

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

Under the Employment Relations Act 2000

BETWEEN Donald Ian Gray (Applicant)
AND The Chief Executive Department of Corrections (Respondent)

Member of Authority: P R Stapp

Representatives: Graeme Gowland for Applicant
Emma Warden for Respondent

Investigation Meeting: Wellington, 14 June 2007

Submissions received: 22 & 27 June 2007

Determination: 27 August 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This is an employment relationship problem about a claim for unjustified action and disadvantage in employment. Ian Gray has raised a problem about how he was treated during the process of management of change impacting on his job. The applicant has also made submissions that Corrections breached the terms and conditions of the employment agreement and breached the duty of good faith, for penalties to be applied. The claims were denied by Corrections. Prior to the Authority's investigation meeting Mr Gray withdrew a claim that he was unjustifiably dismissed and reduced his claim for compensation.

Issues

[2] The issues can best be summarised as whether or not there was any unjustified action by Corrections affecting Mr Gray's employment to his disadvantage? Did Corrections breach any

terms and conditions of employment and good faith, and if so should there be penalties applied? There are some factual disputes on the evidence but largely this is a matter of interpretation of the evidence about Corrections' and Mr Gray's conduct. In particular: did Mr Philip Butter, (Manager Property Management), say to Mr Gray that he did not see a place for Mr Gray in the new structure? Was the delay in providing job descriptions reasonable? Was Mr William Whewell, (the National Manager, Assets and Property), biased? Were there any sufficiently serious defects in the management of change process?

Facts

[3] Mr Ian Gray was employed by the Department of Corrections in the role of Senior Advisor in Property Management, Assets and Property at Corrections Head Office. He was appointed to that position in March 1997. He had an individual employment agreement. That agreement made provision for *reassignment* in the following terms:

Reassignment means placement in a different suitable position. "Suitable" meaning a job that does not involve so significant a change in duties as to be unreasonable when taking into consideration the employee's skills, abilities and potential to be retrained.

[4] A provision for salary equalisation was also provided under the terms.

[5] At the time of his appointment Mr Gray reported to Mr Whewell. There was a restructure in 1999 and he was required to report to a new manager, Mr Butter.

[6] In this early period Mr Gray's title changed to Senior Advisor Maintenance, but the change was not formally made, although much later a job description emerged. There was some conflict around how this happened but it is common ground that the job description fitted Mr Gray's role.

[7] In October 2002 an issue emerged about what Mr Gray's role involved and that his role would be reviewed. He was given an opportunity to comment. The result was that his role would be monitored. Nothing more immediately happened.

[8] In April 2005 there was notice given that there would be a review of the Assets and Property section in Head Office. The delegated approvals for a review were then made involving Mr Whewell and Mr Mike Martelli, the General Manager Strategic Services, with reasons for the review

taking place. Organisational charts were produced but no job descriptions were produced for new positions.

[9] Mr Gray says nothing happened until May 2006. On 8 June 2006 Mr Gray was told by Mr Butter that there was a proposed new structure and that the position Senior Advisor Maintenance had been disestablished. Mr Gray says he asked Mr Butter where he saw him in the new structure and it is alleged by Mr Gray that Mr Butter said "*I don't*". Mr Butter denied making that comment but says he did say that "*given the structure was a proposal only it was premature for me to determine an outcome that could not be foreseen*" (email response dated 27 June 2006). Mr Butter says the information he gave to Mr Gray caused Mr Gray to be a bit shocked.

[10] Mr Gray says Mr Butter's comment was unjustified.

[11] On 9 June 2006 Mr Whewell met with the Assets and Property group to distribute for consultation a restructuring proposal relating to the Head Office positions. Feedback was sought. Mr Gray requested further information.

[12] Mr Gray engaged counsel to assist him to gather information, including job descriptions, and raise issues about change options under the employment agreement. Corrections regarded the request as premature considering no decision had been made and the proposal had been put out for consultation and not been completed. Feedback was received, including from Mr Gray.

[13] Mr Gray took the matter up with Mr Whewell on 12 June. Mr Whewell says he told Mr Gray not to take too much from Mr Butter's comment and that the statement reflected the situation that Mr Gray's position did not appear in the proposed new structure. He says he told Mr Gray he could provide feedback. Mr Whewell made no determination on whether or not Mr Butter had actually made the comment as alleged. Mr Gray says that Mr Whewell's failure to provide job descriptions and further information was unjustified.

[14] On 30 June 2006 a personal grievance was raised by Mr Gray's representative. Mr Whewell decided not to attend mediation as requested because it was premature, a waste of time, would be fruitless and there was nothing to discuss, in his opinion. In the meantime Mr Gray made more requests for information and job descriptions. Corrections say that it has to be remembered that the process was still in the consultation stage.

[15] On 9 October 2006 the decision to confirm the disestablishment of Mr Gray's position as Senior Advisor Maintenance was sent to Mr Gray. During this time Mr Gray applied for a vacancy at Rimutaka and the position was subsequently offered to Mr Gray and held open for him, although he later declined it for genuine reasons.

[16] On 9 November Mr Whewell pointed out to Mr Gray the process of filling vacancies left open the possibility of a vacancy being frozen to enable Mr Gray to be considered.

[17] On 14 November 2006 Mr Gray applied for the new Senior Advisor Management and Policy Development role (called AP 114A). He also showed an interest in two other reassignments, but they are not at issue here. Initially Mr Gray's old role and AP 114A were assessed for reassignment by Mr Butter, but Mr Gray did not know that. He was not provided with the documentation completed by Mr Butter, who made the detailed role comparisons. Mr Butter concluded in his assessment that Mr Gray would on his skills, abilities and ability to be retrained, not be suitable for the new role. He gave a copy of the documentation to Mr Whewell. He also informed Roger Lamberth, Team Leader Assets and Property, and the head of the appointments panel, that his assessment was that Mr Gray was not suitable for reassignment.

[18] The next step involved an interview for the position. Mr Gray was provided with job descriptions that were left on his chair. There were two applicants for AP 114A. The second applicant was an outside contractor. Mr Whewell says the panel used a lower threshold test for Mr Gray as to whether or not he met the requirements of the role (i.e. suitable for the role) instead of the best person for the role because Mr Gray was part of the management of change process. Mr Lamberth says that he initially assumed he was to treat Mr Gray like any other candidate but he was advised by Mr Butter that he had to apply the lower threshold test, not whether Mr Gray was the best candidate.

[19] Mr Lamberth says Mr Gray did not meet the suitability test. He then was treated on the same basis as the other applicant; the best person for the job. That part of the process included referee checks and a review of the personal file. Mr Lamberth decided that the outside applicant was the best person for the job and a recommendation was approved by Mr Whewell.

[20] On 18 December 2006 Mr Lamberth proceeded to send an offer letter to the successful candidate but was informed by Human Resources that he had to hold it. I accept that he did so

because there is another letter dated February 2007 signed by the successful candidate accepting the position then. I have no reason to doubt the veracity of this and it has not been challenged.

[21] On 18 December Mr Lamberth advised Mr Gray that he had been unsuccessful. A notice of appointment was posted on the department's intranet on the same date. Mr Lamberth says he made an error in notifying "the appointment" since no offer had been made to the successful candidate. Mr Whewell says he gave Mr Gray an assurance that no offer had been made and informed Mr Gray that he could make submissions on the preliminary view that he was not suitable for the role in AP 114A.

[22] On 21 December Mr Whewell wrote to Mr Gray setting out his reasoning of the situation and gave Mr Gray the comparison analysis information on the reassignment prepared by Mr Butter that Mr Gray had never seen.

[23] On 22 December Mr Gray initiated a review because he considered an appointment had been made, but Mr Whewell considered it premature because no appointment had been made and the change management process was still alive in his opinion.

[24] Later Mr Gray was advised by email that an offer was sent to the successful candidate on 20 February 2007 and notified on the intranet on 22 February.

[25] On 8 March 2007 Mr Gray proceeded with his request for a review. An external review was conducted and completed by an independent person from outside Corrections. That person's review report recommended that Mr Gray's suitability for the position be reassessed. Corrections accepted the review recommendations except for the recommendation that an outside person reassess the appointment. Instead Mr Whewell was appointed to carry out that reassessment. He says he looked at the interview notes and the applications; Mr Gray's CV, Mr Gray's personal file and considered whether or not Mr Gray would be suitable on his skills, abilities and ability to be retrained. He set out his conclusions in a Memorandum dated 4 May 2007 that Mr Gray did not meet "all" the requirements for the position. He concluded that Mr Gray was not suitable for reassignment because he did not meet the requirements. Mr Gray says Mr Whewell was biased and could not have determined the matter objectively and impartially. Corrections denied the claim.

[26] Mr Gray was given notice of the termination of his employment on 7 May 2007 after all other possibilities were considered for him. He was the only affected employee to be made redundant.

Determination

[27] This employment relationship problem has arisen from what I would describe as a messy management of change process, whereby Mr Gray did not have the benefit of a prescribed outline of the actual process being followed. While a prescribed process was not required under the management of change process contained in the employment agreement, it is not an ideal situation, but nonetheless not fatal.

[28] The length of time that Mr Gray was placed under a review concerning his role and position, the lack of any job descriptions for new positions and the blurred mix of considerations given to “*suitability*” and “*the best person for the job*” criteria for the vacancy in the same process make it entirely understandable why Mr Gray had concerns about how he was being treated. None of these involve a sufficiently serious breach to give rise to any personal grievance in terms of the grounds relied upon because Mr Gray was engaged in the process and was consulted, he did receive job descriptions and Corrections has supported the proper use of the tests that had to be applied in considering Mr Gray, particularly for vacancy AP 114 A. I have noted the subtle use by Mr Whewell of the words in his evidence that Mr Gray did “*not meet all the requirements*” when he was reassessed by Mr Whewell. I am satisfied Mr Whewell was applying the test of suitability instead of the best person for the job and that involved consideration of Mr Gray’s skills, abilities and ability to be retrained, in concluding that he was not suitable.

[29] Although the process was less than ideal, as I have said, it was not fatal, and I am further supported by the following factors:

- Corrections has been able to substantiate the restructuring involving Mr Gray’s position. I am satisfied it was not acting with any ulterior motives.
- There was an opportunity provided to Mr Gray for consultation including the proposal to restructure and the proposal to disestablish his position. The deadline for Mr Gray to provide feedback was extended. He provided feedback.
- The management of change provision under the employment agreement was implemented.
- Mr Gray was given an opportunity for consideration for other positions such as the one at Rimutaka Prison and vacancy AP 114A.
- The offer to the outside person was put on hold until Mr Gray had the further opportunity to be considered under the suitability test as he was an affected employee.

- Mr Gray had an independent review.
- The process was open to confusion and potential unfairness. However, I accept that Mr Whewell had a role to play and would be the ultimate decision-maker. He gave Mr Gray the opportunity to comment. He provided all relevant information to Mr Gray.
- There is no reason to regard Mr Whewell's assessment of the applicant as being done other than fairly and objectively.
- Any lingering affects of any comment made by Mr Butter on 8 June 2006 were allayed by Mr Whewell who acted to correct any false impression caused by Mr Butter and to ensure the proper process was followed and criteria applied.
- Job descriptions were provided as they became available.
- Mr Gray was given opportunities in the consultative phase on the restructuring. There is sufficient evidence of consideration for reassignment and consideration given to his suitability including retraining.
- The failure to engage an outside person to reassess the appointment has not resulted in any disadvantage to Mr Gray. Indeed it would have been Mr Whewell who would have had to make a decision if someone from outside the organisation was engaged to make what could have only been a recommendation, given the delegations.

[30] Mr Gray has relied upon what Corrections says was a mistake when Mr Lamberth proceeded to send a letter of offer to the successful candidate but was informed by Human Resources that he had to hold it. The letter of offer was not sent. A notice of appointment was, however, posted on the department's intranet on the same date. I have accepted that these were errors. There was nothing deliberate or wilful or malicious about Mr Lamberth's actions and the department set about to correct the situation and reassure Mr Gray. Mr Whewell gave evidence of this and I have accepted it.

[31] Mr Gray was not subject to any reconfirmation because his position had been disestablished and no longer existed with duties that were the same. No issue has been taken on this by the applicant.

[32] Reassignment was certainly considered and applied to Mr Gray, for example, the following positions: Assets and Property Officer at Rimutaka Prison, Compliance and Finance Coordinator, a potential Fleet Manager position, Manager Construction, AP 114A, Advisor Quality Assurance and Validation, Senior Advisor/Advisor Environment and Sustainability, Systems Upgrade Planning

and Systems Maintenance and Senior Advisor Commissioning (Quality). Of these AP 114A has become central to Mr Gray's perception of his employment relationship problem.

[33] It is my conclusion that there has been no proven disadvantage to Mr Gray where he lost his job in genuine redundancy/restructuring circumstances and where Mr Whewell was far enough removed from Mr Butter's alleged comments to be sufficiently independent as the decision maker. The evidence does not support the claim that Corrections breached Mr Gray's terms and conditions of employment and the duty of good faith.

Orders

[34] Mr Gray's claims are dismissed.

Costs

[35] Costs are reserved.

P R Stapp
Member of the Authority