

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 154/08
5133070

BETWEEN

ALISON PATRICIA
ROBERTS
Applicant

AND

CHIEF EXECUTIVE FOR THE
MINISTRY OF HEALTH
Respondent

Member of Authority: G J Wood

Representatives: Simon Meikle for the Applicant
Steph Dyhrberg for the Respondent

Investigation Meeting: 23 October 2008 at Wellington

Determination: 13 November 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This case is about whether the applicant, Dr Alison Roberts, was justifiably dismissed by the respondent, where she claims to be entitled to an ongoing position in the Ministry of Health, plus payment of redundancy compensation. Dr Roberts is a medical specialist and was a senior/principal adviser in the Communicable Diseases Environmental Health division of the Ministry of Health. As a result of restructuring of the Population Health Directorate run by Dr Janice Wilson, a Deputy Director General of Health, Dr Roberts' position ceased to exist from Monday 30 June 2008. The parties were in discussion over ongoing employment for Dr Roberts (albeit as an assignment for a limited period of time) over the course of the next few months.

[2] Dr Roberts considers that in law her employment ended on 30 June and that she was re-employed on 10 July in what was in effect a fixed term employment agreement until June 2009, even although she was paid throughout. That employment agreement is said to be in breach of s.66 of the Act and therefore the Ministry would be unable to end her employment at that date.

[3] The Ministry considers that although her position was made redundant on 30 June 2008 Dr Roberts continued as its employee while the parties explored options for alternative employment for her within the Ministry. While Dr Roberts came back to work and started working on a mixture of tasks associated with the proposed new job and her old job, there was never an agreement to continue Dr Roberts' employment, it says, because she insisted on being paid her redundancy compensation as at 30 June and (as Dr Roberts knew) the Ministry would not agree to pay her redundancy compensation until the end of her employment, whenever that might be.

[4] Given Dr Roberts' insistence on being paid redundancy compensation and the failure to agree terms in the new continued employment, the Ministry decided to dismiss Dr Roberts for redundancy on 15 August 2008 with a month's notice, which was paid in lieu, plus redundancy compensation.

[5] The issues for determination are:

- Did Dr Roberts' employment end as at 30 June 2008 and if so what was the nature of the employment relationship thereafter?
- If the relationship became one in the nature of fixed term employment, is Dr Roberts entitled to treat the nature of the fixed term as ineffective?
- Even if the parties had not agreed terms on continued employment, was the Ministry justified in dismissing Dr Roberts in all the circumstances?
- If Dr Roberts was unjustifiably dismissed or disadvantaged in her employment, what remedies, including reinstatement, is she entitled to?

The Course of Dr Roberts' Employment

[6] Dr Roberts had been employed by the Ministry since January 1995. She was a senior adviser/principal adviser in the Communicable Disease and Environmental

Health Population Directorate until her position was *affected* by a restructuring of the Population Health Directorate. She reported to Mr Graham Gillespie, the Manager of Population Health Protection, who in turn reported to Dr Janice Wilson, the Deputy Director General for Population Health. Dr Roberts was unsuccessful in obtaining a job under the new structure. No issue is taken with that decision.

[7] On 23 May 2008 Dr Wilson wrote to Dr Roberts in the following terms:

...I am also providing formal notice that your position as senior adviser/principal adviser will cease to exist on Monday 30 June 2008. This will terminate your employment agreement in accordance with clause 11.1 of the Senior Level Individual Agreement (SIEA) unless we have been able to offer you a suitable alternative position. We will continue to explore options for alternative employment for you within the Ministry as outlined in the letter to you sent 20 March 2008.

Redundancy is not available until all alternative employment options have been examined and exhausted. You should therefore note that if you turn down a reasonable offer of a job you will not be eligible for a redundancy payment.

[8] I accept that Dr Wilson and Mr Gillespie wanted to retain Dr Roberts' services, at least in the interim, in order to benefit from her specialised skills and experience, as well as to give her continued employment and more time to find a new permanent job.

[9] Dr Roberts had been involved in the development and rollout of the new HDV vaccine project and had maintained her involvement throughout. I therefore accept that in June Dr Wilson and Mr Gillespie considered that Dr Roberts' skills could be efficiently utilised in the implementation of that programme, together with some ongoing work in medicines control that she was already responsible for. They concluded that a part time job at four days a week could be offered to Dr Roberts until 30 June 2009, by which time the programme would be well imbedded.

[10] In discussions with Dr Roberts it was made clear by Dr Wilson that if she accepted ongoing employment her redundancy would be deferred until the end of that working period, except that she could be paid partial redundancy compensation for the one day a week's work lost. While the parties talked about the prospect of ongoing employment in very loose language (from an employment law perspective), Dr Roberts understood throughout that it was the Ministry's view that she would not be able to continue to work for it and claim redundancy compensation.

[11] Dr Wilson later instructed Human Resources to prepare an offer of a position of Senior Technical Adviser in the Population Health Protection group on behalf of the Ministry. I accept that Human Resources wrongly labelled this offer as an offer of fixed term employment. In any event the offer was not accepted by Dr Roberts. She wrote on 26 June stating a number of concerns with the offer, including what she saw as her entitlement to lump sum redundancy on 30 June, that her leave and other conditions should remain unchanged and that her medicines control position should continue unaltered.

[12] Meanwhile Dr Wilson had gone on leave, and perhaps for that reason no response was made to Dr Roberts by 30 June. On finishing work that day Dr Roberts told Mr Gillespie that she was leaving as she regarded her job as finished. Mr Gillespie questioned whether that was right because the Ministry was still looking for a job for her. Dr Roberts said that no one had got back to her over her letter of 26 June. Mr Gillespie undertook to follow the matter up.

[13] The next day he wrote to Dr Roberts offering her a temporary assignment, with effect from 10 July 2008, until 30 June 2009, and apologising for not responding to her concerns promptly. He stated:

To ensure you are not disadvantaged by this delay, I have asked that you are paid through to 9 July to allow you time to consider this offer.

[14] The offer was similar to that previously made, except that it was as a temporary assignment. Dr Roberts' relevant terms and conditions contained in her current employment agreement (including service entitlements), other than the changed hours and a slight change to pay, would continue. She was also told:

You will remain affected during this temporary assignment and we will work together in identifying a potentially suitable opportunity for you in the Ministry ... As this temporary assignment would cease on Tuesday 30 June 2009 this would terminate your employment agreement in accordance with clause 11.1 of the Senior Level Individual Agreement unless we have been able to offer you a suitable alternative position. In the event that you accept this temporary assignment, this letter will serve as notice of termination of employment in terms of clause 11.1(a) of that agreement.

[15] Mr Gillespie rang Dr Roberts about the letter the next day. He told her that the matter had been complicated by the misuse of the term *fixed term contract* in the previous offer. The most effective way of dealing with Dr Roberts' concerns was said

to be to roll over her existing terms and conditions within a temporary position. Dr Roberts was told that she would be paid in the meantime, which she was pleased about. Dr Roberts wanted to see the letter before commenting further.

[16] On 6 July 2008 Dr Roberts responded stating that:

I would like to accept this temporary assignment, with the exception that you agree to discuss further my entitlement to severance payment.

Under the terms of the individual employment agreement, Senior Level positions, clause 11.1, I am entitled to four months lump sum compensatory payment following the disestablishment of my role of Senior Advisor/Principal Advisor on 30 June 2008.

[17] Mr Gillespie responded on 8 July stating:

As agreed during our phone conversation I am happy to further discuss the compensatory payment as outlined in clause 11.1 in the Senior Level Individual Employment Agreement.

[18] As that point both Mr Gillespie and Dr Roberts were confident of convincing the other of the correctness of their position. Unfortunately this never occurred. Dr Roberts was clear that she considered herself as an employee throughout, even although she did not return to work until 10 July. She was paid her salary, on the basis of her Senior Adviser/Principal Adviser job throughout the period she was away from work. On her return she began working the lesser hours envisaged in the new assignment. The parties later agreed to reduce Dr Roberts' pay to reflect the lower hours, in order to avoid any later need for repayments. I accept that she did a mixture of her old work and her temporary assignment, but was moving towards concentrating fully on the new assignment.

[19] In the meantime a meeting was arranged for 22 July to discuss the issue of redundancy compensation. Mr Gillespie and a HR adviser met with Dr Roberts on that date. At that meeting Dr Robert was insistent that she was entitled to full redundancy compensation as at 30 June. The Ministry was equally insistent that it could not agree to pay someone redundancy compensation and effectively immediately re-employ them because this was contrary to Ministry policy, particularly as such a practice had been subject to political criticism.

[20] While it was pointed out to Dr Roberts that unless the Ministry could offer her an equivalent position to her previous Senior/Principal Adviser position before 30 June

2009 she could elect to be paid redundancy compensation at that time, she did not trust the Ministry to so do.

[21] Unlike Dr Roberts I can not accept that the Ministry would not keep its word in this regard. In any event she could have got the Ministry to have put those matters in writing in order to cover her position. Dr Roberts' primary concern, I therefore conclude, was that she wanted to retain the ability to leave during the period her employment was extended for and still get the balance of her redundancy compensation, either because it had been paid out already or because it would be part of an agreement she was yet to reach with the Ministry. However, she knew throughout that the Ministry did not want to agree to this and therefore she and the Ministry never at any stage concluded an agreement, nor could they unless either party changed its position.

[22] Dr Roberts asked the Ministry to put its position in writing to her and it did so on 24 July. Two options were offered to Dr Roberts. The first was she was entitled to choose to take immediate redundancy and that she would then be paid compensation accordingly. The Ministry's practice to then not re-employ staff who received redundancy compensation for the next 12 months was pointed out. Option two was effectively a restatement of the offer of 1 July, by which redundancy would not be available until 30 June 2009, and even then only if a suitable alternative position was not available.

Did Dr Roberts' Employment End on 30 June?

[23] While there were no discussions between the parties on any employment matters between 30 June and 2 July, I conclude that Dr Roberts' employment did not end on 30 June. From the Ministry's perspective it did not consider at any stage that Dr Roberts' employment had ended on that day. When approached by Dr Roberts on 30 June Mr Gillespie made it clear that there were still ongoing discussions over her continued employment and that the Ministry was responsible for any delay. He wrote to her accordingly the next day, offering her continued employment and to continue paying her while negotiations over the new position continued.

[24] From Dr Roberts' perspective she had always wanted her employment to be treated as continuous in the sense that she wanted to retain her conditions dependent on

service. She was appreciative of the offer to continue to pay her and it was her belief that her employment continued in the period before she came back to work on 10 July.

[25] The parties' intentions in fact accorded with the reality of the situation. Dr Roberts was not paid her final pay on 30 June, as would have been required had her employment in fact terminated on that day. The employment did in fact continue while the parties negotiated on what Dr Roberts' ongoing role in the Ministry would be. Both parties were clear at that stage that they wanted an ongoing relationship.

[26] One way of analysing this issue is to ask what the answer would be if the Ministry had refused to maintain Dr Roberts' conditions dependent on service after she had returned to work. The reality is that the history of the situation could not have been overlooked and the conclusion would have been that there would have in effect been no break in Dr Roberts' employment and she was entitled to those service entitlements.

[27] If Mr Meikle is correct and the employment did terminate on 30 June then what were the terms of the new agreement? The parties never agreed on the key conditions relating to the payment of redundancy compensation and this lack of agreement fits better into the scenario of the parties' employment relationship continuing throughout, even although Dr Roberts did not accept the conditions to her return after 30 June until 2 July. In effect both parties waived, by agreement, the condition that employment was to end on 30 June 2008 and thereafter. Until the parties negotiated a new agreement they remained contractually bound to their old conditions of employment (see for example *Electrotech Controls Limited v. Rarere* [2007] ERNZ 586). I determine accordingly.

New Employment from 10 July?

[28] Dr Roberts claims that when she commenced employment on 10 July it was in the new role and that meant that her employment recommenced from that point on the basis of agreed terms, other than entitlement to redundancy compensation.

[29] When Dr Roberts did come back to work she was paid under her existing terms and conditions, although she was working lesser hours and at least partly in the new position. It was subsequently agreed between the parties that given that Dr Roberts was only working four days a week from that point her pay would be reduced accordingly.

[30] That does not change the fact, however, that the parties never reached agreement on the key issue, namely that of if and when redundancy compensation would be paid. Dr Roberts accepted that this condition was never agreed and that it was important to both parties, as the correspondence indicates.

[31] Dr Roberts was working at least in part to the new agreement. Many key factors such as her pay had been resolved. In fact all important matters had been resolved, except for the issue of redundancy. The judgment of Shaw J in *Hayden v. Wellington Free Ambulance Service* unreported WC12/02 24 April 2002 at para.21 is instructive in this regard. It states:

While the parties had agreed on important matters such as salary, location, and other conditions of employment, the fact remains that the issue of Mr Hayden's outside employment was critical to both parties. WFA was insistent that his activities with St John be curtailed and Mr Hayden was equally insistent, at least at the time leading up to 21 February, that there was no necessity for him to alter his position. Even though the point had not been at issue at the beginning of the negotiations it certainly became the sticking point and was unresolved. This lack of resolution indicates clearly that the parties had not reached a concluded bargain at the time the offer of employment was withdrawn.

[32] Exactly the same circumstances apply here and therefore the same conclusion, that there was no concluded agreement between the parties, must apply.

Was Dr Roberts Treated Fairly through the Process?

[33] There is no doubt that until 1 August Dr Roberts had been treated fairly by the Ministry. The Ministry was correct to conclude that redundancy compensation did not have to be paid until Dr Roberts' employment had in fact ended. In reality it had not. It was not therefore required to agree to Dr Roberts' claims in this regard.

[34] After it provided Dr Roberts with two options on 24 July she took legal advice and Mr Meikle wrote to the Ministry on 1 August, requiring payment of the compensation within five days. I note that in that letter Mr Meikle stated that Dr Roberts had commenced *fixed term employment* on 1 July 2008, but it was later claimed that this was on 10 July.

[35] On 8 August Dr Wilson replied, stating that the redundancy payment would be made, but on the understanding that this ended the relationship between the Ministry and Dr Roberts. Dr Wilson proposed that the effective termination date be Friday 15

August, when Dr Roberts would receive her redundancy entitlement and payment in lieu of notice.

[36] Significantly, Mr Meikle disagreed with the latter point and informed the Ministry that same day

If you persist with your ill conceived attempt to dismiss my client a further personal grievance will arise, one of unjustifiable dismissal. Copies of correspondence have been despatched to the Mediation Service for mediation. If you fail to attend then injunctive relief will be sought against the Ministry.

[37] The Ministry was also provided with a copy of Mr Meikle's letter to the Mediation Service, although it was misplaced within the system for several days, indicating that because Dr Roberts remained in the workplace he would be grateful for an early mediation date.

[38] The Ministry was prepared to attend mediation, but it also confirmed in its reply of 14 August that Dr Roberts' pay would cease the next day, as would her employment. Given that Dr Roberts' key focus was to retain her employment with the Ministry as well as get her redundancy compensation the Ministry's actions greatly reduced the chance of a mediated solution to the dispute between the parties. This was surprising given the Ministry's good faith behaviour to date.

[39] As indicated below a better option for the Ministry would almost certainly have been to attend mediation and if necessary bring an urgent claim before the Authority to determine the dispute. Then the parties could continue their discussions thereafter, with Dr Roberts remaining in employment, even if on notice, doing useful work to the Ministry.

[40] Either party could have sought a determination of the sort referred to above. Unfortunately neither did and both must take some responsibility for that. In *Sky Network Television Ltd v. Duncan* [1998] 1 ERNZ 354 the Employment Court upheld the view of the Employment Tribunal that in cases involving a dispute over the interpretation or operation of an employment agreement the parties should use the disputes procedure rather than dismiss a employee for wilful failure to follow a reasonable instruction.

[41] On appeal (*Sky Network Television Ltd v. Duncan* [1998] 3 ERNZ 917) the Court of Appeal found, at 924, that the company was correct in its assessment of the contractual position, albeit that the legal position was not clear cut, but:

...the dispute cried out for an attempted resolution either by resort to the disputes procedure referred to in the contract or, if that was considered too long winded, by a speedier means. Such an approach to the issue which had arisen between the parties may well have resolved it without matters reaching the point at which the mutual confidence or trust of the parties, often said to be an essential of the employment relationship, had been destroyed. If the employer had suggested to Mr Duncan that an independent person be asked to arbitrate or mediate between them, and that such a task be undertaken within a week or two, rather than both sides facing a wait of perhaps months for a solution through the disputes procedure, and if Sky had at the same time pointed out again the real difficulty it faced over scheduling of the suites to accommodate Mr Duncan's position pending resolution, Mr Duncan could hardly with much credibility have insisted that the longer route be taken and still maintained that he was being genuine and reasonable in his approach. If he had refused to cooperate in the employer's endeavour to resolve in an expeditious manner the situation which posed difficulty for both parties, his stated belief concerning his contractual rights might have seemed less than genuine. The obligation to act reasonably and in good faith in pursuing contractual rights rests upon the employee as well as the employer. The genuineness of the employee's behaviour, which is central to the character of the act of disobedience, is to be judged objectively in the light of all the circumstances, including the way in which resolution of the dispute is approached.

But, as it happened, Sky elected to dismiss him summarily without broaching the topic of dispute resolution. It was for Sky to show that its behaviour towards its employee was fair in the circumstances and it failed to satisfy the Tribunal and that Judge that it had done so.

[42] The parties' responsibilities to each other to act in good faith have been strengthened with the subsequent passage of the Employment Relations Act. However, it is not in every circumstance that a failure by the employer to utilise the statutory dispute resolution mechanisms means that subsequent actions are unjustifiable (see for example *Sadler v. Quotable Value NZ Ltd* [2004] 1 ERNZ 45 at 74-75).

[43] The Ministry did not even consider using the employment relationship employment resolution process and indeed terminated Dr Roberts' employment (effectively without notice) before mediation could occur. Its reasons for doing so were twofold. First, it did not believe any resolution could be reached between the parties because both had an all or nothing approach to the issue (a point confirmed by Mr Meikle). Second, more staff suited to work on the HPV immunisation programme had become available (one a seconded staff member who was unexpectedly returning and

had no specific job to return to, and the other the newly appointed Chief Advisor Population Health), while further controls on staff expenditure were being implemented, meaning that it could not justify continuing an approach that involved establishing something of a make work job to suit Dr Roberts.

[44] I accept that while the Ministry can always usefully utilise additional staff its resources are not limitless. I also accept that the Ministry can no longer justify holding the temporary assignment position open because of the above factors. Mediation would have provided an ideal opportunity for these facts to have been pointed out to Dr Roberts before her employment had ended.

[45] This is an exceptional case in that Dr Roberts was continuing on in her employment only for the purposes of negotiating a new agreement, but this had proved impossible. The employment relationship problem was in many ways therefore one of over the negotiation of terms of employment, where the Authority's jurisdiction is limited, rather than what was traditionally known as a dispute of rights. Furthermore, mediation did take place within days of the dismissal and were it not for the fact that additional staff had unforeseeably returned the position may still have been able to be retrieved.

[46] I conclude that in the round the Ministry's actions and how it acted were not what a fair and reasonable employer would have done in all the circumstances at the time. It ended Dr Roberts' employment, admittedly in the face of demands (in the final analysis wrong) from her lawyer, with summary effect, when instead of payment *in lieu*, it could have issued a month's notice and had the whole matter determined during the period of that notice, whether by mediation (as requested by Dr Roberts) or determination by the Authority. This option would also have allowed for a dignified departure for Dr Roberts, rather than her effectively leaving, returning and then leaving again in what must have seemed baffling circumstances to any observer.

[47] In this case there could have been significant benefit in an application from either party to the Authority for an urgent investigation (following urgent mediation) into the issue of whether or not Dr Roberts was entitled to redundancy compensation as at 30 June and/or whether she could have continued to work for the Ministry but have claimed redundancy compensation were she to leave in the course of the expected duration of the ongoing employment. The answer to those questions would have been the same, namely no. However, if an urgent application had been made while the

employment remained on foot, rather than after the Ministry had terminated Dr Robert's employment, then the parties would have been in a better position to have assessed the ongoing relationship, rather than the Ministry taking the view that it was right and terminating the employment.

[48] In particular, had this process been followed Dr Roberts would then have been in a position of knowing that the Ministry had not done her wrong by refusing to pay her compensation as at 30 June or if she were to leave during the course of any intended continuation of her employment until June 2009, and that the Ministry were unable to require her to take up a lesser position than her old position at the end of that period. In the light of this information Dr Roberts might possibly therefore have concluded to stay on in the Ministry's employment, to their mutual benefit, although at the investigation meeting she would commit only to considering such a solution. In any event this would have been a far better solution the one that has eventuated.

Remedies

[49] Given the facts that:

- the parties never agreed upon terms of employment for the new proposed role;
- a month's notice was paid;
- mediation did occur within days of the effective end of Dr Roberts' employment and did not result in settlement;
- the proposed role in effect ceased to exist through a reorganising of the Ministry; and
- Dr Roberts was ambivalent when asked at the investigation meeting if she would accept reinstatement without the right to redundancy compensation;

I conclude that while Dr Roberts has been unjustifiably disadvantaged in her employment, there can be no reinstatement or lost remuneration, as there is no position that Dr Roberts has lost or can be reinstated to (see for example *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825).

[50] Dr Roberts is, however, entitled to compensation for the way the Ministry reacted to her seeking mediation and the consequent lack of a dignified exit for her.

The Ministry was aware that she required sensitive treatment and Dr Roberts gave evidence that the ending of her employment came as a surprise to her, as she expected the situation to involve further discussions rather than dismissal. On the limited evidence provided, and as remedies must be focussed on the impact of the issues covered in this paragraph, I determine that \$3000 compensation is appropriate. Given that the deficiencies leading to the conclusion of unjustifiable disadvantage were of the Ministry's making there can be no deduction for contributory behaviour. I therefore order the respondent, the Chief Executive for the Ministry of Health, to pay to the applicant, Alison Patricia Roberts, the sum of \$3000 under s.123(1)(c)(i) of the Act.

Costs

[51] Costs are reserved.

Best Practice

[52] One of the key objects to the Act is to build productive employment relationships through the promotion of good faith in all aspects of the employment environment, including by promoting mediation as the primary problem solving mechanism and by reducing the need for judicial intervention. To this end all employment agreements must provide a plain language explanation of the services available for the resolution of employment relationship problems.

[53] The object to the Institutions part of the Act states:

It needs to be recognised that judicial intervention at the lowest level needs to be that of a specialist decision making body that is not inhibited by strict procedural requirements.

[54] The role of the Authority is as an investigative body that has the function of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities. These are all important provisions that guide good faith behaviour.

[55] The purpose of this section is to attempt to highlight to well resourced employers such as the Ministry the benefits, if in genuine dispute with an employee or employees, of getting urgent assistance from the Authority so that the issues may be determined and the parties can then assess how their relationship can be best continued productively in the light of that determination.

[56] In fact in almost all situations such as this recourse to mediation and the Authority is the preferable way for parties to progress and build upon their productive employment relationships. In making these observations I hope that this practice may become more widely known, so that other parties may benefit from it.

G J Wood
Member of the Employment Relations Authority