Determination Number: CA 4/07
File Number: 5038503

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY OFFICE

BETWEEN	William (Nobby) Clark (Applicant)
AND	Robert Mackway-Jones, Christine Miller and Julian Tommei as trustees of the Family Start Support Services (Invercargill) Trust (Respondent)
REPRESENTATIVES	Christine French, counsel for the applicant Peter Churchman, counsel for the respondent
MEMBER OF AUTHORITY	Philip Cheyne
INVESTIGATION MEETING	Invercargill 5 October 2006
DATE OF DETERMINATION	22 January 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Nobby Clark worked as manager of the Invercargill Family Start Programme (IFS) from its inception in 2000 until he was summarily dismissed on 3 February 2006. In February 2006, IFS was operated by Murihiku Iwi Whanau Services Trust (MIWST) under a contract between it and the Southland District Health Board (SDHB). SDHB was the successor of the Health Funding Authority as funder of the IFS programme while MIWST was the successor of Invercargill Family Start Trust (IFST) as the service provided. MIWST and IFST are separately registered charitable trusts but they shared several trustees at relevant times.

[2] By late 2005, Mr Clark had come to the view that there were financial and other irregularities being perpetrated by the trustees and he reported those concerns to the SDHB which resulted in an audit and a decision by the SDHB to cancel the contract between it and MIWST conveyed in a letter dated 21 February 2006.

[3] Having cancelled its contract with the service provider, SDHB decided to form a trust to operate the IFS pending a transfer of funding oversight from District Health Boards to the Ministry of Social Development and the establishment by that Ministry of contractual arrangements with an appropriate service provider. SDHB was keen to maintain service continuity and believed that any interruption might cause the loss of experienced staff and disrupt critical relationships compromising the ability to re-establish the service later.

[4] The respondents are senior SDHB managers who have been authorised by SDHB's Chief Executive to act as trustees of the Family Start Support Services (Invercargill) Trust, the charitable trust established by SDHB to act as IFS service provider in the meantime.

[5] The problem for investigation and determination is Mr Clark's claim that he was offered employment by the SDHB's Chief Executive and the respondents on behalf of the Family Start Support Services (Invercargill) Trust, an offer which he accepted. Mr Clark says that the

respondents reneged on that agreement. The relevant exchanges occurred on 10 and 13 March 2006. Mr Clark seeks reinstatement and other remedies.

[6] Mr Clark's dismissal by the MIWST, the audit of MIWST and IFS on behalf of SDHB, the disputed transactions between the MIWST and IFST, Mr Clark's alleged complicity in those transactions and his actions in reporting concerns to SDHB form the context against which Mr Clark says he was offered and accepted employment by the respondents. It is necessary to set out in more detail those events before turning to resolving the conflicting evidence about the communications between Mr Clark, the respondents and SDHB's Chief Executive concerning employment.

The audit and related matters

[7] On 12 October 2005, Mr Clark wrote to the Chief Executive of the SDHB raising concerns over the governance of the IFS programme and requesting the appointment of an auditor. In an attached memo, Mr Clark raised concerns that the trustees were related to one another; that the trustees had authorised the transfer of IFS funds to MIWST; and that provision in budgets for depreciation created the opportunity for future surplus transfers. By October 2005, the contract for the delivery of the IFS programme was between SDHB and MIWST. Mr Clark asked that the audit extend to an investigation into MIWST's use of the IFS funds received from the predecessor trust. By the time of the disputed transactions, the trustees of IFST were Maria Pera and Dion Williams. At the time, the former was a board member and the latter an employee of SDHB. The trustees of MIWST were Maria Pera, Sonia Bragg and Dion Williams. The two women are sisters and Mr Williams become Sonia Bragg's son-in-law during 2005.

[8] Mr Clark's 12 October 2005 letter followed a period of disagreement between him and the trustees over a range of issues. The transfer of IFS funds to MIWST in August 2005 created a cash shortfall leaving insufficient funds to meet the IFS payroll obligations in late September 2005. At some point a decision was made by MIWST to deliver the IFS programme through a company. A further company was established to provide services relating to gambling addiction. The trustees of MIWST were also directors and shareholders of both companies. There was discussion but not agreement with Mr Clark over his future role with these companies and appropriate service delivery structures.

[9] After Mr Clark reported his concerns to the SDHB he received a letter from lawyers acting for his employer requiring him to attend a disciplinary meeting to explain his justification for reporting those concerns. Mr Clark responded in writing advising that he would be on leave for several weeks, would meet his own legal adviser promptly on his return from overseas and referred to the Protected Disclosures Act 2000.

[10] Further issues arose between Mr Clark and the trustees over governance of IFS resources exposing IFS to an inability to meet its payroll commitments again. That culminated in a written instruction dated 1 February 2006 from the solicitors acting for the employer requiring Mr Clark to deposit $60,000 held in an ANZ Bank account into an account in the name of one of the companies referred to above. The letter cautioned Mr Clark that failure to do this by 5pm on 1 February 2006 may be serious misconduct resulting in summary dismissal. Mr Clark was also required to attend a meeting on 3 February 2006 to answer an allegation that he had seriously misconducted himself by sending a memorandum to an SDHB manager about financial issues regarding the IFS programme and the gambling service mentioned earlier.

[11] There had been attempts by or on behalf of the trustees to have the SDHB contract payments paid into an account other than that identified in the contract. However, in a letter dated 2 February 2006, the SDHB confirmed that payment would only be made to the bank account designated in the signed contract. Mr Clark's evidence is that the SDHB gave him this letter in order to support his decision not to comply with the 1 February 2006 instruction to transfer funds. He says that the letter was defective and that he was given a further letter when he raised the matter with the SDHB manager. The second letter is dated 3 February

2006 and is signed by another manager. It expresses SDHB's view that the transfer of funds was not deemed appropriate and asks Mr Clark to convey that to the trustees and requests a response to the earlier letter. In evidence, Mr Clark is critical that the letters were addressed to him rather than the trustees. He also criticises the two managers (both of whom are respondents) for not telling him that SDHB had no legal power to prevent the transfer of funds.

[12] Mr Clark's evidence is that he was summarily dismissed by his employer on 3 February 2006 when, in reliance on the second SDHB letter, he again refused the direction to transfer funds.

[13] Mr Clark feels bitter towards SDHB because the transfer of funds apparently occurred soon after his dismissal, following an acknowledgment on behalf of the SDHB to the employer's solicitor before the dismissal, that the SDHB had no right to prevent the transfer of funds. Mr Clark's evidence is that, if the transfer was going to happen anyway, he would have complied with the directive and kept his job.

[14] In about December 2005, the SDHB Chief Executive resigned. Mr Mackway-Jones, the Chief Financial Officer, acted as Chief Executive for a short while until Dr Nigel Murray was appointed as interim Chief Executive commencing in mid-January 2006. Mr Clark wrote to Dr Murray on 21 January 2006 setting out his view of the developing dispute with the trustees as at that date, giving some background information and current IFS service delivery issues, and requesting a meeting with Dr Murray. Dr Murray responded by letter dated 2 February 2006. This letter advises that Mr Clark's disclosures fall within the Protected Disclosures Act 2000 and the SDHB's whistle-blowing and fraud policy. It also advised that an audit was under way and promised that the outcome would be reported to Mr Clark by 20 February 2006.

[15] Mr Clark sees himself as a whistle-blower regarding financial impropriety perpetrated by the trustees of IFST and MIWST. However, during the investigation meeting, counsel agreed that the provisions of the Protected Disclosures Act 2000 cannot assist Mr Clark in the present claims. It is therefore unnecessary to make any findings about Mr Clark's status as a whistle-blower.

SDHB cancels the contract and sets up a trust

[16] Mr Clark and his partner (Karen Carter) met with Dr Murray and another SDHB manager on or about 24 February 2006. By that time, SDHB had decided to terminate its contract with MIWST. Dr Murray told Mr Clark this. Mr Clark was also given a copy of the audit report. Ms Carter's evidence, which I accept, is that she asked Dr Murray *when would Nobby be reinstated* and Dr Murray said that he could not then give an answer as a plan needed to be developed. Mr Clark's evidence, which I accept, is that Dr Murray said that the planning would take no longer than 14 days. It is not suggested that there was an offer of employment made at this meeting. There are evidential disputes about aspects of this meeting, but it is not necessary to resolve them.

[17] On 3 March 2006, Mr Clark sent an email to Dr Murray referring to the meeting and asking him to say *at what stage you will be able to indicate what future, if any, I have with the management of Family Start?* Mr Clark also advised that he would be away from 14 March until 26 March 2006 and asked whether Dr Murray intended them to meet before the departure date.

[18] Mr Clark sent further emails to Dr Murray and Christine Miller demanding an answer whether he would be reinstated. His email dated 10 March 2006 stated:

> *I require you … to advise me* ***today*** *whether or not I am being reinstated by Monday 27 March.*

[19] In response, Mr Clark received three phone calls from Dr Murray later on 10 March 2006. Dr Murray called first from Invercargill airport as he was about to board a plane, then from Christchurch airport and again on his arrival in Auckland.

[20] Mr Clark's evidence is that he was told there was a new managerial role, not re-employment, and was asked if he was interested. He was told that a new trust would be established with three trustees from SDHB and that he needed to meet with Dr Murray to negotiate the employment contract next week. However Dr Murray was not back in Invercargill before Mr Clark's departure overseas so Dr Murray agreed that Mr Clark should contact Christine Miller over the weekend to arrange a meeting with the new trustees to negotiate the contract. Mr Clark followed up this with an email to Christine Miller dated 11 March 2006 in which he says:

> ***REF: Employment offer – Manager of Family Start***
>
> *… I spoke to Nigel yesterday. I was delighted with the offer of this position … I discussed with Nigel my desire to commence at Family Start on Monday 27 March – he said that was Ok but that I needed to negotiate a Contract of Employment with you before that employment could commence. He suggested that I meet with you on Monday 13 – before I go overseas …*

[21] Dr Murray's evidence is that he had a draft of a letter with him when he made the three calls to Mr Clark. Mr Clark also says that Dr Murray referred to a letter that he would receive. There is a letter dated 13 March 2006 which Mr Clark says he received that day. The letter refers to the SDHB's decision regarding Mr Clark's potential future role with the Invercargill Family Start Service, the termination of the existing contract and re-establishing a new trust; and the wish to enter into negotiations with Mr Clark with a view to employing him as manager of the service. Mr Clark was asked to advise his earliest availability to commence discussions. The SDHB for reasons explained later says that Mr Clark could not have received the letter on 13 March 2006.

[22] While it is clear that the letter itself is not an offer of employment capable of acceptance, Mr Clark's communication to Christine Miller on 11 March described the conversation with Dr Murray as an offer. If Mr Clark's description is correct, the discussion between the two men must have gone beyond the gist of Dr Murray's letter. Dr Murray's evidence that the words in his letter reflected what he said about the prospective employment would then be wrong. I will return to the point later.

[23] Mr Clark met with the intended trustees (the respondents) on the afternoon of Monday, 13 March 2006. It is agreed that the meeting lasted about an hour or so. However there is considerable disagreement about some aspects of this meeting and the respondents deny offering employment to Mr Clark. It is convenient to start with Christine Miller as the arrangements for the meeting were made with her. Ms Miller says that Dr Murray asked them to meet with Mr Clark. Both Mr Tommei and Mr Mackway-Jones say they were invited to the 13 March meeting by Ms Miller. Mr Clark's evidence is that he phoned Ms Miller and they arranged to meet. However, there is also email communications setting up the meeting. In any event, Ms Miller coordinated the attendance of the other two trustees.

[24] Ms Miller says that they reminded Mr Clark that Dr Murray had not already offered him the position and that they specifically and clearly told him that they were not in a position of being able to make him any offer at all and that they did not discuss any detail of what an employment contract might contain. I do not accept this evidence. It is improbable that the meeting could have concluded in the amicable way that it did if Ms Miller or the other two trustees had contradicted so clearly Mr Clark's understanding of his phone discussions with Dr Murray.

[25] Ms Miller provided a supplementary statement of evidence. She there acknowledges that there was discussion about Mr Clark's salary level while employed by MIWST and about his employment conditions in general. Mr Clark in his email and memo to Ms Miller before the meeting proposed:

<u>My employment contract</u>

I would suggest the status quo (with the exception of the salary) prevail. This gives identical conditions as those applying to all staff – e.g. four weeks Annual Leave/ten days Sick Leave/3 months Termination payment – I will give you a copy of my latest contract that was not settled with MWS.

My previous salary was – Up until July 2005 - $88,000 pa

- Post-July 2005 - $100,000 pa

The latter figure was for the management of the 2 person Invercargill Gambling Services.

I would suggest that the contract term be for the period of the Family Start contract – until 30 June 2008. My previous contract (and that of the staff) has a Change Management Provision – which implies a roll-over to a new employer if there are changes – this would carry us through the transitional period and beyond.

[26] Ms Miller's evidence is that *we made it clear that we were not in a position to make any offer of employment* because they had not received approval to incorporate the proposed trust. She also says that they explained to Mr Clark the relevance of the trust not then being in existence and SDHB having requested but not received the Minister's approval for the formation of the proposed trust. She says that *we explained to* [Mr Clark] *that until we had approval from the Minister of Health for the trust settlement we could not make any concrete arrangements at all.*

[27] I find that this evidence exaggerates what was actually said. It is correct that approval had been sought but had not been received for the creation of a trust. It is also correct that the plans were contingent upon this approval. Nothing more than this was said to Mr Clark during the 13 March 2006 meeting. Formal approval was received for the creation of the trust on 20 March 2006 and it was formed by deed dated 22 March 2006. In the meantime, the trustees (the respondents) and the SDHB proceeded with arrangements for the proposed trust to take over IFS service delivery upon the expiry of the notice given to MIWST. These arrangements included the appointment of a manager (acting), reassuring existing IFS staff and managing other aspects of the IFS service. The fact that the trust was not actually incorporated until later makes no difference to the validity of these actions, nor can it to any agreement with Mr Clark.

[28] Surprisingly, none of the three respondents took any notes during or even after the meeting with Mr Clark. Ms Miller's evidence, given orally, is that *we were at pains to say at the start that there would be no notes, that it would be an informal meeting*. I do not accept this evidence. Mr Tommei, SDHB's legal risk and quality manager, and Mr Mackway-Jones, SDHB's chief financial officer, told me that they did not take any notes but they did not claim it had been said at the outset that there would be no notes made. Mr Tommei in particular who is a solicitor familiar with the practice of file notes was challenged about the failure to take notes but he explained that as simply a habit acquired while working for SDHB. Neither man claimed that it had been said at the outset of the meeting that notes would not be taken.

[29] Mr Clark, on the other hand, did take some notes which he says were written partly during the meeting and partly in his car straight afterwards. For the most part, one or more of the respondents acknowledge in evidence that the items noted by Mr Clark were discussed during their meeting with him. I should also record Mr Tommei's oral evidence, which I accept. Talking about the discussions between the three respondents after problems arose with employing Mr Clark, he said *we all had a different recollection of the meeting bearing in mind we didn't take notes*.

[30] In the circumstances, I accept the notes made by Mr Clark as an accurate summary of matters discussed at the meeting.

[31] The notes record, and one or more of the respondents acknowledge, that there was discussion about a number of operational matters related to IFS. Mr Mackway-Jones, for example, referred to the service being about $7,000 overspent. There was discussion about new computers and the need for the IFS employees' union to be approached over their employment agreement. Mr Clark was told that the manager who had replaced him (Beryl Pirie) had resigned and was on accumulated leave meantime with another IFS staff member (Dave Jenkins) acting as manager.

[32] During the meeting it was agreed that Mr Clark would meet Mr Mackway-Jones on Monday, 27 March 2006 at 9am. In evidence, Mr Mackway-Jones says that they potentially would have had an offer for him at that stage but denies that Mr Clark was to start work by reporting to him at 9am. Ms Miller says that the purpose of the proposed meeting was to *progress matters*. Mr Tommei's oral evidence is that they did not tell Mr Clark that they anticipated being in a position on 27 March 2006 to make him a written offer. He says that the further meeting was to progress the discussions. The evidence particularly of Mr Tommei and Ms Miller differs from their correspondence after the dispute arose. Mr Tommei drafted a letter from Dr Murray to Mr Clark, the final version being dated 22 March 2006, in which Dr Murray raises a concern that Mr Clark was implicated in the improprieties disclosed by the audit. The draft was circulated to Ms Miller and Mr Mackway-Jones for comment before release. The letter describes the purpose of the 27 March 2006 meeting as being for *further negotiations for an employment contract*. Later, in a letter dated 21 April 2006 from Dr Murray, the following statement appears: *I am advised that there was an agreement that the parties would meet again, on 27 March 2006. It was not for Mr Clark to start work on that date but it was indicated that it was anticipated that the new trust would be in a position to make an offer which could then be considered by Mr Clark at that time*.

[33] Mr Clark's evidence is that they discussed a date for him to start work, initially 28 March but changed to 27 March when he told them that he would not need legal advice prior to signing the written contract. At the conclusion of the meeting, Ms Miller was absent briefly to check her diary. She then returned and said that she was away from Invercargill until 28 March but they confirmed that Mr Clark should still meet Mr Mackway-Jones and Mr Tommei at 9am on 27 March. Mr Clark is wrong about there being an agreement for him to start work on 28 March. He may be confused by Ms Miller's comment about her availability. What Mr Clark did say to the three respondents is that he was looking forward to returning to work and should be able to start work after lunch on Monday, 27 March. Mr Tommei in particular reiterated to Mr Clark that a written contract would be provided and he would have an opportunity to seek legal advice in accordance with the Employment Relations Act 2000. Mr Clark said that he did not need to get advice as he had industrial relations experience which he explained to Mr Tommei. The meeting ended on the basis that Mr Clark would return on 27 March to review the written contract.

[34] Mr Clark went overseas on 14 March 2006 and returned to New Zealand on 26 March 2006 to find the letter dated 22 March from Dr Murray referred to above. That letter referred to documentation received from solicitors acting for MIWST which tended to implicate Mr Clark in some of the improprieties disclosed by the audit. It also stated that Mr Clark's 13 March meeting with the respondents regarding *… the intention on the part of those Trustees* [i.e. the respondents] *to offer to you the position of Manager of the Family Start programme under the new (and still to be formed) Trust entity… was premised on the basis that Mr Clark was not implicated in the impropriety.* The letter asked for Mr Clark's written response before there could be any further meetings but cautioned that further employment discussion seemed a *somewhat tenuous proposition*.

[35] Unbeknown to Mr Clark, Ms Miller had met with Beryl Pirie, the person who had replaced Mr Clark as manager at MIWST. Ms Miller's evidence is this happened on 14 March. Mr Clark knew from his discussion on 10 March with Dr Murray that Ms Miller would be meeting with Beryl Pirie on either 13 or 14 March. Ms Pirie spoke to Ms Miller about concerns with Mr Clark and was asked to put that in writing. Ms Pirie subsequently sent a letter dated 22 March 2006 to Ms Miller and copied it to Dr Murray. Ms Miller's evidence, which I accept, is that she did not see Ms Pirie's letter until 28 March 2006 when she returned to Invercargill. However, I infer

that Ms Pirie outlined during the 14 March 2006 discussion with Ms Miller the nature of the concerns set out in the subsequent letter.

[36] Ms Miller convened a meeting of the IFS staff on 21 March 2006 to update them on events concerning the continuation of the service. This meeting had been arranged by 16 March because Ms Pirie advertised it to IFS staff at the same time as she told them that she was leaving IFS. I infer that the meeting arrangements were discussed between Ms Pirie and Ms Miller on or about 14 March. Ms Miller's evidence, which I accept, is that she asked Ms Pirie to organise Dave Jenkins to act as manager of IFS from 16 March, another matter which I infer was discussed between the two women on 14 March.

[37] Before turning to the 21 March meeting, I should outline some events between SDHB and MIWST as they relate to Mr Clark. On or about 14 March 2006, MIWST's solicitors wrote to Dr Murray in response to earlier correspondence from SDHB. The solicitors asked for details of Mr Clark's disclosure said to be protected under the whistle blower legislation; advised that Mr Clark had apparently used MIWST funds to pay personal legal fees having been advised by Mr Mackway-Jones that this was appropriate and asked for SDHB's comment; and asked for confirmation that Mr Mackway-Jones had instructed Mr Clark not to transfer funds being the dispute that prompted Mr Clark's dismissal by MIWST. Dr Murray responded to this letter on 15 March 2006. He asked for further details about the legal fees issue and responded on the other two points. Dr Murray's letter was copied to the three respondents. Dr Murray's evidence is that correspondence is routinely prepared by his staff for him to review and sign. I have been provided with an email trail showing this process for several subsequent letters signed by Dr Murray. I infer that a similar process of drafting and consultation with one or more of the three respondents preceded Dr Murray's 15 March 2006 letter as well. There is a further letter dated 17 March 2006 from MIWST's solicitors to the SDHB which included memoranda from Mr Clark giving rise to the suggestion that he was implicated in or responsible for improprieties alleged during the audit process.

[38] This sequence of correspondence resulted in Dr Murray's letter dated 22 March 2006 suspending further discussion with Mr Clark about employment. The initial draft of that letter by Mr Tommei is dated 20 March 2006 and it was circulated to the other respondents and Dr Murray on 21 March before being finalised and signed on 22 March 2006.

[39] Turning then to Ms Miller's meeting on 21 March 2006 with IFS staff, it was due to start at 10am. Ms Miller arrived and first met with IFS supervisors. A subsequent letter dated 22 March 2006 to Ms Miller from the three people there present says that it is a record of the concerns raised by the supervisors with Ms Miller on 21 March 2006. The letter states that the attendees are aware that Mr Clark was being considered for reinstatement to the position of manager of IFS. It goes on to detail various concerns and criticisms about Mr Clark, overlapping considerably with the concerns conveyed by Ms Pirie to Ms Miller on 14 March and subsequently detailed in her letter. After the discussion with the supervisors Ms Miller then spoke to the assembled IFS staff and answered questions.

[40] I heard evidence from a large number of witnesses who were present at the general meeting with IFS staff. The issues surrounding Mr Clark have naturally been the subject of much discussion between these witnesses since that meeting. In light of that, the best record of what was said by Ms Miller that day is the note made by Trinity Mennell, one of the attendees. I mean no criticism of any of the other witnesses who I am sure told me the truth as best they now recall. However, the note made by Ms Mennell can be relied on as contemporaneous and an accurate account of what Ms Miller said to the assembled group. Ms Miller was asked: *Will we know who our manager will be before they start on Monday?* Monday was the first work day following expiry of the service contract between SDHB and MIWST. Ms Mennell's note records Ms Miller's response as: *No in discussion with Nobby in first instance nothing signed will talk with him when he returns. Acting manager to continue in the meantime.* This conveys an accurate picture of what Ms Miller said. It follows that Ms Miller did not say that Mr Clark had actually been employed as either manager or acting manager commencing 27 March 2006. It is not surprising that Ms Miller did not commit at the 21 March meeting to having employed Mr Clark because she knew of Ms Pirie's concerns, the

correspondence from the solicitors to Dr Murray and had just heard from the supervisors about concerns with Mr Clark as well.

[41] Dr Murray's evidence is that his 22 March letter was caused by the correspondence from the MIWST solicitors and that he discounted Ms Pirie's letter received by him after 22 March. He also says that he did not discuss the contents of Ms Pirie's letter with any of the respondents. The respondents say either that they did not discuss or did not recall discussing Ms Pirie's letter with Dr Murray. I do not accept that the respondents did not discuss Ms Pirie's concerns with Dr Murray. Ms Miller knew on 14 March 2006 about the nature of the allegations against Mr Clark conveyed in Ms Pirie's later letter. She also heard from the supervisors on 21 March with a range of concerns overlapping those of Ms Pirie. There is also some overlap between the issues referred to by both Ms Pirie and the supervisors on the one hand and matters raised by the correspondence from the MIWST solicitors. SDHB, as promoter of the new trust, was potentially exposed to serious public risks if the employment of Mr Clark proceeded. It is probable that the developing cloud over Mr Clark was discussed between the respondents on or soon after 14 March 2006 and similarly probable that they discussed that cloud with Dr Murray during or before the drafting of Dr Murray's 22 March 2006 letter. However, that does not resolve whether the discussions between Mr Clark and Dr Murray and Mr Clark and the respondents got to the point of creating an employment relationship.

[42] When Mr Clark returned home on 27 March 2006 he first saw Dr Murray's letter putting a halt on further negotiations in the meantime. There ensued correspondence between the parties but the matter remained unresolved. As happens, this correspondence resulted in a widening dispute about related events but it is not necessary to canvass all of the issues referred to in the correspondence.

[43] Before returning to the evidence about events on 10 March and 13 March 2006, it is useful to briefly state the relevant law.

Person intending to work

[44] Because he had not actually commenced work for the respondents, Mr Clark's claim is that he was a person intending to work, defined by s.5 of the Employment Relations Act 2000 as a person who has been offered, and accepted, work as an employee.

[45] In *Canterbury Hotel etc IUOW v. The Elms Motor Lodge Ltd* [1989] 1 NZILR 958, the Employment Court considered the definition of *worker* which under the Labour Relations Act 1987 included a person intending to work. The Court held that there could be a personal grievance only if there had been a breach of a fully concluded contract for employment. That required offer, acceptance, consideration and intention to enter into a binding legal relationship. The Court went on to say, at 965:

> *For there to be a contract it must appear that the parties went beyond mere discussion and in fact both intended to enter into a binding legal relationship with each other and on the same terms as each other.*

[46] Counsel for the respondents referred me to *Reporoa Stores Ltd v. Treloar* [1958] NZLR 177 at 187 where Gresson J said:

> *… to bring about a binding contract the offer and the reply accepting must be of and in respect of precisely the same terms. The offeree must unreservedly assent to the exact terms proposed by the offeror.*

[47] In the *Reporoa Stores Ltd* case, one party purported to exercise a right of purchase by writing to the offeror but the letter contained a term different from the original offer. The communication did not amount to acceptance of the offer but instead constituted a counter offer. However, the law is clear that not all terms of the contract must be settled between the parties for an employment relationship to be established. In *Harrison v. Tucker's Wool*

Processors Ltd [1998] 3 ERNZ 418, the Employment Court found that the employees had been offered and accepted work even though the terms of the employment had not been agreed. That was described as a *very common situation*. In the *Elms Hotel* case, it was understood that a terms of employment form to be prepared by the employer would be signed but the grievance arose before this had happened.

[48] The law is also clear that an individual employment contract is enforceable even if not recorded in writing despite the statutory requirement for writing: see *Warwick Henderson Gallery v. Western* [2005] 1 ERNZ 921.

Conclusions about 10 March and 13 March 2006

[49] The first point at which employment is said to have been offered and accepted is during the phone conversation between Mr Clark and Dr Murray on 10 March 2006. In the statement of problem, Mr Clark claims that Dr Murray said *… we wish to offer you the new manager's role* and he responded by saying he was delighted. In his written evidence, however, Mr Clark says that what was discussed was that there was a new managerial role, not re-employment and the need to meet during the following week to negotiate the employment contract. He also says that he was surprised to be asked if he was still interested. Mr Clark's oral evidence, referred to earlier, is to similar effect. Mr Clark's evidence does not take it as far as having been offered a new position during the phone discussions. That accords with Dr Murray's evidence and also reflects the letter dated 13 March 2006. I note also that the letters dated 30 March 2006, 12 April 2006 and 4 May 2006 from Mr Clark's solicitor did not assert that employment had been offered and accepted on 10 March 2006. From this, I find that no employment relationship was established on 10 March 2006.

[50] It is useful to review the situation as it existed immediately before the 13 March meeting. The SDHB had decided to establish a trust to operate as IFS service provider from 25 March 2007, following the termination of the contract with MIWST. It did not think that Mr Clark was implicated in the improprieties and he was regarded as an effective manager of the service. The new trust needed to employ a manager and Mr Clark was their first port of call. He had been pressing them for some time to make a decision about employment. Ms Miller knew from the email and memo setting up the meeting that Mr Clark thought an offer had been made on 10 March 2006. In addition, Ms Miller had Mr Clark's proposed terms of employment that the *status quo (with the exception of salary) prevail*. In setting the time for the meeting, Ms Miller did not debunk Mr Clark's assertions.

[51] Mr Clark's evidence is that he received Dr Murray's 13 March 2006 letter by post before he attended the meeting with the respondents that same afternoon. Dr Murray says that the letter was posted on 13 March 2006, the day it is dated. He is unsure if he was in Invercargill that day to sign it but his letters are routinely signed electronically in his absence. I accept Dr Murray's evidence that he had the draft letter with him on his way to Auckland on 10 March and that it was posted on 13 March 2006. It would not have been delivered by post on 13 March so Mr Clark's evidence must be mistaken. He must have received the letter after the 13 March meeting. It follows that Mr Clark's mistaken belief about an offer from Dr Murray on 10 March was not drawn to his attention prior to the 13 March meeting. The question remains whether an offer was made and accepted during the 13 March meeting.

[52] I accept that Mr Clark tended to overstate situations. His email to Ms Miller is a good example. It overstated where things had got to between Mr Clark and Dr Murray. Mr Clark also has a strong sense of grievance that SDHB failed to protect his interests in the lead up to his dismissal by MIWST and that SDHB breached its employment promise to him. Those feelings have coloured some of his evidence. However, I also have to say that the evidence of the respondents about what happened on 13 March 2006 is unsatisfactory. I have already found that Mr Clark's notes do reflect the content of the 13 March discussion. Several parts of the notes only make sense on the basis that it was understood between those present that Mr Clark had been offered and accepted the position as manager. The notes say *New financial authorities*, *Need to manage information/staff*, *Notice to staff – next week* and *SDHB to release*

Final Audit reports x 2 – Nobby to manage staff/other agencies. There was discussion about operational matters which an employer might have with an incoming manager. It was made clear that the trust would be the service provider in the interim pending a transfer of funder status from SDHB to the Ministry of Social Development on 1 July 2006. A salary of $88,000 was discussed. It was agreed that Mr Clark would return on 27 March to review a written contract.

[53] From all this I conclude that Mr Clark was offered and accepted the position of manager of IFS to be employed by the intended trust. The trust later reneged on this agreement giving rise to Mr Clark's personal grievance claim of unjustified dismissal. There has been no attempt on the part of the respondents to justify any dismissal so it follows that Mr Clark was unjustifiably dismissed.

Remedies

[54] There is a submission that reinstatement either is unavailable or is not a practicable remedy for several reasons. First it is argued that Mr Clark cannot be reinstated. Section 123(1)(a) of the Act provides a remedy of *reinstatement of the employee in the employee's former position ….* The argument is that the language indicates that a grievant must have actually worked in a position to be reinstated to it. Counsel argues that what Mr Clark really seeks is a compliance order requiring the respondents to abide by the promise of future employment.

[55] I do not accept the argument. Prior to the Labour Relations Act 1987 extending the definition of *employee* to *persons intending to work*, a person who had been offered and accepted a job but who had not actually commenced had no personal grievance rights: see *Auckland Clerical etc IUOW v. Wilson* [1980] ACJ 35. The effect of the legislative change was confirmed in the *Elms Hotel* case entitling an (intending) employee to grievance remedies. It would be illogical to say a person in Mr Clark's position can recover only lost remuneration and distress compensation under the grievance remedies and must separately enforce the promise of work by compliance order or injunction. There has been no difficulty using the remedy of reinstatement to remove an unjustified warning: see *NZ Amalgamated Engineering etc IUOW v Alliance Freezing Co. (Southland) Ltd* [1988] NZILR 1287. The phrase *former position* does not just refer to the employment actually held by a grievant. It includes restoring a state of affairs improperly changed by a grievance as in the present case. I find that a person need not actually have started work to have access to the full range of grievance remedies, including reinstatement.

[56] Second, it is argued that Mr Clark should not be reinstated because it is not practicable and because of his contribution to the circumstances giving rise to the grievance. I do not accept that there was any blameworthy contribution by Mr Clark to the circumstances of his grievance. The respondents were able, if they so chose, to make inquires at the relevant time into Mr Clark's part (if any) in the improprieties of the former trust before employing him. The failure to do so rests completely on their own shoulders and Mr Clark had no part of that.

[57] More must be said about whether reinstatement is practicable. It was clear from the investigation meeting that Mr Clark has considerable support from nearly all the IFS staff. However, it seems from some of the written material available to the Authority that there is some criticism of his managerial style, policies and procedures mostly from a few former IFS employees. There is also some personal criticism of him. It is difficult to judge the extent to which the expressed criticisms arise from loyalty towards the former trustees who have been publicly criticised as a result of Mr Clark's initial exposure of the trust's affairs. More significantly however, the sworn direct evidence I heard was supportive of Mr Clark. There is no persuasive evidence that he would be anything other than an effective manager if reinstated. The respondents also argue that Mr Clark is tainted by his involvement in or association with the improper dealings of the previous trusts. Again, that is something they should have satisfied themselves about before promising employment.

[58] The final impediment raised to reinstatement is the temporary nature of the position. I accept that it was clear between the parties that the respondents would only operate the service in the interim once funding responsibility had been transferred and the new funder was able to make appropriate arrangements with a service provider. However, I do not accept that this amounts to a fixed term contract. Nor do I accept that the terms of employment of the acting manager somehow limit the ability to remedy Mr Clark's grievance. Section 66 of the Employment Relations Act 2000 requires a fixed term agreement to be in writing to be effective. There is no such agreement with Mr Clark. I also observe that the new trust remains the service provider with no date yet set for it to cease its work. The respondents' need to employ a manager will end at some point in the near future. At that time, they will have to deal with Mr Clark in accordance with the terms of his employment and in light of any arrangement agreed about transfer of IFS staff to the new service provider.

[59] Accordingly, I make an order requiring the respondents as trustees of the Family Start Support Services (Invercargill) Trust to reinstate Mr Clark to his former position as manager. The terms of that engagement as agreed are at a salary of $88,000 per annum and with other terms and conditions as to continuity of employment, notice, redundancy and so forth the same as applied between Mr Clark and his former employer. Mr Clark should be able to provide the relevant documents to confirm those terms. Leave is reserved if there is any difficulty but Mr Clark should be reinstated no later than Monday, 29 January 2007.

[60] Mr Clark is entitled to be reimbursed lost remuneration from Monday, 27 March 2006 until the date he resumes work in accordance with the reinstatement order. Counsel described s.128(2) as a *statutory limitation* but it is a minimum that must be awarded and is clearly subject to the discretion to order payment of the whole loss even if more than three months' ordinary time. There is little evidence about Mr Clark's earnings from other employment during the period covered by the order but I do not accept that his loss relates to a failure to mitigate. Mr Clark is unlikely to have been able to secure employment within his field of expertise pending resolution of these claims. Any earnings from alternative employment during the period the compensation order relates to must be deducted from the sum payable by the respondents. Mr Clark should provide the respondents with sufficient detail to allow them to calculate the sum due. Leave is reserved if there is any difficulty.

[61] Mr Clark seeks compensation for distress in the sum of $25,000. I agree with counsel for the respondents that the evidence establishes that much of the distress relates to his very public dismissal by MIWST and his belief that SDHB did not adequately protect him as a whistle blower. That is not relevant to an assessment of compensation for distress following the respondents' failure to honour their promise of employment. The circumstances of the grievance, the recovery by Mr Clark of the whole of his lost remuneration plus reinstatement call for a modest compensation award, which I fix at $5,000.

[62] Mr Clark says that there was an agreement with the respondents for him to be paid the seven weeks' lost remuneration suffered by him when he was dismissed by MIWST until the date he was due to commence work for the respondents. This was discussed during the 13 March 2006 meeting but I do not accept that it was agreed as part of his employment by the respondents. There is no reason why they would have agreed to this and Mr Clark himself in his memo to Ms Miller before the 13 March 2006 meeting says that it could be discussed at a later stage and should not be a road block to the employment contract negotiations. That is where the matter rested. The claim is rejected.

Summary

[63] Mr Clark is to be reinstated by no later than Monday 29 January 2007.

[64] The respondents are to reimburse Mr Clark for lost remuneration from 27 March 2006 until he recommences work in accordance with the reinstatement order.

[65] The respondents are to pay Mr Clark compensation of $5,000.00 for distress.

[66] Costs are reserved.

Philip Cheyne
Member of Employment Relations Authority