Determination Number: WA 61/07
File Number: 5041863

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE

BETWEEN	Peter Bachelor & 34 Others (applicants – the names of which are set out in pars 14, 20 & 21 below)
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
INVESTIGATION	Wellington, 13 March 2007
DATE OF DETERMINATION	26 April, 2007

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. The applicants are managers now employed by the Ministry (previously the Department for Courts) at various court locations around New Zealand. In their application filed on 12 June 2006 they alleged the Ministry had breached the annual reviews of salary structure/bands and job evaluations applicable to them, as set out in their various employment agreements and the respondent's own remuneration policy.

2. In its statement in reply received on 28 June the Ministry denied the applicants' allegations.

3. The parties underwent mediation but their employment relationship problem remained unresolved. A four day investigation was set down to commence on 14 November: that date was later vacated by agreement for a variety of reasons including ongoing effort by the parties to narrow the issues, to reach agreement on some of the facts and to summarise each applicant's individual circumstances, and a proposal to undertake further mediation.

4. Settlement was not reached. However, the parties advised that only a one-day investigation on Tuesday, 13 March 2007 was required. It was their view that the case involved the application of a remuneration policy to certain employees: the employees say it has been misapplied, the Ministry disagrees. The purpose of the hearing was therefore to allow the Authority to reach a determination concerning issues of liability, arising out of questions agreed between the parties (dated 22 February) and a common statement of facts (dated 8 March).

5. During this period, and by way of a determination dated 1 March 2007 (WA 31/07) I declined the applicants' application (filed on 16 February) that this problem be removed to the Employment Court.

Agreed Statement of Facts

6. The agreed statement is as follows (verbatim except for changed paragraph numbering and the shortening of references to the REM Policy to simply the Policy):

7. *"In 2002 the Department for Courts introduced a Remuneration Policy (*the Policy*). A copy of the Policy is agreed exhibit "A" and a Report of the Remuneration Project Team which provides background to the Policy is agreed exhibit "B". The Policy introduced a new remuneration system. Employees who wished to adopt the new remuneration system either varied their employment agreements to this effect or signed employment agreements incorporating the system.*

8. *Section 3 of the Policy prescribed eight* "Principles" *as follows:*

   (i) remuneration will reflect the market, the Department's ability to pay and individual performance;

   (ii) the remuneration process will be consistent across the Department;

   (iii) high performance will be rewarded;

(iv) the remuneration system will be transparent and easy to understand;

(v) the remuneration system will recognise skills of value to the Department;

(vi) staff will be involved in the development and implementation of the remuneration structure;

(vii) the remuneration structure will reflect the balance of internal consistency with external compatibility; and

(viii) the remuneration system will be adaptable and flexible to accommodate change.

9. *The Policy also contains the following statement:* "The Department for Courts wants to ensure that it can attract, retain and motivate high performing people to support the achievement of its business and strategic objectives. To achieve this the Department will operate a transparent remuneration system based on fairness and integrity"*.*

10. *Section 6 of the Policy also includes the following:*

(i) "The Department will align itself to the public sector for comparison purposes. Where the labour market for a position(s) is clearly influenced by the private sector, comparison may be to the private sector".

(ii) "Total remuneration is the basis upon which market comparisons will be made".

(iii) "The Department will use market surveys as an aid to help guide remuneration decisions. Market data will be analysed at least annually during June of each year, with any adjustments to pay ranges being approved by the Senior Executive Team based on recommendations from the National Partnership Forum"*.*

(iv) "Adjustments to ranges will be based on a number of factors including affordability and will not lead to automatic adjustment of individual pay rates".

11. *From February 2002, employees on individual agreements were offered an opportunity to vary their individual arrangements to include the Policy (and consequent remuneration system).*

12. *On 19 August 2002 Corporate Human Resources of the former Department for Courts provided its managers with a memo entitled* "Performance and Remuneration Framework" *a copy of which is agreed exhibit "C".*

13. *On 1 October 2003, the former Department merged with the former Ministry of Justice, to form the current Ministry of Justice (the Ministry).*

14. *The following applicants did not vary their individual employment agreements to include the Policy (and consequent remuneration system):*

    (a) David Body

    (b) Kevin Conroy

    (c) Sally Croy

    (d) Linda Dalton

    (e) Wayne Jackson

    (f) Vance Kapene

    (g) Phillip Miles

    In Annexure One, these applicants are referred to as ***"Category 1"*** *employees.*

15. *At various dates between February 2002 and November 2005 the remaining applicants varied their employment agreements to include the Policy (and consequent remuneration system), or entered into employment agreements which included the Policy (and consequent remuneration system).*

16. *A copy of the standard wording generally used to effect this variation is agreed exhibit "D".*

17. *Internal memoranda, regarding which contained information about the Ministry's intention to apply annual increases to remuneration ranges in 2004, 2005 and 2006 on the basis of an agreed collective employment agreement settlement with the PSA, were circulated to managers on 15 December 2003, and employees on 22 December 2003. Copies of these memoranda are agreed exhibits "E" and "F".*

18. *In about January 2004, a further variation was offered to employees on the new remuneration system. This variation offered a 3% increase to both remuneration bands and individual remuneration (with effect from 4 December 2003 for PSA members or 1 January 2004 for non-PSA members) and generally also included an offer to amend the employees' annual leave provisions.*

19. *A copy of the standard wording generally used to effect this variation is agreed exhibit "G".*

20. *The applicants who did not sign the variation accepting a 3% increase to both their remuneration bands and individual remuneration are listed below, and referred to as **"Category 2"** employees in Annexure One:*

    (a) Alister Frengley – Mr Frengley agreed to vary his employment agreement to include the Policy from 1 December 2004.

    (b) Donald Merrylees – Mr Merrylees did receive the 3% remuneration increase.

    (c) Clare O'Brien – Ms O'Brien commenced working for the Ministry again on 2 June 2004 and her employment agreement incorporated the Policy and system.

    (d) Kevin Robinson – Mr Robinson was appointed to the position of Area Court Manager at the Auckland District Court from 19 July 2004 and the employment agreement which he signed on 25 June 2004 included the Policy.

21. *The applicants who did sign the variation accepting a 3% increase to both remuneration bands and individual remuneration and in some cases an amendment to their annual leave provision are listed below, and referred to as **"Category 3"** employees in Annexure One:*

    (a) Peter Batchelor

    (b) Beth Bowden

    (c) Nellie Brooking

    (d) Philip Clarke

    (e) Bryan Dockary

    (f) Catherine Dodd

    (g) Michael Douglas

    (h) Thurza Eichler

    (i) Evan Gould

    (j) Christopher Greaney

    (k) William Hall

    (l) Hilary Hancock

    (m) John Houghton

    (n) John Huston

    (o) Deborah Masani

    (p) Jennifer Menzies

(q) Elspie Mitchell

(r) Nicholas Munn

(s) Joy Pearse

(t) Wendy Roberts

(u) Graeme Shaw

(v) Leslie Silson

(w) Wayne Tibbles

(x) Marilyn Wilson

22. *On 7 June 2005 the Ministry's Human Resources department provided all National Office staff with the attached agreed exhibit "H" entitled* "Feedback on Remuneration and Performance Development Policy from Staff Consultation".

23. *Annexure One contains the following information about each applicant (within each category):*

(a) A copy of the applicant's Individual Employment Agreement.

(b) Where relevant:

(i) a copy of the applicant's variation to include the Policy;

(ii) a copy of the applicant's variation to accept the 3% increase.

(c) Copies of the applicant's annual performance reviews for relevant years.

In addition, the following information is also provided about some applicants:

(a) A copy of the applicant's variation to include variable pay into base salary.

(b) A copy of the applicant's variation to change the treatment of GSF in relation to total remuneration.

(c) Other relevant information relating to the applicant's annual performance reviews.

(d) Other relevant information relating to the applicant's remuneration.

(signed) *(signed)*

Paul McBride *Andrew Scott-Howman*

Counsel for the Applicants
Date: 8 March 2007

Counsel for the Respondent
Date: 8 March 2007"

Agreed Questions as to Liability

24. As explained in par. 4 above, the parties are in agreement on questions as to liability. They are (verbatim except for changes to paragraph numbering):

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

b. 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:

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

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

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

(iv) Advise the applicants of the steps taken and decisions made in respect of paragraph b (ii) and/or (iii)?

c. 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 a. and b.?

d. *Do the answers in questions a. and b. differ in respect of Category 1 employees? If so, how?"*

Applicants' Position

25. The applicants say this is a straightforward case of the respondent having express contractual duties which it has unilaterally decided to discard.

26. The Ministry's obligations relate to assessing the applicants' salary ranges, or bands, within which they are paid so as to ensure market-comparability.

27. The applicants say the Ministry was obliged to:

- analyse market data annually (agreed exhibit a, section 6);
- properly consider what adjustment to make to salary ranges or base salaries taking into account the relevant factors under the applicants' employment agreements and the Policy (agreed exhibit a, section 6)
- take all reasonable steps to be in a position to fund such movements;
- keep the applicants in the loop about what it was doing and why.

28. The applicants have not and do not advocate that any particular market increase or decrease should be, on a rigid or formulaic approach, be applied to their salary ranges.

29. The applicants say the Ministry has to, at the very least, consider whether to adjust their salary ranges based on the market data and the other relevant factors in the Policy, i.e. do that exercise (section 6 of the Policy). If the Ministry then decides that, but for funding, it would increase the salary ranges, then it is incumbent on the respondent to seek funding.

30. This is a classic case of a discretionary exercise under an employment agreement. The purpose behind the discretion is to ensure that its employees' remuneration is market-based and equitable. Administrative law accepts that a refusal or failure to act when a decision maker has a discretion to do so is unlawful: Joseph; *Constitutional and Administrative Law*, 2nd Edition, page 808; *McIntosh* v *Agresearch – NZ Pastoral Agriculture Research Institute Ltd* [2002] 2 ERNZ 50, etc.

31. Contentions about affordability are no mandate for refusing or failing to undertake the required market assessments.

32. The Ministry is obliged to seek funding in order to give the Policy meaning: a duty to make the policy work must be an implied term of the parties' employment agreements.

33. Principle 6 of the Policy makes it clear the Ministry had an obligation to advise the applicants of the steps taken and decisions made in respect of its considering whether to make salary range adjustments and obtaining funding if necessary.

34. The increases of 3%, 2% and 2% from 2004 – 2006 did not take away the Ministry's obligations. The increases did not amount to some variation of their employment agreements whereby obligations to the applicants under their agreements or the Policy were avoided. A plain reading of the documents show that was not the case – refer to agreed exhibit G. The variation was limited and specific and related to annual leave rather than deleting salary review obligations. There is no mention in the variation signed by some of the applicants, all of whom received the 3% increase, that by doing so they were signing away the subsequent application of the Policy and the clauses in their employment agreements incorporating it.

35. While category 1 employees did not specifically vary their employment agreements so as to expressly incorporate the Policy, that policy and associated remuneration structures still apply to them because there is ample authority that where an employer has a policy in place, employees are entitled to expect that it will apply to them and the employer will not contravene it: *Stimpson* v *Auckland Health Care Services Ltd t/a Auckland Health Care* [1993] 2 ERNZ 614, at 629; and *Chief Executive of the Ministry of Maori Development* v *Travers-Jones* [2003] 1 ERNZ 174, paras 56 & 57.

36. There is nothing in the policy excluding its application to Category 1 employees. They also enjoy remuneration clauses that require annual review.

37. The applicants therefore answer the agreed questions (refer para 24 above) in the following way:

    a. Yes.

    b. Yes, the Ministry had all four obligations.

    c. None.

    d. No.

Ministry's Position

38. The Ministry says this case involves an issue of interpretation around the application of the Policy to certain employees. It does not agree that this policy has been misapplied.

39. Each of the applicants is employed by way of an individual employment agreement. While there are some areas of overlap, the terms of these agreements vary between applicants.

40. Prior to 2000 the then Department for Courts became concerned it was not satisfying aspirational goals to attract and retain high calibre employees, and to encourage high performance focusing on the person rather than the job (agreed exhibit B, pages 9 & 10). It therefore resolved to overhaul its remuneration system, which resulted in the Policy.

41. The Policy commences with an aspirational statement, confirming that the respondent would operate a *"transparent remuneration system based on fairness and integrity"* (opening paragraph, agreed exhibit A).

42. The Policy obliged the Department to align itself to the public sector market for comparison purposes and, in exceptional circumstances, to the private sector. In order to achieve this the respondent was required to undertake an analysis of market relationships.

43. The Policy provided that the respondent would use market surveys as an aid to guide remuneration decisions and that there would be at least annual analyses of market data during June of each year. The consequences of these market reviews and the automatic adjustment of individual pay rates were not guaranteed (clause 6 of the Policy).

44. Adjustment of pay ranges so as to approximate market movement was required from the respondent's senior executive team based on recommendations from the national partnership forum. Adjustment to ranges required consideration of a number of factors, including affordability.

45. Clause 4 of the Policy required it to be expressly incorporated into new employment agreements. Existing employees had a choice: they could 'buy in' to the new system or simply remain on their existing terms and conditions.

46. Seven of the applicants elected not to opt in to the new system: they expressly declined to have the Policy applied to them (i.e. the Category 1 employees). The respondent has therefore honoured their express preference and the Policy has therefore never been applied to them. Their remuneration has been, throughout the period relevant to these proceedings, reviewed instead in accordance with the relevant provisions in their individual employment agreements.

47. The remaining applicants either agreed to vary their terms and conditions to incorporate the Policy or entered into employment agreements which included it. The standard form to effect a variation to include the Policy is agreed exhibit D.

48. In October 2003 the Department for Courts merged with the Ministry of Justice, to form the current Ministry.

49. In December 2003 the Ministry entered into a collective agreement with a union, the PSA. The agreement incorporated the Policy. The coverage of the agreement did not include any of the applicants but did apply to their peers.

50. The collective agreement provided for remuneration increases of 3% (December 2003), 2% (December 2004) and 2% (December 2005). These increases replaced the annual market survey process prescribed by clause 6 of the Policy.

51. Consistent with clause 3 of the Policy, that its remuneration process would be consistent across the Ministry, the respondent offered the same increases to all other of its employees whose agreements incorporated the Policy. The approach was consistent also with the first express principle prescribed by clause 3 of the Policy, namely that remuneration would reflect the Ministry's ability to pay. The Ministry's offer was sent out to the applicants and others in two memoranda (agreed exhibits E & F).

52. In order to accept these increases employees were required to sign letters of variation – refer to agreed exhibit G. All of the applicants in Category 3 accepted the variation.

53. The Category 2 applicants did not sign and return letters of variation. They received and accepted prescribed remuneration increases for 2005 and 2006.

54. No issues were raised by any of the applicants in either 2004 or 2005. Category 2 and 3 applicants received a 3% increase in 2004 and a 2% increase in 2005, i.e. all of these employees' salaries were increased by the percentage amounts proposed in the variation letters and otherwise indicated in the respondent's memoranda circulated in December 2003.

55. All of the applicants had their performance reviewed in 2004 and 2005: no issue is taken in this proceeding with their reviews or the outcomes.

56. The Ministry says that its obligation to undertake annual market reviews, as contemplated in clause 6 of the Policy, has been overtaken by the agreement reached with all relevant employees to accept prescribed pay increases.

57. As to the future, the Ministry has been undertaking a pay and remuneration project (the Field PRS) which it intends to implement from 1 July 2007. If approved and implemented it will present staff including all of the applicants with the option of a new remuneration system.

58. In reverse order the Ministry says, of question 4, that there is no contractual basis for Category 1 employees to raise a claim on the basis of the Policy: it has never applied to them.

59. In respect of question 3, the Ministry says it accepts the Policy required it to make annual assessments of market information by analysing market data and considering whether increases to pay ranges were required. These obligations were not absolute and had to be balanced against other factors including affordability. The circumstances of the Policy, however, were altered by way of contractual variation. Specifically, in 2004 all of the Category 3 employees agreed to a contractual variation by which they accepted a 3% increase, and 2% increases in two future years. Memoranda sent prior to the variation explained how it had been proposed and that consistency would be achieved with other employees covered by the collective agreement. This variation was consistent with the Policy's requirements for adaptability and flexibility – clause 3. The need to analyse market data had become redundant.

60. Because the applicants had agreed to prescribed remuneration increases no purpose was served in undertaking an analysis of market date.

61. In respect of question 2 (a), and as a general principle, the Ministry accepts that as part of the obligation of good faith it should always act in an open and communicative manner. From time to time, and in response to individual requests, the Ministry has provided market data. However, the Policy does not place any express obligation upon it to publish all market data. In any event, no information was obtained for the purpose of clause 6 so no communication obligation arose. There has been no attempt to conceal information.

62. Question 2 (b) lies at the core of the applicants' claim. In essence, the applicants say that – irrespective of their agreement to vary their employment agreements to accept prescribed increases – the Ministry should have nonetheless undertaken annual market reviews. The applicants go on to say that the results of such information would have prevailed over the

agreed percentage increases. The Ministry rejects this argument and says that the agreement to percentage increases was absolute. Contractual integrity should prevail. The variation document gave no room for additional increases. Instead, the variation document prescribed the figure each applicant would be paid. There could be no misunderstanding, particularly as they enjoyed the opportunity to seek independent advice before signing the variation. Besides, the Policy did not guarantee remuneration increases as a consequence of positive market movement. Market reviews were a guide only. Any increases were subject to a number of confining criteria including affordability.

63. In respect of question 2 (c), the nature of the Ministry's funding is such that defined appropriations are required to underpin any remuneration decisions. It is required to manage within the total financial resources available to it, hence the constraint of 'affordability' set out in clause 6.

64. The answer to question 2 (d) requires an analysis of the communication obligation owed by the Ministry. But the matter in this case is moot as the Ministry was not required to undertake communication of this type, because the preceding steps were not taken.

65. Finally, in answer to question 1, the answers set out above demonstrate that this exercise was rendered redundant.

Findings

66. As agreed by the parties, the issues to be determined are those of liability. Issues of quantum are reserved for later consideration in the event of the applicants succeeding.

67. For the reasons set out below I am satisfied that the agreed questions are properly answered in the following way:

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

Answer: it was.

69. **Question 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:

70. **Question 2 (a)**: publish the results of the market remuneration data to the applicants?

Answer: it did.

71. **Question 2 (b)**: if yes, what (if any) obligations did the Ministry have to make adjustment to the Applicants' salary ranges including whether to move those by the resulting percentage market movement (if any) in terms of the Applicants' employment agreements and Remuneration Policy?

Answer: the obligations are those set out in the Policy, including the application of the results of the Ministry's analysis of the market remuneration data in 2004, 2005 and 2006.

72. **Question 2 (c)**: if the Ministry did not have the funding to adjust the Applicants' salary ranges, what obligations did it have to take all practicable steps to obtain it?

Answer: the obligations are those set out, both expressly and implied, in the Policy and by statute applicable to the Ministry, including the State Sector Act 1988, the State Sector Amendment Act 2003 and the Ministry's empowering legislation and the Public Finance Act 1989.

73. **Question 2 (d)**: what obligations did the Ministry have to advise the applicants of the steps taken and decisions made in respect of questions 2 (b) and 2 (c)?

Answer: the Ministry was obliged to communicate information to the applicants sufficient to meet its good faith obligations in general and specifically its obligations as set out in the Policy, particularly those articulated in clause 3, Principles.

74. **Question 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?

Answer: for the reasons set out below, the 3%, 2% and 2% remuneration increases did not vary the contractual obligations owed by the Ministry to the applicants under the Policy.

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

Answer: they do. For the reasons set out below I am satisfied Category 1 employees were not party to the Policy and cannot therefore claim its benefits.

Discussion

76. This investigation has generated an astonishing amount of argument and evidence. Absorbing and summarising that evidence has generated some delay in completing this determination.

77. At the heart of this employment relationship problem is a straightforward question: at its simplest, the Ministry's position is that the Policy (and its obligations under that policy including undertaking annual market reviews) was overtaken *"by the agreement reached with all relevant employees to accept prescribed pay increases"* (par 38, respondent's 12 March submissions; refer also to pars 49 - 55).

78. The Ministry claims that the relevant employees thereby agreed to vary their contracts so as to eliminate the Policy from them. That is plainly not the case. That is because the memoranda of 15 & 22 December 2003 (agreed exhibits E & F) did not offer such a variation. The memoranda, and subsequent communications, did not impliedly, and certainly not expressly, offer a trade off. They did not clearly, fairly, reasonably and unambiguously invite employees who previously had agreed to the Policy, to give up that Policy in exchange for the pay increases. None of the relevant exhibits provide any suggestion that acceptance of the percentage increases entailed the relevant employees giving up the Policy as a term and condition of their employment.

79. Offers to vary individual employment agreements (agreed exhibit G) were similarly silent as to the nature of the variation now claimed by the Ministry. Comment in those offers appears to limit any variation to a change in annual leave provision (i.e. third paragraph first page and last paragraph final page agreed exhibit G): they do not communicate a requirement that acceptance of the pay increases required the employee giving up the provisions of the Policy.

80. Category 1 employees are clearly not eligible for the provisions of the Policy because they never uplifted the offer so that it became part of their terms and conditions of employment. Despite its title, the Policy is not an expression of the employer's right to manage, and to set fair and reasonable policy including disciplinary provisions, etc. It therefore does not extend to them by way of some general administrative principle.

81. As the agreed exhibit D makes clear, the Policy was instead offered to employees by way of an express variation. Ironically, it might be said that that offer was a model of what subsequent memoranda and offers should have contained. For example, it clearly states that, amongst other things, *"I … agree to vary my current employment contract or agreement by deleting all current references to remuneration in that contract or agreement and replacing them with*

the following clause: The principles of the Department's Remuneration Policy are as follows: …". An employee reading and signing that offer could be under no confusion as to what it meant. For reasons specific to themselves, category 1 employees elected to refuse that offer and any subsequent opportunity to uplift the same.

Determination

82. The answers to the agreed questions are as set out above.

83. As requested by the parties, costs are also reserved.

Denis Asher
Member of Employment Relations Authority