

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2013] NZERA Wellington 96  
5383225

BETWEEN MEE HUA TING  
Applicant

AND THE CHIEF EXECUTIVE OF  
THE MINISTRY OF SOCIAL  
DEVELOPMENT  
Respondent

Member of Authority: Trish MacKinnon

Representatives: Barbara Buckett, Counsel for the Applicant  
Samantha Turner and Charlotte Bates, Counsel for the  
Respondent

Investigation Meeting: 5 March 2013

Submissions Received: 27 March and 13 May 2013 for the Applicant  
26 April 2013 for the Respondent

Determination: 2 August 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Mee Hua Ting was employed as a Team Leader in the Risk and Assurance Group of the Ministry of Social Development (the Ministry) from April 2007. A restructure of the Group in March 2012 resulted in the disestablishment of Ms Ting's position.

[2] Ms Ting was reassigned to a position deemed by the Ministry to be suitable for her skills and experience. She declined it and, in doing so, signed a form acknowledging she had waived entitlement to redundancy compensation. Her employment was terminated for redundancy on one month's notice with effect from 5 September 2012.

[3] Ms Ting claims the Ministry breached her employment agreement by not paying her redundancy compensation on the termination of her employment and breached good faith in its dealings with her. She says that the forfeiture of her redundancy compensation was an unjustifiable disadvantage. Ms Ting seeks payment of redundancy compensation.

[4] Additionally, Ms Ting claims that as a result of the *aggressive and oppressive misconduct* of the Ministry, she has suffered anxiety and stress. She seeks compensation for hurt, humiliation, stress and anxiety; special damages arising from the breach of her individual employment agreement (IEA) and/or loss of monetary benefits; and costs. Ms Ting also seeks two declarations, one relating to the waiver she signed, and one relating to her entitlement to redundancy compensation.

[5] The Ministry denies breaching Ms Ting's IEA. It says the Ministry followed a fair process including thorough consultation with Ms Ting prior to making the decision to disestablish her role for genuine business reasons.

[6] It confirmed her reassignment to a suitable alternative position. When she declined the reassignment, the Ministry spent several months consulting and negotiating with Ms Ting in an attempt to meet the concerns she had expressed about the position. It was only after those efforts were unsuccessful that the Ministry eventually notified Ms Ting her employment would terminate, on notice, as it could no longer sustain keeping the reassignment role open for her.

[7] No redundancy compensation was paid as the Ministry said Ms Ting did not qualify for it, having rejected reassignment to a suitable alternative position. The Ministry relies on the provisions of Ms Ting's IEA, its Change Management Protocol and the letter/form she signed on 30 April 2012 declining reassignment and acknowledging that, in doing so, she waived any entitlement to redundancy compensation.

### **Issues**

[8] The issues for determination are whether:

- (i) the Ministry's Change Management Protocol applied to Ms Ting;

- (ii) Ms Ting was entitled to payment of redundancy compensation;
- (iii) Ms Ting was unjustifiably disadvantaged;
- (iv) the Ministry breached good faith in its dealings with Ms Ting; and
- (v) the waiver acknowledgement of 30 April 2012 binds Ms Ting.

[9] Other claims raised by Ms Ting in her Amended Statement of Problem were that she had been unjustifiably dismissed and that the Ministry had breached the Fair Trading Act 1986 in a letter to her. As these claims were not pursued, in either the investigation meeting or submissions, they will not be considered further.

### **Background and evidence**

[10] Ms Ting gave evidence on her own behalf. Three current employees gave evidence for the Ministry. They were Hamish McIntyre, Janet Green and Wendy Venter. I have considered all their evidence but, in accordance with s. 174 of the Employment Relations Act (the Act), will not set out a full record of it in this determination.

[11] Ms Venter is the Deputy Chief Executive, Risk and Assurance (the Group), for the Ministry of Social Development. Shortly after she started in that role in November 2011, Ms Venter realised that changes were necessary to the Group's structure to ensure it would best meet the Ministry's risk and assurance needs.

[12] From February 2012 she began working with the Ministry's Human Resources unit (HR) on a detailed restructure proposal. This entailed the disestablishment of 3 roles within the Group, one of which was that held by Ms Ting. Ms Venter met Ms Ting on 27 February 2012 to inform her of the restructuring proposal and of the potential disestablishment of her position. Ms Venter explained the proposed new structure and invited comments and questions. Ms Ting made no comments and had no questions.

[13] The following day Ms Venter held a general Group meeting to announce the consultation document. Employees were given until 15 March 2012 to provide feedback on the proposed structure. Ms Ting chose not to provide any. In the

investigation meeting she explained that she thought it was a *done deal* and that her comments would not be taken into account.

[14] The final structure differed from the initial proposal in that the proposed roles of Senior Internal Auditor were discarded. This was as a result of the feedback received and considered by Ms Venter. She met with Ms Ting to advise that her current position would be disestablished, before announcing the final decisions to the Group on 23 March 2012. Ms Ting was given a copy of the Change Management Protocol (the Protocol) at the meeting of 23 March 2012.

[15] On 27 March 2012 Ms Venter again met with Ms Ting and gave her a letter confirming her position would be disestablished and assuring her the Ministry would do everything it could to retain her in its employment and match her skills and experience to a suitable vacancy. Ms Venter explained the Protocol that would apply and encouraged Ms Ting to register expressions of interest in positions for which she wished to be considered.

[16] The cut-off date for expressions of interest was 2 April 2012 but, at the request of Ms Ting and one other employee whose position had been disestablished, this was extended to 4 April 2012 for them. Ms Ting says she reviewed the positions and decided not to apply for any, on the basis that none was suitable and all represented a demotion for her.

[17] Ms Ting met with Ms Venter on 3 and 4 April 2012, with the HR Manager attending the second meeting in order to answer some of the questions raised by Ms Ting on 3 April. They discussed positions available for Ms Ting, who identified the role of Internal Auditor as being the closest fit for her. It was the only position in which she was interested, but she saw it as a backwards step. Ms Venter agreed it was a close fit with Ms Ting's skills and experience.

[18] She advised Ms Ting that, in accordance with the Protocol, she could be reassigned to a suitable position even if she did not apply for it. Ms Venter assured her that the restructuring was not about making employees redundant and that Ms Ting was a valued employee whose skills and experience the Ministry did not wish to lose.

[19] The HR Manager provided information about the Ministry's right to reassign Ms Ting to the position, and answered her questions about the application of the

Protocol to her, and how it related to her IEA. It was explained that, if Ms Ting did not accept reassignment, she would not receive redundancy compensation. Ms Venter noted in her evidence that:

*We explained that this was in accordance with her employment agreement that provided that she was only entitled to redundancy compensation if we could not find her another suitable position on terms which were no less favourable.*

[20] Ms Ting informed Ms Venter that she intended to take legal advice over her position and entitlements. She did not respond to Ms Venter's request for information about what she was seeking in a role.

[21] Ms Venter had another short discussion with Ms Ting on 12 April 2012, when Ms Ting advised she had sought legal advice and the Ministry would be hearing from her lawyer shortly. She neither elaborated on the nature of the advice, nor named the lawyer who had given it.

[22] As Ms Venter had heard nothing further by 23 April 2012, she emailed Ms Ting to arrange a meeting with her the following day, the purpose being to inform her of her reassignment to the position of Internal Auditor. At the meeting she gave Ms Ting a letter about the reassignment and went through the details with her.

[23] Ms Venter informed Ms Ting that, if she declined the reassignment, she would not be entitled to redundancy compensation. She asked Ms Ting to advise whether she accepted the reassignment by returning a signed copy of the letter by 30 April 2012. Ms Venter says it was a friendly meeting and Ms Ting had no questions, other than to ask if Ms Venter had heard from her lawyer. Ms Venter had not.

[24] Later the same day Ms Venter received an emailed letter from Ms Buckett, on behalf of Ms Ting, asserting that the Ministry's change management process (the Protocol), which had been negotiated with the New Zealand Public Service Association Inc. (PSA), did not apply to Ms Ting who was employed on an IEA. Ms Buckett claimed that the Ministry had no right to reassign Ms Ting to the newly created position of Internal Auditor.

[25] She cited the redundancy provisions of Ms Ting's IEA, and informed Ms Venter that as there was no other *suitable* role for her in the Ministry, Ms Ting was entitled to redundancy notice and compensation. The letter noted the concerns Ms Ting had about the reassignment role:

- *Notwithstanding a two year equalisation period, the salary for the position is substantially lower, and in a different band.*
- *None of the positions receives the same remuneration as she currently receives.*
- *None of the positions offers the same or similar career and economic opportunities.*
- *None of the positions have staffing or leadership responsibilities.*

[26] The Ministry responded to that letter on 27 April 2012, noting that all staff, both those on the PSA collective agreement and those on IEAs, were covered by the Ministry's Protocol. The Ministry's letter, which was signed by Ms Venter, explained the Protocol and how, and why, it applied to Ms Ting.

[27] The letter addressed the concerns Ms Buckett had raised about the *lesser* nature of the position, noting that the equalisation provisions provided employees with a choice of an ongoing allowance to keep their salary at the former level, or a lump sum payment. Ms Venter's letter also noted the opportunities that were available in terms of leadership and coaching/mentoring of staff.

[28] Ms Venter's letter reiterated the Ministry's view of its ability to reassign Ms Ting to the Internal Auditor position; of the suitability of that role; and of the non-application of redundancy and compensation to Ms Ting. Ms Venter expressed her disappointment that Ms Ting had indicated she would refuse the reassignment, and her hope that Ms Ting would reconsider. She noted that Ms Ting was required to complete an Acceptance/Non Acceptance of reassignment form and return it to Ms Venter by 30 April 2012.

[29] Ms Ting completed the form, declining the reassignment and acknowledging that she would have one month in which to consider her options and, if still unwilling to accept the reassignment, would then be deemed to have resigned her employment and forfeited her right to redundancy.

[30] Ms Ting continued to work at the Ministry over the following 4 months while correspondence was exchanged between Ms Buckett and the Ministry and/or its legal representatives. During this time the parties attended mediation but did not resolve the matter. The one month period for reconsideration of the reassignment was subsequently extended to 15 June and then 22 June 2012 at Ms Ting's request.

[31] On 11 June 2012 the Ministry informed Ms Ting that, although it considered the position, as offered, to be a suitable alternative, it was prepared to address the concerns she had raised. It reiterated that she was *a valued employee* whose *skills and experience* the Ministry did not want to lose.

[32] The Ministry offered changes to the title of the position to reflect leadership responsibility for an area of work, and opportunities for appearances before the Risk and Assurance management team to give regular updates on that area of work. It confirmed that Ms Ting would remain on the same remuneration, and the management remuneration band, she currently enjoyed. Additionally, she would retain coaching and mentoring opportunities, and continued access to training and development.

[33] The Ministry offered an extension to 15 June 2012 (subsequently extended to 22 June) for Ms Ting to reconsider her decision to decline the reassignment. It also offered meetings and mediation. Ms Ting's responses were steadfast that the Protocol did not apply to her and that she was entitled to redundancy compensation as she had not accepted the reassignment. The parties attended mediation but did not resolve the matter.

[34] Ms Buckett rejected the reassignment again on Ms Ting's behalf on 22 June 2012 on the grounds that the position was *unsuitable* because:

- *The title does not reflect the seniority of the position Mee Hua currently holds.*
- *Mee Hua has had her job responsibilities and access to participation in management meetings diminished.*
- *It remains unclear as to whether the salary is subject to equalisation or not.*
- *She no longer has staff responsibilities which are in her current job description*

[35] The letter rejecting the reassignment also indicated Ms Ting was willing to discuss the matter further as she wished to resolve it promptly.

[36] The Ministry's response on 27 June 2012, through its legal representatives, noted that the proposed title change reflected the seniority of Ms Ting's former Team Leader position. It gave assurances about the job responsibilities and opportunities for meeting attendances. It again confirmed that Ms Ting's salary would remain the

same and would not be subject to equalisation. In relation to the staff responsibilities, it was noted that Ms Ting provided coaching and mentoring, and that these responsibilities would continue with the reassigned role. She did not actually have any direct staff responsibilities, despite that being referred to in the job description for her current position.

[37] The letter noted that the Ministry *would benefit from Ms Ting articulating exactly how she considers a resolution could be achieved, outlining what she is looking for in relation to the title of the Role, job responsibilities, participation in management meetings, and staff responsibilities.* It asked for that information by 2 July 2012, after which it believed a meeting would be constructive.

[38] Ms Ting's lawyer responded on 2 July 2012 providing some information and noting that the Ministry's attempts to date to make the position *suitable*, while appreciated by Ms Ting, were *minor and of no real consequence.*

[39] In relation to the job title, Ms Ting wished seniority to be indicated as, *for example, something in respect of senior auditor.* In relation to job responsibilities, it was noted that Ms Ting had the right, under her old job description, to attend management meetings, not just opportunities to do so.

[40] In respect of salary, Ms Buckett stated that the letter from the Ministry's legal representatives *does not assure Mee Hua that she will continue to receive pay increases, and not stagnate at the current level or that the equalisation has been cancelled or overridden.*

[41] Ms Buckett stated that Ms Ting's old job description clearly provided for staff responsibilities and supervision of graduate auditors. She said that *(t)he fact that her job has unlawfully eroded over time does not entitle the Ministry to capitalise on that default/illegality.*

[42] Ms Ting was prepared to accept the position on terms that she specified, which included the payment of her legal fees and compensation of \$5,000. Although this offer was expressed as being made on a *without prejudice save as to costs* basis and would not normally be sighted by the Authority during an investigation meeting, it was put into evidence by Ms Ting, thereby waiving privilege. The Ministry also waived privilege in this letter, and in its reply, in the interests of assisting the Authority's investigation.

[43] Further communication occurred between the parties throughout July and August 2012, including the offer of *Lead* in the title of the reassigned role. However, there was no agreement reached between them and, by letter dated 24 August 2012, the Ministry's legal representatives wrote to Ms Buckett traversing the events since March 2012 and conveying the Ministry's belief that it had no alternative other than to confirm the termination of Ms Ting's employment for redundancy. No redundancy compensation would be paid in accordance with the terms of Ms Ting's IEA, the Change Protocol, and Ms Ting's signed acknowledgement of 30 April 2012.

[44] Ms Ting was on leave at the time and the Ministry wished to meet her on her return to work to discuss when her termination would take effect and what her last day of work would be. The Ministry would not require her to work out her notice period, and would like to host a farewell morning tea for her to thank her for her hard work over the years and to give her colleagues an opportunity to farewell her.

[45] Ms Buckett responded on 27 August 2012 declining the request for a meeting and stating that Ms Ting would now file proceedings for *urgent injunctive relief*. Further correspondence between the parties failed to resolve the matter and Ms Venter wrote to Ms Ting on 30 August 2012 confirming the termination of her employment, effective 5 September 2012. Payment of one month's salary in lieu of notice would be made. Ms Venter repeated the Ministry's wish to host a farewell morning tea for Ms Ting, an offer that was subsequently declined by Ms Ting.

[46] In the course of the investigation meeting Ms Ting was adamant that she was worried about career progression and was unwilling to accept anything she considered to be a demotion. Despite the changes to the position to which she was reassigned, she believed it to be a demotion. She wanted *Senior* in the title and would not accept a title that did not contain that word. She accepted that the position was at the same level (Tier 4) in the Ministry's organisational structure as her previous position but still felt strongly that it was a demotion.

[47] Ms Ting acknowledged that her Team Leader position did not contain the work *Senior*. She also acknowledged she would be the only person in the structure with *Lead* in their title but said that was *only a title change and not important*. Under questioning Ms Ting acknowledged that, if the Ministry had agreed to pay her compensation and her legal fees, she would have accepted the reassigned position.

**Key documents**

[48] Ms Ting's IEA, and the Ministry's Protocol are 2 of the 3 key documents in this matter. The third is the 24 April 2012 letter from Ms Venter to Ms Ting, that was signed and returned by Ms Ting on 30 April 2012.

[49] Ms Ting signed her most recent IEA on 4 November 2008, and signed a variation to it on 8 November 2010 relating, in the main, to leave entitlements. Some of the relevant clauses in Ms Ting's IEA are 16, 18 and 19, and Appendix B, the relevant parts of which I set out below:

***Clause 16.0 Code of Conduct and Ministry Policies***

*The minimum standards of integrity and conduct that apply to all employees of the Ministry are set out in the Code Of Conduct. There are also other Ministry policies setting standards of behaviour and Ministry practices that are issued by the Ministry. The standards and practices outlined in these documents and any successor documents must be adhered to at all times. From time to time the Code of Conduct and or Ministry policies will be reviewed and amended on reasonable notice to you. Employees have access to the Code of Conduct and policy documents and are responsible for ensuring that they are familiar with these and comply with them. Any subsequent amendments to the Code will apply to all employees.*

***Clause 18.0 Change Management***

*The Ministry's purpose is to lead social development to achieve better futures for all New Zealanders. The Ministry operates in a dynamic environment and needs to be responsive to government direction, client needs and other environmental factors. Most change which occurs in the Ministry does not involve job losses or relocation outside a local area. The Ministry undertakes to consult with you about changes that may affect you.*

**Clause 19.0 Redundancy**

*Redundancy is a situation where your employment is to be terminated by reason of your role being surplus to the Ministry's requirements. This includes changes in the requirements of your position including any change to the size, scope or skills required rendering the role as either surplus or substantially altered.*

**19.1 N/A****19.2 Notice**

*If you are made redundant you will receive one month's notice of termination of employment or payment in lieu thereof.*

**19.3 Redundancy Compensation**

*In the event that the Ministry determines that your position has or will become superfluous to its needs and the Ministry is unable to transfer you to another suitable position on terms which are no less favourable to you (or otherwise acceptable to you if the terms are less favourable), then your employment may be terminated by giving notice under clause 19.2 of this agreement and you will be entitled to compensation for redundancy as provided for in Appendix B.*

**Appendix B Redundancy Provisions****Application**

*Following agreement that the option of redundancy is to be made available to you and where it is mutually agreed that you will cease employment with the Ministry the following provisions will apply.*

[50] The Appendix B provisions specify the different levels of redundancy compensation applicable to employees dependent on their years of service with the Ministry and its predecessors.

[51] The Protocol was formulated for managing the process of change in the Risk and Assurance Group. It laid out the principles applicable to the process, including (paraphrased):

- *Maximising employment security for Ministry employees through reconfirmation and reassignment processes;*
- *The application of a common change process for all permanent employees of the Ministry, whether bound by a collective agreement or employed on an IEA, where their positions came within the coverage of a collective agreement.*

[52] The document set out the Ministry's approach to change, which was designed to provide certainty to "affected" staff as quickly as possible following the

*announcement of the new structures.* Reconfirmations would be advised as soon as the final structures were announced, followed by the reassignment process. The Protocol defined reassignment as:

- (i) *the placement of “affected” employees who have not been reconfirmed into a suitable position; or*
- (ii) *the process that applies to the placement of “affected” employees when there are more candidates than the number of positions available.*

[53] The Protocol also included the following *Conflict of Interpretation* clause:

*If in applying this Protocol there is a conflict of interpretation between this protocol and any employment agreement provisions, the applicable employment agreement will take precedence.*

[54] The Protocol contained detailed information on the application of reassignment to which I will refer, but not set out in full.

### **Did the Change Management Protocol apply to Ms Ting?**

The Ministry and Ms Ting have diametrically opposed views on the application of the Protocol to her. Ms Ting argues that the Protocol was a document agreed with the PSA and, as she was employed on an IEA, it had no application to her.

[55] The Ministry in turn asserts that the provisions of the Protocol were incorporated into Ms Ting’s IEA by virtue of clause 16 (reproduced above) and Ms Ting’s agreement was not required for it to be effective and binding on her.

[56] I agree with the Ministry’s submission. I note that, even if Ms Ting had been unaware of it from her IEA, her attention had been drawn to the fact that her employer could change policies applicable to her without obtaining her agreement by the Ministry’s letter to her of 26 October 2010. That letter, offering a variation to her IEA, informed her of recent changes to Ministry policies and practices that affected her, but did not form part of the variation to her IEA. The Ministry noted in the letter that:

*These policies/practices are not terms and conditions of employment so do not form part of the offer of variation to your individual employment agreement. Please note, the Ministry can make changes to its policies/practices at any time and these changes are not subject to agreement from staff.*

[57] The Protocol was agreed with the PSA. According to the evidence of Mr McIntyre, a number of policies applicable to all Ministry employees are agreed with

the union. The Ministry has a partnership agreement with the PSA which entails it working with the union over many Ministry-wide policies. Mr McIntyre referred to recent policies such as Bullying and Harassment, Performance, and EEO that had been negotiated with the PSA.

**Was Ms Ting entitled to redundancy compensation?**

[58] Ms Ting relies on clause 19 of her IEA and *Porteous v Chief Executive of the Department of Building and Housing*<sup>1</sup> as support for her contention that she was entitled to receive redundancy compensation. In that case Couch J found that Mr Porteous, whose position was disestablished during a restructuring, and who declined reassignment to a new position that had been created for him, was entitled to redundancy compensation.

[59] The Judge found as a matter of fact that, applying the everyday meaning of the words in the employment agreement between Mr Porteous and the Department of Building and Housing (the Department), his employer was *unable to relocate* him and he therefore met the criterion for redundancy compensation.

[60] Ms Ting claims that the application of the same approach to the words of her IEA renders a similar result in that her employer was *unable to transfer* her. I disagree with Ms Ting's analysis. There are significant differences between the *Porteous* case and Ms Ting's. These include the wording of the applicable surplus staffing/redundancy compensation clauses, and the contents of the respective Change Management Protocols.

[61] In the *Porteous* employment agreement, there was an obligation on the employer to make *every reasonable effort* to relocate the employee within its operations. The Judge found the Department had discharged that obligation. Where it was unable to relocate the employee, redundancy compensation was to be paid.

[62] The Department's Change Management Protocol, which the Judge found was applicable to Mr Porteous, provided that an employee who did not accept reassignment would be given one month's notice and could access the surplus staffing provisions of their employment agreement. Those provisions included, albeit as a last resort, redundancy compensation.

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<sup>1</sup> [2010] NZEMPC 67

[63] In Ms Ting's IEA, the change management provisions immediately precede the redundancy provisions. That juxtaposition, and the wording of the clause, is significant. The change management clause sets the scene for the changes within the Ministry that could lead to redundancies. It is clear that change is not uncommon in the *dynamic environment*, which needs to be *responsive to government direction, client needs and other environmental factors*, in which the Ministry operates.

[64] It is also clear that most of that change *does not involve job losses*. The emphasis is on the Ministry being sufficiently nimble to adapt rapidly to various changing environmental demands. The aim is to enable the Ministry to achieve its stated purpose without shedding employees, where avoidable.

[65] The redundancy compensation provisions must be read in this context. It is also relevant that the Ministry's Protocol provisions specify that employees who decline an offer of reassignment will not be entitled to redundancy compensation. This dovetails with the Ministry's emphasis on employee retention during periods of change, but is in marked contrast to the provisions that were applicable in *Porteous*.

[66] Ms Ting claims that her IEA gives her the right to decide whether the terms of *another suitable position are no less favourable* to her. She says the test is a subjective one. I disagree with that interpretation. In my view, the question of whether the terms of another suitable position are *no less favourable* to Ms Ting is a matter for objective assessment in clause 19.3.

[67] If, objectively assessed, the terms are no less favourable to the employee, she will not be entitled to redundancy compensation if she refuses reassignment. If the terms are less favourable to her, and she does not accept them, she is entitled to redundancy compensation in accordance with the relevant provisions of Appendix B.

*Were the terms of the reassigned position "no less favourable" to Ms Ting?*

[68] The positions had the same salary, in the same management remuneration band. Both were Tier 4 positions, of equal seniority in the Ministry's structure. Ms Ting would be the only person with *Lead* in her job title. Her professional development opportunities would remain the same as in her previous role, and she would have a *standing slot* at Group management team meetings to discuss matters relating to her portfolio. She would be provided with training and development opportunities.

[69] While she would have no direct staff management responsibilities as had been provided for in the Job Description for her previous position, in reality she had not had such responsibilities in her former position. Under the reassigned position she would continue to provide the coaching and mentoring support she had been providing in the former position.

[70] The position titles were different but both conveyed the status of the incumbent, which had not changed. Ms Ting's insistence that she have *Senior* in her job title was not reasonable. She had not been so described in her former role, but made it clear in the investigation meeting that she was not interested in any other title. There was no evidence she had informed the Ministry this was a bottom line condition for her.

[71] I find that the terms of the position to which Ms Ting was reassigned were not less favourable to her. The differences between that position and her former position, were not such that one was superior or inferior to the other. In key respects the terms of the reassignment position were the same.

[72] Ms Ting acknowledged in the course of the investigation meeting that she would have accepted the reassignment if the Ministry had paid her compensation for hurt and humiliation and her legal costs. That acknowledgement suggests that, when considering the reassignment, she took into account considerations that had no relevance to the objective assessment of the suitability of the position.

*What is the effect of the Conflict of Interpretation clause of the Protocol?*

[73] I have already found that the Protocol applied to Ms Ting. She argues that, even if the Protocol does apply to her, the *Conflict of Interpretation* clause of that document provides that her employment agreement takes precedence.

[74] Mr McIntyre's evidence was that the Protocol did not override an individual employment agreement, but sat alongside it. The documents were to be read in conjunction. When asked in cross-examination whether the Protocol varied Ms Ting's IEA, Mr McIntyre responded that it did not: it amplified the terms and conditions of the IEA but did not vary them.

[75] I accept that evidence but, even if I disregarded the Protocol, I would find that Ms Ting was not entitled to redundancy compensation under the terms of her IEA.

[76] The Ministry had determined Ms Ting's position to be superfluous to its requirements. It further determined that it was able to transfer her to another suitable position on terms that were no less favourable to her. That being so, Ms Ting had no entitlement to redundancy compensation under the terms of clause 19.3 of her IEA.

**Was Ms Ting unjustifiably disadvantaged?**

[77] Ms Ting does not dispute her employer's right to restructure but claims to have been disadvantaged by the non-payment to her of redundancy compensation following the disestablishment of her former position. As I have found she was not entitled to that compensation, it follows that she could not have been unjustifiably disadvantaged by not receiving it.

**Did the Ministry breach good faith in its dealings with Ms Ting**

[78] I am satisfied from the evidence that the Ministry met both its State Sector Act *good employer* obligations and its Employment Relations Act obligations of good faith throughout the restructure process, and the ensuing process of attempting to address Ms Ting's concerns about the reassignment.

[79] I find there to be no evidence of *aggressive and oppressive misconduct* on the part of the Ministry as alleged by Ms Ting. The efforts of the Ministry were directed towards retaining an employee it valued for her skills and experience.

**Is Ms Ting bound by the 30 April 2012 waiver?**

[80] Ms Ting questions the validity of the waiver she signed and returned to Ms Venter on 30 April 2012. She says she signed the form *under duress and without legal advice*. In oral evidence she said the Ministry should never have given her that letter *as a vulnerable employee*. This is because she was very upset, anxious and under significant stress at the time and the Ministry should have told her she must get legal advice about the application of the Protocol to her.

[81] I find that evidence problematic. Ms Ting had clearly taken legal advice before 12 April 2012 when she informed Ms Venter her lawyer would be writing to her. Ms Buckett's letter to Ms Venter was dated, and received, on 24 April 2012. Ms Venter's response referred specifically to the form Ms Ting had been asked to complete and return by 30 April 2012.

[82] The Ministry had no indication from Ms Ting's words or behaviour, or from her lawyer's letter of 24 April 2012, that she was stressed and upset. Nor did the Ministry have any reason to doubt that Ms Ting had the opportunity to discuss the form with Ms Buckett before completing and returning it on 30 April 2012.

[83] If Ms Ting had concerns about completing the form within the specified timeframe, she could have requested an extension until she was able to discuss it with her lawyer. When this was put to Ms Ting in the investigation meeting, she responded that there was a timetable in place.

[84] The existence of a timetable did not deter Ms Ting one month earlier from requesting an extension of time for registering expressions of interest in newly created positions. She was readily granted that extension and had no reason to believe that a similar request for an extension of time in this instance would be rejected.

[85] The threshold for a finding of duress is high. There must be an improper threat or pressure such that the victim's will is overborne by it to the extent that her own free will and judgement is displaced.<sup>2</sup>

[86] Ms Venter's letter of 24 April 2012 contained no threats. It confirmed Ms Ting's reassignment and requested a response by 30 April 2012 signifying acceptance or non-acceptance. The letter invited Ms Ting to contact her manager or Ms Venter if she had *any questions regarding this letter or the process*.

[87] Ms Ting fails comprehensively to meet the threshold for duress. That being so, I find the Ministry is entitled to rely on Ms Ting's acknowledgement that, in not accepting reassignment, she would be deemed to have resigned her employment, and forfeited her right to redundancy compensation.

### **Determination**

[88] Ms Ting's claims are dismissed for the reasons given above. She was not unjustifiably disadvantaged, and the Ministry breached neither her employment agreement nor its obligations of good faith towards her.

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<sup>2</sup> *Pharmacy Care Systems Ltd v Attorney-General* (2004) 2 NZCCLR 187 CA at [98]

**Costs**

[89] Costs are reserved.

**Trish MacKinnon**  
**Member of the Employment Relations Authority**