**IN THE EMPLOYMENT COURT**
**CHRISTCHURCH**

**CC 13/08**
**CRC 6/08**

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|---|---|
| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| BETWEEN | ANZ NATIONAL BANK LIMITED<br>Plaintiff |
| AND | JULIE SVENSSON<br>Defendant |

Hearing: 21 July 2008
(Heard at Nelson)

Appearances: H P Kynaston, Counsel for the Plaintiff
Steven Zindel, Counsel for the Defendant

Judgment: 19 September 2008

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**JUDGMENT OF JUDGE C M SHAW**

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## Introduction

[1] Mrs Svensson is employed by ANZ National Bank Ltd (the bank). In 2007 the bank undertook a restructuring which resulted in her hours and days of work being changed. She did not agree to this and alleged this was in breach of the terms of her individual employment agreement (IEA). She also alleged that in 2006 she was unlawfully induced to accept new terms of employment. In these matters she claimed her employment has been affected to her disadvantage.

[2] She continues to be employed for 24 hours a week without prejudice to these claims. She sought to have her days and hours of work restored to those which existed in 2005, compensation for any loss of income incurred through working fewer hours a week since 11 June 2007, and compensation for hurt and humiliation.

[3] In the alternative, if she is not reinstated to her previous hours of work and therefore receives no back pay, she has claimed compensation under the redeployment provisions of her 2007 IEA. Mr Zindel also raised a claim for distress compensation which had not been pleaded. Mr Kynaston did not oppose this claim being considered.

[4] The bank says that it was justified in disestablishing her position and in the manner in which this was done.

## Employment Relations Authority determination

[5] The ERA investigated Mrs Svensson's problem and concluded that while her employer had acted genuinely and in accordance with its right to reorganise its business, Mrs Svensson had been disadvantaged by the failure of the bank to secure her agreement to the changes it imposed on her hours and days of work. The Authority member recognised the ongoing relationship between the parties and directed them to resolve the compensation issues between themselves.

[6] Mrs Svensson's then employment advocate has since died. The question of compensation and costs has not been resolved. She is now on legal aid and the bank has challenged the Employment Relations Authority's substantive determination.

## Issues for the Court

1. Was Mrs Svensson unlawfully induced to enter into the 2006 IEA making its terms unenforceable?

2. If the 2006 IEA governed her employment what were the parties' rights and obligations under it?

3. Was this a redundancy as contemplated by the IEA?

4. Was the restructuring undertaken by the bank in relation to Mrs Svensson justifiable?

## The facts

[7] The parties' agreed statement of facts forms the basis of these findings. Mrs Svensson and two witnesses for the bank also gave evidence.

[8] Mrs Svensson was employed in 1994 as a permanent customer service officer (CSO) in the Richmond branch of the then Countrywide Bank working 25 hours a week. In mid 1995 she became ill and after 3 months' sick leave resigned because of her health. Following a period of part time work, by August 1998 she was well enough to be re-employed and continued to work full time after the Countrywide Bank was purchased by the National Bank in 1999.

[9] When she suffered a relapse of her health problems in 2001 it was agreed between her and her manager that her hours would be temporarily reduced to 30 a week. Later she became a permanent part time CSO at the Richmond branch working 30 hours over Monday, Tuesday, Wednesday and Friday between 8.30am and 5.00pm.

[10] In 2004 the National Bank and the ANZ Bank amalgamated to become ANZ National Bank Limited and a set of common terms of employment was developed to cover employees.

[11] Up to this time Mrs Svensson had been employed on an IEA based on the collective agreements which covered the National Bank employees. These agreements set common ordinary hours of work for all non-management employees. Within those ordinary hours the National Bank was able to vary an employee's hours of work without obtaining agreement from them although it would seek agreement wherever practicable. By comparison, the ANZ agreements had required that bank to agree fixed hours of work with its employees.

[12] In 2005 Mrs Svensson signed a new IEA which was a combination of the IEAs used previously by the National and ANZ Banks. It is agreed that this 2005 IEA expressly superseded Mrs Svensson's previous IEA in all respects. Her hours and days of work did not change but the terms which governed the way her hours of work could be treated were different from those which had covered her previously.

[13] The standard letter of offer dated 13 June 2005 sent to all former National Bank employees on non-management IEAs provided "*It is a new term of your Employment Agreement that your current hours/days of work cannot be changed*

*unless you agree to this*." A similar provision was included in the corresponding letters to former ANZ Bank employees but did not refer to this being a "*new*" term.

[14] Justyne Carroll, the Richmond branch manager, spoke to staff who were offered the new IEA. At this time bank employees in other branches who did not want to work on Saturdays were taking strike action. Mrs Svensson said the reason for the meeting was to reassure her and others in her position that they could not be made to work outside their agreed hours. Ms Carroll recalled the meeting as being one where she reassured her that the bank was there to work with her but did not recall saying that Mrs Svensson would not be required to work outside her agreed hours.

[15] In September 2006 the bank introduced a new competency based pay framework and salary scales. Mrs Svensson was sent a letter offering new terms of employment. This letter provided, among other things:

> *Your employment agreement is between you and ANZ National Bank Limited ("the Bank"). Your position and your duties and responsibilities remain as previously agreed.*
>
> *Your full terms and conditions of employment will be set out in a new individual employment agreement booklet, which will be available soon on the intranet or from your manager. In the interim, the changes to your current agreement are summarised below and in detail in the attachment to this letter.*
>
> …
>
> *Documents comprising agreement*
>
> *The documents that form your entire employment agreement with the Bank are as follows:*
>
> - *This Letter of Offer;*
> - *The individual employment agreement booklet;*
> - *The Bank's various policies, set out on the ANZ National Bank intranet site, which may be amended by the Bank from time to time. You are expected to familiarise yourself with these policies.*
>
> *If there is any inconsistency between these documents, the terms in this letter and those contained in the Individual Employment Agreement booklet (in that order) will apply. These various documents contain the entire agreement between you and the Bank and replace any previous agreements between yourself and the Bank.*
>
> *Except as provided for above, your employment agreement may only be changed by agreement between you and the Bank, and any such variation must be in writing and signed by both parties.*

[16] Mrs Svensson accepted the new terms offered (the "2006 IEA"). She told the Court that when she signed the 2006 IEA she didn't think it was making any huge change to her situation and that any changes were not brought to her attention. She recalled reading the documents but didn't feel the need to get any legal advice about them and no opportunity for advice was given to her. Under cross-examination she agreed that in the correspondence accompanying the offered IEA she was told that she was entitled to seek independent advice prior to accepting the offer, a course of action that has always been available to her in her years of working with the bank.

[17] The 2006 IEA did not alter her existing work hours. She continued to work 30 hours a week over 4 days as a 0.8 full time equivalent employee (FTE).

***Other relevant terms***

[18] Clause 1.3(a) concerns variation of the employee's individual employment agreement. It provides: *"The party proposing the variation will provide the other party with a proposal in writing. The proposal will set out the variation that is sought."*

[19] Part 2 of the IEA concerns hours of work and overtime. Clause 2.1.1 sets limits on the ordinary hours that may be worked. Then follow a number of subclauses. In virtually every subclause there is reference to an agreement.

- 2.1.1.a refers to agreed hours.
- 2.1.2 states *"By mutual written agreement, the employee may work varied daily hours up to a maximum of 37.5 hours per week."*
- 2.1.3 states *"Times of starting and finishing work … will be agreed between the Bank and the employee."*
- 2.1.4 says that lunch hours may be reduced by agreement.
- 2.1.5 says that hours of work of specified classes of employees (which did not include Mrs Svensson) cannot be altered without the full consent of that person in writing.
- 2.1.6 states:

*If there is a business need to change hours of starting and finishing work, or if an employee wishes to change their starting or finishing times, both the Bank and the employee must work together to meet business and individual needs. In doing so, each party must:*

*(a) Give as much notice as practical, and at least two weeks, prior to the proposed change; and*

*(b) Fully inform the other of the issues under consideration, including family and care-giver needs, travel arrangements and any other relevant issues; and*

*(c) Participate in good faith through full and open discussion*

*(d) Neither party will unreasonably withhold agreement to such changes.*

[20] Other terms of the 2006 IEA relevant to events that followed include the provision for redundancy and redeployment in clause 6.5:

*1.* …

*Where an employee's position is redundant due to restructuring, they will have the opportunity to apply for any positions that become available through the normal application and selection process as a result of that restructuring. Where an employee is unsuccessful in this process they will be considered for redeployment as set out below.*

*2. Definitions*

*a. 'Redundancy' means a situation where an employee's employment is terminated by the Bank, the termination being attributable, wholly or mainly, to the fact that the position filled by that employee is, or will become, superfluous to the needs of the Bank either because of the cessation of the whole or any part of the Bank's operation, or because of business restructuring or reorganisation (including the amalgamation of workplaces)…*

*3.* …

*d. An employee who declines an offer of a directly comparable position may be made redundant but will not be entitled to any of the provisions of sub-clauses (5) and (7).*

[21] Clause 6.5.2.c of the 2006 IEA provides:

*c. 'A directly comparable position' shall mean a position which has the same or higher grade and salary, is in the same location or at another location within reasonable commuting distance of the employee's place of residence, does not involve a change of duties significant enough as to be unreasonable with regard to that employee's skills and ability, and does not involve a change in working hours which would place an unreasonable imposition upon the employee's individual circumstances, particularly domestic or child care arrangements, or a reduction in working hours unless the salary is maintained…*

***Review of the Richmond branch***

[22] In early 2007, a review of the Richmond branch showed it was not meeting its business requirements because the manager and team leader were having to spend a large proportion of their time providing cover on the CSO counter. This was because on Wednesdays and Thursdays only one of the two part time CSOs (both 0.8 FTEs working 30 hours), one of whom was Mrs Svensson, worked on those days leaving the manager and team leader to cover the CSO counter. On the other days of the week when both of the part time CSOs were at work the manager and team leader seldom had to do this.

[23] The bank proposed that the two part time CSOs' hours be restructured so that both of them worked their existing hours over 5 days a week, instead of over 4 days.

***Discussions and correspondence with Mrs Svensson about the proposed changes***

[24] On 23 February 2007, Ms Carroll formally presented the proposed changes to all staff at the Richmond branch. This was done in groups and in three stages: first with the senior staff, secondly with Mrs Svensson and the other part time CSO, and last of all with the other CSOs. The PowerPoint presentation said under "*Potential Impact"* that current FTE levels would remain the same and the hours of the two employees in the 0.8 FTE positions would change. The staff were invited to provide feedback by 5pm on 2 March 2007.

[25] When Mrs Svensson had not provided any feedback by the morning of 2 March 2007 Ms Carroll met with her to discuss the bank's proposal in person. Mrs Svensson acknowledged that she understood the business reasons for the restructuring proposal. She counter-proposed that she work her 30 hours over 2 afternoons and 3 full days (that is, over the course of 5 rather than 4 days per week). However, later that day, she told Ms Carroll that she did not want to change her hours and would be taking advice.

[26] Ms Carroll referred the matter to Natalie Henry, the bank's human resources consultant. Mrs Svensson's representative, Brent Climo, advised Ms Henry by telephone that:

1. Mrs Svensson considered that the bank could not change her hours because it had agreed in the 2005 IEA that it would not do so; and
2. in any event, Mrs Svensson did not wish to change her hours because it would adversely affect her health.

[27] Ms Henry disagreed that Mrs Svensson's hours could not be changed unless she agreed, and requested that Mrs Svensson provide medical information to support her view about the impact on her health.

[28] In a letter dated 20 March 2007 handed and outlined to Mrs Svensson by Ms Carroll in person in a brief meeting with Mr Climo present, the bank:

1. confirmed the bank's stated reasons for proposing the change to a 5-day working week;
2. noted that feedback on the proposal had been invited and that Mrs Svensson had indicated her preference was to continue to work 4, as opposed to 5, days per week because of her health;
3. noted that the bank had requested medical information from Mrs Svensson, but this had not yet been provided;
4. offered Mrs Svensson one of two options: to work Monday to Friday between 10.00am and 5.00pm; or Monday and Friday 11.30am to 4.30pm, Tuesday 10.00am to 5.00pm, and Wednesday and Thursday 9.00am to 5.00pm;
5. advised Mrs Svensson that if she chose not to accept either position, her position may be made redundant;
6. considered she had been offered a *"directly comparable"* position, so would not be entitled to redundancy compensation in the event of redundancy; and
7. invited Mrs Svensson to provide medical information regarding her ability to work 5 days.

[29] On 26 March 2007, Mrs Svensson provided the bank with a medical opinion from her GP, Dr Patch Graham, in which he stated he *"would strongly argue for a*

*maintenance of the status quo as being the best option for* [her] *to maintain her health…".*

[30] On 29 March 2007 the bank advised Mrs Svensson in writing and in person with Mr Climo present that it intended to proceed with the proposed restructuring as it did not consider Dr Graham's medical advice indicated that working 5 days per week would have a detrimental impact on the defendant's health such as to make it unreasonable for her to work 5 days per week. If she did not accept she would not receive redundancy compensation.

[31] The bank proposed a third option for Mrs Svensson's consideration. It was prepared to take into account her preference for working 4 days per week and allow her to do so, although it would result in a reduction of her hours to 24 or 25 hours per week because someone else would be needed to work the fifth day.

[32] The letter also restated the bank's 20 March 2007 offer of one of two positions and advised Mrs Svensson that if she did not accept one of these options her position may be made redundant. It sought a response by Friday, 6 April 2007.

[33] Mrs Svensson requested mediation which the parties attended on 2 May 2007. The parties agreed Mrs Svensson would visit Dr Hartshorn, an occupational specialist nominated by the bank, for specialist medical advice on whether it was unreasonable of the bank to request that Mrs Svensson work 5 days rather then 4.

[34] Dr Hartshorn's opinion, provided to the bank in a letter dated 23 May 2007, confirmed that Mrs Svensson had experienced some functional difficulties with respect to decision-making, but went on to state that:

> *In my opinion there is no medical reason that would prevent Julie Svensson performing her 30 hours per week over 5 days instead of her current 4. Indeed I believe there are some positive medical reasons why this new regime may well be more positive for Julie.*

[35] Further, Dr Hartshorn advised that:

> *In my opinion there is no medical reason why Julie Svensson's specific duties need to be restricted or limited in any way given the change in her work regime.*

[36] Mrs Svensson was advised in writing and in person on 29 May 2007 that based on the advice of Dr Hartshorn it did not consider it to be unreasonable to require Mrs Svensson to work 30 hours over 5 days.

[37] The bank restated its earlier offer of one of two 30-hour positions worked over 5 days, or a third position of 24 hours worked over 4 days and asked Mrs Svensson to advise by close of business on 6 June 2007 whether she wished to accept one of the proposed CSO positions. It advised that if she did not accept, a letter giving notice of redundancy would follow.

[38] Following some further correspondence with the bank, on 6 June 2007 Mr Climo e-mailed the bank to advise that Mrs Svensson wished to carry on working 4 days per week (Monday, Tuesday, Thursday and Friday), being 24 hours in total but that Mrs Svensson considered this to be a breach of contract and reserved her position.

[39] On 8 June 2007, the bank wrote to Mrs Svensson, confirming the new terms of employment. Mrs Svensson signed the letter indicating her acceptance, but noted:

> *I sign this under duress at the unilateral change of my days/hours worked in a week and I will keep pursuing it through the Employment Relations Authority under urgency.*

[40] She began working the new hours from 11 June 2007 and has worked those hours since then. She obtained a further report from Dr Graham dated 16 August 2007 which supported her claim that the changes to work hours would be detrimental to her wellbeing but she did not show that to the bank. It was later provided as part of her personal grievance.

[41] Mrs Svensson told the Court that the benefit of her compromise proposal which included having two mornings off gave her a chance to have a lie in and be okay to work in the afternoon. She had adapted to having Thursdays off, an arrangement that fitted in with the other part time CSO and her own husband's shift work.

***Enforceability of 2006 agreement***

[42] Mr Zindel submitted that the statement in the 2006 IEA that it was an entire agreement which replaced any previous agreements between Mrs Svensson and the bank *"by side wind"* removed her protection against having her hours and days of work altered without her agreement. He argued that Mrs Svensson had been induced to enter into the 2006 IEA by misrepresentation, misleading conduct and/or by a breach of good faith.

[43] As a statement of principle an employment agreement or part of it may be obviated by any of these factors whether under the Contractual Remedies Act 1979 or the Fair Trading Act 1986. However, in each of these cases there must be an evidential foundation to support the allegations.

[44] Mr Zindel submitted that the bank had misrepresented the position to Mrs Svensson in two ways. First at the meeting in mid 2005 when Ms Carroll spoke to staff on IEAs about the new 2005 agreement and gave assurances that Mrs Svensson's hours would not change. I find that any representations made by Ms Carroll at that meeting were for the purpose of reassuring staff on IEAs about the effects of the changes to their agreements in the context of industrial action taken by other staff over the 2005 collective agreement. I find that statements made by her were not misleading or deceptive and in any event were not a significant factor in Mrs Svensson's decision to adopt the 2006 agreement.

[45] Second, Mr Zindel submitted that when Mrs Svensson was offered her new IEA in September 2006 there was no reference to the change of work hours and the change was not brought to her attention**.** He submitted that the changes in 2006 were not adequately communicated to Mrs Svensson and this had the effect of misleading her.

[46] While silence can constitute misleading or deceptive conduct, as Elias J said in *Des Forges v Wright* [1] whether it does is to be objectively assessed in all the circumstances.

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[1] [1996] 2 NZLR 758 at 764

[47] I find that the bank was not silent about the changes it was making. The letter of 29 September 2006 which described the new agreement was very comprehensive even though it did concentrate on the new competency based pay framework and salary scales. It explained the effect of any inconsistencies between the various documents presented to the staff and referred to the replacement of the previous agreements. Importantly, it expressly addressed variation of the agreement and advised that Mrs Svensson was entitled to seek independent advice before accepting the offer.

[48] The bank was neither misleading nor deceptive. Similarly the bank did not breach its obligation to be responsive and communicative in relation to the presentation of the IEA as required under section 4(1A)(b) of the Employment Relations Act 2000.

[49] I do not accept that the bank acted in such a way as to render the provisions of the 2006 IEA unenforceable. The terms of that agreement, including the more general variation clause which now governs her employment, therefore apply to the changes which the bank sought to implement in 2007.

## Obligations under the 2006 agreement

[50] Mr Zindel submitted that under the redundancy and redeployment provisions of the 2006 IEA Mrs Svensson's position was not superfluous to the bank's needs by reason of the cessation of the whole or any part of the bank's operation nor because of business restructuring or reorganisation. Instead he submitted that part 2 of the IEA contains the operative provisions as it deals with changes to working hours. Secondly, he argued that the process adopted by the bank was unfair.

[51] For the bank Mr Kynaston submitted that this was a genuine redundancy which justified the bank's actions. The changed hours proposed to Mrs Svensson were a viable alternative and when she rejected them she became redundant. He also submitted that the process adopted was lengthy, careful, and what a fair and reasonable employer would have done in all the circumstances.

[52] Counsel referred to *Cameron v Manawatu-Wanganui Area Health Board*[2] and *Niao v Tasman Pulp & Paper Company Ltd*[3] both of which dealt with changes to employees' work hours. From these, and the cases referred to in them, the principles to be applied are:

1. The terms of the employment agreement are important in determining whether the employer's actions are justifiable. Relevant matters are whether the hours which are sought to be changed are a term of the contract and whether changes to those hours come within the scope of the redundancy provisions.

2. Where the hours of work are a term of an agreement, unilateral change will amount to a breach of the agreement which may only be justified if the change is technical or inconsequential.

3. Where an employment agreement permits the exercise of management prerogative to alter an employee's working conditions or job description, the employer must act reasonably and fairly before making such changes[4] and the employee may not unreasonably withhold their agreement.

4. If a dismissal or disadvantage occurs as a result of the failure of an employee to accept changes to work patterns, the onus is on the employer to justify the dismissal or disadvantage.[5]

***1. Terms of the agreement***

[53] The variation clause in the letter accompanying the 2006 IEA said:

> *Except as provided for above, your employment agreement may only be changed by agreement between you and the Bank, and any such variation must be in writing and signed by both parties.*

[54] Matters *"provided for above"* included the employment agreement. The letter also said that if there is any inconsistency between the documents, the terms in the letter of offer and the IEA booklet (in that order) applied.

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[2] [1991] 2 ERNZ 886
[3] [1999] 2 ERNZ 805
[4] *Niao* at 813
[5] *Cameron* at 897

[55] Mrs Svensson's employment agreement does not specify her particular hours of work but these had been agreed between the parties and thereby became a term of her employment agreement which could not be unilaterally changed without her consent.

[56] Part 2 of the IEA expressly and repeatedly provides for changes to working hours by agreement between the employee and the bank. Clause 2.1.6 provides a procedure for obtaining such agreement. The same clause recognises both business and individual needs and stipulates that neither party will unreasonably withhold agreement to such changes.

[57] On the other hand, the IEA's redundancy and redeployment clauses contemplate restructuring and reorganisation which may result in the loss of employment.

[58] In the light of these terms of the employment agreement:

1. Did the bank have the right to disestablish Mrs Svensson's position and replace it with a new CSO position and, if so,
2. Did Mrs Svensson unreasonably withhold her agreement to the changes suggested by the bank and, if so, what are the consequences?

***2. Did the bank have the right to disestablish Mrs Svensson's position and replace it with a new CSO position?***

[59] Whether Mrs Svensson's position was redundant depends on an application of the facts of the present case to the definition of redundancy in the IEA in which the elements of redundancy are that (a) there is a business restructuring or reorganisation and (b) the position is superfluous to the needs of the bank.

[60] There is no dispute that the bank was justified in wanting to change the hours of the part time employees at the Richmond branch. The question is whether this was one that resulted in making Mrs Svensson's position superfluous to its needs.

[61] Prior to the reorganisation Mrs Svensson was working as a 0.8 FTE CSO. The new position offered was as a 0.8 FTE CSO but with a different configuration of hours.

[62] The bank treated its need for change as a "reorganisation". It did so by adopting a formal procedure of changing the staffing structure which was presented to the staff as a formal redundancy process. However, in the bank's presentation to the staff the *"potential"* impact of this reorganisation was said to be that current FTE levels would remain the same and the hours of the two employees in the 0.8 FTE positions would change. In other words, apart from the changes to the hours of work there was to be no change of position.

[63] There was no suggestion or evidence that the work duties or numbers of hours to be worked by Mrs Svensson under the new position were to be any different from those performed previously. The only change was when the work was to be done. The bank was undertaking a reorganisation. But the definition of redundancy requires more than a reorganisation. The position must become superfluous.

[64] The question of whether a position is superfluous is a matter of fact and degree. In a case with somewhat similar facts, *Parsons v Upper Hutt City Council*[6] the employer tried to restructure the operation of its business by rearranging rosters so that its employees did additional weekend work. This was found to have been a fundamental change to the employee's contractual position because of the new weekend work and in the increase in the number of hours worked per week. In the absence of the employee's consent, she was found to have been made redundant.

[65] In the present case there was no fundamental change to Mrs Svensson's 0.8 position other than a reorganisation of existing hours during the week which under clause 2 required her agreement. The bank was seeking to change the working hours of Mrs Svensson and her other colleague. While this was a reorganisation it did not result in her position becoming superfluous. This was a matter which fitted the process in clause 2.1.6 of the IEA. The bank had a business need to change the hours of starting and finishing work. Under clause 2 it needed the agreement of the

[6] WC 62/00, 19 December 2000

employee affected by those changes but Mrs Svensson's position was not redundant. I therefore find that her position was not superfluous and this was not a redundancy situation.

[66] I conclude that the bank was not justified in disestablishing Mrs Svensson's position of 0.8 FTE CSO as her position was not superfluous to the bank. It could only change the times when she worked with her agreement.

[67] The plaintiff's challenge to the Authority's determination therefore is unsuccessful although on a different basis from that reached by the Authority.

[68] Although that conclusion would normally mark an end to the case I am mindful that there is an ongoing employment relationship between the parties currently governed by a without prejudice arrangement and that this decision will not necessarily resolve their ongoing issues. For this reason and, having heard evidence on the point, I now turn to the question of Mrs Svensson's reaction to the bank's proposed changes to her working hours.

***3. Did Mrs Svensson unreasonably withhold her agreement to the changes?***

[69] Mrs Svensson was justifiably aggrieved by the fact that the "restructuring proposal" was formally put to all of the staff at the Richmond branch starting with the senior staff so that the proposed changes to her hours were being discussed with all the other staff. If the procedure under clause 2.1.6 had been adopted, the notice and discussions would have been at least initially between the bank and Mrs Svensson rather than all the staff at the Richmond branch as a whole.

[70] While Mrs Svensson undoubtedly had health issues at the time of the proposed changes she was successfully working 30 hours a week. However, apart from her health, her reasons for resisting the proposed changes were not compelling. She did not want to alter what had become convenient to her personal situation. She initially agreed to change her hours to fit in with the bank's proposal and although she subsequently withdrew her agreement this shows that she was able at least to contemplate such a change.

[71] The bank was aware of her health history and this was raised again in the course of the discussions about the proposed changes. The bank invited her to provide medical information. The bank then had an opinion from her GP and another from an occupational specialist that Mrs Svensson had agreed to see. Although Mrs Svensson was critical of Dr Hartshorn's opinion, she did not provide the bank with any evidence which directly put it in issue at the time.

[72] If the bank had followed the clause 2 procedures Mrs Svensson would have had two options in the light of Dr Hartshorn's conclusions. The first was to accept his report and agree to accept the new hours of work at least for a trial period. The other option would have been to obtain further medical evidence to support her claim that her wellbeing would be at risk and to show that evidence to the bank which would then have been obliged to take it into account. If she took neither of these options and maintained an inflexible stance I would have found that she had unreasonably withheld her agreement.

## Conclusion

[73] I have reached the view that it is probable that Mrs Svensson's resistance to change was prompted by the way in which the bank set about implementing the changes it obviously needed to make. Its use of formal redundancy procedures, although carried out immaculately according to the procedure in the IEA, resulted in Mrs Svensson taking an adversarial stance to resist it.

[74] The presentation of the formal restructuring plan to all of the staff, although it only affected Mrs Svensson and her colleague, and the apparent inevitability of the outcome and the way it was presented was, I find, destined to lead to resistance. It is most unfortunate that the bank chose to do its reorganisation in this manner when it had at its disposal the more informal and personal approach available to it under clause 2.1.6. It had genuine reason for the changes it needed to implement but it is quite possible that had it adopted the process of dealing individually with Mrs Svensson from the outset as contemplated under part 2 of the IEA it was more likely to obtain such agreement.

[75] Now that the obligations of each party have been clarified I will not immediately reach a decision as to the outcome. This is a case where under section 188 of the Employment Relations Act 2000 it is appropriate to suspend the proceedings and direct the parties to use mediation to attempt in good faith to reach an agreed settlement of their differences, including the costs of the proceedings.

[76] These proceedings will remain suspended until the parties have complied with the direction to mediation. Counsel are to advise the Court of the outcome of the mediation once it is known.

**C M SHAW**
**JUDGE**

Judgement signed at 4.00pm on 19 September 2008