

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

<b>BETWEEN</b>	Adrienne Scott (applicant)
<b>AND</b>	Chief Executive, Department of Corrections (respondent)
<b>REPRESENTATIVES</b>	Megan Williams for the applicant Phillip Cornegé for the respondent
<b>MEMBER OF THE AUTHORITY</b>	Denis Asher
<b>SUBMISSIONS RECEIVED</b>	9, 14 & 23 December 2005
<b>DATE OF DETERMINATION</b>	20 February 2006

**DETERMINATION OF AUTHORITY: Preliminary Matter**

**Employment Relationship Problem**

1. Ms Adrienne Scott says she was unjustifiably disadvantaged by the Department – statement of problem received on 1 November 2005. The applicant seeks reinstatement under certain conditions and or \$7,000 compensation for humiliation, etc a positive reference and costs.

2. The Department says the disadvantage claim is without merit and says it should be dismissed. It also says that certain parts of the claim were raised outside of the statutory 90-day limit: the Department does not consent to them being raised – statement in reply received on 18 November.
3. The parties did not settle their employment relationship problem in mediation. Agreement was subsequently reached on the Authority determining the 90-day issue on the papers and a one-day investigation into the substantive allegation in Wellington commencing at 10.00 a.m. on 7 March 2006.
4. Submissions on the 90-day issue were received by the parties. This determination addresses that matter.

## **Background**

5. The key facts are largely agreed.
6. By way of a written individual employment agreement (IEA), signed off by the applicant on 14 July 2003 and effective from the 31<sup>st</sup> of that month, Ms Scott was employed by the Department in the position of intervention services trainer, Head Office, Wellington. She was required to “*deliver training, participate in the development of course content and materials and promote and model high standards of skill development and process integrity for course participants*” (position description dated 23 April 2003, statement of problem). What that means is that Ms Scott was required to deliver training to staff who undertake and deliver offender assessment and rehabilitative intervention programmes.
7. Her internal functional relationships were to, amongst others, other trainers, the training co-ordinator, programme facilitators and probation officers and sentence planners; external relationships included external providers, community groups and hapu and iwi (position description, above).
8. Clause 22 of her IEA encouraged Ms Scott to raise any issues she had about her employment with her manager. It also set out a plain language explanation of the Employment Relations Act 2000, the requirements for raising a personal grievance –

including the 90-days requirement – and details about the mediation services provided by the Department of Labour.

9. By email dated 27 October 2004 and letter of 12 March 2005, Ms Scott's representative – Ms Megan Williams – advised the Department of the applicant's concerns. The letter of 12 March advised of Ms Scott's belief that,

*... she has been disadvantaged in her appraisal process as a result of her being expected to do Maori Culture training. She believes there has been a breach on (the Department's) part of her employment agreement ...*

*As you are aware, when she was first employed and since that time she has voiced concern to you on many occasions regarding the fact that she was not comfortable carrying out the Maori cultural training programs. She did not consider that she had the required training in the subject to feel competent and safe to do so. ...*

*... Ms Scott believes she now has a personal grievance.*

(attachment to statement of problem)

10. In its reply dated 22 March the Department expressed surprise at notification of the grievance because, "*Ms Scott is not required to deliver Maori cultural training as part of her performance review*" (statement of problem). Also, Ms Scott was not being measured on her ability to deliver Maori cultural training as part of her performance review. However, her role required Ms Scott to support new employees, including new trainers and new Maori cultural trainers "*in the generic aspects of their training role*" (above). Her grievance was therefore considered as without merit.
11. Ms Scott responded by seeking mediation as she believed she had been detrimentally affected in her performance assessments and resulting remuneration considerations. While not resiling from its position, and in a letter dated 4 April 2005, the Department properly agreed to undertake mediation.
12. In an earlier letter dated 11 March, the Department communicated to Ms Scott its wish to meet with her to discuss various concerns it had about her performance.

13. In a report dated 21 June, and for various reasons set out therein, a Department review panel concluded that *“a fair process was not followed in conducting the assessment of Ms Scott in the 2003/04 Assessment”* (attachment to statement of problem). The Review Panel also recorded that it was not required to, and had not, commented on whether Ms Scott’s progression competencies had been met.
14. Ms Scott resigned from the Department on 2 May 2005, effective 17 June.

### **Applicant’s Position**

15. Ms Scott’s statement of problem sets out her claim that she was required to deliver Māori cultural training to trainers in prisons notwithstanding her advice to the Department, on numerous occasions, that she was not trained to do so.
16. Ms Scott also alleges other grievances, in particular that:

*“she had asked ... to have an input into the scheduling of training programmes because she found she did not have time to complete the expected other activities in addition to the training work load. This was never addressed by her Manager.*

*... she was detrimentally treated as she was required to live in Wellington and travel all around the country to do the training and yet other trainers were able to live where they resided (sic).*

17. The remedies sought by the applicant are set out in her statement of problem: I note here that, in the absence of a clear contractual entitlement to them, the Authority does not have the statutory power to grant the first 6 of the seven remedies sought by Ms Scott.
18. In her submissions to the Authority Ms Scott says she raised her other grievances in respect of time off in lieu (toil), overtime and the fact that other trainers had not been required to live in Wellington at meetings with the Department on 10 and 18 December 2003. The applicant also says that the first two items were discussed in weekly trainers’ meetings and the team leader acknowledged that unacceptable amounts of *“toil and overtime (were) being worked (and said) the matter needed to be dealt*

*with and it was not*" (par 6, submission received from Ms Scott's advocate, Ms Megan Williams, on 9 December 2005).

19. The applicant also claims these matters were raised "*at the mediations in December 2003*" (par 7, above).
20. Ms Scott rejects the Department's claims she misused its credit card and taxi cards: she says of the first allegation an error occurred and she has repaid the respondent money owed to it and all use of the taxi card occurred legitimately while she was an employee.

### **Respondent's Position**

21. The Department says Ms Scott has only ever raised a personal grievance in respect of the alleged requirement that she deliver Maori cultural training. As a result the other matters raised – workload/toil and the claimed requirement to live in Wellington – are outside of the 90-day time limit set by s. 114 of the Act and the respondent does not consent to them being raised after the expiration of that period.
22. The primary role of a trainer with the respondent is to effectively deliver high quality training to staff who undertake offender assessment and rehabilitative intervention programmes. Maori cultural related needs are delivered as part of that training. In October 2003 the Department's Maori cultural trainer resigned. Some difficulty was encountered in recruiting a replacement. Amongst other interim arrangements Ms Scott was asked if she had the skills, and was willing, to deliver Maori cultural training. The Department says the applicant's response has varied: she has advised the respondent that she has insufficient knowledge to deliver the training but that she would be willing if she was paid an allowance. The Department declined that offer.
23. As an interim measure pending the recruitment of an appropriate trainer, the Department provided additional cultural support to trainers. This involved engaging a person with expertise to be present during those parts of the training when Maori cultural training were taught. On rare occasions, when no cultural support was available, the training team (not just the applicant) have provided Maori cultural training without cultural support. Ms Scott has, on very rare occasions, provided

Maori cultural training without expert support being present. However, the respondent was never required to do so.

24. From February 2005 Maori cultural training was provided by external specialist staff.
25. Ms Scott was expected, as all trainers are, to provide assistance to those engaged to provide cultural support in the generic aspects of their training role.
26. Ms Scott's performance was not assessed against her ability to deliver Maori cultural training as part of her performance review. The applicant was not expected nor required to provide Maori cultural training.
27. Ms Scott was not happy with her performance appraisal for the 2003/04 year and asked that it be reviewed. That review was concluded on 21 June 2005. The review does not conclude that the applicant was required to deliver Maori cultural training. It does conclude that the process followed was unfair. The review panel recommended that Ms Scott be given a one off payment equal to the amount of the performance pay for the 2003/04 year: that recommendation was accepted and the applicant received a payment equivalent to 5% of her annual salary.
28. Ms Scott raised a personal grievance on 12 March 2005 regarding an expectation she undertake Maori cultural training. The applicant did not raise as a grievance the other matters now set out in her statement of problem, i.e. issues in respect of her workload and the requirement to be based in Wellington. The Department does not consent to these matters being raised outside of the 90-day period.
29. The Department agrees that meetings took place on 10 & 18 December 2003 however it does not accept that the discussions held prior to, during and after these meetings amount to raising a personal grievance.
30. It argues that there needs to be more than an abstract indication of the possibility of a personal grievance: *Tarawhiti v Mainland Products* [2002] 2 ERNZ 708. No positive notice of a personal grievance was given by the applicant to the respondent during those meetings. As a consequence of those meetings, the Department understood Ms Scott's concerns were resolved. The applicant did not pursue the matters further.

31. The email chain set out by the applicant refers only to Ms Scott's "*concerns*" (statement of problem). They do not specify the nature of those concerns or that the applicant is raising a grievance against the Department. They were not raised in Ms Williams' advice of a personal grievance dated 12 March 2005 or her later letters.
32. The letter of 12 March demonstrates Ms Scott's understanding of how to raise a personal grievance against her employer. The applicant failed to take similar steps in respect of her other concerns.
33. The respondent was only aware of Ms Scott's concerns in respect of workload/toil and the requirement to live in Wellington when the latter filed her statement of problem.
34. A number of the documents attached to the statement of problem had not previously been communicated to the Department: the Authority should therefore ignore these documents when determining whether Ms Scott has raised her personal grievance within time.
35. The Department relies on a signed settlement agreement in respect of Ms Scott's claims relating to her relocation to Wellington (document D, attached to the respondent's submissions received on 14 December 2005). In other words, accord and satisfaction apply.
36. The Department says, any way, that Ms Scott should not receive any of the remedies she seeks. The applicant committed serious misconduct both during and after her resignation, which would have allowed the respondent to terminate her employment. Ms Scott made unauthorised personal purchases on her Department credit card. She also used her Department taxi card after her resignation.

## **Discussion and Findings**

37. I am satisfied that Ms Scott is unable to proceed with her grievances in respect of workload and/or time off in lieu and/or overtime and the claimed requirement that she live in Wellington for the following reasons.

38. The parties to this employment relationship problem agreed, during a telephone conference on 2 December 2005, that the Authority would determine the 90-day issues between them following receipt of their submissions.
39. Ms Scott's submissions provide greater detail and specificity, over that contained in the statement of problem, as to the nature of the grievances now opposed by the Department on the ground of them lying outside of the statutory 90-day period.
40. I find that the evidence presented by the parties does not support Ms Scott's claim she filed notice within the required time of her grievances other than in respect of being required, she says, to deliver Maori cultural training to trainers in prisons when she had told the Department on numerous occasions she was not trained to do so.
41. The basis of Ms Scott's claim that these matters were raised is her version of what occurred between the parties at meetings on 10 & 18 December 2003: the Department disputes the applicant's claim. I find in favour of the respondent's version because:
  - a. There are no affidavits provided by others at those meeting, including her then-advocate, in support of Ms Scott's version as to what occurred;
  - b. There are no written records of follow-up action by Ms Scott in respect of the outcomes of those meetings, in which it could reasonably be expected – given the passage of time – that she made clear her dissatisfaction with the (apparent) failure by the Department to act, and her intention therefore to pursue a personal grievance in respect of specified matters. That failure to act is indicative of the applicant's acceptance of the respondent's position.
  - c. The written communications that do exist, from Ms Scott, are – in respect of her claimed grievances – lacking in specificity. As a result, the Department could not fairly and reasonably be expected to have understood Ms Scott's concerns as they are now particularised in her statement of problem.

- d. While the advice from her representative of 12 March is reasonably clear as to Ms Scott's concerns about the alleged requirement that she deliver Maori cultural training, it makes no equally clear reference to any other matters.
  - e. The letter of 12 March illustrates Ms Scott's familiarity with what is required in the raising of a personal grievance; and
  - f. The applicant's IEA makes clear the requirements for submitting a personal grievance. In particular, clause 22 (d) stipulates the Department's obligation to respond to a grievance within 14 days. The Department's failure to respond would have been a signal to Ms Scott that she had either not communicated a grievance, or that the respondent was in breach of its contracted awareness. In either instance, and as illustrated by her use of mediation, I am confident the applicant was well placed to take the next step.
42. In the absence of the respondent's express consent, Ms Scott is unable to rely on the content of mediation to support her claim she put the Department on notice within the required time as to her other grievances. This is because of the effect of s. 148 of the Act: *Shepherd v Glenview Electrical Services Ltd* [2004] 2 ERNZ 118. I record here that I have not had regard to, and have sealed the material on the Authority's file, and attached to the statement of problem, that is identified as "*Adrienne Scott Mediation Meeting 22nd July 2005*" on the ground that it appears to be a record of the same and therefore may be in breach of s. 148 of the Act.
43. I am also satisfied that there are no grounds to apply ss. 114 (4) of the Act. This is because Ms Scott was clearly aware of the requirements in respect of personal grievances as they are set out in her IEA, she was represented by an experienced advocate during the December 2003 meetings and as illustrated by her advocate's letter of 12 March 2005.
44. I also record here an observation in respect of Ms Scott's claim that she was disadvantaged by having to reside in Wellington: so far I have seen no material making clear any Departmental requirement that Ms Scott reside in Wellington. I do note the applicant apparently freely signing on to a position located at the respondent's Head Office, Wellington. It is therefore difficult to anticipate how this

claim might succeed, on disparity grounds, even were the applicant to establish that other trainers could “*remain living in their own towns*” (par 37 of Ms Scott’s witness statement).

45. Finally, I also record here my concern – based on the evidence on the file to date – that Ms Scott faces considerable difficulty in establishing her grievance, accepted by the Department as having been filed within the required 90-day period, that she was required to deliver Maori cultural training to trainers in prisons notwithstanding her advice to the Department, on numerous occasions, that she was not trained to do so. This is because much of the applicant’s discursive witness statement relates, not to that complaint, but to a much broader dissatisfaction with how the respondent elected to operate its business in general: those complaints, including concerns about her safety, are not relevant to her surviving grievance. Instead, the matter of whether Ms Scott was or was not required to deliver Maori cultural training, etc should be readily resolvable, as a matter of record. As matters presently stand, the evidence presented to the Authority by Ms Scott does not support her claim. The applicant will be aware, from advice from Ms Williams, that costs follow the event. In the event of not succeeding with her claim the Department may seek costs. Costs typically fall within, more or less, a range of \$1,500 to \$3,000.

### **Determination**

46. For the reasons set out above, and by way of a preliminary determination, I find against the applicant, Ms Adrienne Scott’s claim, that she enjoys standing to bring her grievances against the respondent, the Chief Executive, Department of Corrections, in respect of workload and/or time off in lieu and/or overtime and the claimed requirement that she live in Wellington. These matters are struck out. They will not be considered at the forthcoming investigation in Wellington on 7 March 2006: Section 114 of the Act applied.
47. Costs are reserved.

**Denis Asher**

**Member of Employment Relations Authority**

