

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 41
5452097

BETWEEN MARIE McNICHOLAS
Applicant

AND NEW ZEALAND EXCHANGE
LIMITED
Respondent

Member of Authority: Trish MacKinnon

Representatives: Greg Lloyd, for Applicant
 Geoff Davenport, for Respondent

Investigation Meeting: 24 November 2014 at Wellington

Submissions Received: 24 November 2014 from the Applicant
 24 November 2014 from the Respondent

Determination: 21 April 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Marie McNicholas has raised a dispute over the application of the redundancy compensation and employee protection provisions of her employment agreement.

[2] She claims an entitlement to redundancy compensation following the termination of her employment for redundancy on 3 March 2014. The Engineers Printing and Manufacturing Union (EPMU) supports her claim.

[3] Her former employer, New Zealand Exchange Limited (NZX), rejects the claim. It says Ms McNicholas was offered a position in its organisation that was on the same or similar terms and conditions of employment. This disentitles her to redundancy compensation under the terms of her employment agreement.

[4] The parties have attended mediation but were unable to resolve the matter.

Relevant background

[5] Ms McNicholas was employed for more than twelve years as a journalist on Newsroom, an online news provider. Newsroom was independently owned until 2007 when it was purchased by NZX. Ms McNicholas was offered, and accepted, employment with NZX and continued to work as Newsroom's senior political journalist, based in the Parliamentary Press Gallery.

[6] In November 2013 NZX advised Ms McNicholas that Newsroom was to be put on the market. On 24 January 2014 NZX announced it had sold Newsroom to an external agency. Ms McNicholas was not offered employment with that agency. NZX offered her a role as a senior reporter with its Agri Group which has a stable of publications relating to news and information relevant to the agricultural sector.

[7] Ms McNicholas did not accept that position on the basis that it was not comparable to her Newsroom role which had been almost exclusively that of a general political correspondent.

[8] NZX had no other position to offer Ms McNicholas and subsequently terminated her employment. She was paid eight weeks' salary in lieu of notice but did not receive redundancy compensation.

The individual employment agreement

[9] Ms McNicholas signed an employment agreement with NZX in July 2007. It referred to her position as that of *Journalist* with the duties and responsibilities of the position asserted to be set out in "*the position description attached*". However, it appears that no position description was attached as neither party was able to locate one.

[10] Under the heading "*Hours and Place of Work*" the agreement stated Ms McNicholas was required to work from the Parliamentary Press Gallery and the employer's Wellington offices. There was provision for travel away from those locations from time to time. It also included the provision that "*the Employee accepts that the place of business of the Employer may change within Wellington without any accompanying change of remuneration or benefits*".

[11] The relevant provisions of the employment agreement for the purposes of this dispute are those concerning redundancy and employee protection in restructuring situations.

18 Redundancy

Subject at all times to any overriding application of clause 19 of this agreement to a particular situation, where the Employee's position is or will be disestablished the Employer may:

- (a) *Transfer the Employee to a comparable position (that is, a position with the same or substantially similar general responsibilities, requiring the same or substantially similar skills, knowledge and other performance-related requirements and located in the same greater urban area or in another area acceptable to the Employee) elsewhere within the Employer's organisation; or*
- (b) *Offer the Employee some other position within its organisation, which the Employee is free to accept or reject. If the offer is rejected, redundancy compensation will be payable in accordance with the formula set out in this clause.*

Where the Employee's employment is terminated by reason of redundancy, the Employee will receive notice in accordance with clause 17 of this agreement (or payment in lieu of notice) and (where payable) redundancy compensation will be paid on the basis of four weeks' base salary for the first completed year of employment with NZX, and two weeks' base salary for each subsequent continuous completed year of employment with NZX, to a combined maximum of 26 weeks' compensation. No compensation will be paid in respect of part years of employment.

19. Employee Protection in Restructuring Situations

This clause will apply only to situations where the Employer is proposing to, or does, restructure in terms of section 69K of the Employment Relations Amendment Act 2004 (i.e. contracting out, selling or transferring all or part of its business to a new entity) and, as a result, the work performed by the Employee will be undertaken by the new entity. This clause will not apply to any other restructure or reorganisation undertaken by the Employer.

- (a) *Where practicable, and where the proposal would impact substantially on the Employee's employment, the Employee will be consulted about any proposal to sell, contract out or transfer any part of the Employer's business to a new entity prior to a final decision being made.*
- (b) *If the Employer decides to proceed with a proposed restructure, it will enter into discussion with the new entity with a view to encouraging the new entity to offer the Employee employment on the same or similar terms and*

conditions of employment, and to recognise the service as continuous. However, any final decision on this matter rests entirely with the new entity. The Employee is entitled to choose whether to accept or reject any offer of employment that may be made by the new entity.

- (c) *The Employer may also offer the Employee alternative employment within its own organisation in accordance with clause 18(a) or clause 18(b) of this agreement. The Employee is free to accept or reject any offer of alternative employment that may be made by the Employer.*
- (d) *If the Employee accepts an offer of employment by the new entity, or an offer of alternative employment with the Employer, no redundancy compensation will be paid.*
- (e) *If the Employee rejects an offer of employment by either the new entity or the Employer, which is made on the same or similar terms and conditions of employment and which recognises service as continuous, no redundancy compensation will be paid.*
- (f) *Where the Employee's employment with the Employer will end by reason of redundancy, the Employee will receive notice of termination of employment in accordance with clause 17 of this agreement, or payment in lieu of notice at the Employer's discretion.*

Issue

[12] The issue for the Authority to determine is whether Ms McNicholas was entitled to be paid redundancy compensation under the terms of her individual employment agreement when her employment was terminated in March 2014.

The positions of the parties

[13] Ms McNicholas said she was a press gallery political reporter in all the time she worked for Newsroom. By her estimate, 90% of the content of her work was exclusively political. The exceptions were when a major news event occurred, such as those of 11 September 2011 in the United States, or the Christchurch earthquakes of 2010 and 2011. On such occasions she could be required to do work that was not political in nature.

[14] She stressed that parliament-based political journalism was a very specific area of journalism. Even when she did stories of an agricultural nature, which she occasionally did after NZX purchased Country Wide rural publications and formed its

new Agri Group in 2009, Ms McNicholas said she did those stories because of the political element to them.

[15] In Ms McNicholas' view the job description for the new position offered to her by NZX had a much narrower focus than that of the Newsroom role. The overall purpose of the new role was stated in the job description as follows:

The purpose of this new role is to focus on providing mostly agri-political content, either in the form of news reporting or regular commentary, for the company's news title, magazines and websites.

[16] Ms McNicholas said this represented a different job from that of a general political reporter, even if some of the stories might have a political focus.

[17] In submissions on her behalf Mr Lloyd noted:

No matter how the respondent tries to dress up the new job and characterise it as something else, it is an agricultural reporter's job. That is the job that must be compared with the job of political reporter for Newsroom.

[18] NZX disagreed and said that, prior to Newsroom's sale in 2014, it was part of it Agri business division. Tony Leggett, Head of NZX Agri, referred to evidence of this in the company's organisation chart.

[19] Mr Leggett said the work Ms McNicholas produced for Newsroom was not the full extent of her work for NZX and that she produced dozens of stories that were published in the *NZ Farmers Weekly* and in its online news service. He said it was part of her role to produce content for publication through the *New Zealand Farmers Weekly*.

[20] NZX produced evidence of a number of such articles, published between 2009 and 2014, written in full or in part by Ms McNicholas. These covered a wide range of topics which he said fitted into the "agri-political" category. They included articles on matters such as climate change, environmental challenges, water quality, irrigation issues, trade deals or negotiations, and biosecurity.

[21] Mr Leggett's evidence was that NZX wanted to retain Ms McNicholas whom it regarded as a valuable employee. It wanted her to continue writing stories with political content and a strong political focus. He rejected the description of the role she was offered as that of a low level agricultural reporter or "*Rural Roundsman*".

Principles of Interpretation

[22] Counsel for both parties referred me to the well-known principles of contractual interpretation. Both cited the Employment Court's affirmation of the principles in *New Zealand Professional Fire Fighters Union & ors v New Zealand Fire Service Commission*¹ where, at paragraph 17, the Court summarised the principles from the Supreme Court's decision in *Vector Gas Limited v Bay of Plenty Energy Limited*² in this way:

In summary, it would appear from Vector that the starting point for any contractual interpretation exercise is the natural and ordinary meaning of the language used by the parties. If the language used is not on its face ambiguous then the Court should not readily accept that there is any error in the contractual text. It is nevertheless, a valid part of the interpretation exercise for the Court to "cross-check" its provisional view of what the words mean against the contractual context because a meaning which appears plain and unambiguous on its face is always susceptible to being altered by context, albeit that outcome will usually be difficult to achieve. If the language used is, on its face, ambiguous or flouts business commonsense or raises issues of estoppel then the Court should go beyond the contract so as to ascertain the meaning which the relevant provision would convey to a reasonable person with all the background knowledge available to the parties. Extrinsic evidence is admissible in identifying contractual context if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning the parties intended their words to bear. Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time.

Submissions and Discussion

[23] Having cited the same case law and principles of interpretation, counsel for the parties in the current matter have applied those principles to reach different conclusions, both as to the relevance of clause 18(a) to Ms McNicholas' situation, and to the outcome if the Authority were to find that clause applicable.

[24] Mr Lloyd framed the question at the heart of the dispute as in the following terms:

"..whether or not a job which consists of providing immediate, up to the minute political commentary on the full spectrum of political issues and which can only be done from the Parliamentary press gallery, is the same or substantially similar as writing stories with a specific agricultural focus for a weekly farmers newspaper, a job which can be done from anywhere in New Zealand."

¹ [2011] NZEMPC 149

² [2010] NZSC 5, [2010] 2 NZLR 444

[25] In his submission there is nothing in the disputed clauses that should require anything but the plain and unambiguous meaning of the words, having regard to the relevant facts of Ms McNicholas' case.

[26] He submits the clear intent of the agreement, having regard to clauses 18(a),18(b),19(c) and 19(e), is that redundancy compensation will not be payable where an offer of employment is made by the respondent on terms and conditions that are the same or substantially similar, whether or not that offer is accepted by the applicant. He further submits it is equally clear that, where an offer of employment is made that is not on the same or substantially similar terms and conditions, the applicant is free to reject it and claim her contractual entitlement to redundancy.

[27] Mr Lloyd's view is that the Newsroom journalist's position was not the same as, or substantially similar to, the position offered to Ms McNicholas. In the absence of a job description for her Newsroom position he submits the only person who could speak with authority about the role she performed is Ms McNicholas.

[28] By Ms McNicholas' account she was a political correspondent working out of the parliamentary press gallery. Her responsibilities included attending press conferences, interviewing politicians, reporting on their activities, observing and reporting on what happens in the debating chamber. Her role was to provide up to the minute, relevant political news stories from Parliament.

[29] In contrast to that, Mr Lloyd submits, the role of a *Farmers Weekly*³ reporter was to provide content of specific relevance to the agricultural sector. Stories written by Ms McNicholas would occasionally be reproduced in one of NZX's agricultural publications but she did not write specifically for them.

[30] In his submission the question is not whether Ms McNicholas possesses the skills and knowledge to perform the duties of a *Farmers Weekly* journalist. The question is whether or not the position of *Farmers Weekly* journalist requires the same or substantially similar skills and knowledge. He submits it does not. A Newsroom parliamentary press gallery reporter does not require specific expert knowledge of agriculture. Nor does a *Farmers Weekly* journalist require any specific expert knowledge of Parliament, politics and the political process.

³ One of the publications in the NZX Agri division's portfolio.

[31] He submits the skill set and knowledge requirements of the two positions are fundamentally different. To underline the difference, Mr Lloyd submits that to say otherwise would be akin to saying a specialist criminal lawyer is materially the same as a specialist employment lawyer.

[32] Mr Lloyd also refers to press gallery accreditation, noting this was a fundamental requirement for Ms McNicholas' Newsroom role. While the respondent's unverified evidence is that accreditation was able to be obtained for an agricultural journalist, he submits it is not a requirement of the role.

[33] NZX through its counsel, Mr Davenport, submits that NZX, following the sale of Newsroom, offered Ms McNicholas employment that satisfied the requirements of clause 19(e) of her employment agreement. She rejected that employment and therefore no redundancy compensation was payable.

[34] In his submission clause 19(e) overrides clause 18 of the employment agreement, as the wording of clause 18 makes clear that it is expressly subject to clause 19. He submits that, if the Authority determined this was not the case, and that clause 18(a) continued to have application, that clause was also satisfied in that Ms McNicholas was offered a comparable position as defined in that clause. In his submission, whichever view is taken of clause 19(e), the result is the same in that no redundancy compensation was payable to Ms McNicholas.

[35] Mr Davenport refers to the letter dated 24 January 2014 provided to Ms McNicholas by NZX following the sale of Newsroom. That letter confirmed she would remain an employee of NZX in her current role of Senior Journalist and that her place of work and reporting arrangements would change. She would provide content for the NZX Agri Suite of Publications and Websites. All other terms and conditions of her employment with NZX would remain unchanged.

[36] Mr Davenport notes that, subsequently, NZX confirmed to Ms McNicholas that her role would be able to be based at the Press Gallery in Parliament, and that it would continue to have Press Gallery accreditation.

[37] Counsel differ over whether the test in clause 18(a) or that in 19(e) applies. Mr Lloyd's submissions are premised on clause 18(a) holding sway. This refers to a "*comparable*" position, defined as one with the same or substantially similar general responsibilities, requiring the same or substantially similar skills, knowledge and

other performance-related requirements. It also has a location component, which is not at issue here.

[38] Mr Davenport says clause 19(e) overrides clause 18. It refers to employment offered on the same or similar terms and conditions of employment and which recognises service as continuous. This is a lower standard than that of clause 18(a) which requires the offered position to be "*comparable*" as defined above.

[39] Mr Lloyd's interpretation of the operation of the provisions is that, by referencing clause 18(a) and (b) in clause 19(c) of the employee protection provisions, the "*comparable position*" test becomes relevant to any position offered by the employer to an employee in Ms McNicholas' position.

[40] That interpretation, while initially appealing, does not stand further scrutiny and I find it is not the intent of the clause. The opening words of the redundancy provisions of clause 18 are explicit in making those provisions subject to the "*overriding application of clause 19 .. to a particular situation ..*".

[41] Clause 19(c) refers to the employer's ability to "*offer*" the employee alternative employment within its own organisation "*in accordance with clause 18(a) or clause 18(b)...*". I note that clause 18(a) does not deal with an "*offer*" of employment. It deals with the employer's ability to transfer the employee to a comparable position. While unstated, the implication is that an employee so transferred will not have an entitlement to redundancy compensation.

[42] The letter sent to Ms McNicholas on 24 January 2014 informing her of the purchase of Newsroom with effect from 31 January 2014 stated that "*..we can confirm that you will remain an employee of NZX in your current role of Senior Journalist.*" This suggests a clause 18(a) transfer to a comparable position rather than a clause 18(b) offer of some other position within the organisation. In subsequent correspondence, however, both parties referred to the "*offer*" of a position made to Ms McNicholas by NZX which makes the situation less certain.

[43] In effect, however, it does not matter whether the employer used clause 18(a) or 18(b) to transfer, or to offer, Ms McNicholas the position it wished her to undertake within the organisation. This is because I find, in this situation, clause 19(e) set the relevant standard for determining whether redundancy compensation was payable where the employee rejected employment under either clause 18(a) or 18(b).

[44] This was not an internal restructure that did not involve the "*contracting out, selling or transferring all or part of its business to a new entity.*". It was a situation where the part of the business in which Ms McNicholas was employed was sold to an external agency. It was, therefore, a situation in which clause 19, dealing with employee protection in restructuring situations, applied.

[45] The plain meaning of the words in the opening sentence of clause 18 "*(s)subject at all times to any overriding application of clause 19...*" is that, in the situation faced by Ms McNicholas, her entitlement to redundancy compensation was determined by clause 19(e) of her employment agreement. It was not determined by clause 18.

[46] The relevant test for entitlement to redundancy compensation in Ms McNicholas' situation is whether the offer of employment was made "*on the same or similar terms and conditions of employment and which recognises services as continuous*". That is a different, and more easily satisfied, test from the "*comparable position*" test of clause 18(a).

[47] NZX offered Ms McNicholas continued employment with no change to her current terms and conditions of employment. Had she accepted the offer her service would have been seamless and continuous. She would have continued in a role as Senior Journalist. In accordance with discussions between the parties subsequent to the original offer, she may have been able to continue working out of the Press Gallery. Her remuneration and other terms and conditions of employment would not have changed, and her employment would have been continuous.

[48] The major change for Ms McNicholas would have been a change from an almost purely political focus to one that was intended, according to the Job Description formulated by NZX, to "*maintain and grow the agri-political and Wellington content offering for NZX Agri publications and websites*".

[49] Ms McNicholas acknowledged she could perform the duties that would be required of her if she had chosen to accept the position. She did not find the prospect of focusing on *agri-political* farming matters, rather than political, to be acceptable. That was a choice she was entitled to make. However, the exercise of the choice left her with no entitlement to redundancy compensation under the terms of her employment agreement.

Determination

[50] For the reasons stated above I find that Ms McNicholas does not have an entitlement to redundancy compensation under the terms of her employment agreement with NZX.

Costs

[51] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority