

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Michalene Smith (Applicant)  
**AND** New Zealand Post Limited (Respondent)  
**REPRESENTATIVES** Jills Angus Burney, Counsel for Applicant  
Paul McBride and Melanie Brewer, Counsel for Respondent  
**MEMBER OF AUTHORITY** Helen Doyle  
**INVESTIGATION MEETING** 26 August 2005  
**DATE OF DETERMINATION** 26 October 2005

DETERMINATION OF THE AUTHORITY

*The Employment Relationship Problem*

[1] Michalene Smith was employed by the respondent for 24 years and was at the material time a supervisor at the Nelson PostShop.

[2] The respondent, New Zealand Post Limited (“NZ Post”), has approximately 143 corporate PostShops in New Zealand. Anthony Smith as Corporate Network Leader for the Retail Business Channel in Auckland is responsible for these corporate PostShops.

[3] The organisational structure of the corporate PostShops was reviewed in or about late 2003. In early 2004 a proposal was developed for a new Retail Team Leader position in PostShops and to disestablish the Supervisor role. There was consultation with the NZ Amalgamated Engineering, Printing and Manufacturing Union Inc (the union) over a period of some months following which, in June 2004, a decision was made to implement the new Retail Team Leader role.

[4] Ms Smith was notified on 10 June 2004 that her role and the other 13 supervisor roles in the corporate PostShops nationally would be disestablished. Ten new Retail Team Leader positions were to be established, one of which would be at the Nelson PostShop.

[5] Ms Smith says that her employment relationship problem is that she was unjustifiably disadvantaged in her employment with the respondent when she was not paid her redundancy entitlement at the time her employment was terminated. Ms Smith says that this was inconsistent with the way another employee of the respondent, Lexi Thomson who was also in a supervisor role, was treated. Ms Smith did not accept that the re-deployment offer of a customer service representative role by the respondent was genuine. Ms Smith says that even if there had been a genuine role in the Nelson PostShop with the same grade, salary and hours it would have been a step down for her.

[6] Ms Smith seeks a redundancy payment in accordance with the collective employment agreement which covered her work. Two collective employment agreements applied to Ms Smith at the relevant time, 2002 – 2004 and 2004 – 2006. Ms Angus Burney and Mr McBride agreed that there was no material difference between the two agreements in terms of Part G, management of change, and therefore no need to determine which collective agreement covered Ms Smith's work. I shall for convenience refer to "the collective agreement" in the determination.

[7] NZ Post says that Ms Smith was not entitled to redundancy compensation under the relevant provisions of the collective agreement because the offer of re-deployment made to her was practicable and appropriate in the circumstances. NZ Post says the only entitlement Ms Smith had to redundancy was a contractual one and an entitlement to redundancy is not about fairness or whether other employees received compensation.

### ***The Issues***

[8] There is no issue about the genuineness of the redundancy.

[9] The main issue in this case is whether Ms Smith was entitled under the provisions of the collective agreement to redundancy compensation.

[10] This involves consideration of the relevant provisions of the collective agreement, the process adopted by NZ Post and whether the customer service representative role was a practicable and appropriate option for re-deployment.

[11] A second issue is whether the circumstances that led to another supervisor, Lexi Thomson being paid redundancy compensation were the same or similar to Ms Smith's situation.

[12] If the answer to that is yes then can a claim of inconsistent or disparate treatment of two employees in these circumstances give rise to a personal grievance?

[13] The parties were helpfully able to reach an agreed statement of facts with respect to the chronology of events. I have not thought it necessary to set that out in full.

### ***Was Ms Smith entitled under the provisions of the collective employment agreement to redundancy compensation?***

[14] The relevant provisions for management of change are found at section G of the collective employment agreement. In line with the principles of interpretation of employment agreements the words used in section G are the starting point.

[15] Clause 2 of section G sets out the approach of NZ Post in the event of change.

*In recognition of the impact that business changes have on affected employees, the company seeks wherever possible to achieve an outcome that best balances the needs of affected employees and the needs of the company.*

[16] Clause 17 provides that the range of options for affected employees once a surplus staffing situation has been identified includes natural attrition (retirement, resignation, transfer or promotion), re-deployment (transferring the employee to a new job at the same location on the same or lower base pay rate), relocation and voluntary/compulsory redundancy. The preferred option stated in clause 18 is natural attrition.

[17] Peter Richardson who was at the relevant time the Retail Development Manager for PostShops within zone 6 which included Nelson, met with Ms Smith on 10 June 2004. He advised Ms Smith that her role as supervisor was to be disestablished on 30 June 2004, and talked through with her the reasons for the disestablishment of the supervisor role. He also provided information about the new retail team leader role.

[18] A letter handed to Ms Smith at the time of the meeting stated that it was not until Ms Smith's application for the retail team leader position had been unsuccessful that the surplus staffing provisions in section G were to be applied (document 6 of agreed bundle).

[19] Clause 19 provides amongst other matters:

*In selecting from the various options, the aim will be to minimise, as far as possible, the use of redundancy. Redundancy will only be used where the other options are clearly not practical or appropriate in the particular case...*

[20] Clause 19 in my view is clear. The aim in selecting from the options is to minimise the use of redundancy. Redundancy will only be used when the other options are clearly not practical or appropriate. That aim was in line with a letter NZ Post sent to the union's national postal co-ordinator Anna Kenny on 28 May 2004. The letter stated amongst other matters that it would *consider applying the redundancy provisions in extreme circumstances.... The application of the redundancy provisions will be applied on a case by case basis, and, only after the other Surplus Staffing options have been exhausted.*

[21] Ms Smith chose not to apply for the retail team leader role. This surprised NZ Post as Ms Smith was a valued employee and was seen as a suitable candidate for the retail team leader role with an excellent chance of appointment to the role. Ms Smith said that she was not happy with the hours of work for the new role which included working on Saturdays. NZ Post put forward some alternative arrangements including every fourth Saturday but that was not acceptable to Ms Smith. Ms Smith had, after she was notified her position would be disestablished, applied for a position with Kiwibank and following an interview and negotiations was appointed to the position. Ms Smith said this was not a material matter in her decisions made at the time.

[22] Mr Richardson then met with Ms Smith I find on 29 June 2004 (diary entry document 9). He told Ms Smith he was surprised that she had not applied for the retail team leader role. I find there was some discussion about other options available including a customer service representative role at that meeting. It was accepted that relocation was not an appropriate option. Mr Richardson asked Ms Smith to put in writing her reasons for not applying for the retail team leader role to Anthony Smith.

[23] Ms Smith duly outlined her reasons for not applying for the retail team leader role in an email to Mr Smith on 1 July 2004. The main reason was that she did not wish to work on Saturdays. Ms Smith also set out that she was advised by the union that she did not have to apply for the new role, that there were no PostShops of similar size to be redeployed to in her area and she did not wish to relocate because her home and family are in the area. Ms Smith stated that she would appreciate a speedy outcome as she was feeling unsettled and asked for dates to be given to her at the first opportunity.

[24] Mr Smith responded by email dated 5 July to Ms Smith and expressed his disappointment that she had chosen not to apply for the position of retail team leader. He stated in his email that he would still be prepared to consider an application if she changed her mind by 9 July. Mr Smith said

in his email that in choosing not to apply for the retail team leader role the company is guided by the surplus staffing provision of the collective agreement. He noted that the spirit of the agreement was around maintaining people in work with NZ Post.

[25] Within the same email Mr Smith also made an offer of re-deployment to Ms Smith in the Nelson PostShop as a customer service representative on the same grade 4 as her supervisor role working Monday to Friday with hours to be mutually agreed. He recognised within that offer that Ms Smith had a passion for facilitating training. It was envisaged that Ms Smith would carry on with the training component of her work that she had been performing for two to three weeks of the month in her supervisor role with the balance of her role being made up of customer service representative duties. Ms Smith understood that there would be a training component to the new role although had some concerns as to how long that component of the role could continue. I am satisfied after hearing from Mr Richardson that nothing had been decided within NZ Post as to the future of training and how it was to be delivered at that time and at the time of the investigation meeting NZ Post had still not employed designated trainers.

[26] NZ Post accepts that at the time the role was offered there was no-one specifically performing the role in the Nelson PostShop. NZ Post thought the offer of a position with the same hours Ms Smith was working addressed her concerns with respect to the working hours on Saturdays for the retail team leader role, accommodated her passion for training and was both practicable and appropriate. Although in later correspondence to NZ Post Ms Smith alleged that the position was fabricated so that NZ Post could avoid paying redundancy compensation I am not satisfied that the evidence supports that the offer was other than a genuine one for a role which would retain and utilise Ms Smith's skills. I further accept that it has subsequently transpired that there would have been more than sufficient work for Ms Smith to have done at the Nelson PostShop.

[27] It was clear to NZ Post by 5 July 2004 that Ms Smith was highly unlikely to apply for the retail team leader position notwithstanding the extended timeframe to do so. It was necessary then for NZ Post to consider options to be offered to Ms Smith in a surplus staffing situation under clauses 21 - 23 of the collective agreement.

[28] Clause 21 deals with the situation where natural attrition will not meet the required staff reduction and the company may give the affected employee written notice that they are surplus to requirements. I am satisfied that the email from Mr Smith adequately advises Ms Smith in that respect and that in terms of clause 22 Ms Smith then, by email on 6 July 2004, advised that she did not wish to accept the offer of re-deployment as a customer services representative at the Nelson Postshop. Ms Smith said in her email that it would be a backward step for her career wise and that there would be no challenge for her in the role. She also expressed her concerns about the training finishing. Ms Smith said at the end of the email *I feel that it is time for me to move on to new challenges.*

[29] Ms Angus Burney submitted that voluntary redundancy should have been an option offered to Ms Smith by NZ Post. Clause 19 makes it clear though that redundancy will only be used where the other options are clearly not practical or appropriate in the particular case. Even then clause 19 provides that NZ Post is not required to accept any application for voluntary redundancy and will have regard to retaining necessary skills, knowledge and experience.

[30] Clause 23 of the collective agreement provides that in the event agreement cannot be reached within a practical timeframe (or if the employee(s) do not wish to be consulted), the company may:

*Offer to re-deploy or relocate the employee(s). If the offer (provided that it is practicable and appropriate in the circumstances) is not accepted within 14 days, the*

*employee's employment may be terminated on a further 14 days notice and without payment of redundancy compensation.*

[31] In accordance with clause 23 Mr Richardson wrote to Ms Smith on 8 July. He formally offered Ms Smith re-deployment to a full time customer service representative role and asked Ms Smith to consider the offer and let him know within 14 days if she was prepared to accept re-deployment to the position.

[32] I have considered whether the re-deployment offer made to Ms Smith to the customer service representative role was practicable and appropriate. The Employment Tribunal in *Post Office Union v NZ Post* [1991] 3 ERNZ 68 noted the definition of the word *practicable* in *Association of Marine etc Engineers v Tasman Express Line Ltd* [1990] 3 NZILR 946 as:

*“Practicability” means “capable of being carried out in action, feasible, being able to be done or carried out successfully”.*

[33] The re-deployment offer for Ms Smith was for a position at the same grade, pay rate and location as the supervisor role. It included a training component similar to that Ms Smith was performing in her supervisor role. The hours of work were substantially similar and within Monday to Friday. The offer was in some respects a backward step for Ms Smith because there would be a new person appointed to the retail team leader role. I balance against that the continuation of the training component in the role in considering not just whether the offer was practicable but also whether it was appropriate. The definition of re-deployment in clause 17 includes transfer to a new job at the same location on the same or lower base pay rate so the collective agreement does not support that a re-deployment offer must be to the same type of position the employee held. I am satisfied that the role would have been created for Ms Smith and that she would have been able to carry out the role successfully. I am satisfied that the offer of re-deployment as a customer service representative made to Ms Smith was practicable and appropriate.

[34] Ms Smith responded by letter dated 11 July 2004 and advised that she did not want to accept the position and asked for all issues around the disestablishment of her position to be resolved by 16 July 2004.

[35] NZ Post advised Ms Smith by letter dated 16 July 2004 that her employment with the company would be terminated in 14 days on 30 July 2004 without payment of redundancy compensation.

[36] Clause 30 of the collective agreement provides:

*Redundancy compensation will only be considered if attrition, re-deployment, relocation or reduction in the number of standard hours are clearly not practicable.*

[37] I have found that the re-deployment offer made to Ms Smith was practicable and in line with the intention of the clauses in section G of the collective agreement to minimise the use of redundancy. I also find that the re-deployment offer attempted to balance the needs of Ms Smith with a training component and hours of work within Monday to Friday with the company need to retain Ms Smith's valuable skills, knowledge and experience.

[38] I do not find that Ms Smith was entitled under the provisions of the collective agreement to redundancy compensation.

***Were the circumstances that led to another supervisor, Lexi Thomson being paid redundancy compensation the same or similar to those of Ms Smith?***

[39] It is very understandable that Ms Smith would feel upset that Ms Thomson who was also a supervisor at NZ Post was paid redundancy compensation.

[40] I heard considerable evidence about the circumstances of Ms Thomson and Ms Smith. Ms Thomson although quite shocked and upset about the disestablishment of her supervisor role had applied and been interviewed for the Retail Team Leader role but was unsuccessful. Ms Smith had not applied for the role. Ms Thomson said in her written evidence that she *wasn't very keen on the idea of having the successful RTL "over me" and thought this would be embarrassing to have her manage me after all my years at NZ Post.* This would no doubt be more difficult as Ms Thomson was unsuccessful in her application for the new position.

[41] Ms Thomson advised that accepting a lesser role such as the customer service representative role would mean a loss of dignity and that she wasn't interested in the work of a customer service representative or another part-time role offered. I am of the view that there is a difference with the re-deployment offer made to Ms Smith which included a training component in recognition of Ms Smith's skill and passion for training. I also formed the clear impression that Ms Smith was a particularly valuable employee who NZ Post wanted to retain.

[42] NZ Post also felt that Ms Thomson was quite stressed and that had caused some health issues for her and that she had become quite destructive by the end of the process and wanted to leave.

[43] I find that there were differences in the circumstances of Ms Thomson and Ms Smith which led to Ms Thomson and not Ms Smith being paid redundancy compensation. I am not therefore required to go on to consider whether there could have been a personal grievance in circumstances where there was no contractual entitlement to redundancy but two employees were treated inconsistently.

***Costs***

[44] I reserve the issue of costs.

***Summary of Findings***

- I have found that Ms Smith was not entitled, under the collective agreement which covered her work, to redundancy compensation as she was offered re-deployment which was practicable and appropriate in the circumstances.
- I have found that there were differences in the circumstances between Ms Smith and Ms Thomson which led to Ms Thomson being paid redundancy and not Ms Smith.
- I have reserved the issue of costs.

Helen Doyle  
Member of Employment Relations Authority