IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 539
3069652

	BETWEEN	CHERIE MILNE Applicant
	AND	NEW ZEALAND STEEL LIMITED Respondent

Member of Authority:	Vicki Campbell
Representatives:	Matthew McGoldrick for Applicant Emma Peterson for Respondent
Investigation Meeting:	17 September 2019
Oral Determination:	17 September 2019
Record of Oral Determination:	18 September 2019

RECORD OF ORAL DETERMINATION OF THE AUTHORITY

A. New Zealand Steel Limited did not breach the employment agreement and accordingly no compliance orders are necessary.

B. The parties are directed to mediation.

C. Costs are reserved.

Employment relationship problem

[1] This is an application for compliance orders. Ms Milne has applied to the Authority seeking compliance with the terms of her employment agreement on the basis that her position has been disestablished and she is redundant.

[2] New Zealand Steel Limited (NZSL) denies Ms Milne is redundant. It accepts her position has been disestablished but says her duties largely remain in the form of a new role for her to be redeployed into.

Issues

[3] In order to resolve Ms Milne's application I must determine whether she is redundant and if so whether NZSL should be ordered to comply with the terms of the employment agreement with respect to:

a) Notice period;

b) Payment of redundancy compensation;

c) Payment of unused sick leave; and

d) Payment of holiday pay.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. It has not recorded all evidence and submissions received.

Relevant terms of the employment agreement

[5] Redundancy is addressed in the written employment agreement in the following terms:

> **12. Managing Redundancy**
> A redundancy situation occurs where your employment is terminated because your position or the duties and responsibilities of your work role are significantly altered or are surplus to requirements, due to a change in the Company's size, structure, responsibilities, or operation or market requirements.

> The first option is to consider redeployment should your position become surplus. You will be treated fairly and reasonably in any selection process, taking into account such things as skills, experience and employment record.
>
> In the event of redundancy, you will receive as much notice as possible and not less than 4 weeks notice of termination of employment or payment in lieu of notice. During your notice period the Company may provide you with outplacement assistance as appropriate.
>
> Redundancy compensation shall be based on average weekly earnings over the last 12 months and calculated as follows (verbatim):
>
> - 10 weeks pay for the first years service;
> - Each additional complete year 2.5 additional weeks pay,
> - final part year, proportional of 2.5 additional weeks pay based on above entitlement.
> - plus payment at base salary rate for the previous 3 years unused sick leave.
>
> No redundancy will arise by reason of the sale or transfer of the whole or any part of the Company's operations, where the person or entity acquiring the whole or any part of the operation offers you employment in the same capacity, or in a capacity you are willing to accept, on no less favourable conditions of employment overall and agrees to treat your service as continuous.

The restructuring

[6] Mr Chris Blenkiron is the Head of NZSL's Sales and Marketing Division. There are five teams operating within the division including a Marketing team and a Sales team.

[7] Ms Milne has worked for NZSL since 1988. She has held a variety of largely administrative roles her last role being that of Insight Analyst which was a position within the Marketing team. That position was disestablished on 30 June 2019 and a new position of Sales Operations Analyst (SOA) reporting to the Sales Manager was established as a result of a restructuring process within the Sales team.

[8] The role of Insight Analyst was a sales support role providing information to support the sales team. Prior to the May restructuring Key Account Managers (KAM's) were largely responsible for undertaking their own administrative tasks. Mr Blenkiron told me the restructuring was to pull the Insight role out of the Marketing team and put it into the Sales team and to shore up some of the ad hoc functions Ms Milne had been doing to support individual KAM's.

[9] The restructuring process was initiated on 13 May 2019. Ms Milne was advised NZSL was undertaking a restructuring of the Sales team but that her position

would be included in the restructuring process because her role was viewed as having a significant crossover with a new proposed role of SOA.

[10] Ms Milne was provided with copies of the proposed new job description together with a restructuring proposal document. That document confirmed the proposal to disestablish her current role and establish two new roles one of which was the SOA role.

[11] Ms Milne provided written feedback on the proposed new role on 16 May. Her feedback related to the specific requirements set out in the job description for the SOA role. Ms Milne acknowledged in her feedback that there was cross over with her current role, although she felt it was between 25 and 40 percent while NZSL believed the cross over was significantly more and was around 80 percent.

[12] Ms Milne met Mr Blenkiron and Ms Ford on 22 May 2019. This meeting followed other meetings Ms Milne had attended with Ms Ford prior to 22 May. During the meeting Mr Blenkiron outlined his view that Ms Milne's skills and experience would be well suited to the new SOA role a view Ms Milne has not taken issue with.

[13] On 27 May Ms Milne formally expressed her interest in the SOA role which she saw as a pivotal part of the sales team function and was looking forward to the opportunity of working in the new role.

[14] Ms Milne met again with Mr Blenkiron and Ms Ford on 5 June 2019. Between the 22 May meeting and the 5 June meeting amendments had been made to the job description to incorporate suggestions previously made by Ms Milne.

[15] At the meeting Ms Milne was given a letter confirming her Insight Analyst role had been disestablished, offering her the SOA role within the sales team and proposing variations to her employment agreement. The variations included new provisions dealing with confidential information and non-solicitation of NZSL clients and employees post- employment.

[16] During the meeting Ms Ford expressed her and Mr Blenkiron's expectations they had for the SOA role. Despite never raising any concerns with her performance

in the past, Ms Ford advised Ms Milne that errors she had made in a document produced by her the previous week would not be acceptable in her new role. Mr Blenkiron also raised concerns about her getting "caught up in scuttle butt" and how this impacts on the team.

[17] Ms Milne commenced a period of sick leave on 12 June and has not returned to work. Ms Milne formally rejected the offer of redeployment into the SOA role on 31 July.

Did NZSL breach the employment agreement?

[18] Redundancy has been defined as being a condition where a company has more staff than is necessary. It is a state where an employee loses their job because there is no further work to be done.[1]

[19] Consistent with the definition of redundancy in *GN Hale* the employment agreement defines redundancy as a situation where Ms Milne's employment is terminated because her duties are significantly altered or are surplus to requirements.

[20] Ms Milne's employment has not been terminated. I have considered the differences between the two roles and have concluded Ms Milne's duties would not be significantly altered if she accepted redeployment into the SOA role. This is because the functions of the SOA role are similar in nature to those undertaken in the Insight Analyst role including some of the ad hoc functions undertaken to support the KAM's.

[21] In *Pilgrim v Director General of Health* the Court stated: [2]

> Employers have to recognise some restriction on the absolute power to dispose of their employees as they see fit. On the other hand, employees must overcome that resistance to change which is a natural attribute of the human condition. In particular, they have to accept that they may be redeployed to a position with a different department or agency in a position which is neither the same nor necessarily similar but for which they are suitable by reason of skills which they already possess or which they can reasonably be expected to acquire as a result of a modicum of training falling short of retraining.

---

[1] *GN Hale & Sons Ltd v Wellington Caretakers IUOW* [1991] 1 NZLR 151 (CA) at 155.
[2] *Pilgrim v Director General of Health* [1992] 3 ERNZ 190

[22] Ms Milne gave NZSL a written indication of her interest in the SOA role on 27 May. At the meeting on 6 June Ms Milne raised the need for support in aspects of the new role. Ms Ford assured Ms Milne the necessary support would be provided.

[23] As noted by Court in *NZ PSA v Landcorp* Ms Milne does not have the right to insist on being made redundant:[3]

> Redundancy is a misfortune, not a privilege. It is for the employer to decide whether a redundancy situation exists.

[24] The employment agreement does not address the situation which has arisen in this case about what happens when an employee rejects an offer of redeployment. It is not uncommon, for example, for employment agreements to specify that redundancy will not arise in such a situation.

[25] The employment agreement clearly requires both NZSL and Ms Milne to consider redeployment. Both parties have met that obligation and Ms Milne has declined the offer.

[26] Both parties have referred me to the case of *Auckland Regional Council v Sanson* in support of their positions.[4] I have distinguished that case on the basis that the wording in the employment agreement was significantly different. More importantly in this case NZSL has taken steps to propose an alternative role for Ms Milne, for which she has both the experience and skills, before the point has been reached where either notice is to be given or it could be reasonably said that Ms Milne's employment had ended.

[27] The pre-requisite for redundancy requires a termination of employment which has not occurred.[5] Ms Milne cannot pre-empt any determination that might arise as a result of her position becoming superfluous. At all times during the consultation process Ms Milne accepted she had the skills and experience to do the SOA role and expressed interest in being redeployed into it.

---

[3] *NZ PSA v Landcorp* [1991] 1 ERNZ 741 at 759.
[4] *Auckland Regional Council v Sanson* (2000) 5 NZELC 96,025; [1991] ERNZ 597 (CA).
[5] *Wood v Christchurch Golf Club Inc* [2000] 1 ERNZ 756 (CA).

[28] As observed by the Court in *Sewell v New Zealand Trade and Enterprise*, while noting that it was not necessary to minutely scrutinise the two roles, any change in jobs as a result of a restructure will produce some degree of change.[6]

[29] I have accepted Mr Blenkiron's evidence that a significant number of Ms Milne's duties as they existed under the Insight Analyst role are still available even though that job has been disestablished. Most duties have been moved into the new SOA role with some additions which are reflective of functions Ms Milne had been undertaking on an ad hoc basis.

[30] Ms Milne says the introduction of variations to her employment agreement applying to confidentiality and non-solicitation also points to the SOA role being significantly different.

[31] I have accepted Mr Blenkiron's evidence that these clauses were being introduced on a company wide basis and that he was open for Ms Milne to discuss them further with him.

[32] During the investigation meeting Ms Milne told me Ms Ford herself, questioned Mr Blenkiron about why the new provisions were necessary for Ms Milne. Mr Blenkiron told me that if Ms Milne objected to agreeing to the proposed variations it would not have prevented her from being employed in the SOA role.

[33] I find there has been no breach of the employment agreement and accordingly no compliance orders are necessary. The parties are directed to attend mediation to discuss and agree on how and when Ms Milne will return to work.

Costs

[34] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so NZSL shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Ms Milne shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

---

[6] *Sewell v New Zealand Trade and Enterprise* AC5/05, 22 February 2005 (NZEmpC) at [21] as cited in *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpcC 28 at [48].

[35] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority