

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

ATTENTION IS DRAWN TO THE
ORDER
PROHIBITING PUBLICATION AT
PARAGRAPH
[3] OF THIS DETERMINATION

AA 85/09
5090441

BETWEEN

TERRY MARSH
Applicant

AND

CHIEF EXECUTIVE OF THE
DEPARTMENT OF
CORRECTIONS
Respondent

Member of Authority: Marija Urlich

Representatives: Mark Ryan, Counsel for Applicant
Emma Warden, Counsel for Respondent

Investigation Meeting: 17 September 2008

Further information and submissions received: 19 September, 5 and 26 November 2008

Determination: 25 March 2009

DETERMINATION OF THE AUTHORITY

[1] Mrs Marsh is a long serving employee of the Department of Corrections. She alleges two personal grievances for unjustified action causing disadvantage:

- (i) the first concerns her non-appointment to the position of unit manager in 2007;
- (ii) the second, her involuntary rotation to the custodial services unit (“CSU”) in May 2008.

[2] Corrections say neither ground constitutes a disadvantage and that, in any event, Corrections’ actions were fair and reasonable in the circumstances.

[3] A non-publication order applies to the names of any individual who may be referred to in the documents before the Authority but who is not giving evidence before the Authority and is not a party to these proceedings.

Non-appointment to Unit Manager 2007

[4] In January 2007 Mrs Marsh unsuccessfully applied for a position as unit manager in the prison in which she is employed. She requested written feedback. This feedback revealed negative comments had been made in the assessment process and included in the feedback form.

[5] Mrs Marsh says the comments were false and misleading and Corrections have done nothing to rectify that false and misleading information. Mrs Marsh says the subsequent independent review of the selection process has not remedied the breach. She also says she has been disadvantaged in not being shortlisted for the unit manager position.

[6] The employment agreement between the parties does not provide a right to promotion.

[7] The negative comments expressly refer to '*disciplinary action*' being taken against Mrs Marsh in relation to a workplace incident. No disciplinary action had been taken against Mrs Marsh up to the time of the assessment or subsequently. At the investigation meeting the comments were explained as expressing an intention to speak with Mrs Marsh about the workplace incident. This is not what is conveyed by the phrase '*disciplinary action*'. What is conveyed, by such clear language, is that disciplinary action had been taken or was about to be taken against Mrs Marsh. I accept the comments are inaccurate and misleading.

[8] However, I find no disadvantage arose. The subsequent appointment review and recommendations cured the impact of the negative comments. An independent review was conducted and recommendations were made by a Corrections review officer in a timely and thorough manner. Mrs Marsh was offered an opportunity to have her application for promotion reconsidered by a fresh selection panel. That offer

was fair and reasonable. Mrs Marsh declined the offer to resubmit her application because she felt the timeframe was too tight. I am unclear as to the basis for this concern; the offer was for Mrs Marsh to resubmit her original application for a second opportunity to be considered for the position.

[9] I am satisfied that Mrs Marsh's non-appointment to the unit manager position was not in breach of her employment agreement and that she has not suffered any disadvantage in her employment as a consequence.

Involuntary rotation

[10] Corrections operate a rotation policy; staff must rotate through different units on site within specified timeframes¹. Rotation may be voluntary or involuntary. Consultation is a primary element of any rotation decision. The implementation of the rotation policy must be *seen as equitable and having integrity*², elements of which include:

- all relevant information must be considered in deciding an individual's rotation;
- due consideration should be given to the personal circumstances of an individual officer, including the practicalities of a shift to a new position;
- rotations are announced after the affected officer has been informed;
- staff have a right to discuss rotations that have been made with their manager if they feel the rotation has been made without good cause.³

[11] Mrs Marsh says her rotation in May 2008 from Unit 5 to Custodial Support Unit was motivated for personal reasons. She says her unit manager wished to move her because she had successfully gained the promotion which Mrs Marsh had not. Mrs Marsh relies on notes taken during a staff meeting which appear to record her rotation to another unit was discussed. These minutes date from May 2007, one year prior to the events in question. I do not accept these notes are relevant to the events a year later.

¹ Rotation Policy (Auckland Region)

² National Corrections Officer Rotation Policy pg 5

³ National Corrections Officer Rotation Policy pg 6, 7

[12] I have reviewed Ms Sutton's notes of her discussions with Mrs Marsh leading up to her rotation in May 2008. The notes reveal Ms Sutton's reasons for proposing the rotation were put to Mrs Marsh, that she confirmed a number of these reasons and had an opportunity to comment on Ms Sutton's view. These notes do not support Mrs Marsh's view that the rotation was premeditated – the discussions span two months (one in February and three in April), the reasons for the rotation were put to Mrs Marsh for comment and include Ms Sutton's decision to put Mrs Marsh forward for involuntary rotation.

[13] After this consultation phase Ms Sutton put Mrs Marsh's rotation proposal to the management panel convened to consider rotations. Mrs Marsh acknowledged at the investigation meeting that she could have made representations to this panel but chose not to. The panel made the decision to rotate Mrs Marsh.

[14] I am satisfied that Mrs Marsh's rotation in May 2008 was not in breach of her employment agreement and that she has not suffered any disadvantage in her employment as a consequence.

Costs

[15] Costs are reserved. Given the parties are in an ongoing employment relationship it may be appropriate that costs lie where they fall. If the parties are not of this view then application should be made for a costs timetable to be set.

Marija Urlich

Member of the Employment Relations Authority