

Department of Social Welfare agrees to reconsider offer of severance payment for employee

Legislation	Ombudsmen Act 1975
Ombudsman	Nadja Tollemache
Case number(s)	W27493
Date	1992

Application of redundancy provisions in Employment Agreement to part-time employee—part-time employment offered on permanent basis—employee made redundant after 60th birthday and excluded from severance provisions—department reconsidered and agreed to pay severance

In May 1989 an employee of DSW was formally advised that he had been appointed to a job-share position at Student Units at a departmental residential facility. He was 59 years old and at that time no indication was given by the Department that he was appointed to anything other than the permanent staff or that the position was other than a long term one.

Shortly after turning 60, in April 1990, the employee was informed in a letter that the Acting Director of the institution he was employed at approved his retention beyond 60 years subject to review of the Student Units due in June. At this time the employee was not informed that from age 60 he could only be employed on a temporary basis.

In July 1990 the employee was informed by letter that as a result of restructuring he was to be declared surplus and therefore options were available to him under the provisions of the Employment Agreement. He chose severance, having been informed in the letter that both the Department and the PSA had agreed to his inclusion on the surplus list.

Sometime in October he learned that because he was not eligible for the severance option under the Employment Agreement because staff over 60 were temporary staff and therefore not eligible for the surplus provision. This decision was confirmed by letter of 21 December 1990 from the Regional Assistant Director General.

On 25 October the Acting Director had stated (it seems in explanation of his earlier letter of 10 April) that he had approved the employee's retention at that time *'to ensure that the department's interests and your rights and responsibilities were protected'*.

In his complaint, the employee disputed the Department's decision to deny him severance on the grounds he always had an ongoing expectation of employment (this was a requirement in the Employment Agreement for restructuring provisions to apply) and that his position after age 60 was not temporary.

The employee was not a member of PSA when he was employed at the institution and the PSA representative whom he consulted was apparently not interested in assisting him. Since access to the personal grievance provisions at that time, a person had to be a union member, the Ombudsman had jurisdiction and decided to take the matter up with the department.

On the basis of a report and papers provided it did not seem to the Ombudsman that, apart from those temporary employees engaged in accordance with the terms of clause 2.1.0.3. of the Employment Agreement, temporary employees including the complainant were excluded from surplus staffing provisions.

It seemed to the Ombudsman that on being appointed to a permanent part-time salaried position the complainant, although he could be employed as a temporary employee only after age 60, he had an expectation of on-going permanent employment. *'Permanent employment'* is defined in *Clark v Independent Broadcasting Co* [1974] 2 NZLR 587 where Moller J cited a passage from Lord Goddard's judgment in *McLelland v Ireland Health Board* [1957] 2 ALL ER 129 describing what an offer of permanent employment involves:

'It is an offer, I think, of general as distinct from merely temporary employment, that is that the person employed would be on the general staff with an expectation that apart from misconduct or inability to perform the duties of his office, the employment would continue for an indefinite period.' (Lord Goddard at p.133)

The Assistant Director General reconsidered the case in light of the Ombudsman's correspondence. Having been informed that severance would then be paid, the Ombudsman closed the file on the basis that the complaint had been resolved.

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