

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

<b>BETWEEN</b>	Judith Mabbott (applicant)
<b>AND</b>	NZ Amalgamated Engineering Printing & Manufacturing Union (respondent)
<b>REPRESENTATIVES</b>	Gail Irwin for the applicant Tony Wilton for the respondent
<b>MEMBER OF THE AUTHORITY</b>	Denis Asher
<b>INVESTIGATION</b>	Wellington, 5 December 2006
<b>SUBMISSIONS</b>	Received by 30 January 2007
<b>DATE OF DETERMINATION</b>	8 February 2007

**DETERMINATION OF AUTHORITY**

**Employment Relationship Problem**

1. In an amended statement of problem filed on 6 June 2006 Ms Mabbott says she was unjustifiably disadvantaged because of breaches by the Union of the redundancy provisions in her employment agreement, in particular the requirement that she be offered re-employment.
2. In its statement in reply the Union denies the allegation.
3. Mediation did not resolve this employment relationship problem.

4. The parties agreed to a one-day investigation in Wellington on Friday, 2 February. They usefully provided witness statements in advance. During the investigation the Union repeated its offer to Ms Mabbott to sign off a personal reference drafted by her. During the investigation the applicant sensibly abandoned a claim for a penalty.
5. Following the investigation I invited further submissions from the parties.

## **Background**

6. Ms Mabbott was employed by the Union in April 2001 in Wellington as a membership administrator, before being made redundant in early June 2005.
7. Clauses 26.4.6.1 and 26.4.6.2 of her collective employment agreement provided for the following:

*Should the employer require additional staff within 12 months of termination taking effect, the employer shall offer these vacancies, exclusively to employees who have been terminated through redundancy and who have the appropriate skills and experience.*

*The basis of re-employment shall be that the person re-employed shall take on a new position on a like for like basis; provided that an employee may apply for a position and when no suitably qualified or experienced redundant person is available, retraining shall be considered.*

8. By email on 31 May 2005 Ms Mabbott reminded the Union of the above, i.e. of its obligations to consider her for future re-employment opportunities. The Union did not reply to that communication.
9. On 8 September Ms Mabbott enquired of the respondent about a rumour she had heard concerning an office vacancy: she was told the position had already been filled.
10. Ms Mabbott advised the Union of a personal grievance shortly afterward, alleging a breach by the respondent of its obligation to exclusively offer her any vacancies occurring within 12 months of her redundancy per clause 26.4.6.1 of her collective employment agreement.
11. Ms Mabbott says another suitable position has been filled since, without the Union clarifying her suitability for that position.

12. The Union does not accept it acted in breach of its obligations to the applicant.

## Discussion and Findings

13. The Union properly accepts that, while the employment relationship had come to an end, it still had ongoing, contractual obligations to Ms Mabbott. It also accepts that, via, s. 103(1) (b) of the Act, and because of that obligation, i.e. her qualified right to re-employment, Ms Mabbott was entitled to bring a personal grievance in respect of that condition of her employment.
14. However, while the Union's obligations to Ms Mabbott were ongoing, I do not accept that – following her being made redundant – the applicant was an employee in terms of s. 4(1A) (c) of the Act. I am therefore satisfied that, despite the applicant's claim and amongst other things, the Union was not obliged – per that section – to provide Ms Mabbott with access to information relevant *“to the continuation of the employee's employment ... and ... the opportunity to comment on the information to their employer before the decision is made.”*
15. Similarly, I do not accept the applicant's argument, as advanced by her advocate, Dr Gail Irwin, that natural justice required the Union to provide Ms Mabbott with an interview opportunity to address its concerns about her – the applicant's – interpersonal skills. Like Dr Irwin, I have been unable to locate any case law in support of this claim.
16. The primary issue between the parties is whether the Union met its obligations, via Ms Mabbott's employment agreement, to offer her vacancies as a former employee, *“... terminated through redundancy and who (has) the appropriate skills and experience”* (above).
17. The Union says it met its contractual obligations. In particular it says – and there is every reason to believe it did so – that it considered Ms Mabbott's suitability but declined to offer her the vacancies on the ground she did not have *“the appropriate (inter-personal) skills”*. It also says it considered retraining the applicant but decided her inherent attributes – again, her inter-personal skills – were not likely to be remediable through the type of training it could support.
18. The Union says, having turned its mind to its obligations, it made a reasonable decision not to offer either of the two vacancies to Ms Mabbott. It says its decision was based on the experience of working with the applicant for 4-years and, particularly, its letter of 25 February 2005 and the subsequent meeting of 9 March in which – the parties agree – serious performance allegations against the applicant, as set out in the letter, were put to

her. These allegations were: that she was routinely uncooperative with other staff; and that she possessed an unfriendly and hostile manner and demeanour. Two staff were named as the source of those allegations. Other, unnamed, staff were reported to have complained about Ms Mabbott's continual bad moods and general unpleasantness. The letter warned that, if the Union was satisfied there was misconduct on Ms Mabbott's part, disciplinary action could follow including up to a final written warning.

19. The Union said that it did not put the allegations of another complainant to Ms Mabbott as the former had made it clear that – having communicated her concerns to the respondent – she did not want them raised with the applicant as she preferred instead to work out a stress-free notice period.
20. The applicant, then and now, does not accept the complaints set out in the Union's letter or 25 February (however I note that, while rejecting the allegations at the time, Ms Abbott took the matter no further). Ms Mabbott says the membership team was under a lot of stress during the redundancy period leading up to its transfer to Auckland. She says the claim (not raised at the time) that she was responsible for the departure of at least one fellow worker was not substantiated. Ms Mabbott says there was a difficult personal issue and – because the section manager refused to act – she was obliged to put a difficult subject to someone who then took it badly and resigned. She says the actions in one other respect (and previously put to her), that she denied others access to a folding machine, was as a result of instructions previously put to her. The bad atmosphere was, Ms Mabbott said, a result of conduct by "*both sides*" (oral evidence). The applicant maintains she had the appropriate skills for e-employment.
21. Ms Mabbott says of the 9 March meeting that all matters were resolved by way of an agreement that all would work toward the smooth transfer of the membership section to Auckland, and no disciplinary action would be taken against her.
22. The Union agrees it did not proceed with disciplinary action against the applicant following the 9 March meeting. This was because, as its national secretary, Mr Andrew Little, records at par 22 of his witness statement:

*... I deliberately took a lenient approach at this time to preserve the membership processing operation pending its transfer to Auckland.*
23. During the investigation Mr Little acknowledged not responding to Ms Mabbott's email of 31 May asking for confirmation of clause 26.4.6.1. He also confirmed that the section

manager was not effective in his role and that he – Mr Little – had to step in from time to time to facilitate meetings of staff.

24. The Employment Court in *Smith v Sovereign Ltd (owned and operated by the ASB Bank)* [2005] 1 ERNZ 832, at pars 80, 81 & 84 made the following observations. An employer:

*... is entitled to take into account performance matters relating to a present employee who is applying for a new position. But it is equally clear that if there are adverse performance issues then a fair and reasonable employer would have taken the opportunity to have addressed those issues with the employee at the time they were first raised.*

*Even without the express contractual obligation to make every effort to place the plaintiff in the new position any outstanding performance issues should have been addressed in a timely fashion, resolved and then put to one side. This was not how the defendant dealt with the performance issues and it is difficult to escape the conclusion that they clouded her appointment.*

...

*The breach of the contractual obligations were exacerbated because ... (performance issues) were not properly dealt with so that they could have been put to one side and not have influenced the decision not to appoint (the plaintiff) to the new position. These ... were not the actions of a fair and reasonable employer.*

25. Can it be said that the Union addressed adverse performance issues in respect of Ms Mabbott when they were first raised? I think it can. Those concerns are clearly set out in its letter to the applicant of 25 February 2005. They are serious allegations. They were the focus of the discussion of the 9 March meeting. While that meeting clearly had an agreed outcome, that everyone would work toward a smooth outcome, Ms Mabbott cannot fairly argue that she reasonably believed the Union's concerns were thereby set aside, that they were dismissed by her employer. Clearly they remained; in part that is why the parties agreed – prior to the redundancy – to consciously work toward a smooth outcome. And Ms Mabbott herself accepts that “both sides” (above), i.e. her self included, were responsible for the bad atmosphere in the respondent's membership processing operation.
26. I am therefore satisfied that, having raised with Ms Mabbott its concerns about adverse performance issues, and in the context of a shortly pending transfer of operation and related staff redundancies, the Union discharged its good faith obligations to the applicant, particularly its obligations under s. 4(1A) (b), “to be active and constructive in establishing and

*maintaining a productive employment relationship in which the parties are, amongst other things, responsive and communicative.”*

27. Having fairly raised its concerns with Ms Mabbott about her adverse performance, and in the absence of any evidence of animus against the applicant, the Union can thereby justify its decision not to offer the applicant subsequent vacancies, on the legitimate ground it had properly satisfied itself she lacked “*the appropriate skills ...*” (clause 26.4.6.1). While that decision clearly disadvantaged the applicant it cannot be said to be unjustified, particularly as the vacancies – being significantly different from the data processing position previously held by Ms Mabbott – stressed the importance of excellent interpersonal skills (attached to amended statement in reply).

### **Determination**

28. For the reasons set out above I am satisfied that the Union has not unjustifiably disadvantaged Ms Mabbott.
29. Costs are reserved.