

[3] The review resulted in a strategic plan titled “New Model of Care” and reflected changes to the way nursing services would be allocated at Hawera Hospital.

[4] TDHB undertook a comparison of the position descriptions for ED and HIP nurses and concluded that the work undertaken in each area was substantially similar. TDHB consulted with the NZNO who agreed with TDHB and a single generic position description was developed to encapsulate the work performed in both ED and HIP.

[5] TDHB says that following the implementation of the New Model of Care and the new position description, nurses continue to work primarily in their area of expertise and preference, however the generic position description allows TDHB to transfer nurses between ED and HIP in response to “*surges and fluctuations*” in patient admissions and the hospital’s operational requirements. With the exception of Mrs Graamans all nurses in the ED and the HIP now work pursuant to the generic position description.

[6] Mrs Graamans was on an extended period of leave without pay between March and October 2010, the period in which The New Model of Care was implemented. Mrs Graamans returned to work in October 2010. There has been a considerable amount of communication between the parties since that time however Mrs Graamans disputes that TDBH can lawfully instruct her to work to the generic position description.

[7] Mrs Graamans says that the offer (and her acceptance) in late 1998 to work as a registered nurse based in the ED is an individual employment agreement which cannot be altered by general terms contained in the collective agreement or by a change to the position description. She says that she is employed to work specifically in the ED and TDHB cannot change this term and condition of her employment without her consent. In this respect says she is not obliged to work pursuant to the generic position description.

[8] Mrs Graamans further says there is a considerable difference between the work performed in ED and that required in HIP and does not accept that the work in each area is substantially similar.

[9] In October 2010 TDHB and Mrs Graamans agreed to have Mrs Graamans continue to work exclusively in the ED until the dispute between them was resolved. The parties have attended mediation but were unable to resolve their differences.

[10] TDHB now says that it can and is entitled to require Mrs Graamans to work pursuant to the new position description and seeks a declaration to that effect.

[11] Mrs Graamans opposes the declaration. She says her role in the ED has not been disestablished and she continues to perform her duties according to her specific individual employment agreement and within the New Model of Care. She wishes to continue in her role as an ED nurse and says that TDHB, as a fair and reasonable employer, should accept and absorb her position. She says if TDHB requires her to work pursuant to the generic position description it should allow her to have her specific ED position grand-parented into the position description as it relates to her.

[12] Alternatively, Mrs Graamans says that if TDHB requires her to work pursuant to the generic position description then this is a new role. In these circumstances she says her current position has been disestablished and TDHB should follow clause 24.0 of the collective agreement which provides for management of change and allow her to exercise options contained within those contractual provisions up to and including severance.

The Authority's investigation

[13] TDHB's statement of problem was lodged in the Authority on 29 March 2012. In an amended statement in reply sent on 28 November 2012 Mrs Graamans counterclaimed for remedies usually associated with a claim for unjustifiable action. Given that it was not apparent that she had previously raised a personal grievance with TDHB, it was agreed during a telephone conference that if Mrs Graamans wished to pursue a personal grievance claim then that matter should be pursued by

lodging a statement of problem and be treated separately to TDHB's current application.

[14] For the purposes of the Authority's investigation, written statements were lodged by Ms Gillian Campbell, Clinical Services Manager–Medicine, and Mr Brendon Jull, Human Resources Advisor, on behalf of TDHB. Mrs Graamans was represented by her husband, Mr Paul Graamans, and both Mr and Mrs Graamans also provided written statements to the Authority. Each of these witnesses attended the investigation meeting, confirmed their statements and gave further oral evidence in answer to questions.

[15] Ms Chrissy DARTH, Regional Organiser, NZNO attended under witness summons and gave oral evidence and in answer to questions.

[16] A significant number of documents were provided to the Authority. A portion of these documents provided background information but are not directly relevant to the matters the Authority has been required to determine. As permitted by s. 174 of the Act this determination has not set out all evidence and submissions received but has stated the Authority's findings of facts and law and expressed conclusions on matters requiring determination.

Issues

[17] It is useful to analyse the nature of the employment relationship, looking at the following issues:

- a. the consultation and restructuring process
- b. the terms and conditions of Mrs Graamans' employment

The consultation and restructuring process

[18] Mrs Graamans accepted in her oral evidence that TDHB was entitled to restructure its business however she does not accept that it could do so if the restructuring effected her contractual entitlement to work exclusively in ED.

[19] Mrs Graamans says she is employed specifically as an ED staff nurse. She says that TDHB cannot change her position and require her to work in the HIP without her consent. She opposes TDHB's assertions that she is required to perform rostered duties and receive patient allocation in HIP.

[20] By way of background, in November 1998 Mrs Graamans signed a letter of offer following a previous restructure to Hawera Hospital in or around that time. The letter advised materially:

Dear Sandra

I am pleased to be able to confirm you into the following redeployment option:

Position : 0.7 FTE Staff Nurse – Hawera Hospital

Based: Emergency Department

...

Contract The terms and conditions for this position are covered by the THL Nurses Collective Employment Contract

...

[21] Relatively soon after, on 1 December 1998, Mrs Graamans signed an amendment to her contract which increased her hours to fulltime. The amendment did not stipulate that she was based in the ED but stated that all other conditions remain as outlined in the letter of offer in November 1998 and as covered in the then collective employment contract.

[22] Mrs Graamans says that the letter of offer and the amendment of 1 December form an individual employment agreement. I understand Mrs Graamans to say that the letter of offer stipulates her position is as an ED staff nurse and is a specific term of employment.

[23] It was unclear at the Authority's meeting what status Mrs Graamans apportions to terms and conditions contained in the relevant collective agreement between TDHB and NZNO. She says the collective agreement it is not an employment agreement and does not include work duties or job descriptions. Mrs Graamans say that neither the collective agreement nor the generic position description can take precedence over her individual employment agreement of 1998 which provides she is an ED nurse.

[24] At that time Mrs Graamans accepted the position she was a member of NZNO and she had continued to remain a member to the present day. The 1998 letter of offer Mrs Graamans stipulated that terms and conditions of employment not specified within it were contained in the then collective agreement. There is nothing in her letter of offer or the collective agreement which provides that her position is excluded from a restructuring of TDBH services. Further, clause 2.1 of the applicable collective agreement states that the agreement applies to all employees who are members of NZNO and who are employed by District Health Boards who are a party to the agreement. TDHB is a party to the agreement. I consider the terms and conditions contained in the relevant collective agreement form terms and conditions of Mrs Graamans' employment.

[25] Clause 24 of the applicable collective agreement sets out fulsome procedures for the commencement and progression of management of change situations, including how proposals of change should be notified and how consultation should be conducted. The agreement records that the notification and consultation procedures shall be completed prior to implementation of clause 24.3 and that final decisions are the responsibility of the employer. The consultation provisions in the collective agreement also specifically state that while consensus during change management is desirable it is not required.

[26] Clause 24.3 is titled "Staff Surplus". It provides:

When as a result of the substantial restructuring of a whole, or any parts of the employer's operations; either due to the reorganisation, review of work method, change in plant (or like cause), the employer requires a reduction in the number of employees, or employees can no longer be employed in their current position, at their current grade or work location (i.e. the terms of appointment to their present position) then the options in subclause 24.3.4 below shall be invoked and decided on a case by case basis in accordance with this clause.

[27] Clause 24.3.4 sets out a hierarchy of 7 options which TDHB is obliged to consider and discuss with individuals where substantial restructuring has occurred as defined by clause 24.3. The first option is 'reconfirmation in position' and the final option is 'severance'. The agreement notes that a 'reconfirmation in position' will preclude employees from access to other options and that the aim is to minimise the

use of severance. Each of the options is further defined. In respect to 'reconfirmation in position' the collective agreement states:

24.3.5 Reconfirmed in position – where a position is to be transferred into new structure in the same location and grade, where there is one fair candidate for the position, the employee is to be confirmed in it ...

[28] To effect the required changes TDHB compared the position descriptions for ED and HIP using a methodology commonly used by other district health boards, and formed a view that the two roles were 88% substantially the same. Ms Chrissy Dearth, Regional Organiser, NZNO, gave evidence that on 29 April 2010 TDHB met with her and two NZNO delegates and discussed TDHB's conclusions following the similarity testing and says NZNO agreed that the positions were substantially similar.

[29] A draft generic job description was devised and put to affected staff for consultation. NZNO endorsed the new generic position description and TDHB agreed that it would recognise the preference of individual staff members to work in their area of choice when implementing the position descriptions.

[30] On 5 October 2010 TDHB communicated with Mrs Graamans and advised of the following key outcomes of the review as follows:

- All Hawera Hospital ED and HIP nurses had a change of title to Hawera Hospital staff nurses.
- It was acknowledged where a staff nurse had an area of preferred work, that where able they will be rostered to work in this area. However, at times may be required to work within another area of Hawera Hospital.
- It was determined through a robust process between TDHB and NZNO that there was not a significant difference between the current area specific job descriptions and the new Hawera Hospital job descriptions. As such there were no disestablishments of positions but staff as per letter dated 5 July 2010 were reconfirmed into their current FTE with a change of job title and job description.

[31] Mrs Graamans does not agree that the role of the staff nurse in ED is substantially similar as the role in HIP and refuses to work pursuant to the generic Hawera Nurse position description.

[32] The questions for the Authority to determine are, whether after following a process of consultation in circumstance where Mrs Graamans does not consent to alteration to her terms of employment as regards her position and associated duties, TDHB can require Mrs Graamans to work pursuant to the generic position description?. Alternatively, has Mrs Graamans' position altered to such an extent that it is no longer exists such that she is entitled to have TDBH follow the provisions of the collective agreement and make her redundant?

[33] I accept on the evidence that Hawera Hospital underwent a significant restructuring to better achieve its service delivery within the community and as regards its nursing staff it adhered to the management of change provisions contained in the collective agreement. I am also satisfied that TDHB complied with its obligations of good faith and consulted extensively with Mrs Graamans on her return in October 2010 from leave without pay. Mrs Graahams and TDHB exchanged no less than a dozen letters between them over a period of 11 months with each item of correspondence setting out the respective parties' position. TDHB met with Mrs Graamans on two occasions with a view to addressing her objections to TDHB's and NZNO's conclusion that the ED and HIP positions were substantially similar and her concerns about what the reconfirmed position would require from her.

[34] In relation to the ability of an employer to require change in the way work is to be performed within a position, the Court in *Group Rentals NZ Ltd v Canterbury Clerical Workers IOUW* [1987] NZILR 255, observed: “A worker employed generally cannot expect that his or her duties will never be altered.

[35] In *McCulloch v NZ Fire Service*¹ the Court commented: “...whether the job is the same with a change of focus/emphasis or a different position is a question of fact and degree”².

[36] The test developed by the Courts to assist in making this assessment was formulated in *Carter Holt Harvey v Wallis*³. In that case the Employment Court approved of the following test to be applied when comparing restructured positions with existing positions and asked:

¹ [1998] 3 ERNZ 378

² Ibid at page 393

³ [1998] 3 ERNZ 984

Would a reasonable person, taking into account the nature, terms and conditions of each position and the characteristics of [those employed in the position], consider that there was sufficient difference to break the essential continuity of the employment?

[37] In *Pilgrim v Director General of Health*⁴ the Court said:

Suitability was defined as matching individual skills with positions that require similar skills, notwithstanding that this may involve some training. Suitability must be determined objectively and was a question of fact and degree. Suitability was not determined by the subjective view of the employer or employee, but by the position a reasonable and disinterested, but not uninformed, person would take.

[38] Mrs Graamans says that the finding that ED and HIP roles are substantially similar masks the difference between the roles. She says patients in the ED are generally mobile whereas the patients in HIP often require considerable assistance with mobility. Mrs Graamans compared the ED work environment as being akin to the physical demands of a medical practice where she says HIP's work environment is physically heavy and demanding.

[39] Mrs Graamans says she is happy to work in HIP performing tasks which do not include transferring and lifting of patients. She referred to a previous back injury and a recommendation by an orthopaedic surgeon in 2003 that she refrain from heavy lifting as reasons why she refuses to work in HIP. However no evidence was provided to the Authority as to the status of Mrs Graamans current health to perform this type of work. Mrs Graamans asserts that TDHB's policy in respect to heavy lifting and obtaining assistance does not provide a guarantee that she won't be injured when lifting patients.

[40] Mrs Graamans also rejects the findings of a Workplace Assessment Report dated 18 January 2011 which was undertaken by TDHB during its consultation with her and in response to her concerns. That report states assistance required for immobile patients may potentially be more frequent in the HIP setting but that workload is spread evenly across staff so that no individual nurse is required to exclusively deal with patients requiring more assistance. The reports notes that the ED and the HIP deal with unpredictable events such as treating unconscious patients,

⁴ [1992] 3 ERNZ 190

however transfer equipment and colleagues are available to assist in each situation. Mrs Graamans accepted that assistance with patient mobility including manual transfer and lifting of patients is required in ED but says this task is more frequent in HIP.

[41] Finally, Mrs Graamans considers she may be unfairly selected to work in HIP and assigned an unreasonably heavy workload. No evidence was provided by Mrs Graamans as to how she had formed this view and I accept evidence on behalf of TDHB that if Mrs Graamans perceives she is being treated unfairly TDHB will investigate and deal with the matter appropriately.

[42] Mrs Graamans has the requisite qualifications and skills to perform to the generic position description and to work in HIP as required. It is apparent that the core requirements of registered nurses in both ED and HIP at Hawera Hospital is to provide quality nursing cares to patients in the context of a rural/generalist hospital. HIP may require nurses to assist to a greater degree with patient mobility however I do not regard an increase in this type of activity in and of itself alters the clinical practice and duties required by Mrs Graamans. I accept that it is not Mrs Graamans' preference to perform transfers on patients with compromised mobility but assess this is already an aspect of the role she currently undertakes.

[43] I am satisfied that the work required pursuant to the generic Hawera Nurse position description is substantially similar to the duties required under the 2006 ED position description. In this respect I do not consider that the work Ms Graamans currently performs has been altered to such a degree where it could be objectively concluded that that a different job has come into existence. I consider it is reasonable of TDHB, having consulted with Mrs Graamans, to reconfirm her position and require her to perform the role including duties which have altered. Mrs Graamans' position remains and she is not redundant.

[44] In *Nelson Timber etc IUOW v Nelson Pine Forest Ltd*⁵ the Court held that it was difficult to describe a worker as redundant when he still had his job even though the content may have varied and in *NZPSA v Land Corporation Ltd*⁶ the Court noted

⁵ [1989] 1 NZILR 451

⁶ [1991] 1 ERNZ 741 at 759

that no employee has the right to insist on being made redundant. Redundancy is a misfortune, not a privilege. It was for the employer to decide whether a redundancy situation existed.

[45] However, even if I am wrong in my assessment as to Mrs Graamans' position I do not consider the matter alters my findings that TDHB is able to instruct Mrs Graamans to work in areas outside of ED as set out below.

Mrs Graamans terms and conditions of employment

[46] As previously noted Mrs Graamans relies on the letter of offer and the amendment of 1 December 21998 to support her view that she is exclusively an ED staff nurse.

[47] I was provided little by way of evidence on which to assess the intentions of the parties at the time Mrs Graamans accepted the offer of the position of a staff nurse at Hawera Hospital in 1998.

[48] The leading case on the interpretation of commercial contracts is the decision of the Supreme Court in *Vector Gas v Bay of Plenty Energy Ltd*⁷. The Court of Appeal in *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc*⁸ held that the principles enunciated in *Vector* are relevant also to the interpretation of employment agreements. In summary the Supreme Court held:

- (i) the ultimate objective in a contract interpretation dispute is to determine the intention of the parties from the words used in the contract;
- (ii) the words used should be given their ordinary meaning in the context of the contract;
- (iii) the ordinary or plain meaning of the words and text should be the primary focus for interpretation however extrinsic material may be relevant in objectively demonstrating what the parties intended even if the words are not ambiguous;
- (iv) the context in which a contract is made is an important consideration; a contract should be interpreted in accordance with commercial or business commonsense.
- (v) evidence of what was during negotiations for the contract may help establish the circumstances in which the contract was made;

⁷ [2010] NZSC 5; [2010] NZLR 444

⁸ [2010] NZCA 317

[49] TDHB says that the letter of offer provides that Mrs Graamans' position is as a staff nurse at Hawera Hospital. It says the offer to Mrs Graaman was recorded in a standard template form as are all letters of offer. TDHB says the reference to the ED is to the location of work and it does not accept that Mrs Graamans' position is exclusively as an ED staff nurse or that the letter of offer of 1998 provides any additional specific individual terms of employment for Mrs Graamans beyond a position as a staff nurse at Hawera Hospital.

[50] Mrs Graamans says she was specifically offered a position in the ED on the basis that TDHD recognised she was not in terms of her health suitable for a ward environment. On review of the written evidence provided I consider TDHB agreed to have Mrs Graamans based in the ED as this was her area of preference.

[51] A number of documents exchanged between the parties were presented to the Authority as evidence both in support and to dispute the proposition that a term of Mrs Graamans employment was that she is an ED nurse. Sent between 2001 and 2008, these documents were all in the same or similar template form as Mrs Graamans' original offer and largely related to temporary secondments and a second additional casual position Mrs Graamans undertook. However, the documents variously record Mrs Graamans' position as either "Staff Nurse, Hawera Hospital", "Staff-Nurse, Hawera Emergency Department" or simply as "Staff Nurse" and do not provide assistance as to what was agreed between the parties at the time Mrs Graamans and TDHB entered into the employment agreement.

[52] Applying the ordinary meaning of the words used in the letter of 1998 it seems clear that Mrs Graamans was offered a position as a staff nurse at Hawera Hospital. The letter states she will be based in the ED. Whilst the distinction may be fine, the letter of offer does not state that Mrs Graamans' position is as an Emergency Department Staff Nurse but rather that Mrs Graamans will be based in the Emergency Department. I am not satisfied that the words contained in the letter of offer provide Mrs Graamans with an employment position to work exclusively as an Emergency Department nurse. In this respect I do not consider it a term of Mrs Gramaans' employment that her position is as an Emergency Department Staff Nurse.

[53] I am further persuaded that TDHB can require Mrs Graamans to work outside the ED on the basis of the ED job description. Between 1998 and 2006 the position description as regards to work performed in the ED by staff nurses was reviewed and changed on several occasions. It is accepted that Mrs Graamans currently works pursuant to the 2006 ED staff nurse position description which states amongst other things, that incumbents are:

To perform nursing duties on a rostered basis in other areas as required as appropriate.

To assist and work in monitored beds area with appropriate training.

...

This position description is not exhaustive and the incumbent may be requested to perform any reasonable task requested by Nurse Manager/After Hours Coordinator.

This position description will be reviewed from time to time in consultation with the incumbent.

[54] During the Authority's investigation questions were put to representatives of TDHB as to why, if it wished Mrs Graamans to work when needed in the HIP, it did not utilize aspects of the ED staff nurse job description which provides that nurses can be required to work in other areas. Ms Campbell says the new generic position description now provides certainty that TDHB can require staff to work where operationally required. The inference which I take from Ms Campbell's evidence is that there had been some reluctance from staff to be rostered outside of their preferred area and TDHB had refrained from implementing the position description in this way. I was not provided with any evidence that it was an agreed custom and practice that nurses could not be rostered to another area. However I consider the wording of the 2006 job description is clear and TDBH can require nurses based in the ED to perform nursing duties on a rostered basis in other areas as required. In this respect even if I accept that Mrs Graamans was employed to work as an exclusively as a ED staff nurse (which I do not), I consider the wording of the 2006 ED staff nurse position description allows TDHB to require Mrs Graamans to work in HIP as required in any event.

Determination

[55] I conclude that in a context of Hawera Hospital's restructuring, TDHB complied with its management of change provisions and consulted extensively with the NZNO and Mrs Graamans. I find that Mrs Graamans' position has not changed to an extent where the alterations to it are of a magnitude that the position has ceased to exist. TDHB is able to reconfirm Mrs Graamans into the position and pursuant to the provisions of the collective agreement as they relate to management of change and TDHB is not required to obtain Mrs Graamans' consent to do so.

[56] In these circumstances I declare that TDHB's instruction to have Mrs Graamans perform duties pursuant to the generic Hawera Nurse position description is a lawful and reasonable instruction.

Costs

[57] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority