IN THE EMPLOYMENT COURT
WELLINGTON

[2010] NZEMPC 67
WRC 6/09

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	WILLIAM ALEXANDER PORTEOUS Plaintiff
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF BUILDING AND HOUSING Defendant

Hearing: 17-20 August 2009 (4 days)
(Heard at Wellington)

Appearances: Michael Quigg and Tim Sissons, counsel for the plaintiff
Les Taylor and Megan Richards, counsel for the defendant

Judgment: 26 May 2010

JUDGMENT OF JUDGE A A COUCH

---

[1] Mr Porteous was employed in the Department of Building and Housing (the Department). In 2008, the branch of the Department in which he was employed was restructured. His position was disestablished. He was offered reassignment to a new position which he declined. The principal issue is whether, in these circumstances, Mr Porteous was entitled to payment of benefits under the surplus staffing provisions of his individual employment agreement which were expressed to apply if the Department was "unable to relocate" him.

[2] This issue raises questions about the interpretation and application of the employment agreement between the parties. The answers to those questions lie very

largely in the particular wording and context of the agreement in question but there was also significant argument about the principles of interpretation to be applied.

[3] When Mr Porteous' employment came to an end, the Department refused to pay him any of the surplus staffing benefits. Mr Porteous immediately lodged proceedings with the Employment Relations Authority seeking payment of those benefits. He also pursued a personal grievance alleging that he had been disadvantaged in his employment by the length of time he was retained in employment after his position was disestablished doing reduced or alternative duties.

[4] The Authority took the view that Mr Porteous' personal grievance raised an important question of law which might affect a large number of public sector employees. At the joint request of the parties, the Authority removed the whole of the matter into the Court for hearing at first instance on that ground.

[5] In addition to the claims referred to above, the statement of claim also sought the imposition of penalties on the Department for breach of an employment agreement and breach of good faith. These were eventually withdrawn in the course of final submissions.

Facts

[6] At the hearing, a substantial amount of evidence was led and witnesses were extensively cross examined. Although I have had regard to all of that evidence, it is not necessary to record a great deal of it. I set out now the sequence of events, about which there was little dispute. In the course of my discussion of the issues, I will also refer to other specific aspects of the evidence.

[7] Mr Porteous' career has been in architecture and building science. He has a PhD in architecture and, for many years, taught building construction in the School of Architecture at Victoria University. In 1998, he was appointed as Chief Executive of the Building Industry Authority (the BIA). Following public disquiet over the BIA's role in relation to leaky buildings, Mr Porteous stepped down from that position in March 2003 but remained with the BIA as Chief Policy Advisor. At the end of November 2004, the BIA was dissolved and its functions transferred to the

Department. Mr Porteous then took up a position in the Department. Initially, his position was that of Chief Policy Advisor but, in September 2007, it was renamed Senior Advisor – Building Quality.

[8] That position was in the Building Quality branch of the Department and, apparently reflecting his previous senior role in the BIA, Mr Porteous reported to the Deputy Chief Executive Building Quality. In terms of his day to day work, however, Mr Porteous was part of the determinations group within the Building Quality branch.

[9] In July 2006, the Department offered Mr Porteous a new individual employment agreement. While the terms of the agreement were generally acceptable to Mr Porteous, he sought confirmation that his previous service with the BIA would be recognised for the purposes of service related entitlements. He also sought clarification of two other points. In a letter to Mr Porteous dated 11 August 2006, the General Manager, Building Controls said:

> For the purposes of the calculation of all service related entitlements your employment is continuous from 1 March 1988.

[10] Having received that assurance, Mr Porteous signed the employment agreement. It is the terms of that agreement which are at issue in this case. The relevant parts of it will be set out later in this judgment.

[11] In September 2007, David Kelly took up the position of Deputy Chief Executive, Building Quality. In mid 2008, Mr Kelly began developing a proposal for restructuring the Building Quality branch of the Department. That proposal went through several drafts before it was approved for submission to staff by the Chief Executive of the Department, Katrina Bach. Ms Bach gave that approval on 25 July 2008 and the proposal was presented to staff on 12 August 2008.

[12] The proposal, entitled "Building for the Future", identified 16 staff whose positions were expected to change little and whom it was proposed be reconfirmed into new roles. A further nine staff were identified as "unable to be reconfirmed". One of those was Mr Porteous. In the business case he put to Ms Bach, Mr Kelly

had described Mr Porteous' position as "anomalous" and identified Mr Porteous personally as likely to be redundant.

[13] The proposal also identified vacant roles and contemplated the establishment of some new roles to which staff not reconfirmed could seek reassignment.

[14] Included in the proposal was a detailed timeline which required staff feedback to be provided by 25 August 2008 and for a final structure to be communicated to staff on 8 September 2008. Individual meetings with affected staff were to be held by 12 September 2008, interviews for possible reassignment completed by 26 September and reassignment appointments made by 30 September 2008. In a visual presentation of the proposal also given to staff on or about 12 August 2008, this timetable had the additional entry that on or by 1 October 2008, the new Building Quality Branch structure would be in place.

[15] On page 11 of the proposal was the following paragraph:

> **Change Management Protocol**
>
> The Change Management Protocol describes the principles that will be applied during the change process. It is currently in draft form, pending your feedback, and is attached as **Appendix 4.**

[16] The appendix referred to was a two page document containing detailed provisions relating to the restructuring process.

[17] Following feedback from staff, the proposal remained effectively unchanged. It was confirmed and implementation of it authorised by Ms Bach on 9 September 2008. Meetings were subsequently held with staff to tell them of this decision and to explain the process of implementation. Individual letters informing staff of the effect on them personally went out on 17 September 2008. The letter to Mr Porteous included the following passage:

> Please find enclosed the presentation from today's meeting, which includes the organisational chart for the final confirmed structure.
>
> This means that your substantive role of Senior Advisor Building Quality will cease to exist under the new structure from 1 October 2008 and you are therefore an 'affected person' in terms of your employment agreement.

> In line with your employment agreement I will make every reasonable effort to consider you for other suitable roles within our Branch and the Department. As reconfirmation is not an option, I will in the first instance consider reassignment options.
>
> …
>
> If an employee is offered a suitable reassignment and chooses not to accept it, this will be deemed a resignation by the employee and no compensation for redundancy shall be payable.

[18] The "presentation" provided with the letter was a series of PowerPoint screens, one of which was:

> **Change Management Protocol (CMP)**
>
> - Feedback on the draft CMP received from 2 people
> - Respondents were seeking a change to allow BQ staff to apply for any role rather than affected staff being considered first
> - Feedback from the PSA was positive – no changes sought
> - No changes to the Draft CMP as a result of the feedback

[19] Mr Kelly identified two positions to which he suggested Mr Porteous might seek reassignment. On 18 August 2008, Mr Porteous asked to be considered for both of those positions and for three other positions within the Branch as well. He was subsequently interviewed for four of those positions between 30 September 2008 and mid October 2008.

[20] In January 2008, Mr Porteous had expressed interest in appointment to the position of Assistant Secretary General of the International Council for Research and Innovation in Building and Research (the CIB). This is an international body based in the Netherlands. After an initial false start, the position was advertised again in July 2008 and Mr Porteous confirmed his interest. Subsequently, while this restructuring process was going on in the Building Quality branch of the Department, Mr Porteous continued to pursue appointment to the position at the CIB. This included meeting with the CIB Secretary General, Wim Bakens, at a conference in Melbourne beginning on 23 September 2008. Following that meeting, Mr Porteous was identified as the preferred candidate for the CIB role but his appointment was subject to agreement of the terms of appointment and to a work

permit being obtained. Provided these matters could be attended to promptly, it was anticipated Mr Porteous might start the job with CIB on 1 January 2009.

[21] In the course of the interviews conducted with him in late September and October, Mr Porteous told Mr Kelly that he had applied for an overseas position but did not subsequently advise him of progress.

[22] After his position was disestablished on 1 October 2008, Mr Porteous remained working in the determinations group but, as time went on, he had less and less of his former work to do and was asked to do some alternative work.

[23] Mr Kelly met with Mr Porteous on 22 November 2008. At that meeting, Mr Kelly told Mr Porteous that he had not been selected for reassignment to any of the positions in which he had expressed interest. Understandably, Mr Porteous saw this as the end of the restructuring process as far as he was concerned and anticipated that he would then be made redundant. To this end, he asked Mr Kelly to have a calculation done of his entitlement under the surplus staffing provisions of his employment agreement. In fact, several such calculations had been done in the course of developing the restructuring proposal but Mr Kelly did not tell Mr Porteous this or provide any of those figures to him. Rather, Mr Kelly embarked on a process of trying to locate or create a role for Mr Porteous elsewhere in the Department.

[24] Mr Kelly began that process on 5 November 2008 by sending a memorandum to the Deputy Chief Executives responsible for other branches of the Department asking whether they had any possible openings for Mr Porteous or for two other staff of the Building Quality department who had not been reconfirmed or reassigned. Mr Kelly wrote to Mr Porteous on 7 November 2008 telling him that this process was underway and that he expected to complete it by 14 November 2008.

[25] At about this time, Mr Kelly met with Ms Bach. By then, it had been realised that initial calculations of the cost of severance payments to Mr Porteous if he were made redundant had been understated. Possibly for this reason, the potential cost of redundancy was a significant factor in the discussions between Mr Kelly and Ms

Bach in which Mr Kelly was urged to make every possible effort to find an alternative position for Mr Porteous.

[26] Ms Bach suggested specifically to Mr Kelly that he explore the possibility of a position in the Sector Trends and Performance branch. This was a new branch which was then in an unusual position. The branch had been created in May 2008 and an appointment had been made to the position of Deputy Chief Executive to manage it. That person withdrew shortly before he was due to take up the role on 15 September 2008. To fill the gap in the interim, the Deputy Chief Executive Sector Policy, Suzanne Townsend was appointed as acting head of the new branch. At that stage, five positions in the Sector Policy department had been identified for transfer to the new department but those transfers did not take place. The branch had no staff and, as only acting head of the department, Ms Townsend was reluctant to make any appointments.

[27] In these circumstances, Mr Kelly approached Ms Townsend about creating a position for Mr Porteous in the Sector Trends and Performance branch. She was initially reluctant to get involved but eventually agreed that there might be a role as an advisor on technical issues. At Mr Kelly's instigation, a position description was drafted for such a role. In a letter dated 21 November 2008 Mr Kelly offered Mr Porteous reassignment to this new role and invited his comment on the draft position description. By that time, alternative roles had also been found or created within the Building Quality branch for the two other staff who had not previously been reconfirmed or reassigned.

[28] Mr Porteous responded through his solicitor, Mr Quigg, in a letter dated 1 December 2008. That letter did not address the proposed position description. Rather, Mr Quigg suggested that it was too late for the Department to make an offer of reassignment and made a claim on Mr Porteous' behalf for payment of redundancy compensation. A personal grievance was also raised.

[29] The Department responded through its solicitors on 3 December 2008 and Mr Quigg replied on 5 December 2008. In that letter, he suggested that Mr Porteous lacked the particular skills required for the role described in the draft position

description and that it was therefore not an appropriate alternative position. Mr Quigg expanded on that proposition in a further letter dated 15 December 2008 in which he provided detailed feedback on each aspect of the draft position description.

[30] The Department responded by redrafting the position description to closely match the particular skills and experience Mr Porteous had. That revised position description was provided to Mr Porteous with a letter from Mr Kelly dated 19 December 2008 which renewed the offer of reassignment and included the statement:

> As previously advised, the Department considers the Senior Advisor Sector Trends and Performance position to be suitable for your reassignment. This reassignment offer remains open for acceptance by you until 23 January 2009. If you do not accept this offer, and if no other redeployment occurs by 23 January 2009 then this would mean that although your employment would end, you would not be entitled to the payments under clause 15 (surplus staffing) of your employment agreement.

[31] Delays in processing the application for a work permit meant that the CIB position remained uncertain up to the end of 2008 and continued to be uncertain throughout January 2009. On the deadline set by the Department for acceptance of the revised new position, 23 January 2009, Mr Quigg wrote again to the Department's solicitors seeking an extension of time to consider the offer. In doing so, he relied principally on an earlier request for information under the Official Information Act and the Privacy Act which had not then been satisfied. The Department responded by extending the time for Mr Porteous to accept the revised offer until 25 February 2009.

[32] In early February 2009, a work permit for Mr Porteous was approved by authorities in the Netherlands. He and Mr Bakens then negotiated the final terms on which Mr Porteous would be employed by CIB. This process took nearly three weeks. In the meantime, the parties met on 5 February 2009 to discuss their differences and, on 9 February 2009, the Department provided Mr Porteous with most of the information he had requested. Despite these events, Mr Porteous did not respond to the offer of the revised position. Rather, through Mr Quigg, he focussed on collateral issues and threatened the issue of proceedings.

[33] By 17 February 2009, all but one minor issue had been resolved between Mr Porteous and CIB and he knew with certainty that he would be taking up the CIB position. Mr Porteous then instructed Mr Quigg to write a letter to the Department's solicitors rejecting the offer of reassignment to the revised position and bringing his employment to an end. The final paragraph of that letter was:

> As our client's position was made redundant as at 1 October 2008 and there has been no reasonable re-assignment offer made to him during the intervening four and a half months, he considers it is now time to bring his employment to an end and for him to receive his contractual entitlements. He proposes ceasing that employment at the end of the month ie Friday 27 February 2009 (5 months after his position disappeared), but is prepared to work with the management team to ensure that there is an orderly transition of the other duties that he has been attending to on behalf of the Department during this intervening period. Please advise in due course as to whether this is acceptable to your client.

[34] Mr Kelly replied directly to Mr Porteous in a letter dated 24 February 2009 in which he said:

> We note your decision to resign from your employment, effective Friday 27 February 2009. The Department is willing to accept your resignation on this basis, and accordingly your last day of work will be Friday 27 February 2009.
>
> We note that you have not given sufficient notice of termination as required by clause 8.1 of your employment agreement, but the Department is prepared to waive the balance of your notice period and will not require you to work the outstanding notice period.

[35] Mr Porteous began his employment with CIB on 1 April 2009.

[36] The Department did not proceed with the Sector Trends and Performance branch and the revised position offered to Mr Porteous was never filled.

Issues

[37] The most important issue is whether, in the circumstances outlined above, Mr Porteous was entitled to payment of redundancy compensation and cessation leave provided for in the surplus staffing clause of his employment agreement. That issue turns very largely on construction of relevant documents.

[38] The only other remaining issue is whether Mr Porteous was disadvantaged in his employment by the unjustifiable action of the Department. The action of the Department alleged to be unjustifiable was retaining Mr Porteous in employment for an undue period of time after his position had been disestablished. The disadvantage was said to be that Mr Porteous was provided with insufficient or inappropriate work to do.

Documents

[39] In addition to the extracts from documents already reproduced in the summary of events above, consideration of the principal issue requires parts of three other documents to be taken into account. They are set out below.

Employment Agreement

[40] The applicable employment agreement between the Department and Mr Porteous contained the following provisions relevant to this case:

> **2 Variations**
>
> 2.1 Any variations to this agreement shall be mutually agreed between the parties and be in writing.
>
> **15 Surplus Staffing Provisions**
>
> 15.1 Where the Employee's position ceases to exist the following shall apply:
>
> (a) In the first instance every reasonable effort will be made by the Department to relocate the Employee within its operations. Other options may be considered on a case by case basis.
>
> (b) Where the Department is unable to relocate the Employee, redundancy compensation payments shall be made on the following basis:
>
> (i) …
>
> (ii) If the Employee has more than 12 months service:
>
> | *Service* | *% of total remuneration for the preceding 12 months* |
> |---|---|
> | 1 year | 25% |

2-7 years	4%
8-15 years	5%
16-20 years	3.5%

(iii) …

15.5 The maximum length of service that will be recognised by the Department for the purpose of calculating redundancy compensation is 20 years.

15.7 For the purposes of these provisions, service shall mean current continuous service with the Department or its predecessor.

15.8 Cessation leave.

(a) will be paid in accordance with the following for employees with more than 5 years' continuous service.

(b) for the purposes of cessation leave, service means current continuous service with the Department of Building and Housing or Public Service.

(c) Cessation Leave for employees with less than 20 years service

Qualification Required	**Amount of Cessation Leave**
Completion of 15 years service	65 days

…

19 Human Resource Policies

19.1 The Employee agrees to abide and be bound by all provisions set out in any Manual, Policy, procedures document or the Performance Management System which includes but it not limited to the Human Resources Policy and Procedures Manual, the Department's Remuneration Policy, the Employee's Performance Agreement, and the Department's Code of Conduct. The Department retains the right to vary its manuals, codes and policies or to introduce new ones, and the right to amend such documents is at the Department's sole discretion. The Department will endeavour to notify the Employee of all significant changes in such documents.

22 Entire Agreement

22.1 The terms and conditions set out in this agreement together with any covering letter and any attachments to that letter, shall represent all of the terms and conditions of employment (other than matters that are contained in any Act of Parliament and that are applicable to the Employee) and shall supersede all previous terms and conditions of employment.

HR Policies

[41] The Department's Human Resources Policies Manual (the HR Policies) contained provisions relating to the management of change including the following:

> **1.2 Standing of the Policy**
>
> This document sets the framework for the management of change and applies to all directly affected permanent employees…
>
> **2 Policy**
>
> The Department may from time to time make appropriate changes to its structure and processes as required. The primary focus of managing change is to acquire and retain talent and ensure continuation of service delivery, business effectiveness and efficiency.
>
> Staff will be appropriately consulted on changes that directly affect them. The Department proposes to minimise any serious consequences resulting from loss of permanent employment as far as practicable by redeployment and/or relocation and/or retraining. When these options are not possible, a staff member may be declared surplus.
>
> **3 Guidelines**
>
> **3.3 Reassignment**
>
> Following reconfirmation, reassignment will apply. ***Reassignment*** means placement in a different though suitable vacancy in a new structure or agency or in an existing agency. The objective is to place the maximum number of affected employees into positions by matching individual skills with positions that require similar skills.
>
> A ***suitable vacancy*** should not involve so significant a change in duties as to be unreasonable, and should take into account the employee's skills, abilities and potential to be retrained. The employee should be capable of doing the job immediately, or following appropriate training.
>
> The new position must use or build on existing skills, competencies and aptitudes.
>
> **3.3.1 Proposed Reassignment**
>
> An employee who declines an offer of reassignment to a suitable vacancy is deemed to have resigned from the Department.
>
> **3.4 Surplus Staff**
>
> Employees not placed by confirmation or reassignment are deemed as surplus. Surplus employees and their authorised representatives will be notified of the specific options available to them from those listed below, and given notice of termination in accordance with their employment agreement.

Redundancy compensation will only be available as a last resort. Options may be sued singly or in combination.

3.4.1 Attrition

3.4.2 Voluntary Transfer

3.4.3 Lower Level Position

3.4.4 Retraining

3.4.5 Special Leave With or Without Pay

3.4.6 Job Search

3.4.7 Alternative Employment Arrangements

3.5 Redundancy Compensation

Redundancy compensation may be considered only if the above options have been exhausted.

If redundancy compensation is to be paid, it is to be calculated in accordance with the relevant employment/agreement.

Change Management Protocol

[42] Attached to the restructuring proposal put to staff of the building quality branch in August 2008 was an appendix headed "DRAFT Change Management Protocol". That document included the following provisions:

> The primary focus of managing this change is to retain people in jobs and ensure business effectiveness and efficiency, which will be achieved through the maximum utilisation and development of the skills and experience of current employees.
>
> …
>
> **Impacted staff** are those who are expected to experience little or no change as a result of the proposed changes and are able to be reconfirmed into a role.
>
> **Affected staff** are those staff who are unable to be reconfirmed into a role**.**
>
> The change management protocol involves the following steps:
>
> 1. **Reconfirmation** of employees into roles that are the same or nearly the same as the role the impacted employee currently does.
>
> 2. **Reassignment** will apply for employees not reconfirmed into roles and will be made with regard to the protocol below around reassignment.

3. Once the reconfirmation and reassignment process is complete vacant roles will be advertised and will go through a recruitment process. The recruitment process for these roles may be opened up to external candidates at this stage. All staff may choose to apply for these roles.

4. Every effort will be made to **redeploy** affected staff within the Department.

5. Affected employees who are not placed by reconfirmation or reassignment and have not been successful in their application for a vacant position are deemed as surplus to requirements and will be able to access the **surplus staffing provisions** in their employment agreement. Employment agreements may differ therefore each situation will be dealt with on an individual basis. Options may include redeployment within the Department and redundancy compensation.

Reconfirmation

The criteria for reconfirmation is:

- The new role description is the same or nearly the same as the role the affected employee currently does;

- The salary is the same

- The terms and conditions, including career prospects are no less favourable; and the location is the same or in the same vicinity.

…

Where an employee meets the criteria and does not wish to be reconfirmed, they will be required to resign from their role.

Reassignment

Where an impacted staff member is not reconfirmed, they become affected and reassignment will apply. The objective is to place the maximum number of affected employees into roles by matching individual skills with positions that require similar skills. Cases will be dealt with on an individual basis and each employee will be consulted prior to reassignment.

The criteria for reassignment are:

- Reassignment will take into account the employees level of work, skills, experience, and expertise and what additional training they will require to be successful in the role. In agreeing to reassignment an employee may be required to undertake on the job training and/or attend training courses.

- Reassignment can only be applied to roles with the same level of work or below the level of work of the current role of the employee. Employees can not be reassigned into roles above their current level

> of work. For example, Advisors cannot be reassigned into Senior Advisor roles.
>
> - If there is more than one suitable candidate for reassignment to a role a closed selection process will be applied between those candidates. Unsuccessful affected staff will continue to have other reassignment options explored.
>
> …
>
> Where reassignment is not accepted by an employee or there are no other suitable reassignment options then the employee will be given one months notice to the effect and be able to access the surplus staffing provisions outlined in their employment agreement.
>
> **Surplus Staff**
>
> Affected employees not placed by reconfirmation or reassignment are deemed as surplus to requirements. Every effort will be made to redeploy affected staff to another role within the Department. Where no redeployment options are available then the employee will be given one months notice to the effect and be able to access the surplus staff options outlined in their employment agreement.
>
> …

Redundancy compensation

[43] Whether Mr Porteous was entitled to redundancy compensation turns on which documents were applicable to his situation. The employment agreement between the parties obviously applied. What is less certain is whether the HR Policies and/or the Change Management Protocol applied and, if it was both, the extent to which one prevailed over the other. A further issue is the effect on the employment agreement of any inconsistent provisions of the HR Policies or the Change Management Protocol.

[44] Before discussing those issues, it is necessary to make a finding of fact about the status of the Change Management Protocol. When it was incorporated into the restructuring proposal presented to staff on 12 August 2010, the protocol was prominently labelled "DRAFT" and was said to be subject to feedback. Following feedback from staff, the proposal as a whole was adopted and presented again to staff as an operative plan for change. That included the statement that there were "No changes to the Draft CMP as a result of the feedback". This effectively confirmed that what had been a draft document was to be an operative document. As

set out in the proposal, "The Change Management Protocol describes the principles that will be applied during the change process."

[45] Turning to the relationship between the key documents, this is largely governed by clause 19 of the employment agreement. That clause effectively incorporates into the employment agreement the obligations imposed on employees by the Department's human resources policies and other documents referred to.

[46] Mr Quigg submitted that clause 19 could not apply to the HR Policies because they predated the employment agreement and were excluded by the "entire agreement" provision in clause 22.1. I do not accept that submission. Clause 19 is not limited in its terms to subsequent policies and the ordinary meaning of the words used includes documents which existed when the employment agreement was concluded as well as those which subsequently came into effect. Because the obligations in those documents are imported into the agreement by clause 19, they form part of it and are therefore not excluded by clause 22.1.

[47] Mr Taylor sought to persuade me that the Change Management Protocol was not binding on the parties. He submitted that "[t]here is no evidence of the plaintiff and the defendant agreeing in writing that the Change Management Protocol would operate as a binding variation to the employment agreement (which is a legal requirement if it is to be treated as having that effect)." This was a reference to clause 2.1 of the employment agreement. I do not accept this submission either. Clause 19 of the employment agreement records that "[t]he Department retains the right to vary its manuals, codes and policies or to introduce new ones, and the right to amend such documents is at the Department's sole discretion." The effect of that sentence is that new policies promulgated by the Department did not need the agreement of Mr Porteous to be effective and binding on him by operation of clause 19.

[48] As a matter of interpretation of the employment agreement and its application in this case, I find that both the HR Policies and the Change Management Protocol were within the scope of clause 19 of the employment agreement.

[49] Mr Taylor's second submission was that the Change Management Protocol had a lesser status than the HR Policies. He submitted that "[t]he Change Management Protocol describes the principles which will be followed in implementing the Change Management process. It is necessarily descriptive and informative rather than prescriptive."

[50] I do not accept that submission. The Change Management Protocol and the HR Policies on management of change were very similar in form and content. Indeed, much of the wording used in the Change Management Protocol is identical to that used in the HR Policies and was, I infer, copied from that source. The two documents both define a sequential process of allocating staff to positions by reconfirmation and then reassignment. They also both define the circumstances in which an employee who is not placed in a role will have access to the surplus staffing provisions contained in individual employment agreements. Although their content differs in some critical respects, the purpose of the two documents is the same; to govern the process and outcomes of a restructuring exercise carried out by the Department. To that end, they are equally prescriptive and neither can be characterised as superior in nature to the other.

[51] Because the HR Policies and the Change Management Protocol differ in some critical respects and are, in those areas, inconsistent with each other, it is necessary to decide which is to prevail where they conflict. Other than the submission I have just rejected, Mr Taylor did not directly address this issue in his submissions. Rather he suggested that, on the issues of greatest importance, the Change Management Protocol was silent. On that basis, he submitted "[t]o the extent that it is silent on any aspect of the process then the terms of the contract (including the [HR Policies]) apply. It must be read in the context of the employment contract. To the extent there is any inconsistency between it and the contract it cannot operate so as to override, or vary, the contractual provisions." While I accept the submission that obligations imported into the employment agreement under clause 19 could not displace express provisions of that agreement, I do not accept Mr Taylor's suggestion that the Change Management Protocol was silent on the key issues.

[52] In his submissions, Mr Quigg directly addressed the issue of conflict between the HR Policies and the Change Management Protocol. He noted that the Change Management Protocol was specific to the restructuring being undertaken in September 2008 whereas the HR Policies were of general application. He submitted that, where there was a conflict, the specific ought to be preferred over the general. While I accept that there is some force in that submission, the more convincing point is that clause 19 itself specifically allows the Department to vary its policies and to introduce new ones. I find that, to the extent that the HR Policies and the Change Management Protocol were in conflict on any issue in the September 2008 restructuring, the Change Management Protocol must be regarded as having varied the HR Policies for the purpose of that restructuring.

[53] In the employment agreement, the provision directly governing Mr Porteous' claim to redundancy compensation was clause 15.1. Paragraph (a) requires the Department to make "every reasonable effort to relocate the Employee within its operations." On the evidence, I find that the Department discharged that obligation.

[54] The critical and more controversial aspect of clause 15.1 is paragraph (b)

> (b) Where the Department is unable to relocate the Employee, redundancy compensation payment shall be made…

[55] Mr Quigg submitted that the words used should be given their everyday meaning and that, if this was done, the interpretation and application of this provision was straightforward. The Department was unable to relocate Mr Porteous because there was no offer and acceptance of an alternative position. That being so, Mr Porteous became entitled to payment of redundancy compensation calculated in accordance with the contractual formula.

[56] Mr Taylor made a series of submissions in support of a different interpretation of this provision. He argued that it was implicit in paragraph (b) that, if the employee refused to accept an offer of relocation to a suitable alternative position, it could not be said that the Department was unable to relocate the employee.

[57] In support of this proposition, Mr Taylor submitted that the principles applicable to the construction of employment agreements were essentially the same as those applicable to contracts generally. Relying on the decision in *Boat Park Limited v Hutchinson & Findlay,*[1] he suggested that this must be a purposive approach giving effect, as far as possible, to the "reasonable or presumed intention of the parties". *Boat Park* was, of course, a commercial case and this Court must be cautious in directly applying principles established in commercial cases to employment agreements. Provided the special nature of employment agreements is recognised and given effect, however, those principles are a useful and important source of guidance.

[58] Mr Taylor also referred me to the recent decision of the Privy Council in *Attorney-General of Belize v Belize Telecom Limited*[2] in which the scope for implied terms was discussed. Giving the opinion of the Board, Lord Hoffman concluded that an implied term is not something which the court adds to a contract. Rather it is something which the Court recognises as part of the contract in the course of the accepted process of construction. He concluded that, when it was suggested that an unexpressed term was implicit in a contract, "[t]here is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?"[3] He then went on to say that the tests formulated in previous cases remained important tools to be used in answering that question. That included the tests formulated in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*[4]. The principles embodied in those tests remain valid but are to be used as aids to determining the essential issue of construction rather than applied cumulatively as a separate exercise.

[59] I have also had regard to the recent decision of the Supreme Court in *Vector Gas Limited v Bay of Plenty Energy Limited*[5]. Introducing a discussion of the legal principles applicable to the construction of contracts, Tipping J said:

---

[1] [1999] 2 NZLR 74 (CA).
[2] [2009] UKPC 10, [2009] 2 All ER 1127.
[3] At [21].
[4] (1977) 180 CLR 266.
[5] [2010] NZSC 5.

> [19] The ultimate objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear. … The language used by the parties, appropriately interpreted, is the only source of their intended meaning. As a matter of policy, our law has always required interpretation issues to be addressed on an objective basis. The necessary inquiry therefore concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. The court embodies that person. To be properly informed the court must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties' minds.

[60] Later in his judgment, Tipping J said:

> [23] … Subject to the private dictionary and estoppel exceptions to be mentioned below, it is fundamental that words can never be *construed* as having a meaning they cannot reasonably bear. This is an important control on the raising of implausible interpretation arguments. Furthermore, the plainer the words, the more improbable it is that the parties intended them to be understood in any sense other than what they plainly say.

[61] In this case, the words used in clause 15.1(b) are plain and unambiguous on their face. The starting point must therefore be that they mean what they say. That meaning is perfectly sensible in the context of an employment agreement. It follows that it is distinctly improbable that the parties intended the provision to have any other meaning.

[62] In advancing his argument that a different meaning should be adopted, Mr Taylor suggested that the words used in paragraph (b) must be seen in light of the duty of good faith imposed by s4 of the Employment Relations Act 2000 and that the HR Policies formed part of the background against which the employment agreement was formed.

[63] Mr Taylor's submissions on the significance of good faith in interpreting paragraph (b) were very brief. He said only that the mutual duty of good faith was part of the context in which paragraph (b) must be interpreted and submitted that it was "implicit in this that if the employee refuses to accept a suitable offer of relocation then it cannot sensibly be said that the Department is unable to relocate the employee." Later in his submissions, Mr Taylor adopted the proposition that an unreasonable refusal to accept a suitable alternative position would be a breach of good faith.

[64] Undoubtedly, the statutory obligation of good faith formed part of the context in which the employment agreement was reached. To displace the plain meaning of the words in clause 15.1(b), however, I would have to be satisfied that the effect of the duty was to oblige employees to accept reasonable offers of alternative employment when their existing positions were disestablished. I see no basis on which to adopt such a construction of the duty of good faith.

[65] Mr Taylor placed much greater emphasis on his submission that the provisions of the HR Policies required a departure from the plain meaning of the words used in paragraph (b). He referred in detail to particular aspects of the change management policies and submitted that the "fundamental philosophy" of the document was that redundancy was to be a last resort in restructuring. Borrowing the language used by Lord Hoffman in the *Belize Telecom* case, Mr Taylor submitted that a refusal by an employee to accept a reasonable offer of relocation was an event not contemplated by paragraph (b) and therefore should be dealt with by implication.

[66] I accept that Mr Taylor's analysis of the HR Policies is arguably correct. I also accept his proposition that, as the policy was in effect in 2006, it was part of the context in which the employment agreement was concluded. I do not accept, however, that this was likely to be a factor operating on the parties' minds when the employment agreement was made. I also do not accept that the existence of such policies provides sufficient reason to conclude that the parties to the agreement intended the words of clause 15.1(b) to have other than their plain meaning.

[67] In the *Belize Telecom* decision, Lord Hoffman emphasised that the fact that a specific event is not provided for in a contract does not automatically require the court to imply additional meaning into the words used or to depart from their plain meaning:

> [17] The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.

[68] Later, Lord Hoffman approved the speech of Lord Pearson in an earlier case[6] in which he said:

> If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable.[7]

[69] Mr Taylor advanced a second argument based on the HR Policies. He submitted that, because they were effectively imported into the employment agreement by reference through clause 19, they formed part of the agreement and thereby informed the interpretation of clause 15.1. On that basis, he submitted that clause 15.1(b) should be interpreted in light of the provisions of the HR Policies which would deny Mr Porteous access to the surplus staffing provisions. In particular, he relied on clause 3.3.1 which provides that an employee who declines an offer of reassignment to a suitable vacancy is deemed to have resigned.

[70] There are several difficulties with this argument. The most fundamental one is that the express words of clause 15.1(b) are, in my view, perfectly clear and free from ambiguity. They should therefore be given effect according to their plain meaning unaffected by implication.

[71] Two further points can also be made. The first is that the Change Management Protocol expressly stipulates a different outcome. It provides that an employee who does not accept an offer of reassignment will "be able to access the surplus staffing provisions outlined in their employment agreement." To the extent that this aspect of the Change Management Protocol is inconsistent with clause 3.3.1 of the HR Policies then, for the reasons I have given earlier, the Change Management Protocol must prevail. To the extent that the interpretation of clause 15.1(b) is affected by any provisions imported into the agreement by clause 19, therefore, it favours the plain meaning of the words used.

---

[6] *Trollope & Colls Ltd v North West Metropolitan Regional Health Board* [1973] 2 All ER 260.
[7] *Belize Telecom* at [19].

[72] In any event, even if the employee is deemed to have resigned, that is not inconsistent with the express provisions of clause 15.1(b). Put another way, if an employee has resigned, the Department is unable to relocate the employee.

[73] Mr Taylor's final argument in relation to clause 15.1(b) was that an essential aspect of "redundancy" was termination of the employment by the employer. As Mr Porteous brought his own employment to an end, Mr Taylor submitted that he was not redundant and could not, therefore, be entitled to "redundancy compensation". I do not accept this argument. Although it is common for redundancy compensation to be paid only when an employee is dismissed by reason of redundancy, that is not an essential aspect of the meaning of the word "redundant". In this case, clause 15.1(b) of the employment agreement defines the circumstances in which the employee is entitled to redundancy compensation. The only qualifying criterion is that "the Department is unable to relocate the Employee". There is no condition relating to the manner in which the employment ends and no reason to imply such a condition.

[74] Overall, I find that clause 15.1 should be given effect according to the plain meaning of the words used. The provisions of paragraph (a) were satisfied in fact. Also as a matter of fact, the Department was unable to relocate Mr Porteous. He was therefore entitled to payment of redundancy compensation in accordance with the formula set out in clause 15.1(b)(ii). I leave it to the parties to perform that calculation in the first instance but, if they unable to agree, I will decide it.

Cessation leave

[75] In addition to redundancy compensation, Mr Porteous claimed payment for cessation leave pursuant to clause 15.8 of the employment agreement.

[76] Mr Taylor submitted that clause 15.8 applied only when there was a surplus staffing situation and that such a situation did not apply to Mr Porteous because he had not been given notice of dismissal by the Department. This submission was said to be based on the provisions of clause 3.4 of the HR Policies but, with respect, I cannot find that requirement in the clause. Although clause 3.4 requires the Department to give notice of termination to employees who have not been

reconfirmed or reassigned, that obligation is separate from any consideration of redundancy compensation which is required by clause 3.5 to be considered only if all of the options in clause 3.4.1 to 3.4.7 have been exhausted.

[77] In any event, these provisions of the HR Policies were inconsistent with the Change Management Protocol which expressly provided that employees not reconfirmed or reassigned would "be able to access the surplus staffing provisions outlined in their employment agreement." Mr Porteous was neither reconfirmed nor reassigned. The surplus staffing provisions of his employment agreement, contained in clause 15, included cessation leave. On this basis, I find that he was entitled to the benefit of clause 15.8 of the employment agreement.

[78] Clause 15.8 is relatively straightforward but there is one possible difficulty for Mr Porteous which, although counsel did not draw my attention to it in submissions, should be addressed. Paragraph (a) provides that cessation leave "will be paid in accordance with the following". That expression "the following" can only mean paragraphs (b) and (c) of clause 15.8. The schedule of payments in paragraph (c) is headed "Cessation Leave for employees with less than 20 years service." When Mr Porteous' employment ended on 27 February 2009, he had almost 21 years' service for the purposes of clause 15 and was not, therefore, an employee "with less than 20 years' service."

[79] Does this mean that Mr Porteous is not entitled to any cessation leave? I think not. To pay him nothing would arguably be inconsistent with paragraph (a) of clause 15.8 which requires cessation leave to be paid to all employees with more than 5 years' service. While it might be said that the words "in accordance with the following" logically lead to the conclusion that any employee with more than 20 years' service gets nothing, I do not accept that interpretation. Looking at it from the point of view of an objective observer familiar with the context in which employment agreements such as this are made, I find that the intention of the parties was that cessation leave be capped at 20 years service rather than no payment being made to those with more than 20 years' service. The parties would have had in mind Mr Porteous' previous employment agreement which included an almost identical provision but also contained an additional table setting out the cessation leave

entitlement for employees with more than 20 and up to 40 years' service. In preparing the new agreement, the table for more than 20 years' service was deleted without changing the description of the remaining table. I find that Mr Porteous was entitled to payment of cessation leave at the maximum rate provided for in clause 15.8.

[80] It is unclear from clause 15.8(c) whether the periods of cessation leave specified are intended to be steps on a scale or cumulative. This is also clarified by considering the scales in the previous agreement which provided for 65 days leave to be paid to an employee with 20 years service. I therefore find that Mr Porteous was entitled to be paid for 65 days cessation leave.

Personal grievance

[81] In addition to his claims for payment under the surplus staffing provisions of the employment agreement, Mr Porteous also pursued a personal grievance that he was disadvantaged in his employment by the unjustifiable action of the Department. Prior to the hearing, this was advanced on a variety of bases but, in his final submissions, Mr Quigg confined it to an allegation that Mr Porteous had been disadvantaged by the Department unjustifiably providing him with insufficient and/or inappropriate work during the period after his permanent position was disestablished on 1 October 2008.

[82] This contention was thoroughly tested in Mr Taylor's cross examination of Mr Porteous. Mr Porteous eventually accepted that he suffered no disadvantage up to the end of November 2008. I find also that the Department was entirely justified in using that time to find or create an alternative position to which Mr Porteous might be reassigned. It was what a fair and reasonable employer would have done.

[83] By the end of November 2008, the offer of an alternative position had been made to Mr Porteous and it was he who was controlling the time scale. His concerns about the original position description were only provided to the Department on 15 December 2008. The revised job offer came back to Mr Porteous on 19 December 2008. When the period for acceptance of that offer was about to expire on 23 January 2009, it was Mr Porteous who sought an extension of time and was content

to have an extension to 25 February 2009. Mr Porteous accepted that he could easily have complained to Mr Kelly about any dissatisfaction he had with either the quantity or quality of the work provided for him but that he did not do so. When pressed to explain the nature of the disadvantage he suffered during this period, Mr Porteous was unable to give any convincing answer.

[84] I find that, during this remaining period of his employment, Mr Porteous was not at all disadvantaged in his employment. On the contrary, he created and used delay in responding to the revised job offer from the Department to optimise his future employment prospects. His first preference was to take up the position with CIB but, by delaying a final decision on the offer from the Department, he was able to keep that offer available as an alternative if the CIB position did not eventuate. By allowing Mr Porteous an extended period of time to consider the revised job offer, the Department was being generous to Mr Porteous and its actions were undoubtedly justifiable.

[85] I find there is no substance in Mr Porteous' personal grievance.

Interest

[86] Mr Porteous sought interest on the payment of redundancy compensation and cessation leave. The Court's power to award interest is conferred by clause 14(1) of Schedule 3 of the Employment Relations Act 2000:

> **14 Power to award interest**
>
> (1) Subject to subclause (2), in any proceedings for the recovery of any money, the court may, if it thinks fit, order the inclusion, in the sum for which judgment is given, of interest, at such rate not exceeding the 90-day bill rate (as at the date of the order), plus 2%, as the court thinks fit, on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the judgment.

[87] The purpose of an award of interest is to compensate the successful party for the loss of use of money between the time the money ought to have paid and when it is actually paid. Consistent with that purpose, interest ought properly to be paid at a rate consistent with the rates available for the prudent investment of money during that period. For reasons which are hard to understand, this clause limits the rate of interest to no more than 2 per cent more than the 90 day bill rate. It also defines the relevant 90 day bill rate as that applicable at the

time of judgment rather than the rates applicable during the period for which the successful party is being compensated. A further problem with using the 90 day bill rate is that it varies constantly – literally minute by minute – so that it is virtually impossible to say what the rate is "as at the date of the order". I note that, in the year from May 2008 to May 2009, the rate dropped from more than 9 per cent to around 3 per cent.

[88] Clause 14 is anomalous and I strongly suggest that it be discarded in favour of a power to award interest aligned with the powers of other courts which are based on a rate set from time to time under the Judicature Act 1908.

[89] This is undoubtedly a case in which interest ought to be awarded. Mr Porteous has been kept out of money to which he was entitled from the date his employment ended. I therefore order the payment of interest on the redundancy compensation and in relation to the cessation leave from 27 February 2009 down to the date of payment.

[90] As to the rate at which that interest should be paid, the 90 day bill rate has varied between about 2.2 per cent and 2.9 per cent during the last month. Shortly before the time of signing this judgment the rate was around 2.9 per cent. Thus the maximum rate at which interest can be awarded is 4.9 per cent. That is comparable to bank deposit rates over the period since February 2009 and, accordingly, I award interest at the rate of 4.9 per cent per annum.

Conclusion

[91] In summary, I make the following findings and orders:

a) Mr Porteous is entitled to payment of redundancy compensation in accordance with clause 15.1(b)(ii) of the employment agreement between the parties.

b) Mr Porteous is entitled to be paid for 65 days cessation leave in accordance with clause 15.8(c) of the employment agreement between the parties.

c) Calculation of the sums to be paid in accordance with a) and b) above is to be done as at 27 February 2009. Those calculations are left to the parties in the first instance with leave reserved to apply for the amounts to be fixed by the Court.

d) The Department is to pay Mr Porteous interest on these sums at the rate of 4.9 per cent per annum from 27 February 2009 until the date of payment.

e) Mr Porteous' personal grievance is dismissed.

Comment

[92] During the hearing, a good deal of criticism was directed at officers of the Department. In particular, they were criticised for having regard to the potential cost of redundancy compensation payable to Mr Porteous in deciding whether to create a new position to which he might be reassigned and for tailoring that position to Mr Porteous' particular skills and experience. Such criticism was unwarranted. It is proper and prudent for any employer, including a department of State, to have regard to the costs of restructuring its business. It is also open to an employer engaged in restructuring to create a position for the purpose of retaining the services of a particular employee.

[93] Allegations were also made that officers of the Department acted in bad faith and evidence was given apparently in support of those allegations. Although the claims for penalties based on those allegations were ultimately withdrawn, it is nonetheless appropriate to record that I was satisfied on the evidence that all of the officers concerned acted in good faith.

[94] As will be apparent from the analysis of them, the relevant documents in this case were in many respects inconsistent or uncertain. This is an administrative issue which I suggest the Department needs to address in depth. Of particular significance was the statement repeated in letters to affected staff that, if they did not accept offers of reassignment, they would be deemed to have resigned without the benefit of surplus staffing provisions in their employment agreements. That statement was

plainly inconsistent with the Change Management Protocol which had been specifically developed and promulgated by the Department to apply to the restructuring of the Building Quality branch. As such, it caused unnecessary concern to staff engaged in an already stressful process.

[95] A feature of this case was that, although it turned very largely on the construction and application of a few documents, a very great deal of evidence was adduced. This included two and a half days of oral evidence, much of which was peripheral and some of which was irrelevant. I was also provided with nearly 700 pages of documents, the majority of which were never referred to. The need to review all of this evidence in order to find the useful material contributed significantly to the time required to prepare this judgment and the delay in its delivery.

Costs

[96] Although the Department has successfully resisted Mr Porteous' personal grievance claim, overall he has been very largely successful in this litigation. Unless there is good reason to do otherwise, he is entitled to a contribution to his costs. The parties are encouraged to agree what that should be but, if they are unable to do so, Mr Quigg should file and serve a memorandum within 28 days after the date of this judgment. Counsel for the Department is then to have a further 21 days to file and serve a memorandum in response.

A A Couch
Judge

Signed at 12.30pm on 26 May 2010