

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 85/09
5149849

BETWEEN MARY SCHOFIELD
Applicant

AND ANZ NATIONAL BANK
LIMITED
Respondent

Member of Authority: P R Stapp

Representatives: Michael Quigg and Simon Martin, Counsel for the
Applicant
Shane Deegan and Charlotte Bates for the Respondent

Investigation Meeting: 17 April 2009 at Wellington

Determination: 16 June 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mary Schofield was employed by ANZ National Bank Limited (the bank) with 9 years in a senior position before her position was disestablished and replaced with a new position. She and the bank disputed that the position she was offered was comparable under the terms of her employment agreement. She has been critical of the bank for not providing her with adequate information on the proposed position. She declined the offer of the new position and left the bank without being paid redundancy compensation, which she claimed she was entitled to receive.

[2] The parties agree that if there is an entitlement to redundancy compensation, the sum payable is \$88,994.11 gross.

[3] Ms Schofield raised a personal grievance that the bank's action of failing to pay her the redundancy compensation was unjustified and that action disadvantaged

her. Ms Schofield has also claimed that the bank's decision to disestablish her position as at 16 January 2009 was unjustified because it was contrary to the terms and conditions of her employment where the bank required her to undertake *hand over duties* until her last day, on 6 February 2009.

[4] In addition to Ms Schofield's claim for the payment of the redundancy compensation, she has claimed compensation of \$30,000 under section 123(1)(c)(i) of the Employment Relations Act 2000, and costs. The bank denied all her claims. The parties attended mediation provided by the Department of Labour and now it falls on the Authority to provide a determination on the employment relationship problem.

[5] During the Authority's investigation meeting the submission was made by Ms Schofield's representative that the bank did not inform Ms Schofield of her right to obtain independent advice on the offer of an intended employment agreement. The bank has also been criticised for not informing her that if she did not accept that offer, she would not be entitled to redundancy compensation. Further, the bank has been criticised for the arrangements that required Ms Schofield to work through to 6 February 2009 that was inconsistent with the requirement for her right to six weeks' notice that should have expired in January 2009.

The facts

[6] Mary Schofield held the position of *Financial Controller, Credit Cards and Personal Lending* since 2003. Ms Schofield was employed under an individual employment agreement and job description. Her employment agreement made provision for redundancy. The redundancy provision stated:

6.6 Redundancy

Introduction

Unfortunately, no employer can guarantee that employees will remain employed indefinitely. Factors like a downturn in business, a reorganisation, a sale of some or all of the Bank, etc, may mean that an employee's service is no longer required. In the context of this section, "redundancy" means a situation where an employee's employment is terminated by the Bank, the termination largely because the position filled by the staff member is, or will become, superfluous to the needs of the Bank, because of the cessation or restructuring of the whole or any part of the Bank's operation (including the amalgamation of work places), or where the employee's job function is no longer required. An employee engaged for

a fixed term of employment is not redundant simply because his or her period of employment is completed.

Before your employment ends due to redundancy, however, the Bank will attempt to identify and offer an alternative option to you, which may include the opportunity to apply for a suitable position.

If you receive an offer of an alternative position that requires a change of residence you will be given 14 days to decide upon the offer. The period will be seven days for any offer that does not involve a change of residence.

If you decline an offer of a comparable position you will not be entitled to redundancy compensation. A “comparable position” is a role that is:

- *Within reasonable commuting distance of your place of residence; and*
- *At the same or a higher TEC as your current position; and*
- ***Any change of duties is not significant enough to be unreasonable when considered against your skills and abilities.** (Emphasis added)*

...

Notice

If you are declared redundant you will receive six weeks’ written notice of termination, or payment in lieu of notice in respect of all or part of this notice period. As noted above, the Bank will make every reasonable effort to find you alternative employment during the notice period and if the Bank offers you a comparable position then the notice will be withdrawn and your employment will continue.

If you find another job during the notice period and you wish to cease employment before the notice period expires, the Bank may agree to allow you to leave, without jeopardising your entitlement to be paid compensation. In such cases you will not be paid the unexpired period of notice. In all other cases, however, any payment of redundancy compensation is contingent on you remaining at work and satisfactorily performing your assigned duties until the expired period of notice.

[7] In 2008, the bank embarked on a bank-wide restructuring project called “ONE ANZ”. There is no issue about the genuineness of the restructuring and the consultation.

[8] On or about 20 November 2008, Mr Russell Jacobson, Ms Schofield’s line manager, met with Ms Schofield to discuss the proposed changes to her role and to the wider finance team. He informed her that her existing role would be

disestablished. He says he explained the reasons why and gave an outline of the proposed new structure.

[9] On 20 November 2008, there was a meeting of the whole finance team which was consulted about the proposed changes. A pack outlining the proposed changes and new roles was provided to all staff. A further meeting occurred on 25 November 2008 to ensure that the finance team understood the proposed changes and new roles.

[10] On 27 November 2008, Ms Schofield was emailed the internet link to the “*role mandates*” for the proposed new roles in the new finance structure to consider making any expressions of interest. This included a role mandate for the new “*Finance Manager Retail Customer Profitability*” position. The “*role mandates*” replaced the old job descriptions.

[11] On 2 December 2008, Mr Jacobson informally advised Ms Schofield that the changes meant her role would be disestablished as proposed. She was given a further document that outlined the new structure and the new roles. This document was called the “*Finance Feedback and Final Structure 2 December 2008*” document. Affected employees were directed to the intranet where the role mandates for all of the new roles were posted.

[12] Mr Jacobson and Ms Schofield met again on 4 December 2008 where they talked about the new structure and several of the new roles which Mr Jacobson considered were directly comparable and would be of interest to Ms Schofield. He asked Ms Schofield if she was interested in any of the roles in the new structure and she replied that there was nothing in the new structure that interested her. He says she told him she was going to look for other roles within the organisation.

[13] Under the restructuring timetable, bank employees had until 8 December 2008 to provide expressions of interest for roles in the new structure in finance and elsewhere in the organisation. Ms Schofield did not express an interest in any roles. The restructuring involved a number of selection workshops. These workshops took place once the new structure had been confirmed to determine the preferred employees for the roles in this structure. All affected employees were considered for the new roles in the new structure regardless of whether or not they submitted an expression of interest. This applied to Ms Schofield who was considered for a number of new roles in the new structure. A paper produced during the Authority’s

investigation meeting supported this happening, and Mr Jacobson explained that the role offered to Ms Schofield was still vacant, and had been advertised externally.

[14] On 12 December 2008, Ms Schofield was formally advised by the bank that the restructure was completed and that, as a result, her position as financial controller was no longer required. A letter to her stated:

ONE ANZ restructure of CFO Unit NZ – Letter of Offer

As you are aware, the ONE ANZ restructure of CFO UNITS New Zealand has been completed.

*While these changes meant that your role of Finance Controller was not required in the new structure, I am pleased to offer you the position of **FM Retail Customer Profitability** with ANZ National Bank Limited (“ANZ National”) on the terms and conditions set out in this letter. (Emphasis added)*

POSITION DETAILS

You will occupy the position of FM Retail Customer Profitability, CFO Units NZ in Wellington reporting to Russell Jacobson, head of Finance Retail, or such other person as may be designated by ANZ National. Your key accountabilities and your duties are set out in the attached Role Mandate. This may be updated, amended or varied from time to time following consultation with you.

Your commencement date in this position will be 16 January 2009.

REMUNERATION

Your remuneration will remain the same and will be made up of salary (less a deduction for private use of an ANZ National provided vehicle, if a vehicle is required for your role) plus employer superannuation contributions if you are a member of, or decide to join, a superannuation scheme.

Your salary is: \$128,331 per annum.

OTHER MATTERS

All other terms and conditions of employment remain as set out in your existing employment agreement.

[15] On the same day that she was offered the position of *Financial Manager Retail Customer Profitability* she was also provided with a role mandate which purported to set out the key accountabilities and the duties of the new position. Ms Schofield and Mr Jacobson disagree on the comparable nature of the new position with her old role and the adequacy of information about the role. Ms Schofield says that she was not given sufficient information about the role.

[16] On 17 December 2008, Ms Schofield informed the bank in writing, through her solicitors that the new position was not one that was comparable to her current position and, as a result, she would not be accepting the position. The bank took the view that that position was comparable to her current position and that, as she had not accepted the proposed position, she would not be entitled to redundancy compensation. The bank's letter read as follows:

19 December 2008

Dear Mary,

Notice of Redundancy

As you are aware, following the restructure of Finance your position of "Financial Controller" was disestablished and you were offered the position of "Finance Manager Retail Customer Profitability" as an alternative to redundancy.

As discussed, we consider that the position of "Finance Manager Retail Customer Profitability" is directly comparable to your previous position. As you have not accepted this position, you remain in a redundancy situation but, as outlined in your employment agreement, you are not entitled to redundancy compensation. (Emphasis added)

You remain entitled to be considered for other alternative positions during the redeployment period ending 26th December 2008. If you are not successful in securing an alternative position with ANZ National during the redeployment period, this letter serves as six weeks' written notice, effective from 26 December 2008, of termination of your employment due to redundancy.

You will be required to continue to work during this notice period and therefore your last day of employment with ANZ National will be 6 February 2008. However, if you require time off to attend job interviews during the notice period, every effort will be made to accommodate this. ...

[17] Ms Schofield's employment ended on 6 February 2009. She has complained that her departure was not arranged in a dignified way.

The issues

[18] Is Ms Schofield entitled to redundancy compensation under the terms of the definition of a comparable position in the employment agreement?

[19] Was Ms Schofield provided with adequate information at the time concerning the new position?

[20] Does Ms Schofield have a personal grievance for unjustified action causing disadvantage because the bank did not pay her redundancy compensation and required her to work out her notice until 6 February 2009?

[21] Was Ms Schofield afforded a dignified departure?

The applicant's submissions

[22] The applicant claims that it was unjustified of the bank not to pay her redundancy compensation. She claims that the bank's proposal of offering her a "*directly comparable*" position was not in accordance with the definition of a comparable position under her employment agreement, and she was entitled to refuse the offer, and has been disadvantaged. For reasons I will present shortly this is not a personal grievance, but more to do with interpretation and application of the parties' employment agreement.

[23] The applicant has relied on various matters of difference in the offer to say the offer was not comparable. These include that she would not have anyone reporting to her lessening her status and responsibility. Also she has relied upon a letter dated 17 December 2008 and her evidence [34] to [43] for her reasons why the position offered was not comparable.

[24] She claims that she had insufficient information about the position being offered to make any decision at the time. She says she attempted to gain more information but was not provided with it.

[25] She says it was unreasonable to accept that she should forego her redundancy and accept a position with inadequate information.

Is there any entitlement to redundancy compensation?

[26] Both parties agree that the terms of the employment agreement apply.

[27] They are not in dispute over the first two requirements of the definition of comparable position. However, they are in dispute over the third element of the definition that states: "*Any change of duties is not significant enough to be unreasonable when considered against your skills and abilities*".

[28] The bank has satisfied the requirements under the terms of redundancy in the employment agreement. The position offered to the applicant fits within the definition of comparable position. My reasons are as follows:

- The term involves a matter of fact. The question simply put is whether given the employee's skills and ability was it reasonable to expect Ms Schofield to take up the position that the bank offered. The key factor is measuring reasonableness against the employee's skills and ability, and not the degree of the change of duties. A change is permissible.
- The scope of the employment agreement is not altogether about a right to get redundancy pay but also to preserve employment wherever possible. The clause enables the bank to have flexibility to make changes and to, within reason, expect an employee with the requisite skills and ability to accept positions offered and forgo redundancy pay.
- I am satisfied that the comparison meets the test of reasonableness aligned to Ms Schofield's skills and responsibilities because of the comparative outline provided in the bank's evidence of the duties of the two positions. (Jacobson 58-75 and 76-82) and that Ms Schofield accepted she had the skills and abilities needed for the role.
- The comparison of the duties highlights that the requirements were spelt out in broad terms, without specific day to day duties. The key elements of both roles were to "*partner the business, ensure sound financial management, provide insight/advice and deliver business success/meet business targets*". I have accepted the bank's evidence because its witnesses have been directly involved in the set up and management of the restructure and have accountability for managing the roles. Ms Schofield, by contrast, has not had any direct experience in the new role to be sufficiently knowledgeable about the role, although I have considered her assertions. I have not given this as much weight as the bank's direct experience of the matter.
- Also, I accept that the bank acknowledges that there is a change in duties, but not to the extent that Ms Schofield claims. I accept the bank's evidence on this because there was evidence that while there

was a shift in focus required, the accountabilities, responsibilities and skills required would be essentially the same. While I accept Ms Schofield had a different point of view, she has not done enough to challenge the bank's position in regard to its comparisons of the roles. She has not been able to convince me that there has been such a significant change to be unreasonable given, her skills and abilities.

- The two positions were evaluated using the Hay Group job evaluation methodology and were positioned in the same group.
- Ms Schofield's skills and abilities are considerable and she did not deny that she has the skills and experience, and I accept it would be difficult for her to say she did not have them when they are essentially the same required for both positions. Ms Schofield's evidence on her skills and abilities has changed since raising her personal grievance. For example at first she claimed the role was beyond her skills and ability, but now she accepts she has the skills and ability put to her during the Authority's investigation meeting. The fact is she is extremely skilful and has the ability and experience that would have enabled her to fill the role offered, and that is why she was accepted for it. The role offered remains a senior one with a high reporting level and does not involve a demotion.
- Ms Schofield's decision not to apply for any role, and not to accept the role, was not because she lacked the skills and ability required for the role, but because she did not want any position different to the role she had, and wanted redundancy pay instead of a role she says she would not find enjoyable. Also Mr Jacobson's evidence was that she said she was not interested.

[29] I am also satisfied that Ms Schofield was provided with information about the position she was offered. She was given a document that outlined the new structure and the new roles. This document was called the "*Finance Feedback and Final Structure 2 December 2008*" document. Affected employees were directed to the intranet where the role mandates for all of the new roles were posted. She was provided with a role mandate which purported to set out the key accountabilities and the duties of the new position. There were discussions and correspondence between

Mr Jacobson and Ms Schofield where further information was provided for Ms Schofield on the proposed role. I am satisfied that despite there being no job description in the usual sense, the job mandates met that requirement.

[30] There has been criticism levelled at the bank for failing to meet the statutory requirements of providing sufficient information in the letter of offer, and not acting openly and honestly because Ms Schofield was not informed of her right to get independent advice. I reject the first part of those submissions because the letter of offer dated 12 December 2008 provided her with the details of the arrangements and terms around the position offered to her. On the last issue the evidence supports the applicant that she was not advised of her right to obtain independent advice. Ms Schofield instructed Counsel anyway. The breach was not sufficient to base a cause of action on for a penalty. The bank properly accepted it was required to deal with Ms Schofield's representative and the bank did not avoid or obstruct her doing so. The breach was minor and there was no prejudice to Ms Schofield because discussions continued and it was during the notice period and the position offered was left open. Also, I have considered the issue was raised during the investigation meeting and a submission was made at the conclusion of the meeting, but did not form part of the original employment relationship problem.

Does Ms Schofield have a personal grievance?

[31] The employment relationship problem has more to do with the interpretation and application of the employment agreement rather than a personal grievance. The bank acted genuinely based on the interpretation of the employment agreement. As such Ms Schofield can not claim she has been disadvantaged because she had her rights to enforce her entitlement if she was owed redundancy pay. The bank has not paid because it genuinely believed it had offered Ms Schofield a comparable position. Also, there can not be any personal grievance where the bank consulted Ms Schofield and provided her with adequate information.

[32] Ms Schofield's employment ended on 6 February 2009 after she worked out her notice arrangement without objection. Mr Jacobson did try to meet with Ms Schofield prior to her last day to discuss departure arrangements, but Ms Schofield was not available. The thrust of Ms Schofield's claim has been to obtain the redundancy pay, and her claim on the procedure concerning her departure, has been very much a low order priority. None the less I accept that she has some strong

feelings that her departure was much less than ideal, but given the nature of the circumstances, and despite her feelings about the bank, she could have done more to be involved in any arrangements that she might have wanted given that Mr Jacobson was prepared to meet for that purpose. The bank met its obligations.

[33] The applicant's claims are dismissed.

[34] Costs are reserved.

P R Stapp
Member of the Authority