IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2019] NZERA 307
3045672

	BETWEEN	DEREK GIBSON-SMITH Applicant
	AND	MINISTRY OF BUSINESS INNOVATION AND EMPLOYMENT Respondent

Member of Authority:	James Crichton
Representatives:	Michael Quigg, counsel for Applicant Peter Chemis, counsel the Respondent
Investigation Meeting:	1 May 2019 at Wellington
Date of Determination:	24 May 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant (Mr Gibson-Smith) seeks to rely on an understanding that he not perform certain work in his employment. The respondent employer (MBIE) resists Mr Gibson-Smith's claim and maintains that the understanding which, by common consent occurred in or around 2008, is not a term of the employment and/or even if it were, it was not a term of the employment in perpetuity.

[2] Mr Gibson-Smith says that as a consequence of MBIE's attempt to have him do work which was the subject of this 2008 understanding, the proposed change in Mr Gibson-Smith's work arrangements allegedly in contravention of the 2008 understanding, is such as to make Mr Gibson-Smith's position redundant. That claim is also resisted by MBIE.

[3] Further and finally, Mr Gibson-Smith says that he was unjustifiably disadvantaged by MBIE's actions and in consequence, is entitled to compensation. Again, MBIE resist that proposition.

[4] Mr Gibson-Smith is a long-standing and very valued member of MBIE's telephone call centre. Mr Gibson-Smith commenced employment in 2003 initially as a tenancy officer but over time, Mr Gibson-Smith, like other members of the staff of the call centre have added other subject matters to the list of calls staff would take.

[5] The call centre services some fifty-seven different lines of inquiry from citizens and in January of 2018, MBIE determined that the tenancy line and the bond line be merged.

[6] Mr Gibson-Smith told me that tenancy inquiries was "his love" and that dealing with tenancy inquiries represented 80% of the calls that he took. This is notwithstanding the fact that he also answered calls relating to five other lines as well.

[7] It is apparent on the evidence that Mr Gibson-Smith is highly regarded by MBIE for his skill and aptitude and that MBIE seek to continue to have Mr Gibson-Smith available to them to work in the area.

[8] However, by virtue of MBIE's decision to amalgamate the tenancy line and the tenancy bond line into a single line, the parties fell into disagreement and an employment relationship problem was created.

[9] Mr Gibson-Smith told me that the bond work was transactional in nature while the tenancy line was more exclusively concerned with giving callers advice about tenancy matters.

[10] He further referred to and sought to rely upon an understanding he had reached in 2008 or thereabouts with Mr Denis Bloomfield who was at the relevant time the service centre manager. That meant that Mr Bloomfield's responsibilities encompassed the management of the call centre. One of Mr Bloomfield's direct reports was Ms Coralie Berryman who as a team leader in the call centre was Mr Gibson-Smith's direct manager.

[11] It is common cause that Mr Bloomfield and Mr Gibson-Smith were on friendly terms, notwithstanding the difference in their relative ranks in the organisation and that they saw

each other socially outside of the workplace. Mr Gibson-Smith engaged with Mr Bloomfield and in about 2008, came to an understanding with Mr Bloomfield the effect of which was that Mr Gibson-Smith would not have to undertake bond related work. Mr Gibson-Smith says that this agreement is of a term of the employment agreement by custom.

[12] Mr Gibson-Smith seeks to rely on that understanding now and for the balance of the term of his employment, however long, or in the alternative leave the organisation by way of redundancy.

[13] For its part, MBIE says that the 2008 understanding is not a term of the employment agreement whether by custom or otherwise, cannot be relied upon in perpetuity, and that the request for Mr Gibson-Smith to work the bond line as well as the tenancy line is neither unreasonable nor a material change in Mr Gibson-Smith's terms and conditions of employment especially as the effect of the 2008 understanding would have been to place Mr Gibson-Smith in a unique position relative to that of his colleagues.

[14] When Mr Gibson-Smith declined to receive training on the bond line during 2018, MBIE sought to engage with him to understand what his objection was to doing the bond work and MBIE say that they were unable to discern any reason that Mr Gibson-Smith felt unable to do the bond work. However, in an effort to meet Mr Gibson-Smith halfway, MBIE proposed to train Mr Gibson-Smith up in a variety of other areas of work in the call centre so as to avoid both bond work and tenancy work, but Mr Gibson-Smith rejected that suggestion as well.

[15] While the parties have sought to negotiate a resolution of the employment relationship problem between themselves, there came a point, for Mr Gibson-Smith anyway, where it was felt that the only way forward was to file the matter in the Authority and have the Authority determine the question once and for all

Issues

[16] The Authority must consider the following questions:

(a) What is the nature of the 2008 understanding and can it be relied upon?

(b) Is the proposed amalgamation of the tenancy and bond lines tantamount to a redundancy for Mr Gibson-Smith? and

(c) If yes, is Mr Gibson-Smith entitled to redundancy compensation? And

(d) Does Mr Gibson-Smith have a personal grievance for unjustified disadvantage?

What is the nature of the 2008 understanding and can it be relied upon?

[17] I have no hesitation in concluding that the 2008 understanding is no more than that and in particular that it is not a term of the employment which the parties can or should rely upon.

[18] I reach this conclusion because I have not been persuaded that any of the elements that would usually be associated with a binding term of an agreement are present in this case.

[19] For example, there is absolutely no documentation about the nature and extent of the understanding and indeed it was apparent when I talked with Mr Bloomfield that he had never turned his mind to the question of the longevity of this understanding and he had made the decision to accede to Mr Gibson-Smith's request notwithstanding the continued opposition to that arrangement of Mr Gibson-Smith's direct superior Ms Berryman.

[20] Ms Berryman made it clear in her evidence that she had raised the matter with Mr Bloomfield on a number of occasions and she was very clear that she objected to the understanding; Mr Bloomfield's evidence satisfied me that he knew full well that Ms Berryman was opposed to the arrangement.

[21] Given the personal relationship between Mr Gibson-Smith and Mr Bloomfield, it is difficult not to see the 2008 understanding as no more than an agreement between friends to provide a degree of latitude to what might have otherwise been entirely appropriate and enforceable duties and responsibilities. Put shortly, I think it difficult to imagine that Mr Bloomfield would have reached the conclusion that he did in relation to this matter if he and Mr Gibson-Smith were not on friendly terms outside of the workplace.

[22] That is not in any way to demean or disapprove of the personal relationship between the two men; I simply say that I think it more likely than not that the personal friendship between them was a significant factor in the achieving of the 2008 understanding and that Mr Bloomfield, as an experienced manager, would have been unlikely to reach such an informal arrangement with the staff member that he was not on such friendly terms with.

[23] That view of matters is, I am satisfied, supported by Mr Bloomfield's evidence that the 2008 understanding was "an informal arrangement" and that he did not feel any need to document it in any way. It is apparent that in fact there is no documentary evidence for the understanding; no email traffic, no note on a personal file or indeed any other written reference to the 2008 understanding.

[24] If the 2008 understanding is to be implied by custom, then the usual rules on that matter would apply, as those rules were enunciated in the leading case of *Woods v N J Ellingham and Company Limited,* [1977] 1 NZLR 218 where Henry J. identified the principles for implying terms on the basis of custom and practice as follows:

(a) The custom must be notorious;

(b) The custom must be certain;

(c) It must be reasonable;

(d) It must be proved by clear and convincing evidence; and

(e) It must not be inconsistent with the express contract.

[25] Looked at in the round, the only element of that test which could reasonably accord with the facts of the present case is the last mentioned; the rest of the elements of the test would require the drawing of a very long bow indeed. For example, there was no notoriety as such about the agreement; it was very much a private understanding between two men who were on friendly terms.

[26] Moreover, the extent of the understanding was never clear; Mr Bloomfield told me that he had never turned his mind to how long the understanding would apply for. Whether such an arrangement could be considered reasonable when all of Mr Gibson-Smith's colleagues in a similar position to him were required to deal with bond calls must be open to question and it is difficult to prove with "clear and convincing evidence" what constitutes the custom given the complete absence of any documentation especially as to the length of time the understanding is to be in place and indeed whether it was to be a term of the employment or not.

[27] As if that is not enough, the notion that this arrangement can somehow be treated as if it were a bargain between the parties applying the elements of contract law, just does not

stand up to scrutiny. There does not appear to be any consideration for the so-called bargain; nor, on the evidence is there anything pointing to an intention to enter legal relations. Even if one could characterise the understanding as offer and acceptance (and I doubt that anyway) there is no certainty of terms, no consideration and I am satisfied, no intention to be legally bound.

[28] It follows from that analysis that I am not satisfied Mr Gibson-Smith has proved on the balance of probabilities that his 2008 understanding is a term of his agreement which may therefore be relied upon for the purposes of determining his entitlements now.

Are the proposed changes to Mr Gibson-Smith's circumstances tantamount to redundancy?

[29] Nor do I accept the proposition that Mr Gibson-Smith is entitled to a conclusion that his position has become redundant because of MBIE's intention to add the bond line to the tenancy line.

[30] I consider this outcome follows inexorably from my conclusion in the last section of this determination that Mr Gibson-Smith is unable to rely on the 2008 understanding to inform the performance of his employment obligations now.

[31] To put that point another way, because Mr Gibson-Smith does not have a term in his agreement which prevents him from doing bond work, then in principle, it is available to the employer to train him up to do this work. That has happened apparently in relation to other staff and it happens regularly in relation to staff being trained on new lines as and when required.

[32] There is nothing in the documents which suggest to me anything improper in MBIE seeking to broaden the areas of work of its staff and in particular, nothing which requires the staff members consent before that broadening of scope is undertaken.

[33] The evidence of Ms Berryman is that as new staff come on board, they are usually trained in one line and then other lines are added from time to time. Moreover, she says that employees frequently have lines added or taken away from their schedule and critically that "adaptability" is important as lines are sometimes merged and demand changes over time.

[34] The position description for the role which Mr Gibson-Smith currently holds is illustrative of what the parties have agreed about the nature of the position. I was particularly drawn in Ms Berryman's evidence to the fact that Mr Gibson-Smith was involved in a working group which actually reviewed the current position description for his own job and so the position description which I am relying upon in this determination was actually created by a working group which Mr Gibson-Smith was part of.

[35] The job description contains this observation under the heading Key Responsibilities "responsibilities of this position are expected to change over time as the Ministry responds to changing needs. The incumbent will need the flexibility to adapt and develop as the environment evolves".

[36] Moreover, the job description requires position-holders to "willingly undertake any duty required within the context of the position" and it says under the broad heading "How we Work" that "our people will need to adopt a generous disposition and actively seek out opportunities to be purposely collaborative across MBIE. This means asking "why not" instead of "why"…".

[37] In reliance then on the job description, which Mr Gibson-Smith had had a role on developing, it seems to me axiomatic that MBIE has an absolute right to ask Mr Gibson-Smith to take on new responsibilities and the flexibility contemplated by that very job description cannot, on any proper construction of it, justify the conclusion that by virtue of the proposed change to Mr Gibson-Smith's duties, he is or could be redundant.

Is Mr Gibson-Smith entitled to redundancy compensation?

[38] The answer to this question is of course in the negative; I have already determined that Mr Gibson-Smith's position is not redundant and therefore no question of redundancy compensation can arise.

Does Mr Gibson-Smith have a personal grievance for unjustified disadvantage?

[39] I have not been persuaded that Mr Gibson-Smith has been treated unjustly. He has sought to rely upon the 2008 understanding in the entirely mistaken belief that that understanding could apply in perpetuity when it plainly could not and he has failed absolutely to provide his employer with any tangible basis on which it could understand why he was so reluctant to do bond calls.

[40] Ms Thomson who replaced Mr Bloomfield as the service centre manager told me in her oral evidence at my investigation meeting that all that she could get from Mr Gibson-Smith was this statement about his reluctance to do bond work: "I will not train on the bond line for reasons that are personal to me." I can understand MBIE's frustration about trying to understand why Mr Gibson-Smith, who they are very clear is an exceptionally talented and able member of the team, would not take on this additional responsibility for which he is unusually well qualified by virtue of his huge experience and great customer manner.

[41] It was because of the failure of Mr Gibson-Smith to articulate any proper explanation of why he did not want to do the bond calls that MBIE sought to escalate the engagement with Mr Gibson-Smith to a disciplinary focus, really out of sheer frustration. I suggested to Ms Thomson that perhaps this escalation was unhelpful and even heavy handed, and her response was that "Derek (Mr Gibson-Smith) simply wouldn't engage with me".

[42] In the particular circumstances of this case, I am not persuaded that Mr Gibson-Smith has been treated harshly, or that he was harassed or bullied. An employer has a right to manage its undertaking and by dint of the job description for the role that Mr Gibson-Smith fulfilled, it was entitled to ask him to train in another line.

[43] Moreover, even if I am wrong in that conclusion and the move to a disciplinary response is heavy handed, MBIE remedied its default by offering Mr Gibson-Smith the opportunity of training in a range of other lines so as to exclude both bond line work and tenancy work. But even that did not interest him. He seems to have become fixated on continuing with the range of work that he had always enjoyed and particularly the tenancy work and not taking on the bond work at all.

[44] I am not satisfied that the elements of a disadvantage personal grievance are present. First, I am satisfied that the employer is entitled to engage with Mr Gibson-Smith in these circumstances including in a disciplinary environment where he fails to articulate what his objection is to broadening his work to include the bond line. Moreover, the job description for Mr Gibson-Smith's role makes it abundantly clear that MBIE will have the right to ask staff to be flexible and change their particular responsibilities to meet the needs of the business.

[45] Secondly, I am not persuaded that Mr Gibson-Smith has suffered a disadvantage either; while it may be true that the disciplinary process caused him distress and resulted in

him having attendances with his doctor, he seems to have rejected out of hand MBIE's alternative suggestion that he be trained on a range of other lines so as to avoid the necessity of doing the bond work at all. It is difficult to see that as a deficit for him but even if I am wrong as to that, it seems to me, clear as can be, that the employer has a right to manage its business and in terms of the job description, a very clear right to ask staff to do work that they are not currently doing within the general scope of the very wide obligations that the call centre has.

Conclusion

[46] It follows from the foregoing analysis that I am not persuaded that Mr Gibson-Smith has any justiciable claim. I do not think that he can rely on the 2008 understanding to preclude him doing bond work now, I do not think that he has lost his position by redundancy because of the proposal to amalgamate the tenancy and bond lines because that flexibility seems to me implicit in the job description which Mr Gibson-Smith himself had a hand in, and he is not therefore entitled to any redundancy compensation and I am also not satisfied that he has proved the elements of a personal grievance.

[47] It follows from the foregoing that Mr Gibson-Smith's choices are as clear as can be. If he chooses not to challenge this determination, then he needs to engage again with his employer with a view to agreeing on the work that he will do having regard to the determination I have made herein that the 2008 understanding cannot be relied upon now.

[48] It was clear to me from the evidence that MBIE wanted Mr Gibson-Smith to continue working with them, that they valued him as an employee and simply wanted to find a way of keeping him in the organisation doing the work that he seems so well able to perform.

[49] If, on the other hand, Mr Gibson-Smith is not disposed to continue in the employment given those terms, then he has the option of resigning his employment, but in my judgment, as it is clear from this determination, that will not result in his being entitled to redundancy compensation.

Costs

[50] I reserve costs.

James Crichton
Chief of the Employment Relations Authority