

**Attention is drawn to the order
prohibiting publication of
certain information in this
Determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2023] NZERA 39
3156761

BETWEEN	LISA BUCKINGHAM Applicant
AND	THE PRIORY IN NEW ZEALAND OF THE MOST VENERABLE ORDER OF THE HOSPITAL OF ST JOHN OF JERUSALEM Respondent

Member of Authority:	Andrew Gane
Representatives:	Michael Smyth, counsel for the Applicant David Traylor and Barnaby Locke for the Respondent
Investigation Meeting:	26 & 27 October 2022 at Auckland
Submissions and other: information received:	28 October 2022
Determination:	27 January 2023

DETERMINATION OF THE AUTHORITY

Non-publication order

[1] At the investigation meeting Lisa Buckingham sought a non-publication order over any personal information regarding her offer of employment. I am satisfied it is appropriate to make an order under clause 10(1) of the second schedule of the Employment Relations Act 2000 (the Act) that any personal information referencing Ms Buckingham's offer of employment is prohibited from publication.

Employment relationship problem

[2] Ms Buckingham was employed as Territory Manager - Northern Region at The Priory in New Zealand of The Most Venerable Order of the Hospital of St John of Jerusalem (St John) in Manukau. Ms Buckingham had nearly 20 years of service at St Johns in various roles and was well regarded. As a result of an organisational restructure at St John in 2021 the Territory Manager position was to be disestablished.

[3] Ms Buckingham questioned the rationale behind the restructuring and her Territory Manager position being disestablished. She claims St John unjustifiably disadvantaged her by failing to provide adequate information during the restructuring process, including failing to provide her information regarding her redundancy entitlements. Ms Buckingham claims St John disestablished her position making her redundant but acted in bad faith by failing to pay her contractual redundancy entitlements.

[4] Ms Buckingham is seeking remedies of payment of redundancy compensation of 26 weeks salary, calculated in accordance with her individual employment agreement (IEA), and to be awarded compensation for the distress and humiliation she says was caused by the prolonged process and decision to not pay her redundancy. She is also seeking penalties against St John.

[5] St John contend that Ms Buckingham was not disadvantaged by the restructuring process, and that she could have been redeployed to a suitable role that maintained her ongoing employment. St John also states that Ms Buckingham was provided adequate information and was aware of her contractual redundancy entitlements. St John contend that Ms Buckingham left her employment at St John to take up employment with her employer prior to her position being disestablished.

The Authority's Investigation

[6] There were several case management conferences and directions issued prior to the hearing. An issue was raised by Ms Buckingham regarding the disclosure of certain personal documents. This matter was resolved by conditional disclosure of the documents in question and a non-publication order being made.

[7] I investigated Ms Buckingham's claims by receiving a witness statement and other documents from Ms Buckingham. For St John, I heard received evidence and

supporting documents from the District Operations Manager, Mr Glenn Metcalfe, General Manager, Stuart Cockburn, District Operations Manager Pauline Buchanan, and Payroll Manager, Susan Farquhar.

[8] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. In determining this matter, the Authority has carefully considered all the material before it, including all the evidence by the parties and their submissions.

Issues

[9] The issues for resolution were:

- (i) did St John make Ms Buckingham redundant;
- (ii) was Ms Buckingham unjustifiably disadvantaged by St Johns restructuring process and St John not paying her contractual entitlement to redundancy compensation;
- (iv) if St Johns actions were found to have unjustifiably disadvantaged Ms Buckingham what remedies should be awarded considering;
 - (a) redundancy compensation;
 - (b) compensation under s 123(1)(c)(i) of the Act;
- (v) if any remedies are awarded, should they be reduced under s 124 of the Act for any blameworthy conduct by Ms Buckingham that contributed to the situation giving rise to her grievance;
- (vi) if breaches are established are penalties warranted and
- (vii) should either party contribute the cost of representation of the other party?

Background

[10] On 23 March 2021, St John produced a document whereby it proposed reducing ‘spans of control’ across its emergency ambulances response services group (EAS) and to increase the number of full-time equivalent employees it employed. The discussion document included a proposed structure where an additional 82 FTE dedicated managers would be required across the business.

[11] On 12 July 2021, St John issued a change proposal document which commenced a consultation process and proposed that Ms Buckingham's role of Territory Manager would be disestablished.

[12] The change proposal further provided that: "the current district management teams (i.e., Territory Manager, Shift Manager/Supervisor positions) would remain status quo (with the addition of VSM [Volunteer Support Managers] and OSM [Operations Support Managers]) until the respective phases of the rollout had been completed".

[13] Other positions in District Leadership Team roles would also be created including an Area Operations Manager (AOM); an Area Support Manager (ASM) and a Volunteer Support Manager (VSM). These roles were expressed to be the 'leader of leaders' and 'relationship managers. Other roles referred to as 'people managers' were also created, Watch Operations Managers (WOM); and Group Operations Managers (GOM).

[14] Staff were invited to provide their feedback on the change proposal by 9 August 2021. Ms Buckingham provided feedback on 7 August 2021, including asking several questions regarding the change proposal. While Ms Buckingham noted that the timeframe and uncertainty were unsettling, she did not oppose the changes or ask for further information regarding her entitlement to redundancy compensation at this stage.

[15] On 9 September 2021, St John issued its final decision (decision document) regarding the proposed changes to the EAS management structure. This confirmed the Territorial Manager positions would be disestablished and be replaced by the ASM roles until the WOM and GOM roles were appointed. The provisional date for disestablishment of the Territorial Manager positions would be February 2022. For each contestable role there would be an assessment process, first consideration would be those affected by the restructure.

Events leading to the termination of Ms Buckingham's employment

[16] On 27 September 2021, Ms Buckingham wrote to Glenn Metcalfe stating that as her role of Territory Manager would be disestablished, she had received advice that none of the roles suggested for redeployment, or the roles she could apply for, met the definition of 'substantially similar' role. She stated that she believed she was entitled to redundancy compensation in accordance with her IEA. She proposed that she give St

John one month's contractual notice and end her employment by way of redundancy on 22 October 2021.

[17] On 30 September 2021, St John became aware that Ms Buckingham had a new role with New Zealand Blood Service and that her start date would be 15 November 2021.

[18] On 5 October 2021, Mr Metcalfe met with Ms Buckingham and provided a letter dated 4 October 2021 disputing her view that none of the roles created as part of the change process were 'substantially similar' to her present role. He advised her that St John did not support her request to be made redundant and reiterated there was a recruitment/redeployment process to go through and that the Territorial Manager positions would not be disestablished until February 2022. Ms Buckingham instructed her union to negotiate on her behalf on 5 October 2021. Negotiations lasted until 13 October 2021 without resolution.

[19] On 6 October 2021, Ms Buckingham called Mr Metcalfe and advised him that she was preparing her handover for 22 October 2021, and whether she could send work to another colleague who would be taking over her role as Territory Manager. Mr Metcalfe said he again confirmed St John had not accepted her proposal to end her employment by way of redundancy. He again reiterated the Territorial Manager positions would not be disestablished until February 2022 and there were other roles available to her.

[20] On 13 October 2021, Mr Metcalfe met with Ms Buckingham to discuss her plans regarding her employment with St John considering her email dated 27 September 2021. Mr Metcalfe stated that at this meeting, Ms Buckingham advised him that she would be finishing her employment on 22 October 2021.

[21] On 15 October 2021, Mr Metcalfe followed up with Ms Buckingham to request that, if she was finishing her employment on 22 October 2021, could she confirm this in writing by email so he could make plans going forward.

[22] On 15 October 2021, Ms Buckingham responded through her representative raising a personal grievance claiming St Johns had committed a breach of good faith in its dealings with Ms Buckingham and that St John was effectively constructively dismissing her. The letter stated: "if St John fails to give Lisa notice of termination and

pay her redundancy compensation, then Lisa will have no option to resign since she will not perform a role to which she has not agreed". The letter went on to advise that Ms Buckingham would be applying to the Authority for a determination that she was entitled to redundancy compensation pursuant to clause 22 of her IEA.

[23] Due to the communications from Ms Buckingham that she was finishing her employment with St John on Friday 22 October 2021, Mr Metcalfe arranged for another staff member Zane Chapman, to cover Ms Buckingham's role should she not return to work on 26 October 2021 (25 October 2021 was a public holiday). During the week of 18 October 2021, Ms Buckingham's engaged with Mr Chapman in the handover process.

[24] On 22 October 2021, Mr Metcalfe emailed Ms Buckingham's representative stating that St John did not accept his views and expressed in his letter of 15 October and in his view, there was no factual basis to support a claim of constructive dismissal or breach of good faith. He further stated Ms Buckingham's claim to redundancy was premature as there were options available to her and her role had not yet been disestablished. He reiterated he considered Ms Buckingham a part of the team.

[25] Ms Buckingham's representative emailed Mr Metcalfe that evening, to advise that his client had "handed over her role and work tools to her replacement". He also advised that Ms Buckingham was "treating her employment at an end on the grounds of redundancy" and that "she has no role to go to on Tuesday morning".

[26] Mr Metcalfe emailed Ms Buckingham's representative advising that he wanted to give Ms Buckingham the opportunity to reconsider her decision to resign from her employment with St John, but if Ms Buckingham chose not to return to work the following week, he would treat that as meaning that she had decided to resign from her employment, and her last day would be 29 October 2021.

[27] On 26 October 2021, Ms Buckingham's representative replied to advise that Ms Buckingham had not resigned, and that she had "merely expressed her lawful election to receive redundancy compensation". Ms Buckingham's representative stated that it was Ms Buckingham's "decision to receive redundancy compensation rather than accept redeployment into a role which is not substantially similar".

[28] On 28 October 2021, Mr Metcalfe replied to Ms Buckingham's representative to advise that as Ms Buckingham was not resigning from her employment, she would be

expected to return to work on 3 November 2021, otherwise he would need to consider whether her employment could be deemed to have ended pursuant to her IEA.

[29] During this time because of an alleged administrative error, payroll had processed Ms Buckingham's final pay through the St John payroll system. Ms Buckingham logged into her online personal file and saw that her personal details recorded that her role as Territorial Manager had finished on 22 October 2021.

[30] On 28 October 2021, Ms Buckingham's representative responded to advise that Ms Buckingham's employment had been terminated on the grounds of redundancy on the basis that St John had paid Ms Buckingham's final pay including her holiday pay entitlement and had instructed her to hand over her work tools to her replacement.

[31] Mr Metcalfe's evidence was that this was an administrative error by the payroll team following Ms Buckingham's own advice to payroll that she was ending her employment on 22 October 2021. Ms Buckingham confirmed in evidence that she had disclosed to her friend in payroll that she was leaving St Johns on redundancy grounds.

[32] During this time, Ms Buchanan who was the District Operations Manager had also disclosed to the payroll manager that Ms Buckingham had found new employment and was leaving St John. Ms Buchanan was a nominated referee for Ms Buckingham in respect of her new employment.

[33] It is accepted there was no formal communication to payroll regarding Ms Buckingham's termination of employment and that the usual termination procedure through the online portal was not received by payroll. Although the HR Advisory Manager had advised payroll to continue paying Ms Buckingham beyond 22 October 2021, the miscommunication meant that they still thought Ms Buckingham was ending her employment and proceeded to issue her final salary payment by mistake.

[34] Mr Metcalfe invited to return to work and repay her annual holiday entitlements that had been mistakenly paid to her.

[35] Ms Buckingham declined to return to work

The Authority's view of the employment relationship problem

[36] Ms Buckingham argued that her IEA stipulated that she was entitled to redundancy compensation in the event of termination as a result of redundancy. Clause 22 of her IEA states that redundancy occurs where the 'position is no longer required'. The IEA also provides that the entitlement to redundancy compensation is not available where Ms Buckingham has been offered a 'substantially similar' position within St John. The term 'substantially similar' is defined in the clause. Ms Buckingham submits that neither the AOM or WOM/GOM roles met the definition because they were not broadly comparable, nor did they offer similar remuneration.

[37] St Johns redundancy policy states that redundancy "will apply when a position is formally disestablished, no suitable redeployment options are available to the jobholder". Ms Buckingham argued that the outcome document sets out that her role had been disestablished and the nature of her employment had fundamentally changed. She was no longer a permanent employee, and it was simply a matter of timing when her employment came to an end (in February 2022). She stated her employment as a Territory Manager became fixed term or temporary.

[38] Ms Buckingham argued the redundancy policy placed an obligation on St John to give Ms Buckingham notice of termination when those conditions in her IEA had been met and that St Johns breached the policy as no such notice was given. Ms Buckingham took issue with the fact that , St John chose to delay the giving of notice until at the earliest February 2022 or longer depending on St John's recruitment process and claimed this disadvantaged her as she was not consulted on the extension of the notice period.

[39] Ms Buckingham submits that St Johns in deciding to disestablish her role and not offering her any 'substantially similar' role, had a duty to provide notice of termination to her. She argued St John could not require her to work longer than a reasonable period beyond their notice period without her agreement.

[40] When being examined by myself Ms Buckingham agreed with the proposition that she had resigned with four weeks' notice by virtue her proposal letter of 27 September 2021 and believed that she felt she was able to do so as the final decision document disestablished her position of Territorial Manager.

[41] Ms Buckingham submitted that her employment had been terminated on the grounds of redundancy on the basis that St John had paid her final pay including her holiday pay entitlement. In the circumstances I accept and find that the payment of Ms Buckingham's final pay was made in error and that her role at St John continued to exist at the time of her leaving St John.

[42] Unfortunately for Ms Buckingham, at the time of giving notice, her position at St John had not been disestablished, nor had St Johns progressed to making decisions of offering her any alternative positions under the new structure. Her role remained in place until at least February 2022 as part of St Johns business continuity during the restructuring process. Under clause 6.21 of the redundancy policy Ms Buchanan was not entitled to redundancy compensation as her conduct in leaving her employment and her correspondence to St John advising that she had been made redundant, only confirms from St John's position that it was reasonable to assume that she had, for all intents and purposes, elected to leave her employment with St John to take up employment with a new employer.

Outcome

[43] Prior to the disestablishment of Ms Buckingham's role in February 2022, or the commencement of any appointment process, Ms Buckingham through her communications with St John and actions elected to end her employment with St John. Ms Buckingham had accepted a new role with another employer. Redundancy normally applies when an employee's role is terminated by an employer, not through the course of conduct of an employee. I find that St John did not make Ms Buckingham redundant under her IEA and Ms Buckingham was not entitled to any redundancy compensation payment.

[44] I accept Ms Buckingham was upset that as a long serving and loyal employee, she was not paid her redundancy entitlement. There were some minor procedural inadequacies in providing information in a timely manner while St John was progressing the restructuring process, however I do not find that Ms Buckingham was unjustifiably disadvantaged by St Johns actions. Ms Buckingham throughout the restructuring process was acutely aware of her contractual right to redundancy.

[45] As I have found Ms Buckingham was not dismissed on redundancy grounds, and Ms Buckingham was not unjustifiably disadvantaged by St John, there is no basis to award a penalty against St John.

Costs

[46] Costs are reserved. If a determination of the Authority is required on costs, St John may lodge a memorandum within 14 days of the date of this determination and Ms Buckingham would then have 14 days from the date of service to lodge a memorandum in reply. No submissions on costs will be considered outside this timetable unless prior leave has been sought.¹

Andrew Gane
Member of the Employment Relations Authority

¹ For further information about the factors considered in assessing costs, see:
www.era.govt.nz/determinations/awarding-costsremedies/#awarding-and-paying-costs.