IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 154/08
5120692

	BETWEEN	WEST COAST DISTRICT HEALTH BOARD Applicant
	AND	NEW ZEALAND PUBLIC SERVICE ASSOCIATION Respondent

Member of Authority:	James Crichton
Representatives:	Paul White, Counsel for Applicant Peter Cranney, Counsel for Respondent
Investigation Meeting:	19 September 2008 at Christchurch
Determination:	16 October 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant board (the Board) applies to the Authority for a determination resolving a dispute about the correct application of staff surplus provisions in two collective employment agreements that the Board has with the respondent association (the PSA).

[2] The two collective agreements affected (the employment agreements) are:

(a) The South Island Mental Health Services and Public Health Nurses' Collective Employment Agreement (the Nurses' Collective); and

(b) The West Coast District Health Board Collective Employment Agreement for Mental Health Services Unit Managers (the Managers' Collective).

[3] The provisions in the employment agreements are very similar in that each provides that there are a number of options to be explored in staff surplus situations in respect of staff who are declared surplus to requirements and that the identification of which option is to apply in a particular staff member's case is to be the subject of negotiation. Critically, however, neither of the employment agreements specifies what happens if the negotiation between the parties fails to produce an agreement.

[4] The PSA has willingly submitted itself to being the respondent party in the instant application; it clearly has an interest in the outcome.

[5] The parties' respective positions can be easily outlined. As to the Board, it seeks a declaration from the Authority that, in the event that negotiation of the options for a surplus staff member either does not happen for any reason or that negotiation does not result in an agreement between the parties, then the Board may offer redeployment or retraining without agreement and then, if that offer is not accepted, no severance or gratuity payment is to be made.

[6] Conversely, the PSA view is that negotiation around the option to apply in respect of a surplus staff member is mandatory and that, in the event the negotiations in a particular case do not result in agreement, the affected employee is entitled to a severance and/or a gratuity payment.

The evidence

[7] The Authority heard just two witnesses. For the Board, evidence was given by Ruth Punnett, the Human Resources Manager of the Board, and for the PSA, evidence was given by Mike Cunliffe, a PSA organiser responsible for PSA members employed by the Board.

[8] By common consent, the evidence advanced by both those witnesses was unremarkable. Ms Punnett sought to satisfy me that the Board had no particular reason for seeking a declaration at this point; however, Ms Punnett accepted during questioning in the investigation meeting that there were two employees or former employees of the Board whose circumstances were effectively *in a holding pattern* until my decision issued.

[9] Both Mr Cunliffe and Ms Punnett accepted that in the normal course of events, if there were a staff surplus situation, the Board and the PSA would negotiate about

the future of the particular individual or individuals concerned. From the Board's perspective, the hierarchy in the relevant clauses was set up so as to make severance the least preferred option, it being the last in the hierarchy of options provided in the relevant provisions and it was suggested to me that it followed that *the aim will be to minimise the use of severance*.

[10] So far as the PSA was concerned, it was its view that once all of the options had been explored and, in the absence of agreement between the parties, then the employee affected by the staff surplus situation must, as a matter of law, be redundant by force of common law and, that being the position, such employee was entitled to access the severance calculation in the document.

The employment agreements

[11] As I have already indicated, there are in fact two separate employment agreements and each provides a detailed provision for dealing with the staff surplus situation. However, those detailed provisions are substantially similar and I intend to deal with the issue in effect as if there were only one employment agreement involved.

[12] However, it is useful to set out the relevant provisions of each agreement. The relevant provisions of the Nurses' Collective are to be found in clause 10 (Schedule D). Over 13 subparagraphs of clause 10 the Nurses' Collective first defines what staff surplus consists of, then deals with notification by the Board to the PSA, then covers the information which the Board must make available to the PSA and then provides the list of options.

[13] It is appropriate to set out that subclause in full:

> *10.4 Options*
> *The following are the options to be applied in staff surplus situations:*
>
> *(a) Reconfirmed in position;*
>
> *(b) Attrition;*
>
> *(c) Redeployment;*
>
> *(d) Leave without pay*
>
> *(e) Enhanced early retirement;*
>
> *(f) Retraining;*
>
> *(g) Severance.*

> *Option (a) will preclude employees from access to the other options. The aim will be to minimise the use of severance. When severance is included, the provisions in subclause 10.11 will be applied as a package.*

[14] The clause then continues with a detailed analysis of each of those options in turn. Subclause 10.11, which has just been referred to, sets out in detail the payment calculation for the severance option.

[15] The Managers' Collective has the equivalent provisions in clause 20 under the title *Management of Change*. The arrangement of the provision is broadly similar and in particular, under the heading *Options* at subclause 20.2 the same list of options is referred to and, importantly, the same sentence in the second paragraph, namely:

> *The aim will be to minimise the use of severance.*

[16] Unlike the Nurses' Collective, the actual calculations of the severance package due and owing to an affected employee is found elsewhere in this document.

Interpretation of the employment agreements

[17] I am satisfied that the only matters that I can usefully derive any assistance from are, first of all, the sentence common to both documents referring to the need to minimise the use of severance and secondly the hierarchy of options which again is exactly similar in each of the employment agreements.

[18] As to the first question, the issue for the Authority is what guidance, if any, can be derived from the sentence included in the second paragraph of clause 10.4, which reads as follows:

> *The aim will be to minimise the use of severance.*

[19] That, as the Board correctly observes, is a statement of principle and more importantly a statement of intent of the negotiating parties when the document was agreed.

[20] The Board encouraged me in the view that, in reliance on that particular provision, I can make a finding that, where there is a failure to reach agreement about which option is to apply, then redeployment or retraining should be offered and if those options are not acceptable, then no gratuity or severance payment is accessible.

[21] The Board seeks to rely on the minimisation of severance principle and on the hierarchy of options arguing that in respect of the last mentioned matter, the parties' intentions must have been to adopt that hierarchy in their negotiations over surplus staff such that reconfirmation in a position was the preferred option and severance the least preferred option.

[22] The Board then refers me to the principles of contract interpretation and in particular to the principles set out by Chief Judge Colgan in *Godfrey Hirst New Zealand Ltd v. National Distribution Union*, EC Auckland AC62/04; ARC45/04.

[23] In essence, those principles require:

(a) Using the words in the agreement as the starting point for interpretation and then considering the surrounding circumstances to see if the natural meaning of the words has to be modified in any way;

(b) Accepting that interpretation is an objective process and the parties' declared intentions are neither here nor there, as the document must be capable of being interpreted and applied by people who were not in any way involved in the negotiation;

(c) Recognising that if the words of the document are clear and can have only one meaning, that meaning should be the meaning that is applied.

[24] I do not understand the PSA to be quarrelling with those reasonably well known principles of employment agreement interpretation. What I understand the PSA to be saying is that, on the central point in dispute, the employment agreements are in fact silent and because, on general legal principles, employment agreements that provide for matters to do with redundancy effectively modify the common law, insofar as that modification is not complete, then the common law must apply.

Discussion

[25] Mr Cranney has helpfully referred me to a number of authorities which touch on the issue before me. I have considered those authorities in reaching my decision.

[26] It seems to me that the essence of the difficulty is that the employment agreements simply do not provide for the situation where, after negotiation between the parties, there is no agreement as to which option is to apply.

[27] Mr Cranney graciously draws comfort from an earlier decision of mine in which I made the observation that it would require explicit words to exclude an entitlement to redundancy compensation: *Wilson & Ors v. NZCCS Marlborough*, CA93/05, 7 July 2005 at para.[29]. I remain of the same view and do not think it can be right that, where as in this case, employees who are surplus to the Board's requirements and who decline the various other options available to it, are excluded from the benefit of redundancy compensation.

[28] If the position is that the affected workers are surplus to the Board's requirements, then the clause requires negotiation around a range of options, but the provisions are silent as to what happens where there is no agreement. The Board's default setting is that the affected employees must simply resign without entitlement to financial compensation in any shape or form, while the PSA's default position is to say that, in the absence of any agreement, then a commonsense interpretation would say that the workers concerned are not provided for in the explicit terms of the employment agreements and so the common law provides for the affected employees to be dismissed for redundancy.

[29] The Board's objection to the PSA's thesis is that the logic would suggest affected employees would simply defer agreement in order to access the inevitable redundancy compensation which would follow on the PSA's interpretation. But the logic of that does not seem sound to me. If an affected employee wished to remain in the employ of the Board and was offered redeployment, for instance, or retraining, then surely the affected employee would earnestly consider those options. I do not believe it logically follows that affected employees will, as it were, simply sit on their hands and wait for the cheque that follows from a failure to agree. This is particularly so, because the Board makes a point of its geographical isolation and its difficulty in obtaining and retaining staff. For precisely that reason, I would have thought it more rather than less likely that employees employed by the Board and affected by a restructure would do all in their power to remain in employment even if that necessitated retraining or redeployment.

[30] The Board correctly says that the parties have agreed to *minimize* the use of severance. That must be the sense of the sentence:

> *The aim will be to minimize the use of severance.*

But minimize does not mean avoidance at all costs. There must be circumstances where there is no option but to invoke severance. Were that not the case, why is that option available at all? The Board does not appear to be saying that it may not agree to severance only that it cannot have severance forced upon it when there is not agreement. Similarly, the fact that on the hierachy of desirability, severance is the least desired option doe not mean it can never be accessed. Were that so it would not be provided at all.

[31] In the end, though, my considered view is that none of the practical consequences are determinative. The short point, in my judgement, is that the relevant provisions in the employment agreements simply do not cover the situation where there is a failure of the parties to agree and I am not attracted by the Board's argument that it ought to be able to require redeployment or retraining (there is no provision in the collective agreement entitling this course of action), and failing acceptance of one or other of those provisions (and failing to agree is the absolute entitlement of the affected employees), then the affected employees have no entitlement whatever to redundancy compensation.

[32] Conversely, I see no reason why, in the absence of an explicit provision in the employment agreements covering a failure of the parties to agree, the overarching common law in relation to redundancy cannot and should not apply.

[33] With the exception of provisions for specific departments of State contained in the State Sector Act and particular rules for vulnerable employees on sale or transfer of enterprises in Part 6A of the Employment Relations Act, there are no legislative provisions for redundancy. Typically then, questions of redundancy turn on the interpretation of the relevant clauses in employment agreements. However, where the employment agreement is silent then the overlay of the common law must be referred to.

[34] It is clear law that provisions relating to redundancy in collective employment agreements modify the common law, but in the instant case, it is equally clear as a matter of fact and I hold that there is no relevant provision in the employment agreements covering the matter in dispute and for reasons which I have enunciated above, I do not consider it proper to imply one into the employment agreements.

[35] It follows that the common law concerning redundancy will apply and in the event that, at the end of the application of the relevant clauses, using the process mandated by *Andersen v. Capital Coast Health Ltd* [2000] 1 ERNZ 256, there is no agreement, then it remains for the Board to dismiss for redundancy, which process would attract the relevant calculations provided respectively in the employment agreements.

Determination

[36] I have reached the conclusion for reasons advanced above that the following declarations ought to be made:

(a) If negotiation under clause 20.1 of the Managers Collective does not result in agreement on which of the options specified in clause 20.2 should be applied, then the employer can reconfirm the affected staff member without that staff member's consent or dismiss the affected staff member for redundancy, in which case severance pay will be due and owing in accordance with the Managers' Collective;

(b) If negotiation under clause 10.1 of the Nurses' Collective does not result in agreement on which of the options specified in clause 10.4 should be applied, then the employer can either reconfirm the affected staff member without that staff member's consent, or dismiss the affected staff member for redundancy, in which case severance pay will be due and owing in terms of the relevant provisions in the Nurses' Collective.

Costs

[37] Costs are reserved.

James Crichton
Member of the Employment Relations Authority