Determination Number: CA 1/05
File Number: CEA 122/04

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

BETWEEN	Susan Petrie (Applicant)
AND	Canterbury District Health Board (Respondent)
REPRESENTATIVES	Andrew McKenzie, Counsel for Applicant Penny Shaw, Counsel for Respondent
MEMBER OF AUTHORITY	Philip Cheyne
INVESTIGATION MEETING	16 November 2004
DATE OF DETERMINATION	19 January 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Susan Petrie is employed by the Canterbury District Health Board (CDHB) as an occupational therapist. In June 2003, CDHB withdrew from direct provision of a service in which Ms Petrie spent most of her work time. This problem is about the lawfulness of CDHB's actions affecting Ms Petrie during the restructuring process.

[2] By amended statement of problem, Ms Petrie claims penalties for breaches of her employment agreement, a determination that she is entitled to redundancy compensation and other ancillary orders.

[3] Before lodging the original statement of problem, Ms Petrie asked the respondent to participate in mediation but that was refused. In its statement in reply, CDHB explained that refusal by expressing its view that it had complied with its obligations and had met with the applicant on a number of occasions. The Authority directed the parties to participate in mediation nonetheless but that did not resolve the problem. One of the penalty claims is based on the respondent's refusal to participate in mediation (prior to the direction), said by Ms Petrie to amount to a breach of her employment agreement.

Background

[4] Most of the background events are not in dispute and an outline is sufficient for the purposes of this determination.

[5] The relevant employment agreement is the National Union of Public Employees Mental Health Division & The Princess Margaret Hospital Division Collective Agreement effective between 1 July 2003 and 31 December 2004. Clause 3.1 says: *The employer shall act as a good employer in dealings with employees. For the purposes of this Agreement a good employer is an*

employer who treats employees fairly, properly and openly in all aspects of their employment. Clause 23 is headed *Management of Change*. Clause 23.5 says:

> *When as a result of formally reviewing systems, procedures or work methods employees can no longer be employed in their current position ...the following options will be negotiated with the affected employees and their representative(s):*
>
> *(a) Employees may be redeployed to a new position at the same or lower salary...*
>
> *(b) Where a skill shortage is identified, the employer may offer employees retraining to meet that skill shortage.*
>
> *23.5.1 Where no redeployment or retraining opportunities are available, declare the employee redundant by providing one month's notice.*

Clause 24 deals with severance payments and other rights *Where an employee is declared redundant by the employer ....*

[6] Ms Petrie is a qualified and experienced Occupational Therapist (OT). Before the problem arose, she was employed fulltime by the CDHB as an OT. Primarily, she worked in CDHB's Residential Rehabilitation Service providing OT services for the outpatient residents of four community rehabilitation houses. However, she also worked as and when required providing OT services at Tupuna Villa, an inpatient service. For budgeting purposes, Ms Petrie's salary cost was allocated 50% against Tupuna Villa but in practice, she received little work from Tupuna Villa.

[7] A proposal was developed that involved CDHB withdrawing from direct provision of residential rehabilitation services. There is no doubt that the management of change provisions in clause 23 of the employment agreement applied to that proposal. It affected Ms Petrie because most of her work was within the affected service. In June 2003 an announcement was made to affected staff that included the following commitment: *It is our primary objective to find redeployment options for all the staff within the Canterbury District Health Board.* That message was reinforced in a personally addressed letter dated 13 June 2003 received by Ms Petrie. At that point, it was thought that the changes would take five months. The Mental Health Services group manager (Vince Barry) acted on the objective by sending a memorandum to service managers which made it clear that affected staff had priority for relevant vacancies.

[8] Staff were interviewed individually in order to determine their personal circumstances. Ms Petrie indicated her desire to continue fulltime employment. Because Ms Petrie's role (and salary allocation) with the inpatient service (Tupuna Villa) was unaffected by the restructuring, it seems to have been assumed that she could continue there on a .5 FTE basis so there was a need to find another .5 FTE position to make up a fulltime position.

[9] As it happened, Ms Petrie required major surgery so she was on leave from late 2003 until early March 2004. Prior to the commencement of this leave, there had been discussions between CDHB and Ms Petrie about several redeployment options but they were not suitable because CDHB would not increase them from .7 FTE and .8 FTE positions to fulltime positions and Ms Petrie did not want to accept less than fulltime employment. However, another vacancy emerged. It was a .5 FTE position for an OT in Te Whare Hohou Roko, a secure inpatient unit which is part of Forensic Service of CDHB's Mental Health Service. I note that Ms Petrie's roles with both the Residential Rehabilitation Service and Tupuna Villa were within CDHB's Rehabilitation Service. Both Tupuna Villa and Te Whare Hohou Roko are inpatient units and are located within the Hillmorton Hospital site (although physically separate from one another) but fall within different CDHB management

structures. In mid November 2003 Ms Petrie expressed an interest in the .5 FTE forensic position noting that she had a .5 FTE position at Tupuna Villa to return to after her leave. CDHB agreed to defer filling the forensic position pending Ms Petrie's expected return to work *early in the new year*.

[10] As it transpired, Ms Petrie was not able to return to work until early March 2004. During her leave, she saw advertised in the paper a position for a fulltime OT with CDHB's Forensic Community Team, part of the Forensic Service. She responded to the advertisement with a letter (dated 26 January 2004) and a copy of her CV. She was not interviewed for the position. Ms Petrie's evidence is that her CV was returned to her soon after 26 February 2004.

[11] A meeting was arranged for 26 February 2004 to discuss the .5 FTE forensic redeployment option. At that meeting, Ms Petrie voiced her preference to work 2½ days in each area rather than mornings in one area, afternoons in the other. CDHB considered that possibility but each unit required OT services 5 days per week so CDHB was not prepared to agree to the 2½ - 2½ split. Ms Petrie repeated that she would not accept working half a day in each unit because of her view that such an arrangement was professionally unworkable. She told CDHB that her view was supported by its OT professional advisor. CDHB sought and received confirmation on that point from the professional advisor.

[12] There was a second meeting on 11 March 2004. Ms Petrie again refused the redeployment option. Thereafter, CDHB took the position that because Ms Petrie had refused the .5 FTE forensic redeployment option, she remained employed .5 FTE in the Tupuna position and had forfeited any further rights under clauses 23 and 24 of the employment agreement. When fit, Ms Petrie did return to work at Tupuna for .5 FTE. Some months later, she was appointed to another fulltime position with CDHB and then relinquished the Tupuna work.

Issues

[13] I find that CDHB could no longer employ Ms Petrie in her current position having formally reviewed its systems, procedures or work methods pursuant to clause 23.5 of the collective agreement. As a result, CDHB and Ms Petrie were obliged to negotiate the options identified in clause 23.5. *Negotiate* means conferring with another with a view to compromise or agreement: see *NZPSA v Designpower NZ Ltd* [1992] 1 ERNZ 669. The stipulated negotiation options are arranged hierarchically since an employer may only declare the employee redundant *Where no redeployment or retraining opportunities are available*. The issues for resolution here are whether CDHB negotiated with Ms Petrie about redeployment options (including retraining) and whether no redeployment or retraining options were available so as to permit or require CDHB to declare Ms Petrie redundant.

[14] In part, Ms Petrie's problem is about an alleged failure by CDHB to negotiate redeployment and retraining options. The second point is answered by there being no skill shortage identified by either party at the relevant time for which Ms Petrie sought retraining or CDHB needed her to retrain. Indeed, Ms Petrie specifically sought redeployment options within her field of professional expertise. Nor do I accept that there was a failure on the part of CDHB to negotiate on redeployment options. By 8 December 2003, the negotiation had produced an agreement for CDHB to hold open the .5 FTE forensic position pending further discussions upon her return to work, then anticipated for early in the new year. At the same time, it was common ground between Ms Petrie and CDHB that the .5 FTE role at Tupuna Villa was available to her. Along the way, redeployment to either a .7 FTE or a .8 FTE position had been ruled out because Ms Petrie required fulltime employment and CDHB would not make either position fulltime. Neither can be criticised for taking those respective positions. Unfortunately Ms Petrie did not raise as part of the negotiation

the fulltime OT position in the Forensic Community Team that she applied for in late January 2004. By that time both Ms Petrie and CDHB were focussing on the .5 FTE forensic position as her redeployment option.

[15] The return date was necessarily extended from early January 2004 to early February 2004 when Ms Petrie provided a medical certificate certifying that she was unfit to work between those dates. In a covering note to her new manager, she said she was scheduled for further surgery and *On recovery I expect to return to work (.5 FTE Tupuna Villa, .5 FTE to be finalised – redeployment.)*. By 22 January, CDHB was advised that an early February return date was unlikely and a medical certificate of the same date reported that Ms Petrie *may be fit to resume work on 01/03/04*. On 30 January 2004, Ms Petrie's representative was advised that CDHB would not be able to hold open the .5 FTE forensic position after 5 March. There followed the meetings on 26 February and 11 March 2004 referred to above. I note that CDHB relented somewhat on the 5 March 2004 cut-off date by proposing 20 hours work per week in either Tupuna Villa or Te Whare Hohou Roko until 19 March 2004 in the face of Ms Petrie's restricted hours medical clearance. Ms Petrie was eventually given until 12 March 2004 to indicate whether she would take up the .5 FTE forensic position but she steadfastly rejected it on the basis that it was *professionally unworkable* for her to split her hours each day between the two roles.

[16] On the evidence available from my investigation, I conclude that there was no failure on the part of CDHB to negotiate redeployment, simply a failure on the part of both sides to reach agreement about that option.

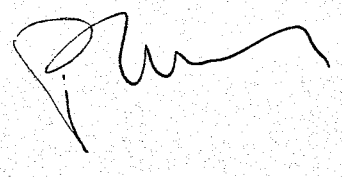
[17] Another part of Ms Petrie's problem is that CDHB did not negotiate with her over redundancy or make a severance payment. That involves saying that there were no suitable redeployment or retraining opportunities since counsel acknowledged the hierarchical or two-step nature of the options to be negotiated. The .5 FTE forensic position is said to be an unsuitable redeployment opportunity because of Ms Petrie's and CDHB's professional advisor's view that it was *professionally unworkable* for her to split her hours each day between two roles. Reference was made in the evidence to issues such as the different management reporting lines, impediments to engaging with the two distinct multi-disciplinary teams, and the risk that daily tasks associated with one role could not be completed within the allocated half day. There was also evidence that other OTs had been dissatisfied with a daily split between two roles, which was considered inherently stressful. The evidence leads me to the conclusion that a daily split between roles was less desirable than Ms Petrie's proposed split but not that it was unworkable. Accepting that CDHB had a clinical need for daily OT services to be available in the two separate units located on the same site, the potential problems and risks identified by Ms Petrie could have been ameliorated if there had been a will to do so. I find that the redeployment opportunity identified by CDHB was not unsuitable. It follows that the obligation to pay severance compensation did not arise.

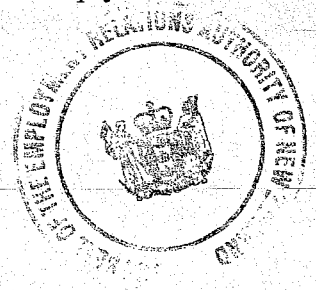
[18] The above conclusions dispose of the claim for a penalty for the breach of clause 23.5 of the employment agreement. There remains the penalty claim for the alleged breach of clause 3.1 (the express good employer obligation) because CDHB refused to attend mediation prior to the direction from the Authority. I do not accept that the general words of clause 3.1 impose a specific contractual obligation to participate in mediation at the request of one party to the contract. Even clause 33 which refers to the resolution of employment relationship problems falls just short of making mediation always compulsory: see clause 33.4.

Conclusion

[19] I find that Ms Petrie has no sustainable complaint against CDHB.

[20] The Employment Relations Act 2000 does not make mediation compulsory although it is promoted in various ways as the primary problem-solving mechanism. It is regrettable although not a breach of the employment agreement that CDHB declined to attend mediation until directed to do so. If that stance resulted in unnecessary legal costs for Ms Petrie, it can be reflected in any award of costs made in due course. Meantime, it is sufficient simply to reserve costs.





Philip Cheyne
Member of Employment Relations Authority