

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Peter Bachelor & 35 Others (applicants)
AND	Secretary for Justice, Ministry of Justice (respondent)
REPRESENTATIVES	Paul McBride for the applicants Andrew Scott-Howman for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
SUBMISSIONS RECEIVED	by 28 February 2007
DETERMINATION	1 March 2007

DETERMINATION OF AUTHORITY: Application for Removal

Employment Relationship Problem

Background

1. By way of an application filed on 12 June 2006 the applicants says the Ministry has breached the annual reviews of salary structure/bands and job evaluations applicable to them, as set out in their employment agreements, as well as the respondent's own remuneration policy.
2. In its statement in reply received on 28 June the Ministry denies the applicants' allegations.

3. The parties underwent mediation but their employment relationship problem remained unresolved. A four day investigation was, in the meantime, set down to commence on 14 November.
4. By agreement that date was subsequently vacated for a variety of reasons including ongoing effort by the parties to narrow the issues, identify agreed categories of applicants, reach agreement on some of the facts and to summarise each applicant's individual circumstances, and a proposal to undertake further mediation.
5. Failing resolving the matter on their own terms, the parties agreed to – if necessary – a four-day investigation commencing Tuesday, 13 March 2007.

Application for Removal

6. By way of an application filed on 16 February 2007 the applicants now ask the Authority to remove their employment relationship problem to the Employment Court.
7. The Ministry filed its notice of opposition to the application by email on 20 February.
8. By telephone conference also on 20 February the parties agreed the applicants would file their submissions by 22 February, the respondent's by 26 February, and the applicants' closing submissions by 28 February.

Applicants' Submissions

9. The applicants say this case is one in which their employer has a remuneration policy expressly incorporated into some of their employment agreements requiring that market remuneration is assessed annually with a view to adjusting salary ranges. The applicants say the Ministry has unilaterally decided, since 2002, not to undertake annual or any market salary surveys.
10. They also say they are entitled to remuneration changes based on movements recorded by market surveys.
11. The applicants rely on ss. 178 (2) (a), (b) and (c) of the Act in their current application, i.e. they say an important question of law is likely to arise in the matter other than incidentally, or the case is of such a nature and of such an urgency that it is in the public interest that it be

removed immediately to the Court, or the Authority is of the opinion that in all the circumstances the Court should determine the matter.

12. In addition to the applicants' case as detailed in the statement of problem, the parties have now agreed the questions as to liability. They are:

1. *Was the Ministry obliged to analyse market remuneration data annually in 2004, 2005 and 2006 in relation to the Applicants' salary ranges?*

2. *If the Authority/Court decides that the Ministry had the obligation in question one, in no particular order, did the Ministry have any or all of the following obligations:*

(a) *publish the results of the market remuneration data to the Applicants?*

(b) *consider what (if any) adjustments to make to the Applicants' salary ranges including whether to move those by the resulting percentage movement (if any) in terms of the Applicants' employment agreements and Remuneration Policy?*

(c) *If the Ministry did not have the funding to adjust the Applicants' salary ranges, to take all practicable steps to obtain it?*

(d) *Advise the Applicants of the steps taken and decisions made in respect of paragraph (b) and/or (c)?*

3. *What effect, if any, did the application of the 3%, 2% and 2% remuneration increases in 2004, 2005 and 2006 have on the obligations in questions 1 and 2?*

4. *Do the answers in questions 1 and 2 differ in respect of Category 1 employees? If so, how?*

13. The issues are of law rather than any (or any substantial) factual dispute, and thus are strictly ones of legal interpretation. This is not a case in which the Authority's specialist fact finding processes are required.

14. The test of whether there is an important question of law is set out in *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1, at p7.

15. The test is not whether a novel issue of law arises, nor does the question necessarily have to be difficult. There are numerous cases in which removal of proceedings has been ordered where the question of obligations under employment agreements were at issue.

16. Applying these principles to the facts of this case, it is submitted the resolution of this case will affect a large number of the Ministry's senior employees (upwards of 80), over and above the 36 named applicants. The amounts at stake are substantial – liability approaches \$1,000,000 in respect of the 36 applicants. Broader liability could be of the order of \$3m.
17. Applying *Hanlon* (above), the issues the applicants seek to have referred to the Court are decisive in this case, i.e. what obligations does the respondent owe to them in respect of their remuneration under the relevant policy and employment agreement?
18. The nature of the case means that it is in the public interest it be referred to the Court. The case involves senior employees of the Crown bringing a sizable claim. Their employment is at the heart of the Court system. Their action is unprecedented. There is also substantial Crown liability.
19. The employment is ongoing. Prompt and definitive resolution of the matters is crucial for all parties. Definitive resolution can only be reached in the Court. Given what is at stake a challenge (coupled with duplicated costs and further delays) is inevitable. Liability continues to accrue. The impact on the individuals is substantial. The court has indicated a hearing at a similar time to that in the Authority (in March or April) is possible.
20. There is no real prejudice to the Ministry in removal, particularly given the inevitability of recourse to the Court in any event.

Respondent's Position

21. This matter involves personal grievance claims brought by each of the 36 applicants, all of whom have similar circumstances. At the core of each claim is a question about the interpretation of a policy provision and its application to the applicants. The claims are resisted on a number of bases. The Ministry says the policy does not apply to some of the applicants. It says that others agreed to vary their terms in such a way they are now disentitled from claiming breach. While considerable overlap exists, the resolution of the issue at the heart of the matter requires an examination of individual circumstances.
22. The parties have agreed the matter should be approached in two parts: an initial hearing as to liability and, if required, a subsequent hearing as to quantum. No agreement has been reached as to a statement of facts in respect of the initial hearing. Significant differences of fact exist between the parties. The issues as to quantum are even more complicated and, if required, an examination of individual circumstances would be extensive.

23. The parties are justified in seeking a prompt hearing as proceedings were filed in June 2006 and the matters at issue occurred as long ago as 2003. However, these factors do not constitute urgency. There is no feature of the case which makes it time sensitive. While delay is inconvenient it does not affect the merits of the claims. Besides, the Authority can hear the matter within the near future. Removal of proceedings will not achieve a more prompt hearing. The applicants have therefore not made out the grounds prescribed by s. 178 (2) (b).
24. The issues as to liability have been confined by agreement between the parties. There is no issue that those questions are of importance to the parties, and their resolution has the potential to affect other employees, over and above the applicants. This feature does not, however, justify removal as the fact of a potential wider application does not elevate issues to important questions of law. Further, the issues are not of public or national significance and their determination does not have the potential to affect anyone not employed by the Ministry. The answers to the questions are not likely to be determinative of the case as individual circumstances are involved and separate hearings required as to quantum. For these reasons the applicants have failed to make out the ground specified in s. 178 (2) (a).
25. Because of my findings I do not intend to address the respondent's argument in the alternative in respect of the circumstances of the case.

Discussion and Findings

26. I accept the Ministry's submissions: the task before the Authority is, I find, neither novel nor unusual. It is instead a 'bread & butter' examination of individual circumstances and the interpretation of an employment policy and its application to those employees. The analysis required, of the terms of the applicants' employment agreements, does not constitute an important question of law. It is a task regularly undertaken by the Authority and one – I am satisfied – intended for it by Parliament. I am also satisfied that the interpretation of the applicants' employment agreements is unlikely to impact significantly on employment law generally.
27. In reaching this discussion I am also conscious of the following: this is a very late application particularly as a hearing remains available to the parties in the very near future (commencing on 13 March). While the parties understandably want to make progress on their concerns, this matter goes back to 2003: the patience with which the applicants have approached their concerns will not be unfairly or unduly penalised by a decision rejecting their application for removal.

28. As submitted by the Ministry, I also do not accept that a challenge to the Authority's determination (if one is necessary) is inevitable. The broad power given to the Authority to encourage settlement will, I am confident, assist the parties both in respect of liability and, if successful, quantum on an individual by individual basis.
29. Given the ongoing nature of the employment relationships, both parties must also bear in mind their good faith obligations under the Act, its object of promoting mediation as the primary problem-solving mechanism and the Authority's statutory obligation to consider further mediation.

Determination

30. The application for removal is declined.
31. As requested by the parties, costs are also reserved.

Denis Asher
Member of Employment Relations Authority