those who were subsequently successful in appointment to those positions went through a process of interview and selection. I find that thoroughly consistent with the evidence put before the Authority and it serves to highlight the alternatives the respondent offered to the applicant.

### ***The determination***

[43] Having reviewed the evidence and read the supporting documentation from both parties, I make the following findings.

[44] I find that the process employed by the respondent in carrying out the restructuring was fair and was applied in accordance with the CEA. In respect of the removal of the applicant's *senior duties*, I find Ms Kellerhals was aware of that possibility as a result of discussions with appropriate senior staff and that the letter of 13 September 2004 from Mr Dally simply confirmed matters in respect of the change. As I have already indicated above, this aspect of the matter has to be seen against the background of a more extensive restructuring which was taking place.

[45] I find the applicant was not discriminated against in respect of the removal of her senior duties, nor in the context of the restructuring was she unjustifiably disadvantaged.

[46] I find the respondent was not in breach of its obligations to the applicant in regard to direct appointment to an SME role given its prerogative to require objective assurance that the applicants had the capability to perform that role. The evidence of Ms Burgess was clear that no person appointed to an SME role was appointed directly. I accept that evidence and I also find that the respondent went beyond its obligations in offering the applicant an *enhanced interview process* assuring her of an SME role should she meet the respondent's requirements. For reasons best known to herself, Ms Kellerhals declined that offer.

[47] She took a similar approach to making applications for any other role within the new structure and accordingly on 8 October 2004 was given notice of redundancy consistent with the advice she received from Mr Dally on 3 August 2004. Consistent with the requirements of the CEA, the applicant was provided with four weeks' notice.

[48] For sake of completeness, I find that Ms Kellerhals has not been unjustifiably disadvantaged in that the respondent failed to appoint her directly to an SME position nor was she unjustifiably discriminated against in respect of the removal of her senior duties held as an SCSR. Further, I find that the respondent did not breach the terms of the CEA in issuing notice of redundancy on 8 October 2004.

[49] It follows that the dismissal on the ground of genuine redundancy of the SCSR position was legitimate.

[50] Ms Kellerhals does not have a personal grievance nor has the respondent breached the terms of the CEA. There is therefore no reason to address the matter of remedies or penalties.

***Costs***

[51] Costs are reserved. The parties, through their representatives, are to attempt to resolve this issue between themselves. Should this not be possible, leave is reserved to approach the Authority for its determination on the matter of costs.

Paul Montgomery  
Member of Employment Relations Authority