

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 135/08  
5090471

BETWEEN                      SHARYN SEABORYNE  
   Applicant  
  
AND                                HAWKES BAY DISTRICT  
   HEALTH BOARD  
   Respondent

Member of Authority:      P R Stapp  
  
Representatives:            Philip Bartlett for Applicant  
   Elizabeth Brown for Respondent  
  
Investigation Meeting:      Napier 23 September 2008  
  
Submissions                    By 29 September 2008  
  
Determination:                2 October 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     Dr Sharyn Seaboryne is employed by the Hawkes Bay District Health Board as a registrar and as a provisional trainee. During her employment with the board there was a restructuring that involved new 24/7 rosters and changes being made to positions: from medical officers to registrars. This was to enable the Board to have greater flexibility for registrars in training to be recruited for rotations based on the registrar academic year from December to December.

[2]     Issues around Dr Seaboryne's employment involved a settlement being reached (5 July 2007) in mediation services provided by the Department of Labour. It was agreed Dr Seaboryne would be located in the role registrar emergency department (ED) and would have an equalisation allowance for two years under the parties' settlement to transfer to the registrar's scale.

[3] However the settlement now means different things to both parties and Dr Seaboryne says she was never told about the rotation arrangement.

[4] Dr Seaboryne participated in the 2007/08 rotation process and on 26 July 2008 accepted a rotation as a medical registrar with adult medicine; following that she was scheduled for another rotation in the emergency department from 16 June 2008 to 15 December 2008. However, she became pregnant, and agreed to work for one week in the Acute Assessment Unit (AAU) and to work suitable hours temporarily in the emergency department for two weeks following that and before commencing her leave in January 2008. The arrangement was not part of the standard roster. Dr Seaboryne says this cancelled the rotation arrangement to work as the registrar in medicine.

[5] Dr Seaboryne was due to return from her parental leave on 1 October 2008. She says she is employed as a registrar in the emergency department and that she is entitled to remain in the position for two years, but the Board will not take her back in that position. The Board says that it has a registrar's position kept open for Dr Seaboryne to return to in medicine and that there is an offer for her to return to the emergency department in June 2009 as part of the normal on going rotation for the training of provisional trainees.

### **The issues**

[6] The issue is whether or not Dr Seaboryne was appointed to the position of registrar ED in a discrete and permanent role for two years. What was the position that Dr Seaboryne held when she took her leave?

[7] What role is she entitled to return to; ie medical registrar or registrar ED?

[8] Underlying the above issues are: what does the written record of settlement mean? Did Dr Seaboryne and Barbara Rowe, manager Doctor Recruitment and Support Unit, agree to cancel the arrangement for Dr Seaboryne to work in medicine as a registrar, and what was the arrangement for Dr Seaboryne to work in the emergency department before her parental leave?

**What was Dr Seaboryne's position?**

[9] The terms of the mediation settlement clearly refer to the emergency department. The terms also provide for an equalisation allowance for two years. However, the terms fall short of explaining that Dr Seaboryne's role was as a registrar on training rotation. A letter dated 23 May 2007 was attached to the Record of Settlement dated 5 July 2007. That letter referred to a generic registrar role that could be in any department subject to selection for training. Dr Seaboryne did not reply to that letter or challenge it.

[10] The Board says that as Dr Seaboryne was a provisional trainee she was required to apply for positions to fulfil her training requirements. Dr Seaboryne applied for the 2007/08 rotation, although she says she did so pro forma under the terms of the record of the mediation settlement and because there was no discussion on rotation. In the meantime Dr Seaboryne continued to work in the emergency department.

[11] A letter dated 23 July 2007 confirmed that Dr Seaboryne was offered, and that she accepted the position of medical registrar for the period 10 December 2007 to 15 June 2008, followed by the position emergency registrar from 16 June 2008 to 15 December 2008. However, when Dr Seaboryne became pregnant other arrangements were entered into by agreement for her to work before commencing her leave, but were not formalised as a variation to the 23 July 2007 offer. Dr Seaboryne's acceptance of the 23 July offer was qualified on the understanding that her "*income protection*" agreement remained in tact. This did not contradict the offer and acceptance of the arrangements for her employment.

[12] I conclude that Dr Seaboryne's position was medical registrar when she commenced her parental leave because:

- She had not commenced her rotation in the emergency department before commencing her leave.
- She signed her acceptance at the time on the understanding that her settlement was an "*income protection*" agreement.
- She accepted the 23 July offer that provided for the position of medical registrar for the period 10 December 2007 to 15 June 2008, followed by the position emergency registrar from 16 June 2008 to 15 December 2008.

[13] I am further supported in my conclusion by the following:

- Dr Seaboryne's position on the matter is inconsistent with the provisional training role that applies and the restructuring of the Board's positions.
- The role of registrar in a training programme held by Dr Seaboryne is consistent with the 23 July offer and acceptance.
- Dr Seaboryne's pregnancy involved a change to the formal arrangements of 23 July, but there was no formal variation to the arrangements to supersede the offer and acceptance of 23 July 2007. Thus, the evidence that Dr Seaboryne's work in the emergency department was temporary work before her leave has not been contradicted.
- Any cancellation of the 23 July 2007 arrangements would have reasonably involved some proper documentation and none exists.
- The parties have placed different meanings on the 5 July 2007 record of mediation settlement and the attached 23 May 2007 letter. The Board acknowledged that the settlement does not convey what was meant at the time. It accepted it was amiss not to have included sufficient wording to convey what it meant. It has left itself exposed to Dr Seaboryne's claim that the rotation was not discussed. Perhaps the best conclusion to reach is that the parties were discussing income protection (equalisation) and had assumed the meaning of the restructuring without commenting on it.
- The record of settlement made provision for a trial and recognised that Dr Seaboryne was undergoing IVF treatment that are both consistent with the Board's position on the matter and that when Dr Seaboryne became pregnant there were temporary arrangements put in place to support her needs.
- It is plausible that the Board has referred to the position of Registrar ED as a reference point in the record of settlement, notwithstanding the rotational arrangements that could follow, because Dr Seaboryne had been in that position at the time of the restructuring. The arrangements that followed underpin what was meant and I am supported in this conclusion by the letter of 23 May 2007 where it referred to "*...applicable Registrar rate for the role you are in*" and the offer and acceptance dated 23 July 2007. Dr Seaboryne did not challenge these at the time.
- The settlement makes no provision for any arrangement for Dr Seaboryne to hold the position for two years as she has claimed, except applying the equalisation provisions. It is inconceivable that any such arrangement was

made for a two year tenure given there was a written settlement signed off by the parties. It is inconceivable that any other arrangement would have been made orally, such as a cancellation as claimed by Dr Seaboryne. I am also supported in this by Dr Seaboryne's qualified acceptance of the 23 July offer where she referred to "*income protection*" agreement. Ms Rowe denied that she was involved in any cancellation.

- Although the job description refers to the title Registrar Emergency Medicine, and the location as Emergency Department, the generic thrust of that description reflects the Board's position on it being a "*run description*" and providing a 24/7 roster to reflect the changes. Also, the "*run description*" covers training and a length of time being 26 or 52 weeks that is consistent with a rotation. The appointment by application is supported by the application process, which was followed by Dr Seaboryne. I cannot accept that her application was a pro forma application given her training status and the restructuring. My reasons are that Dr Seaboryne made no mention of any pro forma arrangement. She never raised any issues with senior doctors and that she did not understand what the forms were for and made no objection prior to these proceedings. There is a procedure in the Board for allocating preferences involving Ms Rowe.
- Dr Seaboryne has relied upon letters and emails entitled "Registrar Emergency Department" to claim her position, but there is more to the role than just the title, I hold. It is not inconsistent with the rostering arrangements for the Board to refer to the current appointment on rotation as the position held ie in Dr Seaboryne's case it was Registrar ED because that was where she had been working prior to the record of mediation settlement and the offer and acceptance of 23 July.
- The parental leave interrupted the arrangements for the rotation and that other arrangements were entered into to assist Dr Seaboryne before she took her leave, including for her to work in the emergency department on a temporary basis.
- Dr Seaboryne's payments of her leave entitlements during her leave were consistent with the emergency department registrar role. However, this is not determinative on its own because the decision to pay out Dr Seaboryne on the basis of 40 hours instead of 55 hours was a discretionary decision, and the pay

out was the same amount paid to her but over a longer period of time. This was not challenged.

### **What position is Dr Seaboryne to return to?**

[14] The Board has a position open in the role of medical registrar because Dr Seaboryne was in that role before she commenced her parental leave. The Board has confused the situation by claiming that Dr Seaboryne was indecisive about what she wanted to do upon returning and Dr Seaboryne's view that the Board should have known that she would be returning on 1 October 2008. This is an example of some poor communication between the parties that includes the interpretations now being placed on what the settlement was supposed to mean.

[15] However, Dr Seaboryne had accepted an offer to work on the training roster from June 2008 until December 2008. The Board is still bound by that because it was never varied even although there were different arrangements put in place prior to Dr Seaboryne's leave commencing that related to her pregnancy and to suit both parties. The right to that run is preserved, I hold. I accept that Dr Seaboryne had every intention to return to work. The offer and acceptance was part of her employment arrangements suspended by her parental leave.

### **Conclusion**

[16] It is my conclusion that Dr Seaboryne has a parental leave complaint: that the Board had a responsibility to keep open the position of Registrar in the emergency department, which had been offered by the Board and accepted by Dr Seaboryne. It was reasonable for Dr Seaboryne to conclude that she could return to that position during the period of the agreed arrangements from 16 June 2008 to 15 December 2008. However, the parties' arrangements were affected by Dr Seaboryne's parental leave. Given there was no agreed variation to the planned runs, I hold that Dr Seaboryne could reasonably expect to return to the registrar in the emergency department role for the remaining period from the date of her return from parental leave until to 15 December 2008. There was no evidence of any agreement for the period of the run to be 2 years as Dr Seaborne has claimed.

**Reinstatement**

[17] Dr Seaboryne is to be reinstated to the position that the Board was required to keep open for her upon her return from parental leave, ie Registrar in the emergency department. There is no requirement under the Act to determine the practicability of reinstatement, as there is under the Employment Relations Act. I realise that the Board has filled all the positions, but as it showed prior to Dr Seaboryne's leave there could be arrangements made for her to work in ED until the expiry of her run. Dr Seaboryne should not be punished for any administrative oversight where the Board completed arrangements for the 2007/2008 academic year without including her, or any confusion over what Dr Seaboryne might have wanted on returning, or where the Board made the decision to keep open the registrar medicine position. The Board's responsibility to keep open Dr Seaboryne's position under the offer and acceptance was clear, despite any confusion over Dr Seaboryne's return to work.

**Compensation**

[18] I accept that there has been some impact on Dr Seaboryne of the Board's decision and the offer and acceptance not being adhered to. I order the Hawkes Bay District Health Board pay Dr Seaboryne the sum of \$4,000 that relates to the impact on her of the Board's failure to keep her position open.

**Remaining claim on compliance**

[19] The claim for a compliance order on the record of settlement must be dismissed because no breach has been established.

**Costs**

[20] Costs are reserved.

P R Stapp  
Member of the Employment Relations Authority