

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN John Russell Goodall Applicant

AND Chief Executive Officer of the Department of Corrections
Respondent

REPRESENTATIVES Mr Goodall in person
Mrs Karen Spackman for respondent

MEMBER OF AUTHORITY A Dumbleton

DATE OF INTERIM ORDER 9 April 2001

INTERIM ORDER OF THE AUTHORITY

Employment Relationship Problem

Mr John Goodall has worked as a Probation Officer for the Corrections Department and its predecessors for 33 years. His employment relationship problem lies in the decision very recently taken by the Department to substantially reduce his salary, an action he opposed. This reduction, which was from \$70,700 to \$42,000, took effect from 10 February 2001. Since then, on every regular pay day Mr Goodall receives less salary than before although he continues to do the same work as a Probation Officer. Mr Goodall's superannuation has not however been consequentially affected, as the Department at its own expense is maintaining contributions at the level they were at before the salary reduction.

The salary level of \$70,700 had been set in January 1997 by written agreement between Mr Goodall and the Department. Part of their agreement states:

- a. Your salary shall be \$70,700 and this salary will neither abate nor increase in future.*

Although the agreement itself does not say so, the parties had entered into it in 1997 with a clear intention or understanding that Mr Goodall would be retiring when he became eligible for GRI state provided superannuation. This would occur on 26 December 2000. In January 1997, at \$70,700, his salary was considerably greater than that earned by other Probation Officers of similar skill, competence and seniority to Mr Goodall. This was because of an enhancement made to recognise the consequences to him of earlier restructuring within the Department. Previously his position and conditions of employment including remuneration, had been affected to his disadvantage by change within the organisation.

The reduced level of salary of \$42,000 that Mr Goodall now receives is apparently the maximum paid to other Probation Officers. In the Department's view it would be neither financially viable nor equitable to other staff for there to be any significant and enduring disparity in pay levels.

Intention to retire

The intention and understanding of Mr Goodall and the Department in 1997 that their employment relationship would end with Mr Goodall's retirement on 26 December 2000, had been formed on the basis of the employers requirement at that time for its employees to retire at their age of GRI eligibility. This was an express term of the Departments staff collective employment contact for 1996/97. However the Department later came to recognise that its requirement, although lawful for the time being in respect of the Crown as an employer, should not be insisted upon in view of the way the law in relation to age discrimination had been changing for employers in the private sector.

It is not clear when the Department decided to relax its requirement but Mr Goodall may not have become aware of the decision until September 2000. Up to then he had been planning for his retirement to take place in December 2000.

Decision of Mr Goodall to remain employed

Upon having its change of approach to compulsory retirement confirmed by the Department, when asked Mr Goodall said that he would like to stay on working as a Probation Officer. The question then arose as to whether he was entitled to continue receiving the salary of \$70,700, which as already mentioned was an enhanced salary the parties had expected would be paid for a definite period of about four years until December 00. This became a matter of dispute between the parties and remains so. When the dispute could not be resolved mediation was voluntarily undertaken by both, and when settlement of the matter could not be achieved Mr Goodall lodged his application with the Employment Relations Authority.

Mr Goodall seeks from the Authority orders requiring that his salary be restored to \$70,700 from the date on which it was reduced to \$42,000. Further he requires the Department to compensate him for the effects of its actions and to advise all of its employees of the change to its retirement policy.

An investigation meeting for the purpose of considering and finally determining the problem has been set down to take place on 10 May 2001.

Application for interim order

Mr Goodall has also sought an interim order or direction requiring the immediate reinstatement of his salary pending the final determination by the Authority of his problem. In this connection he refers to the following:

...the arbitrary nature of the cut in salary and the fact that I urged the Department not to proceed with the reduction before the issue could be resolved by due process.

Mr Goodall refers to the unilateral action taken by the employer in reducing his salary, and to his plea made to the Department not to "pre-empt" the various processes that were available to the parties to resolve their dispute.

Memoranda have been received on 28 March 2001 and 4 April, from Mr Goodall and the Department's representative, Mrs Spackman, with regard to the making of the interim order as sought.

Having considered the submissions of both parties, I conclude that the overall justice of the matter favours Mr Goodall and that in the interim his salary should be reinstated with back pay, to make up for the reduction he has been regularly experiencing since 10 February 2001 and will otherwise continue to experience until determination of this matter.

The question of compensation for loss of use of the money can be left until this matter is finally determined in a few weeks. It is, however, a condition of the operation of this order that Mr Goodall provides an undertaking to repay any money he is held not to be entitled to, depending on the final determination of this case.

Reasons for order

The reasons for my interim order are as follows:

A genuine dispute arose between the parties as to the interpretation, operation or application of the employment contract or agreement. Under previous legislation, the Employment Contracts Act 1991, this would have been the kind of dispute that could and should have been made the subject of the standard disputes procedure. Under the current legislation, the Employment Relations Act 2000 the parties, at least up to a point, have used statutory dispute resolution procedures available to them. The point they reached was mediation. This was undertaken willingly and in good faith by both so far as I can tell. There is no suggestion to the contrary.

Originally the Department intended to make the reduction of salary on 26 January 2001, one month after the GRI date. Then, after correspondence and discussions with Mr Goodall, it wrote to him advising that the higher salary would be maintained for a further two weeks until 9 February 2001. This was to allow the Department time to consider a proposal that had been made by Mr Goodall in mediation. Mr Goodall apparently withdrew his offer on 29 January and advised the Department that he would seek an injunction if any of the terms and conditions of his employment were changed. He accused the Department of acting in bad faith, particularly with regard to taking action while the process of mediation was being undertaken, and he accused the Department of putting unfair pressure on him by threatening the reduction of his salary.

As to the statutory requirement of good faith in this situation, I note that under s.4 of the Act there are a number of situations set out in s.4(4) in which the duty of good faith expressly applies. The instant problem does not immediately fit anything in the sub-section. However, s.4(5) states that these are examples which do not limit the general requirement under s.4(1) for parties to an employment relationship to deal with each other in good faith.

In all the circumstances of this case good faith required the employer to suspend a proposed action that arguably might, if taken, be in breach of the employment agreement. I say arguably because the parties have not yet been fully heard at an investigation meeting and a determination has not yet been made.

In my view the Department failed to comply with the obligation under the Employment Relations Act to deal with its employee Mr Goodall in good faith, in that it acted unfairly and with unnecessary haste in reducing the salary. The Department ought to have paid more heed to Mr Goodall's letter of 19 January 2001, written a few days before mediation was planned to take place. Mr Goodall referred to the proposed change to his salary and said that rather than being an action taken in good faith, this was a breach of contract and should not be proceeded with. He said further:

I am a long-serving and loyal officer and the case I have presented to maintain the status quo of the terms and conditions – post 26 December 2000 – has merit. I believe that both morally and legally the Department is obliged to change nothing until this matter is resolved either by mediation, arbitration, or judicial decision.

(my underlining)

Mr Goodall also urged the Department as a good employer not to proceed with the proposed reduction, but to follow the procedures for dispute resolution. By letter dated 23 January (but possibly written on the 26th after mediation had taken place) the Acting General Manager of the Probation Service wrote the following acknowledgement;

You have requested that the Department maintain your salary at its current level until the matter is resolved through litigation.

(my underlining)

I place some reliance on this correspondence. Although it is not before the Authority in any form of evidence but is simply presented as copies of letters attached to the statement of problem, it is quite unlikely from the contents and course of the correspondence taken in the overall context of this dispute, that the letters are anything other than authentic. I have therefore taken them at face value as information, if not evidence, under s.160 (2) of the Act.

I agree with Mr Goodall that a good employer in the circumstances of these parties, on the one hand a government department and on the other a long-serving and stable employee, as well as a person of integrity I infer, should not have taken the action without first giving Mr Goodall a reasonable opportunity to resolve the matter through the processes available in the Act. He had clearly signalled his intention to do just that up to the point of “judicial decision,” which may be taken to be a reference to intervention by the Authority. Mr Goodall had threatened to seek an injunction and I think the only matter that the Department could legitimately have hesitated over was any concern it had that Mr Goodall might procrastinate or delay in lodging any claim with the Authority seeking a determination. The Department had however agreed he was correct about the pace when he had earlier declared that he was acting quickly in trying to resolve the dispute.

Interim injunction - guidelines

In considering this application for an interim order, I have applied the guidelines or tests for the granting of an interim injunction, a discretionary remedy that is available from the Authority. These are; a serious question to be tried, the balance of convenience, whether other remedies are available to the applicant, and the overall justice of the case; see, *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (HC & CA) at p142.

Mrs Spackman for the Department has properly acknowledged the existence of a serious question for hearing, or an arguable case. This test favours Mr Goodall. The status quo and its maintenance are matters to be looked at the present time rather than in the past when the Department decided to reduce Mr Goodall’s salary. However Mr Goodall experiences the consequences of this decision every payday and will continue to do so on several more such days until this matter is determined. Mr Goodall has not claimed that he is currently experiencing financial hardship as a result of this substantial reduction in his pay, and that is one aspect of convenience. This test slightly favours Mr Goodall.

Mr Goodall does have other remedies available to him if an interim order is not made. Undoubtedly he will be able to recover the shortfall in salary that is occurring now and may continue in the future, if that is the final order of the Authority. There is no suggestion that the Department would not or could not meet any order, including any order to pay interest on the amount of shortfall. This test favours the Department.

Finally when I stand back from the various points that can be made about the situation of each party and consider all matters together, I find that the overall justice favours Mr Goodall. In particular, the role of the Authority as stated under s157(2)(b) of the Act is to aim to promote good faith behaviour and support successful employment relationships. It is a stated object of the Act to build productive employment relationships by recognising the foundation of good faith behaviour.

Although there will only be a relatively short delay before this matter can be determined by the Authority, the paramountcy of good faith behaviour under the Act requires an immediate restoration of the salary. This should not have been reduced at a time when Mr Goodall had expeditiously begun to follow statutory procedures or processes to have the dispute resolved fairly and quickly. Mediation followed by Authority investigation and determination if necessary, are the appropriate procedures to be applied when there is a problem within an otherwise successful employment relationship.

I emphasise that my decision turns very much on the particular facts of this case. This dispute is about the very formation and subsequent alteration of the employment contract or agreement, and it is also about the terms themselves of the employment relationship. The answer to the problem is by no means clear-cut. Indeed, the Department has indicated that it must rely partly on the existence of an implied term in the employment contract to justify its position, whereas Mr Goodall can point to an express term. Other circumstances surrounding the making or amending of the employment agreement will be relevant as well. There is sufficient uncertainty for an employer acting reasonably to have held back from the action taken the Department, at least until the dispute could be resolved by due process of law rather than self-help.

Just as the Department no doubt felt it was justified in reducing the salary, as a response Mr Goodall might have felt justified in reducing the performance of his work or work output. The Department may then have considered it necessary to obtain a compliance order requiring him to restore full performance of his work in the interim and until matters had been finally determined. Mr Goodall has not taken direct action and instead is doing all he can to have this matter resolved through the Authority and without interruption to the employment relationship. The interim order I make will assist both parties in this regard to achieve this objective.

It must be emphasised that the making of an order in favour of Mr Goodall and against the Department is no indication of the way that the parties dispute, according to its substantive merits, will finally be resolved. No inference can reasonably be drawn about that from this interim order.

Order

Subject to one condition, the Department of Corrections is ordered to reinstate the remuneration of Mr Goodall to \$70,700, or the level it was at prior to 10 February 01. Further, the Department is to make up the difference or shortfall to Mr Goodall between that date and the date of reinstatement. This order is made on the condition that Mr Goodall provides to the Department and to the Authority, in writing, an undertaking that in the event he is unsuccessful with his substantive claim he will immediately account to the Department for any excess payment received. He is to acknowledge in writing that in the event his claim does not succeed, he will become liable to repay any excess within 21 days of the final determination of the Authority, and that any late payment in

any amount will be subject to interest at 8%. The Department is to restore the old salary level immediately upon receipt of Mr Goodall's written undertaking, subject to a reasonable allowance of time for programming the computerised pay system I expect is being operated by the Department.

This order is to remain in force until further order made by the Authority to discharge or confirm it.

A Dumbleton
Member of Employment Relations Authority