

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN John Buchanan Dewar

AND The Order of St John Midland Regional Trust Board

REPRESENTATIVES Applicant in person
Peter Churchman for respondent

MEMBER OF AUTHORITY Y S Oldfield

INVESTIGATION MEETING 1 March 2005, 2 March 2005

DATE OF DETERMINATION 14 April 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] In 2004 as now Mr Dewar was Human Resources Manager for The Order of St John Midland Regional Trust Board (St John, Midland.) The Order of St John Midland Regional Trust Board is not an autonomous body. Such Regional Trust Boards deliver services throughout New Zealand but are required to operate in accordance with the policies and charter of the New Zealand Priory of the Order of St John of Jerusalem (NZ Priory.) In relation to Mr Dewar's personal employment issues the Chief Executive of St John Midland, Eddie Jackson, received support from the NZ Priory's Chief Executive, Jaimes Wood, and Human Resources Manager, Tom Dodds.
- [2] A number of years ago Mr Dewar was a senior police officer. In that role he conducted inquiries into certain alleged rapes by police officers. In 2004 these alleged attacks hit the news again and Mr Dewar attracted considerable media attention over his handling of the original inquiries. Included in the reporting was historical Judicial and Police Complaints Authority comment which had been critical of Mr Dewar and his judgement at the time. A fresh police investigation and Commission of Inquiry were announced and it quickly became clear to Mr Dewar that he would have to give considerable input into these in order to account for himself and answer accusations that the original inquiry had not been full and fair.
- [3] After the story broke, he and Mr Jackson agreed that he should take special leave on full pay until the Commission of Inquiry had completed its work and made a decision. This would have benefits for both parties. Mr Dewar would have time to prepare material for the

Commission of Inquiry and St John would be able to distance itself from negative publicity arising out of Mr Dewar's association with it.

[4] There are no issues in relation to the leave. It was taken by agreement and Mr Dewar has subsequently returned to work. However employment problems have arisen over the following related matters:

- i. what Mr Dewar says was a flawed inquiry by St John Midland into the whereabouts of his own employment records;
- ii. restrictions placed on Mr Dewar's return to work at the end of his leave;
- iii. the respondent's alleged failure to address Mr Dewar's concerns over all these matters, and
- iv. a warning letter issued to Mr Dewar shortly before he returned to work.

[5] In relation to these issues Mr Dewar claims breaches of contract and/or grievances of unjustified action to his disadvantage. The issues for me to determine are whether the employer's action was justified and if not whether it was to Mr Dewar's disadvantage.

[6] I am mindful of the fact that there is an on-going employment relationship in this case and of the need for a prompt determination. For these reasons, despite receiving statements of problem which ran to well over 100 pages and a very large body of documentary evidence, I have kept what follows very brief. I also note that Mr Dewar lodged two separate grievance applications (AEA 1063/04 and AEA 116/05.) This determination disposes of both.

(i) First alleged unjustified action to Mr Dewar's disadvantage: inquiry into missing documents.

[7] Shortly before Mr Dewar's leave began a problem arose when Mr Jackson was unable to locate either recruitment information relating to Mr Dewar or any written employment agreement for him. Mr Dewar said that no written agreement could be found because none had ever been executed. Mr Jackson disagreed; he thought he recollected sitting down with Mr Dewar to work on such a document.

[8] Concerned that important records appeared to have gone missing at such a sensitive time, Mr Jackson launched an internal investigation to try and establish what had happened to them. Because responsibility for maintaining employment records (including his own) rested ultimately with the Human Resources Manager, Mr Dewar was advised that the outcome of that investigation could affect his employment.

[9] Mr Jackson and Mr Dodds, between them, then made searches of the respondent's records and directed inquiries to the payroll clerk and officers of the respondent who might have had knowledge of the whereabouts of any records. In the end, Mr Jackson decided that it was not possible to establish whether a written agreement had ever been entered into or what had happened to it (if it did exist) or to other recruitment records. Mr Dewar was advised that the results of the investigation were inconclusive and that no further action would be taken. This ended the investigation as far as St John Midland was concerned. There was no adverse finding against Mr Dewar and so no question of any sanction upon him.

- [10] However Mr Dewar says that this outcome is not satisfactory as he has not been cleared of any wrongdoing associated with his employment records. He says that if a full and fair investigation had been carried out a result favourable to him would have resulted. This has led to his first allegation of unjustified action to his disadvantage.
- [11] Although there is doubt that there was any employment agreement to find, I have been satisfied that there can be no doubt that material relating to Mr Dewar's recruitment was on file before it mysteriously disappeared. Given the extensive media coverage of Mr Dewar and his background Mr Jackson was rightly and seriously concerned about these confidential documents going missing. For this reason an inquiry into what had happened was justified. It was also incumbent on St John Midland to acknowledge the possibility that (as Human Resources Manager) Mr Dewar could be held accountable for any systems failure that might be uncovered in the course of the inquiry.
- [12] I therefore conclude that there was no unjustified action in relation to the launching of the inquiry or the advice to Mr Dewar that his employment could be affected by what came out of it. This leaves only the question of whether the inquiry was full and fair. Mr Dewar says it was not because he says if it had been it would have been established conclusively that there had never been a written agreement and that he had nothing to do with other documents going missing.
- [13] Mr Dewar told me that he was not given a written agreement when he joined St John Midland in April 2001. Mr Jackson accepts this. However he says that subsequently (in 2003) efforts were made to tidy up employment agreements for all staff and he had believed that Mr Dewar was included in this process. He says he tried in good faith to establish whether this was the case but was not able to shed much light on the issues and so in the end he gave Mr Dewar the benefit of the doubt.
- [14] I asked Mr Dewar what other relevant information might have come out of a full and fair inquiry. He told me that Mr Williamson, an office holder of the respondent could have told Mr Jackson that Mr Dewar did not have a written contract. Mr Williamson came to the investigation meeting and confirmed that Mr Dewar had complained to him that he had not received a written employment agreement.
- [15] While Mr Jackson was investigating the missing documents Mr Dewar had suggested to him that certain individuals might have some relevant knowledge to pass on. (These people were spoken to and confirmed that soon after the employment began they had heard Mr Dewar complain that he had no written agreement.) Mr Williamson's name was not one of them. In his evidence to me Mr Williamson acknowledged that he had never spoken to Mr Jackson about Mr Dewar's contract. I am satisfied that Mr Jackson had no way of knowing that Mr Williamson knew anything at all about Mr Dewar's agreement.
- [16] In any event, it emerged during my questioning of Mr Williamson that Mr Dewar probably made his complaints to Mr Williamson fairly early in his employment. This is consistent with (undisputed) approaches Mr Dewar made to other office holders on the same subject at that time. Since this was in a period prior to the tidying up of contracts in 2003 it does not take matters any further.
- [17] Mr Dewar was not able to point to any other information that Mr Jackson should have had regard to when investigating the employment records. I am satisfied that there was nothing more Mr Jackson should have considered.

[18] Mr Dewar has not made out a personal grievance in relation to the respondent's inquiry into the missing documents.

(ii) Second alleged unjustified action to Mr Dewar's disadvantage: restrictions placed on return to work.

[19] As things turned out, the Commission sat for nine months before criminal charges were laid against some of the individuals who were being investigated. At that point it adjourned for an unspecified period. Clearly Mr Dewar could not remain on paid special leave indefinitely. In fact Mr Jackson had already contacted Mr Dewar in early September to suggest that they start thinking about how and when he might return to work. Unfortunately in late October Mr Jackson fell ill and took sick leave. For this reason, on 22 October, responsibility for liaising with Mr Dewar over his return was passed to Jaimes Wood and Tom Dodd.

[20] Mr Dewar believed that once the Commission adjourned he should go back to work straight away. It is not in dispute that his paid leave was not disciplinary in nature and was taken by agreement. Mr Dewar says that in such circumstances the employer was not entitled to impose conditions of any sort on his return and he should have been able to return immediately.

[21] The respondent says that it did not want Mr Dewar to return to the workplace directly upon the announcement of the adjournment of the Commission (Friday 22 October) because it wanted to ensure an orderly hand over from those who had been responsible for the Human Resources portfolio during his absence. Specifically, St John Midland wanted to wait until the Commission had issued its decision regarding the adjournment before confirming Mr Dewar's return and announcing it to staff. It then wished to execute a written employment agreement for Mr Dewar and to prepare a return to work plan.

[22] Negotiations over the written employment agreement had already been going on and both parties had signed it by Tuesday 26 October. Over the next three weeks Mr Wood and Mr Dodd put together a return to work plan and a list of conditions under which Mr Dewar was to work when he came back. (Later Mr Jackson signed off on the plan.) These conditions amounted to restrictions on the duties Mr Dewar was to perform. Mr Dewar was consulted about the programme for his return and some changes were made to it to reflect his input. He remained unhappy with it however, believing that no restrictions were justified at all.

[23] Mr Dodds and Mr Wood believed restrictions were necessary because some sections of the respondent's staff had (directly or through their union delegate) expressed a loss of confidence in Mr Dewar in his role as Human Resources Manager. Mr Wood, Mr Dodd and Mr Jackson were at pains to tell me that they did not share this loss of confidence because most of the material reported in the local papers was completely unsubstantiated. However, Judicial and Police Complaints Authority comment which was critical of Mr Dewar was also in the public domain, and they acknowledged that this had caused concern amongst women staff in particular. In the circumstances, they did not feel that these staff should be forced to accept Mr Dewar's involvement in sensitive employment situations. They told me that they saw any restrictions as temporary measures until things settled down, staff fears were reassured and Mr Dewar could be eased back into a full range of duties.

[24] Mr Dewar was aware of at least some of the fears expressed by staff. In particular he knew of the union's concerns (expressed in a letter to Mr Jackson in February 2004.) He did not however accept the validity of these concerns.

[25] In its final form, the return to work plan required of him the following:

- to undertake an induction/briefing process immediately upon his return to work;
- not to investigate complaints (particularly those involving sexual harassment and/or bullying) unless directed to do so;
- to be sensitive to the apprehensions that other staff may have;
- not to perform in the role of Acting Chief Executive officer in the event of Mr Jackson's absence (as he had done previously pursuant to the terms of his employment agreement.)

[26] Mr Dewar finally did return to work on 18 November. His return has gone smoothly but he continues to challenge the need for restrictions on the work he was to perform and says the restrictions amount to a disadvantage to him.

[27] As Human Resources Manager Mr Dewar was in a unique and sensitive role within the organisation. Rightly or wrongly, as a result of negative publicity about him in the news media, some staff no longer trusted Mr Dewar and objected to him exercising the full range of duties of a human resources manager. Recognising his responsibilities to all staff, Mr Wood endeavoured to balance Mr Dewar's rights and needs with those of other staff in a managed process. I am satisfied that it was not just reasonable but essential for him to do so. In my view both the restrictions imposed on Mr Dewar's work and the delay in his return were reasonable and justified.

[28] For completeness I note that there was no substantive disadvantage to Mr Dewar in the restriction on his duties. His salary remained intact, he was not required to pick up any duties at a lower level and he continued to be able to perform the broad sweep of strategic Human Resources functions. The respondent's actions are neither unjustified nor do they constitute a disadvantage to Mr Dewar. Mr Dewar does not have a personal grievance in relation to this issue.

(iii) third alleged unjustified action to Mr Dewar's disadvantage: failure to address concerns

[29] Mr Dewar put all his concerns regarding the above matters to his employer in a letter dated 30 October 2004. On 1 November Mr Dewar received a response from Mr Wood. Mr Wood considers that this letter addressed Mr Dewar's concerns adequately. Mr Dewar disagrees.

[30] I have considered these items of correspondence plus a number of other related items in a very substantial body of documentary evidence. I am satisfied that the respondent did listen to Mr Dewar's concerns, consult with him and continued to attempt to develop a return to work programme which would meet his needs as well as the needs of others. At the end of the day, Mr Wood did not consider himself able to agree to everything Mr Dewar wanted.

[31] I have already stated that the managed return to work (including the delay and the restrictions on duties) was justified. The respondent did not need to do anything further to address Mr Dewar's concerns. He has no personal grievance in relation to this issue either.

(iv) Fourth alleged unjustified action to Mr Dewar's disadvantage: warning letter.

[32] In the interval before he recommenced his duties Mr Dewar entered the workplace in what he describes as a brief visit and in what St John Midland says was direct disobedience of an instruction to stay away. Mr Wood was of the view that until the return to work programme had been sorted out it was not helpful for Mr Dewar to be spending time at the office or talking to staff.

[33] Mr Dewar received a warning in relation to this. He disputes receiving a clear instruction to stay away and says that the warning was not legitimate because he had not been suspended and the respondent had no justification for telling him he could not go on the worksite.

[34] I am satisfied that in the period after 26 October Mr Dewar was instructed to stay away from the workplace pending his formal return. The evidence of this is unequivocal and I have to say that Mr Dewar is 'splitting hairs' in suggesting that he was not told so very clearly. I am also satisfied that, given the concerns expressed by other staff and the respondent's very proper wish to conduct a managed return to work for Mr Dewar, Mr Jackson was justified in telling him to stay away in the interim. It follows that the warning letter of 11 November 2004 was justified. The warning letter was a disadvantage to Mr Dewar but because it was justified, there can be no question of there being a personal grievance over this issue.

Summary

[35] Mr Dewar and his employer were in a difficult situation during 2004. I am satisfied that in all the circumstances St John Midland did what it could to support and assist Mr Dewar, not least by providing him with nine months on full pay including use of the respondent's vehicle. Mr Dewar has experienced a great deal of stress but this arose out of the wider situation he found himself in rather than anything his employer did.

[36] I can do nothing more to help Mr Dewar with his employment relationship problem.

Costs

[37] I leave it to the parties to discuss this matter between themselves but if it cannot be resolved and they wish me to determine it they must advise me of this within 28 days of this determination.