

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 112
5359922

BETWEEN	KATHERINE LORRAINE WATKINS Applicant
AND	CANTERBURY DISTRICT HEALTH BOARD Respondent

Member of Authority:	Philip Cheyne
Representatives:	Jeff Goldstein, Counsel for applicant Amanda Rooney, Counsel for respondent
Investigation Meeting:	15 December 2011
Determination:	12 June 2012

DETERMINATION OF THE AUTHORITY

Acknowledgement

[1] Regrettably, the issuing of this determination has been delayed. The investigation meeting was in December 2011. Work on this determination was deferred while I attended to other matters delayed as a result of the September 2010 and February 2011 earthquakes. Preparation of the determination has also been affected by the issue referred to by the Chief of the Authority in his memorandum dated 7 May 2012.

[2] Since turning my attention to this matter, I have reviewed the administrative file and reread the statement of problem, statement in reply, statements of evidence, all the exhibits, my full notes of the evidence and the parties' considered submissions. The careful analysis of exhibits, evidence and submissions, tasks which are necessary for determining an employment relationship problem, are difficult in the Authority's present working circumstances. That too has contributed to the delay.

[3] I acknowledge the parties' patience and understanding and sincerely regret any difficulties caused by the delay.

Employment relationship problem

[4] Kathy Watkins is employed fulltime (1.0FTE) by the Canterbury District Health Board (CDHB). Ms Watkins provides PA support to three service managers within the older persons health service and is based at The Princess Margaret Hospital (PMH). I will sometimes refer to Ms Watkins' position as the PMH role.

[5] In August 2010 Ms Watkins wrote to her general manager identifying several issues with her position and asking for it to be restructured. About a year later CDHB initiated a restructure that proposed splitting Ms Watkins' fulltime position into three part-time positions.

[6] In September 2011 CDHB decided to proceed with the proposal which included disestablishing Ms Watkins' current position. Hours and days of work for the three part-time positions meant that they could not be combined as had previously been the case to create a 1.0FTE position. Ms Watkins prefers to work fulltime. She became aware of a vacancy for a fulltime PA/secretary at Hillmorton Hospital and sought to be redeployed to that position. However, CDHB declined to redeploy Ms Watkins to the Hillmorton position. Ms Watkins also applied for that position and was short-listed and interviewed. The interview panel concluded that Ms Watkins was not appointable to the Hillmorton position despite being the only remaining candidate by that time.

[7] Ms Watkins says that she is entitled to be redeployed to the Hillmorton position and she seeks an order from the Authority to that effect.

[8] The applicable terms of employment include a provision called *Management of Change*. The dispute is about the rights and obligations created by these provisions and the effect of statutory good faith provisions as more recently interpreted by several important Employment Court cases. In addition there is disagreement about

whether Ms Watkins was fairly treated by CDHB regarding the Hillmorton interview and the conclusions of the interview panel.

[9] By consent there is an order of the Authority that CDHB will not make an appointment to the Hillmorton position pending this determination.

Management of change

[10] Ms Watkins was employed on an individual employment agreement based on a collective employment agreement. Her commencement salary was step 10 of the clerical scale in the collective agreement. Later, Ms Watkins moved to step 12 on the clerical scale.

[11] Ms Watkins' individual employment agreement includes at clause 26 detailed provisions dealing with rights and obligations in change situations such as at present. I will paraphrase the provisions as presently relevant. There is first an acknowledgment that changes in the means of delivery of health services are necessary to provide efficient and effective services. The employer acknowledges the desirability of consultation. The consultation process is as follows: presenting a proposal with sufficient information, allowing sufficient time for assessment and a response, genuinely considering matters raised in the response, and the employer making the final decision.

[12] When as a result of restructuring employees can no longer be employed in their current position *then the employer at its discretion shall invoke the options in Clause 26.7*. There is a requirement to give notice of a proposed surplus prior to giving any employee notice of dismissal for the purpose of the employer and the affected employees and their representatives discussing the options appropriate to the circumstances of each employee. They must *use their best endeavours to reach agreement on which is the most appropriate option. The aim of all parties is to minimise the use of severance*.

[13] The options are reconfirmation, attrition, redeployment, leave without pay, retraining, enhanced early retirement and severance. Reconfirmation precludes the other options and *The aim will be to minimise the use of severance*.

[14] Employees may be redeployed to a new position at the same or lower salary in the same or a new location. Redeployment may involve employees undertaking additional training. If redeployed to a position with a lower salary the employee must be paid an equalisation allowance. These provisions are set out in clause 26.7.3.

[15] Where the employer is not able to exercise any of the other options then the employee's employment will be terminated with payment of the appropriate severance compensation.

Redeployment

[16] Ms Watkins says that the findings of the Employment Court in two cases make the discretionary application of clause 26.7.3 unlawful. I take Ms Watkins to mean that CDHB must redeploy her to the Hillmorton position. Those two cases are *Jinkinson v Oceania Gold (NZ) Ltd* [2010] NZEmpC 102 and *Wang v Hamilton Multicultural Services Trust* [2010] ERNZ 468.

[17] In *Jinkinson* the employer disestablished two classifications of employees affecting seven incumbents and established six purportedly new positions that combined the work of the two disestablished classifications. The applicant sought but was not appointed to one of the new positions and was dismissed for redundancy. There was a submission for the employer that it was not open for the Court to consider the merits of the employer's decision not to redeploy the employee, there being no contractual right to redeployment. The submission was based on a passage from the Court of Appeal's judgment in *New Zealand Fasteners Stainless Ltd v Thwaites* [2000] 2 NZLR 565 (CA). However, the Employment Court rejected the submission finding that the failure to redeploy the employee was one of the steps in the employer's decision to dismiss her and therefore relevant because of the s.103A test for justification for the dismissal. The Court also held that s.4(1A)(c) applied to the employer's redeployment consideration. Relevantly in *Jinkinson* the Court held that there was no genuine redundancy as the new position was not significantly different from the old position held by the employee.

[18] As I read *Jinkinson*, the test for justification requires the Authority to objectively review all the actions of the employer up to and including the decision to dismiss. That includes the employer's actions concerning redeployment, even in the absence of a contractual right to redeployment. I do not consider that *Jinkinson* makes the present clause 26.7.3 unlawful. It simply makes the employer's actions concerning redeployment one of the circumstances for objective review.

[19] *Wang* is an example of the application of the principals set out in *Jinkinson*. In *Wang* the employee held the position of financial administrator. The employer restructured by creating a new position of finance manager. The employee did not apply for the position and was dismissed as redundant. However, the Court held that there was an obligation on the employer to consider alternatives to making the employee redundant. In evidence the employer acknowledged that the employee was well able to perform the duties of the new position. The employer had in fact encouraged him to apply. The Court inferred that, absent a better candidate, the employee would have been appointed. There was no other appointable candidate and the position remained unfilled for a time after the redundancy. The failure to consider redeployment led to the conclusion that the dismissal was unjustified.

[20] The facts in *Wang* are unusual in that it was accepted by the employer that the employee was capable of performing the new job and he would have been appointed if he had applied. Hence the failure to consider redeployment led to the dismissal.

[21] As with *Jinkinson* I do not read *Wang* as having the effect of making a provision such as clause 26.7.3 in the present case unlawful. The obligations expressed in *Jinkinson* and *Wang* run alongside the express contractual obligation in the present case.

[22] I turn now to consider the Hillmorton position and CDHB's decision regarding redeployment.

The Hillmorton position

[23] George Schwass is the operations manager for CDHB's mental health service. He reports to the general manager. The Hillmorton position includes the role of

personal assistant to the operations manager. That represents .4FTE of the role. The remainder of the role (.6FTE) is as secretary to the Clinical Governance Resource Unit (the Unit). The Unit has a clinical manager and 21 staff. The person who fills the Hillmorton position supports and reports to the Unit's clinical manager and has to provide each of the staff with secretarial support.

[24] The Hillmorton position includes covering for the general manager's PA if that person is unavailable. The general manager's PA also provides services to a number of other senior clinical and management positions.

[25] Mr Schwass in his evidence sets out differences between the Hillmorton position and Ms Watkins' position. First, the mental health service is nearly twice the size of the older persons health service whether measured by budget or staff numbers. There are six service managers who report to the operations manager in the mental health service whereas there are three who report to the operations manager in the older persons health service. Mr Schwass says that each of the six service manager roles is bigger in terms of responsibility, FTEs and financial management than is the case with the three service manager roles in the older persons health service. It also emerges from this evidence, none of which is in question, that a substantial part of the Hillmorton position involves support to the management level above the PHM role.

[26] The second key difference according to Mr Schwass lies in the number of positions and the variety and complexity of the roles supported by the Hillmorton position. Mr Schwass says that the Hillmorton position is a significantly larger, more demanding, complex and diverse role that requires a very efficient, flexible, highly intellectual, highly personable, focused and balanced person. They need to be able to deal on the one hand with the Minister's office and on the other hand with mental health patients. I take this as an indication of the breadth of types of situations that must be managed by the person in the role. They need to be cognisant of the purchasing and delivery systems within CDHB and capable of learning the clinical management systems within the mental health service. According to Mr Schwass, all this is reflected in the starting salary for the position, which at step 14 of the relevant collective agreement would be a promotion for Ms Watkins.

[27] Apart from these broad views Mr Schwass also refers to various specific tasks and attributes required of the Hillmorton position. I will refrain from repeating that evidence here but there is no reason to doubt any of it.

Consideration of Ms Watkins for the Hillmorton position

[28] The Hillmorton position became vacant and was advertised internally and externally. Both shortlisted candidates accepted other job offers so the position was re-advertised. This time there were four candidates after shortlisting and screening. Prior to interview three of the four withdrew, leaving only Ms Watkins.

[29] Ms Watkins was interviewed on 4 November 2011 by Mr Schwass, Barbara Wilson (clinical manager), Sharryn Sunbeam (PA to the general manager) and an HR advisor (Louis Van Rensburg). The interview involved set questions designed to measure specified competencies. Each interviewer scored the answers to each question between 1 (poor) and 5 (excellent). There was also a practical test involving reformatting a document and some Dictaphone typing within a time limit.

[30] I have been provided with the documents completed at the time by each interviewer and the practical test results. Mr Schwass also explains in some detail in his evidence the reasons for the conclusion that Ms Watkins was not appointable to the Hillmorton position. The interviewers scored Ms Watkins between 40 and 44 out of 75. In summary Mr Schwass says that Ms Watkins achieved scores of around 50% and he would not appoint to the role unless the candidate scored significantly better. In response to a question Mr Schwass said he was looking for scores of *very good* and *excellent* totalling 80%. He says that he would have been pleased if Ms Watkins had been appointable because it would have provided him with a permanent PA service. However, on his (and the interview panel's) assessment Ms Watkins was not appointable.

[31] There are a number of criticisms made of the way CDHB assessed Ms Watkins for redeployment or appointment to the Hillmorton position.

Good fit

[32] There is a submission that CDHB should have assessed whether Ms Watkins had the skills and attributes to perform the role rather than whether she was a good fit for the role. The inference is that CDHB applied a different and higher standard than it was obliged to apply when assessing Ms Watkins for redeployment.

[33] Sally Nicholas is the operations manager of CDHB's older persons health service. The service managers supported by the PMH position report to her. Her evidence is that she considered Ms Watkins' request to be redeployed to the Hillmorton position but did not agree to automatically appoint her to that role, partly because of the need to achieve team fit. I should not be taken as endorsing Ms Nicholas' views as to what is necessary before there is an obligation/right to redeployment. It must be remembered that CDHB's obligation to Ms Watkins (and vice versa) is to *use their best endeavours to reach agreement* and the *aim is to minimise the use of severance*. The phrase *Employees may be redeployed* (my emphasis) must be read as subject to those *best endeavours*, that *aim* and the application of the options other than severance once the employer has invoked those options as a result of a restructuring. I doubt that *best endeavours* and *minimising severance* are achieved simply by allowing or encouraging an affected employee to apply for an existing vacancy and be considered alongside other applicants, to be appointed only if they are assessed as a better candidate. I do note however Ms Nicholas' evidence about how consideration of redeployment options would normally be supported. In the present case that did not occur because of Ms Watkins' focus on redeployment to the Hillmorton role.

[34] Because there were no other candidates interviewed for the Hillmorton position the interview process can be seen as a proxy for CDHB's consideration of redeployment for Ms Watkins to that position.

[35] In its statement in reply CDHB says that Ms Watkins does not have the skills and attributes necessary to adequately perform the Hillmorton role. That assertion is well supported by the evidence of Mr Schwass about his and the panel's assessment of Ms Watkins. Overall, the panel's conclusion was that Ms Watkins was not appointable. Accordingly I do not accept that CDHB applied an inappropriate

standard when assessing whether Ms Watkins should be appointed or redeployment to the Hillmorton position.

The interview

[36] There is a submission that Mr Schwass was not going to be dictated to as to who should be appointed to the Hillmorton position. The implication is that he was biased against Ms Watkins. The evidence is that Ms Nicholas spoke to Mr Schwass about Ms Watkins' interest in the vacancy. Ms Nicholas asked Mr Schwass about the requirements of the role and apologised to him for any delay in appointment to the Hillmorton position. Ms Nicholas says that Mr Schwass did not ask her any questions. Mr Schwass' evidence is that he was asked about the Hillmorton job and told that there may be a redeployment coming from Ms Nicholas' area. His evidence is that he did not find out that it was Ms Watkins until later and that Ms Nicholas did not say anything to him about Ms Watkins. There is no basis for disbelieving this evidence. While Mr Schwass knew by the time of the interview that Ms Watkins was seeking redeployment I do not accept that he was biased against her.

[37] I am referred to several questions during the interview in support of the point that panel members each heard different parts of Ms Watkins' answers and that the interview was unfair.

[38] First, *in answer to question 3 Ms Sunbeam did not record that the applicant had been working in the health sector and thus scored her a 2* which was lower than the other interviewers. However, Ms Sunbeam's notes show that she knew that Ms Watkins was working in the health sector because she records that Ms Watkins did not mention that point. I also note that Ms Sunbeam tended to briefly note answers on the form rather than use the check list boxes. The evidence indicates that Ms Sunbeam simply scored Ms Watkins based on the answer given to the question *Please outline why your background equips you to fill this position.*

[39] I am also referred to question 7. The submission is that Mr Schwass thought Ms Watkins' answer was vague and scored her 1 while the others scored her 3. In fact Mr Schwass' note is *vague answer indicating poor self awareness.* There is no reason to think that Mr Schwass did not hear the answer. He simply considered that it

did not demonstrate any of the competencies sought. That was his subjective view and it was no less valid than the views of the other interviewers.

[40] I do not accept that these differences indicate any unfairness in the interview.

[41] In her evidence Ms Watkins spoke about her feeling that it was not a genuine interview, that Ms Wilson was very nervous so that Ms Watkins felt that she was being pressured, how no questions were asked about her current role and how the panel appeared not to know that Ms Watkins had not given names for referees in her CV.

[42] Alan Hayward was Registrar at the University of Canterbury and Ms Watkins was his PA until his retirement in 2005. Mr Hayward accompanied Ms Watkins to the interview. Mr Hayward's evidence is that he thinks some of the written comments are *unduly harsh* but he does not criticise the conduct of the interview or the demeanour of the interviewers. Mr Hayward was probably in a better position than Ms Watkins to comment objectively on conduct and demeanour. I consider that Ms Watkins views are attributable to the situation she was in rather than the conduct of the interview and the demeanour of the interviewers. Mr Hayward's evidence about Ms Watkins' confidence and promotion of herself probably explains the difference between the interviewers' assessments as reflected in their comments and Mr Hayward's view, remembering also that Ms Watkins worked to a good standard as his PA for some years.

[43] Ms Watkins was asked about her current role. There were questions that invited her to speak about her recent work experience. Accordingly I do not accept that part of Ms Watkins' evidence.

[44] There may have been confusion about whether Ms Watkins had provided referees as part of her application and CDHB may have been reluctant to accept Mr Hayward as a referee in light of his role as a supporter during the interview. However, Ms Wilson did complete a referee check with Mr Hayward on 9 November 2011. Ms Wilson appears to have made a mistake about when Ms Watkins began her employment at the University and may not have accurately recorded another of Mr Hayward's responses. However these points are minor.

[45] After the interview Ms Watkins was asked to do several practical exercises. When provided with a laptop computer Ms Watkins asked for and was provided with an external keyboard to use. In her evidence Ms Watkins mentions her poor eyesight but it is not apparent how that contributed to any difficulty with the practical exercises. Ms Watkins' evidence is that the foot control provided for one of the exercises did not work. However Ms Watkins did not draw that to anyone's attention at the time. Mr Schwass' evidence is that the practical exercises showed that Ms Watkins has good skills in document formatting and is very accurate but Ms Watkins had only just started the second task at the end of the allocated time. Mr Schwass' evidence, which I accept, is that he did not support Ms Watkins' appointment at the end of the interview, a position that did not change with the practical exercises.

[46] Overall I find that the interview was conducted in a fair and reasonable manner.

Interview scores

[47] There are some submissions about the interview scores. The aggregate scores were 44 (Mr Schwass), 40 (Ms Wilson), 43 (Ms Sunbeam) and 40 (Mr Van Rensburg). Mr Schwass and Ms Wilson thought that the maximum was 80 but that was a mistake on their part. The submission is that Ms Watkins received *more than a pass mark* based on 3 representing a score of *good*.

[48] There were 15 questions. Ms Watkins was scored very good or excellent on 3 of the questions by Mr Schwass, 3 of the questions by Ms Wilson, 2 of the questions by Ms Sunbeam and 2 of the questions by Mr Van Rensburg. However, Ms Watkins was scored as weak or poor by Mr Schwass on 5 of the questions, by Ms Wilson on 7 of the questions, by Ms Sunbeam on 3 of the questions and by Mr Van Rensburg on 6 of the questions. That picture is not of someone who received *more than a pass mark*.

[49] Issue is taken with scoring on question 1 – Ms Watkins referred to restructuring and redeployment rather than speaking positively about her interest in the vacancy. Discounting the low scores given by all the interviewers on question 1,

in aggregate Ms Watkins was scored weak or poor on about 28% of the remaining questions. Again in aggregate, Ms Watkins was scored very good or excellent on only 15% of those questions. Differentiating between interviewers and discounting question 1, two in aggregate scored Ms Watkins at 42 out of 70 or *good* on average while the other two scored her 39 and 38 respectively, or below *good* on average. Again, the picture is not of someone who received *more than a pass mark*.

[50] The scores to question 1 are said to show that Ms Watkins was discriminated against on the basis of her employment status: a redundant employee seeking redeployment. Despite the submission counsel specifically disavowed any separate grievance based on discrimination. That was no doubt because employment status is exhaustively defined to mean being unemployed or on a benefit: see s.21(1)(k) of the Human Rights Act 1993 for the relevant definition. Ms Watkins' situation falls outside the statutory definition of unlawful discrimination. Secondly, on my assessment of the evidence the scores simply reflect the answers given by Ms Watkins to the question asked. There was no unlawful discrimination.

[51] Overall the interview scores do not support the contention that Ms Watkins must be redeployed to the Hillmorton position.

Selection criteria

[52] There is a submission that Ms Watkins was not given the *selection criteria*. However, there were no *selection criteria* as such. Ms Watkins had the advertisement and the position description. The position description quite fully describes the objectives, functional relationships, key performance objectives, qualifications and experience and personal attributes sought. What Ms Watkins did not have is the list of questions to be asked at the interview and the list of competencies each question was designed to elicit information about. Ms Watkins did not ask for such additional material.

[53] I am referred to *Jinkinson*, an example of the application of the good faith obligation in s.4(1A)(c) of the Employment Relations Act 2000 that requires an employer who is proposing to make a decision that will or is likely to have an adverse

effect on the continuation of an employee's employment to give that employee access to relevant information and an opportunity to comment prior to the decision.

[54] *Massey University v Wrigley* [2011] NZEmpC 37 perhaps offers more guidance. In that case the University disestablished a number of positions and created a smaller number of new positions to be filled by selecting from the existing staff who applied for the new positions. The selection process was based on interviews conducted by panels comprised of several members. Candidates were scored on their responses to questions and consensus scores were given following discussion between panel members. The grievants scored lowest and were not recommended for appointment. They were given a summary of why the panels had not recommended them and some but not all the information compiled by the panel members (the disputed documents). The grievants had several opportunities to respond to the information that had been disclosed but the outcome did not change. They were then dismissed as redundant. In personal grievance proceedings the Full Court was required to consider whether the University had complied with s.4(1A)(c) of the Employment Relations Act 2000. The Court noted the requirement to ascertain the meaning of a statute from its text and in light of its purpose. S.3 of the Employment Relations Act 2000 emphasises good faith as the principal means of achieving successful employment relationships. The Court said at [47]:

This supports an interpretation of the specific obligations in s 4 which minimises the likelihood of employment relationship problems developing. In general, that is more likely to be achieved by giving timely and ample access to relevant information. More informed employee involvement will promote better decision making by employers and greater understanding by employees of decisions finally made. That will avoid or reduce the sense of grievance which may otherwise result and thereby reduce the incidence of personal grievances and other employment relationship problems.

[55] The Court went on to say that recognition of the inequality of bargaining power was also relevant. Employers generally have almost total power over the outcome in a restructuring. Employees may influence the outcome only if they have knowledge and understanding of the relevant issues and a real opportunity to express their views. Knowledge is the key to giving employees a measure of power to reduce the otherwise overwhelming inequality of power in favour of the employer. At [55] the Court held:

The purpose of s 4(1A)(c) is to be found in paragraph (ii) which requires the employer to give the employees an opportunity to comment before the

decision is made. That opportunity must be real and not limited by the extent of the information made available by the employer.

[56] The requirement is to provide access to relevant information, about which the Court said at [62] and [63]:

What is within the scope of s 4(1A)(c) in any given case will, however, depend on the particular circumstances of the case. The starting point must be the nature of the decision which the employer proposes to make. For example, if the employer has restructured its business and is deciding whether an employee whose position is disestablished is suitable for an alternative position, what will be relevant is information relating to that person's attributes and to the new position. On the other hand, if the employer is downsizing and selecting employees for dismissal on grounds of redundancy, the process is likely to be a comparative one and information about the other candidates will also be relevant. In cases, the perceptions and opinions of those involved in the process leading to a decision will be relevant.

Although it was not in dispute between the parties, we comment briefly on the nature of the information potentially within the scope of s 4(1A)(c). It must include not only information which is written down or otherwise recorded but also information in the minds of people.

[57] *Massey* concerned the application of s.4(1A)(c) at the point of dismissal. The question in the present case is its application to considerations of redeployment to the Hillmorton position. In considering redeployment, was CDHB *proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment* of Ms Watkins? The answer must be yes. Ms Watkins received confirmation on 5 October 2011 that her existing position would be disestablished in the next six to eight weeks. That was in effect the invocation of the management of change options in clause 26 of her employment agreement. Reconfirmation would not have had an adverse effect on the continuation of Ms Watkins' employment but other options were likely to or would have such an effect. Reconfirmation was not possible because of the outcome of the restructuring. I find that CDHB's consideration of Ms Watkins for redeployment to the Hillmorton position was subject to the good faith obligations in s.4(1A)(c) of the Employment Relations Act 2000.

[58] It is common ground that Ms Watkins learnt that she would not be redeployed to the Hillmorton position as a result of seeing CDHB's statement in reply dated 14 November 2011 which was lodged with the Authority on 15 November 2011. Relevant parts read:

The decision not to offer the Applicant the Hillmorton position by way of redeployment was justified and meets the requirements of section 103 (A) of the Employment Relations Act 2000.

The Respondent's position is that the Applicant does not have the skills and attributes necessary to adequately perform the Hillmorton position, and therefore the [Respondent] is justified in its decision not to redeploy the Applicant to the Hillmorton position.

[59] However, Mr Schwass' evidence is that the interview panel met on 17 November 2011 when they decided not to appoint Ms Watkins to the Hillmorton position. At the same time Mr Schwass' notes dated 4 November 2011 confirm that he did not support appointing Ms Watkins at that point either. However, Mr Schwass is adamant that no-one else saw his interview notes until the 17 November meeting. There is no reason to doubt the bona fides of Mr Schwass' notes, nor his evidence on this point. On the material before the Authority I am unable to resolve the contradiction that CDHB had concluded that Ms Watkins lacked the skills and attributes for the Hillmorton position before the interview panel actually made that decision.

[60] I will put that conundrum aside and consider whether Ms Watkins has a personal grievance arising from CDHB's decision not to redeploy her to the Hillmorton position.

Disadvantage grievance

[61] Ms Watkins' grievance is her claim that her employment, or 1 or more conditions of her employment, was affected to her disadvantage by an unjustifiable action by CDHB: see s.103(1)(b) of the Employment Relations Act 2000. However, an action deriving solely from the application or operation or disputed application or operation of any provision in her employment agreement cannot support a personal grievance: see s.103(3) of the Employment Relations Act 2000.

[62] Ms Watkins must show that her employment has been disadvantageously affected before CDHB is required to justify its actions.

[63] I find that Ms Watkins has established that her employment, or 1 or more conditions of her employment, was affected to her disadvantage by CDHB's actions.

CDHB is obliged to deal with Ms Watkins in good faith. It fell short of that requirement in how it approached consideration of redeploying Ms Watkins to the Hillmorton role. The decision not to redeploy Ms Watkins is no doubt disadvantageous to her because it lessens the prospects for her continued employment with CDHB.

[64] CDHB's actions do not derive solely from the interpretation, application or operation of the employment agreement. What falls for consideration in the present case is how CDHB dealt with its obligations.

Justification for the redeployment decision

[65] S.103A(1) & (2) of the Employment Relations Act 2000 now provide that the Authority must consider whether CDHB's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time (my emphasis). In applying this test I am assisted by *Angus v Ports of Auckland* [2011] NZEmpC 160; (2011) 9 NZELC 94,015 (EMC). There, the Employment Court held:

...the Authority ...must determine whether what the employer did and how the employer did it, were what a notional fair and reasonable employer in the circumstances could have done, bearing in mind that there may be more than one justifiable process and/or outcome. The ...Authority must do so objectively, that is ensuring that they do not substitute their own decisions for those of the fair and reasonable employer in all the circumstances.

[66] The Court recognised in *Angus* that the mandatory considerations set out in s.103A(3) if applied literally may not be appropriate to the present type of case. I should nonetheless paraphrase what the statute says. In applying that test I must consider whether CDHB sufficiently investigated the allegations against Ms Watkins having regard to the resources available to CDHB; whether CDHB raised its concerns with Ms Watkins before taking its action against her; whether Ms Watkins was given a reasonable opportunity to respond to the concerns before CDHB took action against her; and whether CDHB genuinely considered Ms Watkins' explanation (if any) before taking action against her; and any other matters that I think are appropriate.

[67] I must not determine an action to be unjustifiable under s.103A solely because of defects in the process followed by CDHB if those defects were minor and did not result in Ms Watkins being treated unfairly.

[68] The circumstances were such that a fair and reasonable employer could have assessed Ms Watkins for redeployment by interview or some similar process in the way that CDHB did. The position to which redeployment was sought was graded two steps higher reflecting a more complex role. It involved some duties that Ms Watkins had expressed reluctance about in her current role. It was with a different division of CDHB based at a different site and a substantial part of the role included PA support at a management level above Ms Watkins' current role. A much larger number of staff is supported by the role. The situation was therefore different to *Wang* where the employer knew and acknowledged that the employee could perform the new role.

[69] However, a fair and reasonable employer could not have decided against redeploying Ms Watkins to the Hillmorton position without giving her access to all the relevant information. That included the undisclosed interview materials such as the questions and competencies, the interview notes and scores. Ms Watkins was not simply a candidate for a vacancy to whom would be owed less extensive obligations. CDHB was obliged to comply with s.4(1A)(c) of the Employment Relations Act 2000. It is a statutory requirement to provide access to relevant information and to give an opportunity for comment on that information prior to any decision. Whenever the decision against redeployment was actually made, Ms Watkins was never given this opportunity.

[70] There is a submission, relying on s.103A(5) of the Act, that the Authority must not determine an action to be unjustifiable solely because of minor process defects that did not result in the employee being treated unfairly. I am also referred to *Sanders v Ingham Motor Holdings Ltd* [2011] NZERA Auckland 328. In that case concerning redundancy there was a breach of s.4(1A)(c) in that the employee was provided with some but not all the information relevant to selection. Two existing roles had been restructured to create one new role. The two incumbents of the old roles were competing for the new role. However, the Authority found that the grievant was not deprived of an opportunity to make it known that she had a particular skill. There was no evidence that the grievant could have said anything to change the selection decision so she was not unfairly treated. The Authority found that the dismissal was justified but there was still an unjustified disadvantage grievance in relation to the breach of s.4(1A)(c).

[71] However, CDHB's defect in the process was not minor and did result in unfair treatment. Ms Watkins should have had a better opportunity to respond to the concerns about her suitability for redeployment to the Hillmorton role. For example, Ms Watkins produced a table demonstrating how her experience in previous roles suited her for the Hillmorton position. She should have had an opportunity for that discussion with CDHB.

[72] It follows that CDHB has not justified its decision not to redeploy Ms Watkins to the Hillmorton position and that Ms Watkins has a personal grievance of unjustified disadvantage. I turn now to consider remedies.

Remedies for a personal grievance

[73] The remedies available for an established grievance are those set out in s.123 of the Employment Relations Act 2000.

[74] Ms Watkins has not lost any remuneration as a result of her grievance. Reinstatement does not arise. Her only claim can be for compensation for distress. There is some evidence of distress arising from the established grievance. It is clear that Ms Watkins is apprehensive about her future and the possibility of unemployment. I assess \$5,000.00 as a proper sum to compensate Ms Watkins for the proven distress.

[75] Ms Watkins has not contributed in a blameworthy way to the circumstances giving rise to her grievance.

Breach of employment agreement

[76] Ms Watkins says that CDHB is obliged by clause 26 of her employment agreement to redeploy her to the Hillmorton position. I will set three extracts from clause 26:

26.5 ...The Employees directly affected and their duly authorised representatives shall meet with the Employer to discuss the options appropriate to the circumstances as they relate to each Employee and the parties shall use their best endeavours to reach agreement on which is the

most appropriate option. The aim of all parties is to minimise the use of severance.

26.7.3 Redeployment – Employees may be redeployed to a new position at the same or lower salary in the same or a new location. Redeployment may involve Employees undertaking additional training.

26.7.7 Severance – Where the Employer is not able to exercise any of the above options then the Employee's employment shall be terminated with payment of appropriate severance compensation...

[77] The specific contractual obligations are to meet to discuss the appropriate options and to use best endeavours to reach agreement on the appropriate options. Only where the CDHB is not able to exercise any of the other options shall the employee's employment be terminated. Ms Watkins' employment has not been terminated so breach of that obligation does not arise.

[78] I note particularly that clause 26.7.3 does not include any reference to redeployment to a *substantially similar position*, words that are often included to guide the parties about the scope of their obligations. Here, that guidance is derived from the need to use best endeavours to reach agreement about the most appropriate option, the aim to minimise the use of severance and the placement of severance as the option of last resort. In addition there is some guidance in the statement that employees may be redeployed to new positions at the same or lower salary which may involve some additional training.

[79] I do not accept that there has been any breach of clause 26 by CDHB regarding its actions to date.

[80] In summary, as CDHB was deciding to disestablish Ms Watkins' existing position she sought redeployment to the Hillmorton position and also applied for the vacancy. CDHB asked Ms Watkins to meet with its recruitment specialist (Kylie Mentink) regarding the Hillmorton position and redeployment generally. Ms Watkins was also asked to meet with an external consultant to assess her capabilities with several software packages. Ms Watkins was sick at the time scheduled for these meetings. Although Ms Nicholas spoke to Ms Watkins about arranging another time to meet with Ms Mentink Ms Watkins has not done so. Ms Watkins says that Ms Mentink has not contacted her to rearrange an appointment. However,

Ms Watkins' evidence is that these appointments were set up to make her fail. She was also pursuing the Hillmorton position as explained above. Ms Watkins also declined another redeployment opportunity because it was less than full-time despite the one year salary equalisation provision. To the extent that there has been any failure to meet to discuss the appropriate options or to use best endeavours that has been driven by Ms Watkins' rather than CDHB.

[81] There is evidence for and by Ms Watkins to the effect that the Hillmorton role and the PMH role are very similar. However, I prefer Mr Schwass' evidence to the effect that the dissimilarities are material. As explained above it was reasonable for CDHB to assess Ms Watkins for redeployment to the Hillmorton position by interviewing her. There is no proper reason for me to question the interview panel's process or conclusion that Ms Watkins is not appointable to the position. Ms Watkins has established a personal grievance based on CDHB's failure to disclose relevant information and to give her an opportunity to comment before making the decision about redeployment. However that is different from establishing a contractual entitlement to redeployment to the Hillmorton position or any other particular position.

Summary

[82] Ms Watkins has a personal grievance of unjustifiable disadvantage.

[83] To remedy that grievance, CDHB must pay Ms Watkins \$5,000.00 compensation pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.

[84] Ms Watkins has not established that CDHB's decision not to redeploy her to the Hillmorton position is a breach of clause 26 of the employment agreement.

[85] The parties should focus on using their best endeavours to reach agreement on the most appropriate option.

[86] Costs are reserved. Any claim for costs must be made by lodging and serving a memorandum within 28 days. The other party may have 14 days in which to lodge and serve any reply.

Philip Cheyne
Member of the Employment Relations Authority