

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA60/08
5077461

BETWEEN ANN VALENTINE
 Applicant

AND CANTERBURY DISTRICT
 HEALTH BOARD
 Respondent

Member of Authority: James Crichton

Representatives: Frank Wall, Advocate for Applicant
 Penny Shaw, Advocate for Respondent

Investigation Meeting: 24 January 2008 at Christchurch

Submissions received: 17 April from Applicant
 8 May from Respondent

Determination: 9 May 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Valentine) was employed as a Transit Nurse at Christchurch Hospital where she commenced that employment in 1999. The original hours of work for the position were essentially normal daytime hours between 9am and 5pm and Ms Valentine had worked within those hours in accordance with her Employment Agreement from the beginning of her employment.

[2] A Transit Nurse escorts patients transferring within the Hospital who are in need of medical care. As the service requirements of the Hospital changed, Ms Valentine's employer, the respondent Canterbury District Health Board (the Board) sought to change her hours of work.

[3] An audit of the Transit Care Nursing Service was conducted for the period July to December 2005 and that audit resulted in the Board circulating a *proposal for change* in March 2006.

[4] Specifically, the proposal for change sought to change the hours of work for Transit Nurses and increase the number of full time equivalent (FTE) nurses involved in the service by one FTE. In addition, the proposal for change suggested that all Transit Nurses be included in the roster and that the hours of work be changed for all Transit Nurses to better align the service with the Hospital's requirements.

[5] The proposal solicited and received comments from the affected staff, and on 10 May 2006, the recommendations were released and subsequently adopted which had the effect of requiring Ms Valentine to change the terms and conditions of her employment.

[6] Between that date and November 2006, there were numerous meetings between the Board and Ms Valentine with a view to trying to resolve her issues and on 7 November 2006 the Board gave Ms Valentine advice that it intended to transition to the new roster by 30 November 2006.

[7] On 28 November 2006 Ms Valentine through her then representative the New Zealand Nurses Organisation, gave notice that she would not be rostered for other than Monday to Friday 0900 to 1730 hours, being the hours of work she was then engaged for and the hours of work contemplated by her Employment Agreement. That email also indicated that the effect of the change was to make Ms Valentine's position surplus to requirements.

[8] There was a further meeting on 13 December 2006, as a result of which the Board made Ms Valentine a formal offer on new terms and conditions which remained open for four weeks from that date.

[9] In mid January 2007, Ms Valentine verbally advised the Board's representative that she would not be accepting the new hours of work and on 16 January 2007 the Board told Ms Valentine that as she had not accepted the offer the Board would assume that Ms Valentine no longer wished to be in an employment relationship, but gave her a further month until 15 February to advise if that was not the position.

[10] On 15 February 2007, the Board told Ms Valentine that her shifts of 0900 to 1730 were no longer available although she could work the new roster. Ms Valentine has not returned to the Board's employ in this role since.

[11] Ms Valentine says that she is entitled to the benefit of the terms of her existing Employment Agreement which effectively provide for her to work days and not to work shift work. In the alternative, she says that, if her job has, in truth, disappeared, as a consequence of the Board's restructuring, then she is entitled to the redundancy compensation set out in her Employment Agreement.

[12] For its part, the Board says that Ms Valentine has no entitlement to a redundancy compensation because she simply refused attempts at reconfirmation and/or redeployment doing shift work.

Issues

[13] It will be useful to analyse the nature of the employment relationship, looking at the following issues:

- (a) the nature of Ms Valentine's Employment Agreement;
- (b) the alleged unilateral changes;
- (c) the restructure;
- (d) subsequent conduct.

Ms Valentine's Employment Agreement

[14] When Ms Valentine was first employed by the Board at Christchurch Hospital, she was a casual nurse who would relieve in any department of the Hospital on an as and when required basis.

[15] Then in June 2000 she was offered a three months fixed term engagement to work as a Transit Nurse for 16 hours per week. Ms Valentine gave unchallenged evidence that the purpose of this arrangement was to fill-in a service gap left by an existing Transit Nurse who had previously worked on a full-time basis but who wanted to cut her hours to three days per week. That arrangement continued until September 2001 such that the fixed term engagement was successively renewed.

[16] In September 2001, the other Transit Nurse who had reduced her hours to three days per week resigned her employment altogether and Ms Valentine was offered, and accepted, employment for 36 hours per week being the amalgam of her

original 16 hours per week together with the hours previously worked by the former Transit Nurse.

[17] The effect of this new arrangement was that Ms Valentine was employed as a more or less full-time day worker. Her evidence was that she actively chose to work days and resisted the prospect of working shifts because of the latter's impact on her family life.

[18] Ms Valentine accepted in oral evidence before the Authority, that virtually all public sector nursing involved a shift cycle and that the opportunities for day work within a large public hospital were by definition, small indeed. Notwithstanding that, Ms Valentine maintained that she had an employment agreement which mandated that the Board must offer her day work and not shift work.

[19] Ms Valentine accepted in her oral evidence that the Board was entitled to restructure its business but not so as to affect her entitlement to day work.

[20] Ms Susan Hayward is the Director of Nursing at Christchurch Hospital. She gave evidence that the patient profile at the Hospital had changed and the consequence of that was that there was a need to change the Hospital's operational structure at a number of points. Ms Hayward said that there had been an increase in patient presentation rates of 4% a year and the modus operandi had changed as well so that there were more transfers now than there had been historically.

[21] She said that there was very little day work available for nurses and in fact that day work was the exception rather than the rule. Indeed, Ms Hayward made the graphic statement that *nursing is shift work* and she went on to say that the Hospital needed flexibility of rostering in order to meet patient demand.

The unilateral changes?

[22] Ms Valentine alleges that the Board effectively tried to make unilateral changes to the terms and conditions of her employment on more than one occasion leading up to the implementation of the management of change proposal.

[23] First of all, Ms Valentine relies on a conversation that she had with Ms Liz Henderson, who was then the Resource Coordinator, a conversation which Ms Valentine says took place in September 2004, or thereabouts. The context was

that at that time, the Board appointed three additional nurses to work with Ms Valentine in what was called the *transfer pool*, all of whom worked shift work. The thrust of Ms Valentine's discussion with Ms Henderson at that time was what effect those new appointments would have on Ms Valentine's own position. Ms Valentine reports that Ms Henderson reassured her with words to the effect *you work days, they work shifts, end of story*.

[24] Ms Henderson did not give evidence before the Authority but the evidence that Ms Valentine gave about Ms Henderson's reassurance was not challenged by the Board, so I am inclined to accept that words of the sort Ms Valentine remembers were actually used in that conversation. Certainly, Ms Henderson's alleged reassurance is consistent with the subsequent behaviour of other senior members of the Board's staff who did give evidence before the Authority.

[25] Also consistent with Ms Valentine's recollection of that conversation with Ms Henderson is her subsequent evidence that she was required to give an orientation course to the incoming shift transfer nurses and again she records them telling her that they understood that she was a day worker and not a shift worker. Again, that evidence was not challenged by the Board and again it seems to me appropriate to accept it as more rather than less likely to be an accurate recollection of events.

[26] The first occasion on which Ms Valentine describes a unilateral change to her working hours happened in July 2005 when Ms Valentine returned from annual leave to find her name on the roster. She visited Ms Henderson to protest and she recalls Ms Henderson effectively telling her that she (Ms Henderson) was in charge and she could do as she pleased.

[27] Ms Valentine went to see Ms Hayward, the Director of Nursing, who seems to have fixed the problem. Certainly, in her oral evidence before the Authority, Ms Hayward told me that it was unacceptable that Ms Valentine was *hassled* to become a rostered employee after returning from leave.

[28] Precisely the same set of events happened after Ms Valentine took another period of leave and returned to duty on 1 November 2005. Again she was confronted with the shift roster with her name on it, again she saw Ms Henderson to complain, but then for reasons which I confess I found unsatisfying, Ms Valentine went directly to a senior manager in human resources rather than talking again to Ms Hayward. She

of course had resolved the issue the first time around. Ms Valentine told me that she thought it was *becoming an employment issue* and therefore she needed to see human resources rather than Ms Hayward, despite the fact that Ms Hayward had resolved the earlier issue.

[29] The Human Resources Department advised Ms Valentine that the matter was *not cut and dried* and there were a number of meetings between the Staff Association (representing Ms Valentine) and the Human Resources Department, but without resolution. By this time of course the proposal for change was well and truly gaining traction and it is to that issue that I now turn.

The restructure

[30] Ms Hayward told me that the genesis of the restructure which affected Ms Valentine was in 2001 when she and her team started looking at patient flow through the Hospital. Amongst other things this resulted in a focus on trying to improve the care and transit time for patients gaining access to the Hospital through the accident and emergency department which was under increasing pressure from 2004 onwards. Ms Hayward also spoke of benchmarking work which her team did with other District Health Boards in New Zealand and with similar hospitals in Australia.

[31] In that context, Ms Hayward's evidence was that she asked for an audit of the transit care nursing service in 2005 and this document issued in January 2006, having measured the physical volume of work of the transit care nursing service for the six months to the end of December 2005.

[32] In March 2006 the Board initiated its proposal for change, the core recommendation of which was, according to Ms Hayward, the employing of an additional FTE Transit Nurse with all Transit Nurses working a rostered system.

[33] The submissions then received from the persons most affected by the proposal for change all tended to support the proposal, and perhaps the most curious aspect of this is the submission forwarded by Ms Valentine herself which, contrary to what one might have expected, given the argument now being advanced by her, made no mention of her unwillingness to contemplate working shifts. Clearly, Ms Valentine had a golden opportunity to make her position absolutely clear and to try to influence the Board in a direction that she was comfortable with. However, it would not be true

to say that the Board was unaware of Ms Valentine's position because she had made her position absolutely clear to Ms Hayward in July 2005 when Ms Valentine was first confronted with a unilateral change to a shift arrangement after returning from annual leave.

[34] In any event, the proposal having been issued for comment and Ms Valentine having missed that immediate opportunity to comment on it, the Board made its decision and determined that in the interests of the service, all nurses involved in the transit care operation needed to participate in a shift roster and on 10 May 2006, the document was released setting out that decision.

Subsequent Board conduct

[35] Once the proposal for change was publicly notified, the Board proceeded to engage with Ms Valentine and her advisers and clearly spent a significant amount of time endeavouring to address Ms Valentine's concerns about changing her hours of work from those of a day worker to a shift work pattern. In particular, over a succession of meetings, the Board's management tried to establish just what Ms Valentine's objection to the change was and how they might appropriately assist her to deal with those objections.

[36] I am satisfied that the Board expended significant energy in endeavouring to meet Ms Valentine's objections. From the point at which the change was publicly notified in June 2006, there were no fewer than six meetings in which Ms Hayward, as Director of Nursing was involved wherein the Board endeavoured to meet Ms Valentine's needs in the new structure. Not all of those meetings involved Ms Valentine personally; some of those meetings were simply with her then advisers, the New Zealand Nurses Organisation.

[37] In addition, the Board wrote extensively to Ms Valentine and/or to her advisers setting out the results of the meetings and endeavouring to suggest a way forward.

[38] I accept Ms Hayward's evidence that the Board had deferred the implementation of the new roster by fully four months to endeavour to get Ms Valentine's consent to the new arrangement. I also accept the Board's evidence that a consequence of that deferral was increasing unrest from Ms Valentine's immediate colleagues who clearly thought her stance was unfair to them as it meant

that they were burdened with more unsociable hours as a consequence of her refusal to participate in the shift roster.

[39] Finally, on 14 December 2006 Ms Hayward wrote to Ms Valentine giving her four weeks to accept the new terms and conditions of employment, a letter to which Ms Valentine responded verbally in mid January by indicating she was not prepared to compromise her position. The being the position, the Board, through Ms Hayward, wrote to Ms Valentine again and gave her a further four weeks from 16 January 2007 (the date of the second letter) in which to accept the change or the Board would regard Ms Valentine as having *decided to discontinue her employment*.

[40] I am not satisfied that the Board could have done any more to engage with Ms Valentine once it had made its decision. It seems to me plain that the Board used every proper opportunity to make efforts to meet Ms Valentine halfway, but were always rebuffed by her refusal to contemplate any change.

[41] One of the most puzzling aspects of this case is Ms Valentine's staunch belief that she *did not know there was a restructure going on*. She said in her evidence before the Authority that she *didn't realise that I was restructured until Mr Wall (her advocate) told me*. Given the extensive process which the Board undertook, the voluminous documentation which was generated by the audit and then by the proposal for change and the extensive meetings which were undertaken either with Ms Valentine or on her behalf, it is difficult to understand why she did not appreciate that her work area was in the course of a restructure. However, I am satisfied that nothing really turns on that misunderstanding. The fundamental question remains, whether the Board had in its power the right to impose a change in working hours on Ms Valentine after going through a process of consultation with her, and whether, in the alternative, a failure to secure Ms Valentine's agreement to make a change necessarily constitutes a redundancy situation which entitles Ms Valentine to redundancy compensation under the terms of her Employment Agreement.

Determination

[42] Ms Valentine's employment is governed by, amongst other things, a letter dated 29 October 2004 which notifies her of a formal change to her position title, but then goes on to contain the following provision:

*You will continue to be employed to work 72 hours per fortnight (0.9FTE). As discussed, you will be required to work public holidays and your hours of work will be between 0900 and 1730, **negotiable later than this.***

[43] Ms Valentine says that the effect of this provision is to emphasise that the hours of work set out in the just referred to letter are her hours of work and that her consent must be obtained before there is any change. She says in effect that the words that I have emphasised above from the Board's letter make no sense unless they contemplate a bilateral rather than a unilateral situation.

[44] For its part, the Board says that it has a right to organise its business affairs so as to best achieve its statutory obligations and community purposes. As I observed at the investigation meeting, it is trite law that an employer has such a right; there was ample evidence given at the investigation meeting about the Board's need to adjust its processes so as to better fulfil its obligations to patients.

[45] The question for the Authority is what should happen when the Board having reorganised its business so as to better provide for its patients, but that reorganisation affects the terms and conditions of employment of a particular employee, in this case Ms Valentine.

[46] The Board's own letter to Ms Valentine of 29 October 2004, creates an obligation that any changes in Ms Valentine's hours will be by agreement. The letter in question clearly sets out the hours that Ms Valentine is to work and then says that variations must be *negotiable*.

[47] In those circumstances, where the Board establishes early on that Ms Valentine is not willing to negotiate different hours of work from the ones set out in her Employment Agreement, it seems to me axiomatic that the Board is obligated to disestablish Ms Valentine's position.

[48] I agree with the submissions made on Ms Valentine's behalf that the difference between the day work which Ms Valentine had performed for many years, and the new proposal of shift work is a fundamental change, particularly given Ms Valentine's very strong commitment to not working unsociable hours, a view

which would have been very clear to the Board as they progressed the negotiating process with Ms Valentine.

[49] I think the logical and proper approach for a fair and reasonable employer having conducted a proper process would have been to declare Ms Valentine's position surplus to the Board's requirements (as indeed it was) and then deal with Ms Valentine appropriately in terms of the management of change provisions in her Employment Agreement.

[50] Those provisions are set out in clause 24 of the Employment Agreement and they provide broadly for a schema for dealing with precisely the issues that are in dispute here. In effect, once a proposal has been notified, commented on, and subject to a proper period of consultation and engagement, the Board may make a final decision which impacts on staff adversely.

[51] The relevant provisions set out a hierarchy of options starting with reconfirmation in a position and running through to severance.

[52] In my opinion, the Board has obligations to engage with Ms Valentine in terms of those provisions, the Authority having become satisfied that, in truth, the positions available to her now are so fundamentally different from the position which she previously adopted as to create a staff surplus situation.

[53] Because the Authority is also satisfied that it is not available to the Board to unilaterally determine that Ms Valentine should move from a day role to a shift role, because the change is so fundamental, the only proper course of action is for the parties to engage in terms of the extensive staff surplus provisions in the relevant Employment Agreement with a view to reaching an agreement between them.

[54] It follows that I now direct that the parties are to resolve their differences in terms of the provisions of clause 24 of the applicable Employment Agreement and should they find it helpful, they may enlist the assistance of the Mediation Service of the Department of Labour.

[55] In the event that the matter is unable to be resolved by agreement, then leave is reserved for the parties to revert to the Authority by the filing of submissions exclusively on the issue of remedy to include compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.

[56] I desire to make one final closing observation in relation to this matter. The fact that I have reached a decision that the Board has not met the statutory test required of it ought not to be taken as evidence of the view that I think the Board has behaved badly. I think the Board has misinterpreted its legal obligation to Ms Valentine but I am absolutely satisfied that they did everything in their power to try to get Ms Valentine to change her position so as to avoid the necessity for a termination of the employment relationship and I also do not accept that there is any evidence that the Board has acted in bad faith.

[57] I also think it proper to allude to the fact that this particular decision relies very much on its own facts. The circumstances in which Ms Valentine was originally employed and in which she was provided with the letter which forms a central building block in my decision, are probably more or less unique given the somewhat rare opportunity for nurses to work day work in public hospitals.

Costs

[58] Costs are reserved.

James Crichton
Member of the Employment Relations Authority