New Zealand Employment Relations Authority Decisions

Parr v Chief of Defence Force (Wellington) [2011] NZERA 962; [2011] NZERA Wellington 38 (8 March 2011)

Last Updated: 25 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2011] NZERA Wellington 38
5163968

BETWEEN IAN EDWARD PARR Applicant

AND CHIEF OF DEFENCE FORCE Respondent

Member of Authority: G J Wood

Representatives: Ian Parr on his own behalf

Nigel Lucie-Smith for the Respondent Investigation Meeting: 8 and 9 December 2010 at Wellington Submissions Received: 9 December 2010

Determination: 8 March 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Parr claims that he was unjustifiably disadvantaged in his employment with the respondent, the Chief of the Defence Force (Defence), in that it had failed to treat him fairly during the course of the relocation of his workplace (including a lack of consultation), and then failed to declare him redundant when that was what the provisions of the parties' employment agreement required. Other claims were held to be statute barred.

[2] Mr Parr withdrew a claim for reimbursement for train fares after Defence agreed to pay him that sum during the course of the investigation meeting. Defence rejects all other claims.

Issues

[3] The issues for determination are:

(1) Was Mr Parr treated fairly throughout the relocation process; and

(2) Should Mr Parr have been declared redundant and be paid redundancy compensation.

Factual discussion

[4] Mr Parr had a 34 year career in the Defence Force, much of that being in Human Resources administration, including payroll. Mr Parr's most recent role was as a Business Analyst in the Computer Information Systems (CIS) Branch of the Defence Force based at Porirua, but it appeared to be still payroll related. His manager was the Head of Applications Development in the CIS Branch.

[5] In mid-2008 Defence planned to relocate CIS and other staff from Porirua to Trentham, for acknowledged logistical and strategic reasons. Many of the other activities of Defence at the Porirua site were to be retained there, however. Over fifty staff were affected.

[6] The Public Service Association (PSA) was consulted by letter the day before a presentation to staff on 12 June 2008. Mr

Parr was a member of the PSA when an employee of Defence. He was thus covered at the relevant times in his employment under the parties' 2007/2009 Collective Employment Agreement. Section 5.11 deals with transfer and relocation provisions. It provides:

5.11 ***Transfer and relocation provisions***

...

5.11.2 Relocation: Where employees are relocated within the NZDF as a result of restructuring (in terms of 7.2), the transfer provisions in 5.11.1 shall apply. Except that where the new job is located within the same local area, the following provisions apply:

(a) Where extra travelling costs are involved, actual additional travelling expenses equivalent to travelling by public transport will be reimbursed for up to 12 months.

(b) Where the extra travelling time one-way to the new place of work by public transport is more than 30 minutes, transfer provisions as in 5.11.1 apply provided there will be a reduction in travelling time by public transport of 30 minutes from the new domicile to the new place of work

....

[7] Clause 7.2 provides for restructuring and surplus staffing provisions principles. It provides:

7.2 Restructuring and surplus staffing provisions principles

7.2.1 The parties to this agreement recognise the serious consequences that the loss of employment can have on individual employees and propose to minimise this as far as possible by using the provisions of this agreement to keep as many employees as practicable in employment.

7.2.2 In seeking to minimise the impact of restructuring the parties agree that permanent employees affected by the restructuring process will have first access to permanent roles established in any new structure, with fixed term employees being able to apply for any positions remaining after the reconfirmation and reassignment processes have been completed for permanent employees.

7.2.3 Consistent with the principles in 7.1.1, the General Secretary of the PSA shall be advised of any review initiated by the employer prior to commencement (whether externally or internally driven) which may result in significant changes to the organisational structure or staffing levels and which may affect employees. The PSA shall be invited to provide input into the review.

7.3 Consultation

7.3.1 As a guide to the process of consultation, the employer and the PSA

agree that:

(a) Consultation requires more than mere notification but does not require that there be agreement. Consultation cannot be equated with negotiation in the sense of a process which has as its object, arriving at agreement. Although this not uncommonly can follow, the tendency in consultation is to seek at least a consensus.

(b) The requirement for consultation is never to be treated as a mere formality. The PSA must be given reasonable and sufficient information to express views or to point to problems or difficulties.

(c) Consulting involves stating the proposal, not yet finally decided upon, listening to what is said, considering responses, and then deciding what will be done. This does not involve a right to demand assurance, but there must be sufficiently precise information given to enable the PSA to state a view, together with a reasonable opportunity to do so.

This may include an opportunity to state views in writing or orally. A genuine effort must be made to accommodate the views of the PSA.

(d) The employer is quite entitled to have a working plan already in mind, but must keep its mind open and be ready to change and even start afresh.

(e) If there is a proposal to make a change, the change must not be made until after consultation. The PSA must know what is proposed before being expected to give their views.

(f) There are no universal requirements as to the form and duration of consultation. However, the PSA must be allowed sufficient time for consultation.

7.4 Staffing Restructuring Situation

*7.4.1 Definition: A staffing restructuring situation exists when the employer requires a change in the number of employees or, employees can no longer be employed in their current position, within their current NZDF Salary Band or at their work location. As the new staffing structures will generally be established on the basis of permanent positions, current **permanent** employees affected by the restructuring process will have first access to permanent roles established in any new structure, using the reconfirmation and reassignment provisions.*

*7.4.2 Reconfirmation and Reassignment: Where a staffing restructuring situation exists the employer may, following consultation with the PSA, either reconfirm in the same or similar positions, or reassign to an alternative position within NZDF for which they are suitable, the **permanent** employees affected by the surplus staffing situation. **Fixed term** employees will be able to apply for any positions remaining after the reconfirmation and reassignment processes have been completed for **permanent** employees.*

7.4.3 Reconfirmation: The use of the reconfirmation provisions shall be maximised in terms of the following principles:

(a) Where a position is available in a new or existing structure and there is one employee who is a clear candidate for that position and the criteria below are met, then that employee is to be confirmed in it.

(b) The criteria for reconfirmation will be as follows:

(i) The new job description is the same (or very nearly the same) as what the employee currently does.

(ii) The salary for the new position is the same.

(iii) The new position has terms and conditions of employment agreed with the PSA which are no less favourable.

(iv) The location of the new position is the same (note this need not necessarily mean the same building or street).

(c) In those situations where there is more than one clear candidate, the employer shall consult with the PSA, and either:

(i) The position will be advertised, with appointment made as per the usual NZDF appointment procedures; or

(ii) Agreement will be reached amongst the candidates on which candidate(s) will transfer if there is a clear preference amongst potential candidates to uplift other options under this Collective Agreement.

(d) Proposed reconfirmations shall be advised to all affected employees to enable them to assess whether they meet the criteria. For those employees who meet the criteria and do not wish to be reconfirmed, the only other option available shall be leave without pay for 12 months or resignation.

(e) Job descriptions (current and proposed) shall be available to those employees who are to be reconfirmed at the time that the reconfirmation list is published.

(f) The PSA may propose that an employee may also be reconfirmed where that employee believes his or her current job is sufficiently similar to a new job.

7.4.4 Reassignment:

(a) Following reconfirmation, and where there are positions still vacant, then the employer and the PSA shall meet to assess the skills of all those employees still left without a position and to reach agreement on the process for appointment to new positions.

(b) In determining the parameters for reassignment the employer and the PSA shall deal with cases on an individual basis, with a view to placing as many employees as possible by matching individual skills with positions which require similar skills. This exercise may involve individuals undertaking some on- the-job training or attending training courses. Such training needs shall be identified prior to the individual being reassigned.

(c) Employees to be reassigned under this process shall be consulted prior to any appointment being made. This consultation will give the employee an opportunity to comment on the suitability of the proposed reassignment offer, including identification of any training requirements or skill development. For those employees who decline an offer of a suitable reassignment within the local area, the only other options available shall be leave without pay for 12 months or resignation.

(d) Where employees accept reassignment to a new position at a lower salary in the same or new location, an equalisation allowance shall be paid to preserve the salary of the employee at the rate paid in the old job at the time of

reassignment. The salary can be preserved in the following ways:

(i) A lump sum to make up for the loss of base salary for the next two years (this is not abated by any subsequent salary increases); or

(ii) An allowance equivalent to the difference between the present salary and the new salary payable for up to three years (this

allowance is abated by any subsequent salary increases).

(e) Relocation: Where the new job is at a new location, assistance with the transfer shall be provided in terms of the Transfer and Relocation provisions in clause 5.11 on the basis that the employee shall not suffer financial loss in respect of expenses incurred as a result of transfer. Where employees are to be relocated at least 3 months notice shall be given to employees, although a lesser period of notice may be agreed between the employee and the employer.

7.4.5 Notification of Surplus Staff: The employer shall advise the General Secretary of the PSA the names and locations of all affected employees who are not placed by reconfirmation or reassignment, including any ***fixed term*** *employee whose term of employment is being ceased earlier due to the restructuring outcome. This advice shall be provided at least one month prior to the date that the surplus staff are required to be released. Where circumstances warrant, this date may be varied with the agreement of the employer and the PSA. The PSA shall be supplied with additional information on request.*

7.4.6 Notice: In the event of the employee's position ceasing to exist, the employee will be notified of the options available and given at least one month's notice. The options that may be considered by the employer are set out below.

7.4.7 Options:

(a) Attrition: Where a surplus staffing situation exists, an option is to allow attrition to reduce the numbers of staff rather than making staff redundant. Attrition as an option means that as people leave their jobs (e.g. retirement, resignation, transfer, death) or are promoted they are not be replaced. In addition, or alternatively, there may be a partial or complete freeze on recruitment or promotions.

(b) Leave without pay: Provision may be made for special leave without pay within a defined period without automatic right of re-engagement. This may include an opportunity for training.

(c) Retraining: Where the employee's position has become surplus, the employee may be offered retraining.

(d) Redeployment and job search: During the notice period both the employer and the employee will make reasonable efforts to locate suitable alternative employment in the NZDF for the employee. The following provisions apply:

(i) Paid or unpaid time off may be made available for job seeking.

(ii) In the event that a reasonable offer of employment is made, the employer's responsibilities under these Restructuring and Surplus Staffing provisions shall be fulfilled.

Note: *For the purposes of this provision, a reasonable offer of employment is an offer of a position in the same location or one within reasonable commuting distance, at the same salary and with similar terms and conditions of service, and with comparable duties and responsibilities.*

(e) Enhanced early retirement: This option is an enhancement of the standard early retirement options available to all employees. It provides for an employee to be paid the money available under the redundancy option which may, if the employee so desires, be used to make up the actual superannuity payable.

Note: *Enhanced Early retirement may be made available at any time to eligible employees not declared surplus if they are replaced by a surplus employee seeking redeployment or reassignment.*

(f) Redundancy: Redundancy is defined as termination of employment which is attributable wholly or mainly to the fact that the position filled by an employee has been, or will be, disestablished and no other option is approved under the options above. The provisions relating to redundancy compensation are set out below.

[8] Defence accepts that the move constituted a restructuring under clause 7.2, but considered then (and now) that the result for Mr Parr and the others affected could only be relocation under clause 5.11.2, because the jobs were located within the same local area, a key issue in dispute. The PSA organiser involved in the shift timed the extra travelling time by car as being less than 30 minutes.

[9] The consultation that occurred was not so much about whether the move would take place, but rather what recompense would be given to affected staff, including the possibility of redundancy compensation for those not prepared to move. Defence also consulted the PSA over a number of other matters, such as the potential for providing a bus, car pooling, and child care, as well as the travelling expenses and travelling time provided for in clause 11.2.

[10] In the end agreement was reached with the PSA for staff to be paid public transport fares, plus four days special leave in lieu of travelling time. The PSA wanted redundancy to be considered on a case by case basis, but Defence refused.

[11] Mr Parr was pushing for redundancy. One of the reasons for that no doubt was that Mr Parr had purchased an orchard and was building a house in the Bay of Plenty. He expected to be moving there some time in 2008 or 2009, depending on financial matters. Mr Parr was up front with Defence about that eventuality (which would occur some time), but at the time

of the restructuring he could not be certain exactly when. Mr Parr confirmed this in a meeting with the Head of Applications Development to discuss his personal circumstances over the move.

[12] Discussions were held with Mr Parr not only about his desire for redundancy, but also his wish to take his chair with him, have his gym membership refunded and to have time off for medical appointments with his personal doctor in the Porirua region. These requests were all agreed to by Defence. It also offered Mr Parr the opportunity to work in the Wellington CBD two or three days a week, which would save him travel time, but Mr Parr never responded to this offer. I accept that this was a genuine offer, but Mr Parr did not wish to uplift it for his own reasons.

[13] As a result of all these discussions and a reluctance by the staff to move, the move was delayed. However, by the end of September the PSA had decided to go along with Defence's decision to move, on the following conditions:

• *All affected PSA members agree to move to Trentham by the end of this week.*

• *The 'affected' PSA members accept (without prejudice) the package proposed by NZDF and submitted in writing to the PSA at the conclusion of the NZDF/PSA meeting on Thursday*

25 Sept 08.

• *Any PSA member who disagrees with the package as it applies to them, may consider lodging a personal grievance.*

[14] Mr Parr believes that he was not bound by the PSA decisions but I conclude that the only clear exception that was provided for him was to have the right to take a personal grievance, which he later did.

[15] Mr Parr believed that in his particular circumstances he could have stayed at Porirua, as there was a spare desk there and as he did not have to move with his colleagues in the CIS Branch, because he had more to do with the staff in Porirua. I accept that this was a matter for Defence to determine (i.e. how to utilise its own resources) and that it was appropriate for Mr Parr be co-located with his fellow CIS staff.

[16] As Mr Parr did not accept that the arrangements agreed with the PSA applied to him, he felt that he was entitled to travelling time rather than the extra leave, even though Defence had not specifically agreed to it. Accordingly Mr Parr was late to work on his second day of work on 7 October (having missed the vehicle sent to the station earlier to collect staff), and as it was raining he got soaked. He was written to and given forewarning by his manager that if he did not comply with the terms of his employment agreement and the agreement between the PSA and Defence then disciplinary action could result. This was an unfortunate overreaction, given that this was a very stressful period for all concerned, but for reasons given below does not constitute a disadvantage to Mr Parr in his employment.

[17] Mr Parr then became quite unwell (for reasons unrelated to his soaking) and was on leave for a number of weeks. On 28 October Mr Parr informed Defence that he was *trying to work out my last day of employment with Defence as we now have a confirmed buyer for our home.* He wanted his last day of employment to be 28

November.

[18] In response Defence congratulated him on selling his house and asked whether this was notice of his resignation. Mr Parr later made it clear that he did wish to offer his resignation (without prejudice to his claim for redundancy) and that his last day of employment would be 28 November 2008. Mr Parr was farewelled with a morning tea. His position remained open until September 2010, it proving impossible for Defence to replace him, such was his experience and knowledge. I therefore accept that Defence always wanted to retain Mr Parr.

[19] Subsequently, Mr Parr formally raised a personal grievance over his lack of agreement to shift, a lack of consultation, a lack of additional travel time and the non- payment of redundancy compensation. Despite mediation the matter has not been able to be resolved and it therefore falls to the Authority to make a determination.

Determination

[20] While Mr Parr believes that he was not bound by the PSA decisions, as a member of the PSA he was bound by them and the exception that was provided for him was to have the right to take a personal grievance, which he later did.

[21] I accept that Defence was obliged to consult with both the PSA and, on items individually applicable to Mr Parr, with him personally. The parties' agreement on

consultation is a very useful guide. In respect to the issue of whether the staff should move at all, consultation by Defence was minimal at first, in particular because of the lack of notice given to the PSA and its members. However, this was subsequently resolved by the decision of the PSA members to refuse to move in the short timeframe provided, which was accepted by Defence. Thus although the consultation was less than ideal, I accept that it was not so poor so as to disadvantage the PSA members and Mr Parr in his employment. This is particularly because Defence was entitled to not treat Mr Parr as an exception to the general rule that the CIS Branch moved as a whole, with Mr Parr to remain part of that team.

[22] On all other matters I accept that Mr Parr and the PSA were adequately consulted. Defence was entitled to act on the PSA's acceptance (subject to personal grievance, which has occurred) of its proposals on leave etc., as part of the conditions to be met under clause 5.12. In addition, Mr Parr's personal circumstances were consulted over and taken into account, e.g. personal chair and gym membership. What is more, consultation and communication is a two-way street, and Mr Parr was offered an opportunity to work part time in Wellington, but never even responded to that offer. Therefore it was fair that Defence assumed by implication that he did not wish to take up that option.

[23] Again while it was unhelpful to have suggested disciplinary action may result following Mr Parr expectation that he be paid travelling time, that is not a disadvantage to his employment, because no such disciplinary action ever occurred. His job was never put at any risk.

[24] In summary therefore, while the process adopted by Defence was not ideal, its decision to relocate staff including Mr Parr is not one that is subject to proper challenge, being within the employer's powers. Any procedural issues that arose are minor and bedding in issues raised by Mr Parr could have been resolved over time. It therefore follows that Mr Parr was overall treated fairly over his relocation, both as a member of the PSA and on an individual basis.

[25] I accept that this was a restructuring process and that the parties were contractually obliged to minimise the loss of employment and give PSA members first access to permanent roles with Defence. The move constituted a staff restructuring situation under clause 7.4.1 and the issue is whether reassignment by way of relocation was appropriate.

[26] I accept that this was an issue for relocation because the job was the same, it was simply the location that had changed. Thus it was open to Defence to determine to relocate Mr Parr, provided that it was within the same local area, in which case the provisions of clause 5.11.2 rather than 7.4.7 (surplus staffing) would apply.

[27] I note that redundancy is defined in the employment agreement as *termination of employment which is attributable wholly or mainly to the fact that the position filled by an employee has been, or will be, disestablished and no other option is approved under the options above.* Clearly reassignment by relocation is such an earlier option and is to be implemented before options such as redundancy and the other options in 7.4.7 are considered.

[28] Therefore, under the collective agreement, to be disestablished a position must not meet the requirements for redeployment by relocation. In this case the employment agreement provides for reassignment by relocation without any direct reference to a new location. Instead it provides certain constraints under clause

7.4.4(c), *that those employees who decline an offer of a suitable reassignment within the local area, the only other options available shall be leave without pay for 12 months or resignation.* The employment agreement also provides for options in respect of relocation under either clause 5.11.1 or 5.11.2. The phrase *local area* is repeated at clause 5.11.2. From that I take it that the parties intended that if relocation was not within the same local area then redundancy may later become an option to be explored.

[29] I accept from clause 5.11.2(b) that one may be in the same local area even although one way travelling time to the new place of work by public transport is more than 30 minutes, because otherwise clause 5.11.2 would be internally inconsistent, and the parties cannot have intended that. It therefore follows that there is no need to focus on 30 minutes public transport time as being the maximum.

[30] It could be that the provisions of the collective agreement may distinguish Mr Parr's case from many of the other cases involving the private sector, which have dealt with the issue of whether or not a change in location was of such a great degree that it was not intended by the parties that the employment could continue. Thus where an employment agreement is silent on change of location it is a matter of reasonableness as to whether or not the relocation is of sufficient a change that the

employer is not able to direct the employee to relocate. Issues of reasonable commuting distance become important in these circumstances.

[31] The particular interface between the surplus staffing and transfer and relocation provisions of the collective, and thus the phrase *local area* has not been interpreted in any particular case, however. Thus I conclude that it is appropriate to look at cases of more general application in this area. In particular, I accept that the same *local area* is similar to the phrase the same labour market, in an employment context. In my determination in *Johnson v. Salamander Enterprises Ltd* unreported WA156/07 29 November 2007, I assessed the issue of reasonableness of transfer of a worker from a workplace in Miramar to one in Upper Hutt. I held:

[19] As a matter of general principle, I accept that the greater Wellington region is one labour market for many workers and that given a reasonably efficient public transport system and the wide availability of private transport to workers, that the burden of distance is not as great as the burden of extra time on commuting workers, compared to twenty years or more ago. The extra distance of approximately 80k per day can not therefore be seen, in its own right, as unreasonable, I conclude.

[20] I also conclude, for the above reasons, and the fact that all other staff have agreed to shift to the new premises and largely commute without apparent complaint, that the extra time per day of two hours or so per day, can not be generally seen as an unreasonable burden on workers in today's economic and social climate, even although it is stretching the bounds of what could be considered reasonable. The same could not be said if the shift had been from Upper Hutt to Miramar, because although the distance is the same, the travelling time would be much greater and much less consistent given that the commute would be with, rather than against the traffic.

[32] I then addressed the personal circumstances of Mr Johnson.

[33] It follows from the above that I accept that Porirua and Trentham are in the same local area or labour market. Many workers commute to Trentham from further afield than Tawa and Porirua. The distance is not 80k, but less than 30k. The daily travel time by car is not up to two hours but less than one hour.

[34] Mr Parr claimed that previous staff had been paid redundancy entitlements in similar positions. In the one case that he was able to refer I accept that it related to a staff member who was made redundant 'early', in the sense that he was not required

to relocate, because his position would soon be redundant. Such a case is clearly distinguishable from Mr Parr's circumstances.

[35] Mr Parr's claim that a predecessor body to the Authority had determined that Trentham was not in the same local area as other parts of Wellington was not able to be located, despite extensive searches. I therefore can not accept his proposition.

[36] For all these reasons I conclude that Porirua and Trentham are in the same local area for the purposes of the parties' employment agreement.

[37] Furthermore, I accept that there is nothing in the personal circumstances of Mr Parr that meant that he could not reasonably be expected to make that commute. He had two options - by public transport via Wellington city, or to take his family's second car. It was Mr Parr's own choice to take public transport rather than the car, which would have been significantly quicker. This means that Mr Parr should not be treated differently than the 50 odd other workers who were required to transfer.

[38] It therefore follows that Mr Parr's claims must be dismissed.

Costs

[39] Costs are reserved.

G J Wood

Member of the Employment Relations Authority
