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IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 5/09
5112279

	BETWEEN	ALAN KOEHLER Applicant
	AND	NEW ZEALAND FOREST RESEARCH INSTITUTE LIMITED T/A SCION Respondent

Member of Authority:	Dzintra King
Representatives:	Peter Kiely, Counsel for Applicant Rob Towner, Counsel for Respondent
Investigation Meeting:	at Auckland
Submissions Received	1 and 15 August 2008 from Applicant 8 August 2008 from Respondent
Determination:	9 January 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Alan Koehler, was employed by the respondent, the New Zealand Forest Research Institute ("NZFRI") trading as Scion ("Scion") from 1977 until 23 January 2008. Mr Koehler says that he has been unjustifiably disadvantaged by the failure of Scion to pay him redundancy compensation. He seeks payment of $85,000 being unpaid redundancy compensation and interest on that amount. Additionally, he seeks payment of compensation in the sum of $25,000. Mr Koehler also says the respondent has breached his employment agreement and disclosed matters discussed at mediation, failed to address his concerns on a timely basis and breached the duty of good faith. He seeks penalties in the amount of $5,000 per breach, totalling $30,000.

[2] Mr Koehler says that his position with Scion, which was based in Melbourne, was disestablished on 31 December 2007. He was offered ongoing employment with Scion as Contract Manager based in Rotorua but says the position offered was substantially different to the Operations Manager role he held at the time of disestablishment.

[3] The issues for determination are:

- Whether Mr Koehler was seconded to CSIRO or was on leave without pay.
- Whether Scion had an obligation to offer him a position that was substantially similar.
- If so, was the position offered substantially similar?
- Was he made redundant by the respondent?
- Did he have an entitlement to redundancy compensation?

Background

[4] In 2001 Mr Koehler was employed as Client Services Manager and accepted a three year secondment to Forest Research Australasia Pty Ltd carrying out client relationship management and business development. He said it was intended that at the conclusion of the secondment period he would return to Rotorua to resume his Client Services Manager's role in New Zealand.

[5] However, in July 2004 the Ensis 50/50 Joint Venture was formed between Scion and the Australian Commonwealth Scientific and Industrial Research organisation ("CSIRO"). Ensis was an unincorporated joint venture and staff were not employed directly by Ensis but by either Scion or CSIRO. Mr Koehler was in Australia at the time the joint venture was formed and his Client Services Manager role was converted to that of Ensis Operations Manager. His secondment was extended by a further six months until 31 December 2004. At the conclusion of the extended secondment the transitional Ensis Operations manager role was established on a permanent basis and was based at Scion's offices in Rotorua. Mr Koehler's reassignment letter shows the employer as NZFRI. His relocation costs back to New Zealand were paid by Ensis.

[6] On 1 December 2005 Mr Koehler was appointed as acting ENSIS Finance Manager while still continuing to carry out duties associated with the Operations manager's role.

[7] The Ensis Finance Manager role involved travel to and from Australia. Mr Koehler indicated to Scion's then Human Resources Manager, Ms Sylvia Hunt, that he wanted to relocate back to Australia on a more permanent basis. He approached the then Chief Executive at Ensis, Mr Larry Little, to discuss his options regarding relocation.

[8] Mr Little arranged for the relocation of the Operations Manager role to Melbourne. Mr Little formally notified Scion of Mr Koehler's relocation to Melbourne by a memorandum dated 1 December 2005. The memorandum is headed "Relocation of Alan Koehler to Clayton" and states that he will be transferred to the CSIRO payroll under the terms of the CSIRO Enterprise Agreement. Part of the memorandum stated that:

> *All costs associated with the relocation will be covered by Ensis in accordance with the Ensis secondment policy dated 1 July 2005…*

[9] Mr Richard Ede signed the applicant's employment agreement with CSIRO. The agreement was for a period of twenty four months and stated that Ensis would provide for the costs of the relocation from New Zealand to Australia within the terms of the Ensis secondment policy. No reference is made to payment of relocation back to New Zealand. There was no agreement reached between Scion and CSIRO that Mr Koehler was seconded to CSIRO. Mr Koehler was not employed by Ensis during the period in question but by CSIRO. Mr Koehler accepted at the investigation meeting that he was a CSIRO employee, employed under a CSIRO employment agreement and paid by CSIRO.

Nature of Transfer

[10] Before his relocation to Melbourne, Mr Koehler had several discussions with Ms Hunt regarding the basis upon which he could transfer employment to CSIRO. Ms Hunt explained that the only way to enact a transfer to Melbourne was for him to take two years leave without pay from Scion. Mr Koehler wrote to Ms Hunt on 10 January 2006 requesting a period of leave without pay, not a secondment. He wrote to Ms Hunt saying *"as you are aware on the 23rd of January 2006 I will be*

transferring to CSIRO as a CSIRO officer". He asked to be granted leave without pay from Scion as from 23 January 2006 for a period of two years.

[11] Mr Koehler was granted the leave without pay for which he had applied. This was confirmed in the Larry Little memorandum wherein Mr Little stated that he understood "*that to effect transfer of employment from SCION to CSIRO Alan will be required to take LWOP from Scion"*.

[12] On 10 January 2006 Ms Hunt responded to Mr Koehler's request for leave without pay. Her letter confirmed that he would be on leave without pay from 23 January 2006 until 23 January 2008. Ms Hunt also confirmed that "*with LWOP situation, there is no guarantee of ongoing employment at the end of the term."*

[13] Ms Hunt wrote again to the applicant on 15 March 2006 "*to ensure absolute clarity regarding your leave without pay from Scion"*. Ms Hunt reiterated that there was no guarantee of ongoing employment at the end of his leave without pay period and that if there should be no ongoing employment with Scion Mr Koehler would not be entitled to any redundancy payment.

[14] On 14 August 2006 Mr Koehler emailed Ms Hunt. In this email he asserted that he was on secondment to CSIRO and on that basis his entitlement to redundancy compensation from the respondent remained unaffected. He asked that the statement in Ms Hunt's letter of 15 March 2006 referring to the lack of entitlement to redundancy compensation be formally withdrawn and asked for another letter stating that his entitlement to redundancy remained in force.

[15] Ms Hunt replied to this by letter dated 28 August 2006. She confirmed that he had not been seconded to CSIRO but was on unpaid leave. The letter confirmed that his transfer to Melbourne had been dealt with on this basis because of his desire to return to Australia for personal reasons. Ms Hunt reiterated the main points from her letter of 15 March 2006. There was no entitlement to redundancy compensation and there was no certainty of ongoing employment with the respondent at the end of the leave period. Ms Hunt was not prepared to send a letter stating that Mr Koehler had an ongoing entitlement to redundancy.

[16] Mr Koehler then wrote to Dr Richardson, Scion's then Chief Executive Officer, by email dated 12 October 2006 seeking further clarification of his employment status. The respondent replied to this email by letter written on 1

December 2006 by the General Manager, Organisational Management, Mr Patrick Brus. Mr Brus gave an interpretation of Scion's leave without pay policy that was inconsistent with the position previously taken by Ms Hunt. Mr Brus wrote:

> *Firstly, I confirm that you are on leave without pay until23 January 2008. This was agreed to by the company following your written request on 10 January 2006.*
>
> *If your present position with CSIRO comes to an end before 23 January 2008 as a result of redundancy, then you will either be placed in a suitable role with Scion, or paid redundancy pursuant to your employment agreement (according to the company's unpaid leave policy.*
>
> *On the other hand, if you decide to accept a permanent position with CSIRO or otherwise resign from Scion's employment, you will not be redundant and not be entitled to redundancy.*
>
> *I trust this clarifies the position for you.*

Termination of Position

[17] In August 2007 the Ensis Liaison Board decided to terminate the joint venture arrangement, effective on 31 December 2007. As a result Mr Koehler's role with Ensis, that is his employment with CSIRO, would be redundant as at 31 December 2007.

[18] Following this decision Mr Koehler notified Scion that he wanted to return from leave without pay to work for Scion. He stated that his willingness to return to Scion would be dependent on the appropriateness of any position offered. The respondent began searching for a suitable role for him within the organisation.

[19] On 22 November 2007 Scion offered Mr Koehler the position of Contracts Manager. The Contracts Manager role was a permanent position commencing 28 January 2008 based in Rotorua. Mr Koehler advised by letter dated 7 December 2007 that he would not accept the Contracts Manager's position. On 18 December 2007 Scion advised that it genuinely considered the Contracts Manager role to be suitable for him. He was given the opportunity to reconsider the position. He was told that if he rejected the offer he would not be entitled to redundancy compensation.

[20] On 23 January 2008 Mr Koehler's period of leave without pay finished and his employment with Scion ended. On 4 March 2008 he raised a personal grievance

alleging unjustified disadvantage. He was at that time employed by CSIRO on a temporary basis.

[21] Mr Koehler says that the Contracts Manager role was not suitable because he did not have the technical competencies required for the role.

Leave Without Pay or Secondment?

[22] Mr Koehler was on leave without pay from Scion; he was not seconded either to Ensis or to CSIRO. The references to the Ensis secondment policy in Mr Little's memo and the CSIRO employment agreement are simply references to the basis on which relocation costs to Australia would be paid.

[23] Mr Koehler's employment with Scion did not terminate because he was made redundant from Scion. At the time of the redundancy he was an employee of CSIRO.

[24] When Mr Koehler decided not to accept the position offered by Scion at the end of his leave without pay period, he was not entitled to any compensation whatsoever. The relevant provision of his employment agreement states that:

> *Unpaid leave:*
>
> *From time to time, at the discretion of Forest Research, you may be granted leave without pay. Placement on return from leave without pay of more than one month cannot be guaranteed and is conditional on a suitable vacancy being available. If you cannot be placed in employment on return, you will be given one months notice in writing that the employment is to be terminated.*

[25] Scion's leave without pay policy which forms part of Mr Koehler's contract of employment states:

> *Generally, placement on return from leave without pay of more than four weeks cannot be guaranteed and is conditional upon a suitable vacancy being available. An employee who cannot be placed in employment on return will be given four weeks notice in writing that their employment is to be terminated and they shall not be entitled to any additional compensation whatsoever (other than normal contractual entitlements).*

[26] No entitlement to redundancy compensation arose under the leave without pay policy.

[27] I accept the respondent's submission that the question of a suitable vacancy arises only in relation to the question of whether an employee may return to the respondent after extended leave without pay.

[28] The factual situation is analogous to that in *Heenan v. The Ministry of Agriculture and Fisheries* (CEC 16/91, 8 November 1991). In *Heenan* the plaintiff took 12 months leave without pay in circumstances analogous to Mr Koehler's situation. The risk of no position being available on the plaintiff's return was explained to him before he commenced his leave. During the plaintiff's leave period his previous position was disestablished. He bought a personal grievance under the Labour Relations Act 1987 and sought payment of redundancy compensation. The Court noted at para.[23]:

> *It was Mr Heenan who applied for extended leave without pay … and then renewed his application for such leave …. The applicant proceeded with an advised awareness, we have found, of the risk that such leave posed to his employment by the first respondent. The vacant position of technical officer at Invermay was not, as we have held, disestablished until March/April of 1990. No redundancy situation affected Mr Heenan as he contended arose when he proceeded upon unpaid extended leave.*

At para.[26] the Court held:

> *…the first respondent discharged at all material times, up to the commencement of the extended unpaid leave which Mr Heenan embarked upon, its obligations of confidence and trust ….We have already explained why we are of this view. Mr Heenan knowingly, we find, incurred particular risks in his employment setting in proceeding upon 12 months leave without pay … .*

[29] Mr Koehler was seconded to CSIRO between 2001 and 2002 and so would have been familiar with the differences between leave without pay and secondment. Ms Hunt stated at the investigation meeting that at the beginning of the Ensis joint venture one issue that the joint venture partners discussed was whether length of service would be recognised if an employee transferred from the employment of one entity to the other. This was being discussed at the time Mr Koehler relocated to Melbourne. Therefore one of the reasons why Ms Hunt advised him to take leave without pay was that if the joint venture partners decided to recognise the service of each others employees, being on leave without pay would mean that his service related entitlement with the respondent would not be adversely impacted in terms of his employment with CSIRO.

[30] Mr Brus' interpretation of the leave without pay policy was inconsistent with the interpretation Ms Hunt had provided. Mr Brus's interpretation of the leave without pay policy was incorrect.

Redundancy

[31] Mr Koehler was not entitled to redundancy compensation under the terms of the respondent's leave without pay policy. This is because he was not redundant within the definition of redundancy contained in his employment agreement and the redundancy policy. Therefore redundancy was not a normal contractual entitlement at the end of his leave without pay period and no entitlements to redundancy compensation arose.

[32] The redundancy provision of his employment agreement and redundancy policy only apply:

> *Where your position has, or will, become surplus to [the respondent's] requirements because of the cessation of any part of the respondent's operation or lack of suitable work or your job function is no longer required.*

[33] Mr Koehler's underlying employment with Scion on a leave without pay basis until January 2008 when his leave without pay ended and he declined an offer of ongoing employment. The end of his employment was governed by Scion's leave without pay policy and was not a redundancy as defined in his employment agreement.

[34] I agree with the respondent that even if Mr Koehler was redundant within the definition of redundancy in his employment agreement he would not have been entitled to redundancy compensation. The redundancy policy, which was incorporated into and formed part of his employment agreement, provides for compensation as follows:

> *Where no other options are available to retain employees in employment, compensation will be paid as per the terms of the individual's employment agreement.*

[35] Despite Mr Koehler's concerns about a lack of skills for the position, the Contracts Manager position was clearly an option available to retain him in employment. The respondent was confident that he had the skills and experience to

undertake the role. Mr Koehler had undertaken many different positions during the course of his employment and had shown he was adaptable in undertaking and succeeding in new and varied roles.

[36] The respondent accepted that for another position offered to an employee to qualify as another option available for the purposes of the redundancy compensation clause, it must be a reasonable option. The requirements of reasonableness must be implied into the clause, with the result that if there was a reasonable option available to retain Mr Koehler there was no obligation to pay redundancy compensation.

[37] I agree with the respondent that it is not necessary to consider whether the other option was substantially similar. This is not the standard expressed in the agreement or redundancy policy.

[38] I accept the submission that a reasonable option is not necessarily a position where the employee has every skill or experience in all facets of the role; rather, it is a position that the employee, given his particular skills and experience could reasonably be expected to adapt to and succeed at.

[39] Mr Koehler was not made redundant from the respondent. Mr Koehler was offered a reasonable option which he chose not to accept. There is no entitlement to redundancy compensation.

Penalties

[40] The applicant claims penalties in respect of alleged breaches by the respondent.

Failure to pay redundancy compensation

[41] I have found that there was no obligation to pay redundancy compensation. There has been no breach of the employment agreement. Even if there had been, this was a matter where the interpretation of the employment agreement was contested.

Failure to respond in a timely manner

[42] While communications may not have taken place as quickly as the applicant may have wished, the evidence established that the respondent had been active and communicative in replying to Mr Koehler's communications. The respondent

complied with its statutory obligations under the Privacy Act. When the respondent realised that some documents had been omitted from the initial bundle provided an apology was forthcoming and the documents were then promptly provided. There are no grounds for the award of a penalty.

Breach of mediation confidentiality

[43] This claim also has no basis. Ms Howell corresponded with Mr Koehler directly and in those letters she referred to the mediation. There was nothing wrong in doing so. Scion was not aware that Mr Koehler was opposed to being contacted directly rather than through his solicitors as he had himself initiated the direct communication by writing directly to Dr Richardson and Ms Howell on 30 January 2008 and 15 February 2008 respectively.

[44] The applicant had referred to discussions at mediation in those letters.

[45] None of these breaches amounted to breaches of s.148. Any reference made to mediation were *inter-partes* and the respondent did not disclose anything about the mediation to a third party. It was not a breach of the confidentiality of mediation for the parties to continue to discuss the relevant issues between themselves after the formal mediation meeting without recourse to their solicitor.

[46] The purpose of the penalties provisions in ss.133-135 is to provide a punitive remedy to penalise a party who has acted improperly. In *Ruapehu District Council v. Northern Local Government Officers Union* (WEC54/92, 16 November 2002) Castle J stated that:

> *Generally speaking, a penalty is appropriate only whether there has been a wilful breach or default.*

[47] None of the breaches alleged by the applicant meets the standard of intention on the part of the respondent. Authorities support the proposition that penalty awards will not be an appropriate remedy where the problem at issue is essentially one of contested interpretation. In *New Zealand Printing and Related Trades IUW v. Wairarapa Times Age Co. Ltd* [1991] 1 ERNZ 57, Castle J commented at para.[62] that:

> *The basis on which both claims are brought is essentially one of interpretation. Even had I been satisfied beyond reasonable doubt*

> *that breaches of the award had been established I would have felt some reluctance to impose any penalty having regard to the circumstances.*

Costs

[48] If the parties are unable to resolve the issue of costs the respondent should file a memorandum within 28 days of the date of this determination. The applicant should file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King
Member of the Employment Relations Authority