Determination Number: CA 93/05
File Number: CEA 178/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

BETWEEN	Leanne Wilson (First Applicant) **AND** Sylvia Clark (Second Applicant) **AND** Jill McLean (Third Applicant)
AND	NZCCS Marlborough Inc. (Respondent)
REPRESENTATIVES	Peter Cranney, Counsel for Applicants Karen Sagaga, Counsel for Respondent
MEMBER OF AUTHORITY	James Crichton
INVESTIGATION MEETING	4 July 2005
DATE OF DETERMINATION	7 July 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] By a statement of problem filed with the Authority on 20 June 2005, the applicants alleged that they had been dismissed both unjustifiably and in breach of their respective contracts.

[2] The respondent ("CCS") denied that there had been a dismissal at all.

[3] The applicants sought urgency in relation to two matters of interpretation of the relevant employment agreements, on the footing that determination of those issues by the Authority would materially assist the parties to resolve their differences including with the assistance of the Mediation Service of the Department of Labour. The request for urgency was made particularly because the applicants remained in employment until 10 July 2005.

[4] I was able to conduct an investigation meeting at Blenheim on 4 July and at the conclusion of the proceedings gave an oral decision to the parties which I undertook to confirm promptly by this determination and to develop and substantiate the reasoning for the decision.

Issues

[5] The two issues that required urgent determination were:

a) Was Ms Wilson (one of the applicants) covered by an individual employment agreement, an agreement dated 10 December 2002 (as varied by an amendment dated 18 March 2005) or was she covered by the collective employment agreement ("Collective") for the period from 1 January 2003 to 31 December 2004; and

b) Are the applicants entitled to the benefit of clause 19 of the Collective with its provisions for redundancy pay and payment in lieu of notice?

The applicable employment agreement for Ms Wilson

[6] Ms Wilson was employed by CCS on 16 September 2002 and entered into an individual employment agreement on 4 December 2002.

[7] On 29 November 2004, Ms Wilson joined the Service and Food Workers Union who were and are a party to the Collective.

[8] CCS argues that Ms Wilson is employed pursuant to the individual employment agreement dated 4 December 2002 as amended by the variation dated 18 March 2005. For present purposes, the effect of that individual employment agreement is to exclude Ms Wilson's entitlement to the benefits of the redundancy provision in the Collective (clause 19).

[9] CCS rely on clause 1.2 of the Collective. That clause provides:

> *This agreement shall not apply to any team leader who by agreement accept the duties they perform are substantially management*.

[10] CCS say that Ms Wilson is as a matter of fact a team leader, that she has effectively verbally assented to the proposition that she is *substantially management* and that therefore she is excluded from the force and effect of the Collective and covered by the individual employment agreement.

[11] CCS accept that if that argument just referred to fails then Ms Wilson is indeed covered by the Collective because of the effect of section 56(1)(b) of the Employment Relations Act 2000. Simply stated that section provides that a collective agreement which is in force binds and is enforceable by an employee, who is employed by an employer that is a party to the agreement, and who becomes a member of a union which is also a party to the agreement, and whose work comes within the coverage clause in the agreement.

[12] Clearly section 56(1)(b) applies. The collective agreement is by consent in force. Ms Wilson is an employee of the employer CCS who is a party to the agreement and Ms Wilson has become a member of the union (although she was not originally a member of the union when she commenced her employment with CCS). The only issue is whether her work comes within the coverage of the agreement and that is the reason that CCS seeks to rely on clause 1.2 of the Collective.

[13] As I indicated to the parties at the investigation meeting, I do not accept that Ms Wilson falls within the terms of clause 1.2 of the Collective. CCS rely on the definition of team leader in schedule 1 of the Collective where team leader (A) is defined as having supervision of *up to* 5 staff. They say that because Ms Wilson has supervision of 2 staff, she is therefore a team leader (A). I think, with respect, this argument does violence to the facts. Ms Wilson's position is described as *Supported Employment (mental health) Co-ordinator* and her hourly rate is less than the hourly rate provide in schedule 1 for a team leader (A). The document is expressed to be a *minimum rate* document.

[14] Ms Wilson's position is not described as a team leader and she is paid less than the hourly rate specified in the schedule for a team leader. Because the Collective is a minimum rate document it would not be available to the parties to have Ms Wilson paid as she is, be a team leader, and conform to the Collective.

[15] Furthermore, CCS are unable to identify any agreement as is required by clause 1.2. They refer only to a verbal understanding between the parties which Ms Wilson plainly does not share. At paragraph 11 of her brief of evidence, Ms Wilson says this:

> *CCS has only one team leader per region to whom all coordinators are required to report. I am not a team leader.*

[16] It follows then that I am not persuaded by CCS's argument that Ms Wilson is excluded from the benefit of the Collective and that being the position, Ms Wilson takes her place with the other applicants in the wider enquiry which constitutes the second issue for this determination.

The applicants' access to clause 19 of the Collective

[17] Clause 19 of the Collective sets out the provisions in respect to redundancy. It has now been established that all of the applicants are covered by the Collective and so all are entitled to the benefit of that clause, whatever that benefit may be.

[18] CCS say that the Collective does not provide for payment of compensation or payment in lieu of notice where employees decline an offer of suitable alternative employment. CCS say that the applicants are not redundant because they have not been dismissed and because they have been offered alternative employment which they have chosen to turn down, they are not therefore entitled to redundancy compensation. CCS seem to rely on the definition of redundancy in the Collective which relies on superfluity of workers rather than positions.

[19] In essence, at a practical level CCS claims that because clause 19 of the Collective is silent about the particular circumstances that the parties find themselves in, it is available to CCS not to pay redundancy compensation.

[20] For their part, the applicants simply say that they are entitled to a genuine election as to whether or not to accept the proffered alternative positions and that if they are (as they claim) actually occupying positions which have been declared surplus to the employer's requirements then their positions are redundant and the employer has an obligation pursuant to the Collective to make the appropriate payments in respect to their redundancy both in terms of redundancy pay and in respect to pay in lieu of notice.

[21] In my view the factual matrix discloses that there has been a restructuring process quite properly initiated by CCS which has culminated in a decision to disestablish the positions occupied by the 3 applicants. There is unanimity that the positions concerned had in fact been disestablished. Certainly the decision to disestablish was communicated by CCS to the applicants by several individual letters dated 18 May 2005.

[22] That decision to disestablish the 3 subject provisions is a decision available to CCS to make and is absolutely in accord with the provisions of clause 19 of the Collective which makes it clear that the final decision in relation to a restructure shall be a decision of the employer.

[23] Where the difference is between the parties is that while both accept that the positions have been disestablished, CCS denies that that of itself triggers the redundancy clause because the *employees* are not superfluous. The difficulty with this thesis is that the factual process used by CCS suggested a genuine election for the employees between taking the new roles and refusing them. Although there was no explicit mention of the alternative, a reasonable person might well assume that the alternative was accepting redundancy compensation on exiting the organisation. The letters

of offer certainly refer to the possibility of four weeks pay in lieu of notice, itself a component of the redundancy clause in the Collective.

[24] CCS offered the applicants an election to take new positions which would allow the employment relationship between those parties to continue on different terms and conditions. In my opinion, the applicants must have a genuine election to choose to remain in that employment relationship.

[25] I am very clear that the terms and conditions of employment offered in the new positions are materially different from the positions previously occupied by the applicants. Two out of the three new positions require acceptance of change of hours, change of duties and change of remuneration and the third involves all but a change in remuneration.

[26] If, as CCS claims, the "new" positions are substantially similar to the "old", why would CCS disestablish the positions and then seek to have the applicants accept new roles? If the new positions are indeed substantially similar, then one would have expected CCS not to disestablish the "old" positions but to negotiate its staff into the new roles.

[27] CCS's argument that they wish to redeploy these employees in fresh positions which are substantially similar to the disestablished positions might be sustainable if the "new" positions are indeed substantially similar to the "old" positions. However, I have found that the "new" positions are materially different from the "old".

[28] In those circumstances it is my considered view that the applicants are entitled to the benefit of clause 19 of the Collective because CCS's actions have, in practical terms, triggered redundancy for these applicants. I do not accept that the applicants can not have an entitlement to the benefit of that clause simply because they have chosen not to accept alternative positions with CCS which are in my view materially different from the positions that they previously occupied.

[29] In my opinion, a requirement that an employee be denied compensation for redundancy where that employee had not accepted an alternative position offered by the same employer would require an explicit provision in the applicable employment agreement.

[30] Indeed, such a view would seem to be consistent with one of the decisions CCS referred me to in support of their argument: *NZ Engineering Coach Building Aircraft Motor etc. IUOW v Dunlop NZ Ltd* [1986] ACJ 848.

[31] CCS relies on *Dunlop* as evidence for the proposition that they can refuse to pay redundancy compensation where their employees will not accept an offer of suitable alternative employment. I do not see *Dunlop's* case as authority for that view. Indeed, I think *Dunlop's* case cannot be authority for that proposition because the factual matrix in *Dunlop* contained an explicit employment agreement provision giving the employer the power which CCS seeks to impose.

[32] CCS also directed me to *Auckland Chemical etc IUOW v Morrison Printing Inks and Machinery Ltd* as authority for their position. Again I think *Morrison* is distinguishable. In *Morrison,* as in this case, the employment agreement was silent about the question of *suitable alternative positions.* In the result, Colgan J (as he then was) determined that the subsequent position was not so different that the worker was entitled to reject it. In the present situation, the new positions are materially different and it follows in my view that the applicants are entitled to make a genuine election as to whether they accept the new positions or not.

[33] In reviewing the relevant law, I have also been much assisted by the decision of the Court of Appeal in *Auckland Regional Council v Sanson* [1999] 2 ERNZ at 597. In *Sanson's* case there are a number of factual similarities to the present matter. The employer, the Auckland Regional Council, sought to rely on what the Court called *technical* arguments including the contention that because the employee's employment had not been formally terminated in terms of a redundancy agreement and the union had not been notified, as was required by that redundancy agreement, the employee could not then rely on the terms of that redundancy agreement.

[34] The Court upheld the decision of Travis J the effect of which was to confirm that the employee's position had been disestablished, that the proposed new position was so dissimilar as to constitute an entirely different position and in consequence the employee was entitled to the benefit of the redundancy agreement.

[35] Applying those principles to the present case results in a decision for the applicants. There will be orders in their favour.

[36] However, if my analysis is incorrect in so far as I determine that the applicants are in truth redundant, I hold that the applicants have a personal grievance by having suffered an unjustifiable action to the employees' disadvantage by reason of the process CCS has used. As an alternative to the redundancy pay the applicants would have received were they, in truth, redundant I award the applicants compensation under s 123(c)(i) of the Employment Relations Act 2000 in the same sum they would each have received were clause 19 of the Collective to apply: *Watties Frozen Foods Ltd v United Food Chemical Union of New Zealand* [1992] 2ERNZ 1038, applied.

Determination

[37] As to the applicable employment agreement in respect to the employment of Ms Wilson, I find that Ms Wilson is covered by the Collective.

[38] As to the wider issue of the entitlement of all 3 applicants to the benefit of clause 19 of the Collective I find that CCS has misconstrued its obligation and that it is not available to CCS to preclude payment of redundancy pay and payment in lieu of notice because of the applicants' unwillingness to accept new positions which in my judgement are materially different from their old positions.

[39] That being my decision, I now issue the following declarations:

a) A declaration that each of the applicants is entitled to 4 weeks pay in lieu of notice.
b) A declaration that each of the applicants is entitled to the payment set out in clause 19.3 of the Collective.
c) An order reserving the issue of costs on this part of the proceedings.
d) An order reserving leave for the applicants to revert to the Authority to seek further assistance should that prove necessary.

[40] The Authority understands the parties are intent upon endeavouring to conclude this matter at mediation and the Authority commends that intention. It is in accordance with the spirit and intent of the Act.

[41] The parties are also commended for the helpful and constructive way in which they participated in the investigation meeting.

[42] The representatives are thanked for their helpful and constructive submissions.

James Crichton
Member of Employment Relations Authority