New Zealand Employment Relations Authority Decisions

Roberts v Serfontein (Wellington) [2018] NZERA 2080; [2018] NZERA Wellington 80 (7 September 2018)

Last Updated: 19 September 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2018] NZERA Wellington 80
3104917 and 3015511

BETWEEN PETER ROBERTS Applicant in 3014917

AND ETIENNE SERFONTEIN Applicant in 3015511

AND AIRWAYS CORPORATION OF NEW ZEALAND LIMITED Respondent

Member of Authority: M B Loftus

Representatives: Richard McCabe, Counsel for Applicants

Penny Shaw, Counsel for Respondent

Investigation Meeting: 27 and 28 February 2018 at Wellington

Submissions Received: 6 March and 16 March 2018 from Applicant

12 March and 16 March from Respondent

Determination: 7 September 2018

DETERMINATION OF THE AUTHORITY

[1] The applicants each claim they were unjustifiably dismissed and unjustifiably disadvantaged. They also contend the respondent, Airways Corporation of New Zealand Limited (Airways), has breached the duty of good faith.

[2] Airways denes the claims have validity. It says neither has been dismissed and in redeploying the applicants it properly applied the applicable contractual provisions. Airways adds even if that is incorrect the application is flawed in that it seeks remedies applicable to a personal grievance when the underlying allegation is Airways has failed to properly apply the collective agreement. That, it is contended, is a dispute that to which the remedies sought cannot apply.

Background

[3] The applicants are air traffic controllers of long standing; Mr Serfontein in Napier and Mr Roberts in Nelson. Both occupied the position of Regional Standards Specialist with the responsibilities of that position being exercised beyond their home locale.

[4] The terms of employment were governed by a collective employment agreement (albeit renewed over the period this dispute progressed). Contained therein and pertinent to this claim is Schedule 7. Schedule 7 is entitled Redundancy Agreement and contains a detailed provision.

[5] On or about 18 June 2015 Airways proffered a proposal which could see the disestablishment of the Regional Standards Specialist position each applicant occupied. After a consultation period confirmation of the proposals adoption was advised by e-mail on 3 August 2015 though it also said a more formal confirmation would follow. That occurred on 5 August and the

letter advised various options which might be available to the applicants. These included applying for various vacancies that then existed or the application of one of the options available under the redundancy agreement.

[6] Further communication, including meetings, followed which narrowed down the possible options available to each applicant. Essentially Airways was seeking to retain the applicants while both wished to be made redundant.

[7] On 9 October matters came to a head with letters to each. In essence the applicants were advised Airways had, having considered their objections to various redeployment possibilities and notwithstanding those, decided redeploy each. The letters advised *it is Airways intention to offer you redeployment back to your home location effective 1st November 2015.*

[8] Those letters were followed on 15 October with advice of the terms which would apply to the redeployments. Both would *return to the operational role of Air Traffic Controller*. Their salaries would reduce but an equalisation allowance would be payable for two years in accordance with the employment agreement. Payment could be made as either a lump sum or by maintaining the previous salary for the two year period. Both were asked to indicate which they would prefer.

[9] Suffice to say neither is happy with this and while both redeployed they continue to pursue redress which has resulted in this investigation.

Discussion

[10] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

[11] Each applicant now seeks a determination the Regional Standards Specialist position was not redundant as the duties are still being performed by others. Indeed they claim to have themselves been asked to perform some of the duties they previously performed as Standards Specialists. As a result each claims to have been unjustifiably dismissed and seeks reinstatement to the Standards Specialist role, compensation and costs.

[12] In the alternate the applicants seek a determination the redundancy was conducted in breach of the provisions of the redundancy agreement thus constituting an unjustified disadvantage. In this instance compensation is sought.

[13] The applicants also seek a determination that by withdrawing the option of severance Airways breached the duty of good faith.

[14] For the applicants the argument is the redundancy agreement applies where Airways has a staff surplus.1 It is argued it could not be applied as there was no staff surplus but a re-assignment of work which resulted in two long serving employees being demoted.2

[15] Clause 1 to Schedule 7 (the Redundancy Agreement) provides:

Redundancy is a condition in which Airways has employee(s) surplus to requirements because of the closing down of the whole or any part of Airways operations due to a change in plant, methods, re- organisation or like cause requiring a permanent reduction in the number of permanent employees who have not reached the agreed age of retirement in their occupational classification.

[16] In support of the argument there was no staff surplus it is said:

Here there was not a surplus staffing situation within the collective agreement's definition of redundancy. Such a situation would require Airways to *"have employee(s) surplus to requirements"* but also that the surplus in question exists *"because of the closing down of the whole or any part of Airways operations"* due to one or more of the specified causes requiring *"a permanent reduction in the number of permanent employees".* (Emphasis added)

Here, there was not a closing down of any part of Airways' operations due to a change in plant, method, re -organisation or the like. Note also that Airways did not identify the part of its operations that it was closing down.

All work that had been performed by the applicants remain and is performed by other employees. Further, it is common ground that post dismissal from the SSR positions, both applicants (and Mr Trounce) were asked by Airways to perform duties they were purportedly made redundant from. 3

[17] The argument there was no surplus fails to convince. It is based on a scrutiny of the clause which fails to reflect what occurred here. The evidence shows a portion of the employers business was closed in that a specialist function performed by three employees (the third was based in Queenstown but was not an applicant) ceased to be required as a separate stand-alone function. Yes a number of the tasks continued to be performed but by normal operational staff as part of their regular function. That an employer can contemplate changing the way in which tasks are performed is well established provided they do so in an appropriate way.

[18] The evidence can lead to no conclusion other than a part of Airways business, namely a stand-alone regionally based standards operation, was closed. The evidence shows this was a legitimate decision reached after appropriate consultation. There was a change of method and organisation that resulted in a surplus in the affected areas and the fact there as not an overall Airways wide surplus does not alter that fact or undermine a conclusion the clause is applicable in the circumstances and should be applied to those affected. That is a common sense interpretation.

[19] The outcome was that the jobs occupied by the applicants had disappeared and the options specified in clause had to then be applied. That renders nugatory the claim the applicants had been dismissed. For a start they haven't. Dismissal implies a

complete severance. Both remain employed by Airways.

1 Applicants closing submission at [1]

2 Above n 1 at [2]

3 Applicants closing submission at [4]-[6]

[20] The real issue here , and this was made clear by the evidence and the way it was presented, is both wished to depart and have the transition to new endeavours assisted by a redundancy cheque which was ultimately denied them. That raises the question of whether or not Airways can, having identified a surplus and as it ultimately did, enforce redeployment.

[21] The relevant provision to which both parties refer are:

4.3 If volunteers for redeployment or applications for special leave without pay do not discharge the surplus Airways reserves the right to redeploy surplus employees to vacant suitable positions... within the local area.

4.5 If a staff surplus remains Airways reserves the right to redeploy surplus employees... outside the local area to vacant suitable positions for which there have been no appropriate applicants, within six months of the surplus being declared.

4.7 A position shall be suitable when it is acceptable to both Airways and the individual concerned, having regard to his/her individual circumstances and the overall objectives of retention of employment and management of staff surplus.

[22] In essence the Applicants argument is they could not be redeployed as the positions to which they went were not suitable. They were not suitable as they were not *acceptable to both* as they were not acceptable to the individuals concerned.

[23] Airways says that would be a nonsense interpretation as it would render nugatory the right to redeploy in 4.3 and 4.5. It is argued it would also be inconsistent with other provisions which emphasise the objective is to preserve employment opportunities.

[24] I cannot agree with this approach. The right to redeploy remains unaltered. It was always expressed to be conditional upon the new position being suitable. Clause

4.7 defines what constitutes suitable and that is acceptance by both parties. While it can be argued the applicants ultimately accepted by both going and accepting the compensation specified in the redundancy agreement that is nullified by the fact it is recorded they did so without prejudice to their rights to argue the matter. Similarly employment opportunities are preserved but that does not mean employees can be obliged to avail themselves of those opportunities if unsuitable.

[25] In other words the applicants should not have been compulsorily redeployed and their application succeeds to that extent.

[26] The above finding means the alternate claim, which according to the submission relies on allegations of various deficiencies, need not be considered. These were said to be Airways:

a. failure to notify all those it should about the potential for a surplus staffing situation having limited such advice to selected employees;

b. failure to seek volunteers for redeployment, special leave or severance as required by the agreement;

c. failure to offer alternate positions to the applicant's instead requiring

them to apply in a contestable environment; and

d. failure to advise who the real decision maker was in that it failed to advise a senior manager had a power of veto over the restructuring proposal and neither applicant had an opportunity to address her. It is said she only heard from the person with whom they were liaising and he as determined to disestablish the positions.

[27] Having said that I would suggest for reasons outlined in Airways submission at least the first three would have failed in any event.

[28] With respect to the good faith argument the applicants submit Airways originally offered severance and indicated acceptance or otherwise was solely in the domain of the applicants. It is argued that impression was reinforced with various actions such as providing compensation estimates. It is also said to have intimated the choice was the employees via a memo that advised the estimates were drafts subject to confirmation *once you have made a decision.* It is submitted the applicants relied on that and made plans accordingly. Those plans were subsequently dashed when Airways withdrew the option.

[29] The breach of good faith claim is countered by Airways with a submission it has no factual foundation. Both applicants claim in their evidence the allegation has its foundations in comments attributed to one of their managers at a meeting on 20

July but when answering oral questions some uncertainty appeared. It would appear

from those answers the assertion they could opt for redundancy was actually made by their union when it advised what it understood had been said and not directly by Airways. It is difficult to assert a breach of good faith when you cannot positively assert the promise alleged to have been broken was actually made. In any event it is submitted that the alleged conversation occurred prior to the disestablishment decision being made. It would be natural to canvass all possibilities during the consultation phase and Airways should not be criticised for airing the possibility of severance as it was an option under the agreement.

[30] I agree with Airways. The fact the applicants cannot affirm the statements upon which they found the claim were actually made is determinative. This claim fails.

[31] Finally a debate has arisen, via submission, that the grievance has in fact been raised out of time. Further reading of the submission suggests this refers to arguments concerning the allegation the applicants have been required to continue performing duties they performed prior to redeployment. There is nothing in the pleadings to suggest such a claim comprises a separate grievance and no remedies have been sought in this respect. The argument about being asked to continue previous functions appears to have been proffered as evidence the positions were not in fact surplus and was considered in that light.

[32] The conclusion the applicants have succeeded to the extent they were redeployed in contravention of the redundancy agreement raises further questions. First can it be considered a personal grievance as pleaded? The answer, as Mr McCabe points out, is yes – a personal grievance can arise from a breach of contract.4

Second, what type of grievance? It was pursued primarily as an unjustified dismissal but as already said the applicants have not been dismissed. The redeployment must be considered a disadvantage which is clearly what the applicants consider it. It must also be unjustified if, as found, it was forced contrary to the provision of the collective employment agreement.

[33] The conclusion both applicants have established they have a personal grievance in that they have been unjustifiably disadvantaged raises the question of

remedies. While not pleaded the evidence made it clear the applicants really wanted

4 *Shakes v Norske Skog Tasman Ltd* [2008] ERNZ 121 EmpC

to be made redundant and paid accordingly. Redundancy is, using a conventional and well accepted definition, a dismissal brought about by two factors – a disestablishment of the positon occupied by an employee who is subsequently dismissed because an acceptable alternate cannot be found. That remedy will not will not be granted for two reasons. The first, as already stated, is it was not sought. The second is a redundancy payment constitutes recompense for a dismissal. The Authority is a creature of statute and I know of nothing that allows me to order an employee's dismissal.

[34] The remedy actually cited was reinstatement but that is simply not viable due to my finding there was a staff surplus situation. The position of Regional Standards Specialist disappeared so reinstatement thereto is simply impractical.

[35] That leaves compensation but despite claiming this as a possible remedy neither gave supporting evidence in their briefs. Both did however speak to the claim in their oral evidence though I also have to recognise that while I have found neither should have been forced to redeploy both did, albeit under protest, and both received the contractual recompense that would have been due in recognition of such a change.

[36] Mr Serfontein commented on the anger he felt as a result of having been deprived of the opportunity he felt he had been offered to study and start an alternate life an expressing, the resulting depression, insomnia and hypertension. He commented about the confusion which engendered anger which both affected his wife and necessitated counselling.

[37] Mr Roberts spoke of being shocked, feeling undervalued, feeling tricked by Airways, feeling deflated, losing concentration and having to take extensive leave over Christmas 2015 / 2016 to "reset" in order to take up his diminished role.

[38] Having considered the evidence which in both instances went unchallenged, the circumstances and current trends in respect to compensation I conclude both are entitled to an award of $10,000 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

Conclusion and costs

[39] For the above reasons I conclude both Mr Serfontein and Mr Roberts have a personal grievance in that each was unjustifiably disadvantaged. As a result I order

the respondent, Airways Corporation of New Zealand Limited, pay each applicant the sum $10,000.00 (ten thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.

[40] The alternate disadvantage claims need not be addressed and the allegation

Airways breached the duty of good faith fails. [41] Costs are reserved.

M B Loftus

Member of the Employment Relations Authority
