

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 129/09
5124150

BETWEEN

JONATHAN RAWIRI
Applicant

AND

THE ATTORNEY-GENERAL
IN RESPECT OF THE CHIEF
EXECUTIVE OF THE
INLAND REVENUE
DEPARTMENT
Respondent

Member of Authority: P R Stapp

Representatives: Stephanie Dyhrberg Counsel for the Applicant
Susan Hornsby-Geluk Counsel and Juliet King for the
Respondent

Investigation Meeting: 20 and 21 May 2009 and 10 June 2009 at Wellington

Determination: 9 September 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Rawiri commenced employment with Inland Revenue as a school leaver cadet in Hamilton. He was employed in the Inland Revenue Department for 22 years and his roles included working in the Adjudication and Rulings Group and then a transfer to the Information Technology Group Corporate based in Head Office, Wellington.

[2] In 2005 he was offered the position of Enterprise Architect in the Enterprise Technology Architecture Group in Head Office, which he accepted. He did not accept an offer of a new individual employment agreement and remained on an employment contract (Contract No.15) which he accepted on 30 June 1999. That

employment contract contained protected entitlements including resignation and retirement entitlements.

[3] Mr Rawiri claims that he has a personal grievance for unjustified action causing disadvantage because Inland Revenue refused to pay him retiring leave.

[4] During the Authority's investigation meeting Mr Rawiri withdrew a claim for back-pay.

[5] Inland Revenue denied Mr Rawiri's claims.

The facts

[6] Mr Rawiri says that during late 2007 and early 2008 when there was a review of the Enterprise Architecture Team, he started to seriously consider retiring from Inland Revenue.

[7] In March 2008 Mr Rawiri decided to accept a role working with Gen-i and retire from Inland Revenue. He spoke with his manager at the time, Mr Lloyd Chard, and sent him a letter dated 10 March 2008 giving notice of retirement from Inland Revenue under the protected entitlements of his employment agreement. He referred to his intention to take enhanced early retirement and asked about his entitlements. He says that at that time he was under the impression that he might have been able to access enhanced early retirement because of the restructuring situation, as it was evident that his position would be affected.

[8] He had some discussions with Mr Chard about his intention to retire alongside the fact that he qualified having over 20 years' service with Inland Revenue. Mr Chard agreed with him on his entitlement to retiring leave entitlements.

[9] On 19 March 2008 Mr Chard met with Mr Ross Hughson, Inland Revenue Chief Information Officer, and they discussed Mr Rawiri's request to leave Inland Revenue. Mr Hughson says that Mr Rawiri's request to retire came as a surprise and he was keen to discuss the possible options to try and keep Mr Rawiri at Inland Revenue.

[10] It became apparent that Mr Chard's opinion about Mr Rawiri's request to retire was different to that held by Inland Revenue's head office. For this reason, Mr Hughson took over the decision making role.

[11] During this time Mr Chard prepared a draft approval of the request but revised his response when Inland Revenue made its view of the policy on retirement clear to him.

[12] Mr Rawiri produced an email dated 19 March in which he advised Inland Revenue of his reasons for retiring: he sought *clarity and certainty and to be able to control the change instead of the change controlling me*, and that *retiring is the best option for me and will provide me with the time to focus on myself as well as spending more time to meet my family responsibilities*.

[13] Mr Hughson also understood that Mr Rawiri had referred to looking after his 97 year old grandmother and 68 year old mother in Hamilton whom Mr Rawiri visited to provide assistance and care.

[14] Mr Hughson came to the conclusion that it seemed to him that Mr Rawiri was resigning rather than retiring, and for that reason did not agree with Mr Chard that Mr Rawiri should receive retiring leave.

[15] Mr Chard contacted Mr Rawiri on 20 March and advised him–

- Of the decision to decline Mr Rawiri's request for retiring leave on the basis that Inland Revenue did not believe Mr Rawiri intended to permanently leave the workforce;
- Proposed some alternative options for Mr Rawiri to think about that might enable him to spend more time with his family; and
- Offered Mr Rawiri the opportunity to meet and discuss the decision with Mr Hughson.

[16] The above was confirmed by email on 20 March.

[17] On 25 March 2008 Mr Hughson met with Mr Rawiri for the purpose of discussing the matter and giving Mr Rawiri the opportunity to explain his intentions directly with the view to coming to a mutually agreeable solution. Mr Hughson says that Mr Rawiri did not indicate that he genuinely intended to leave the workforce. Mr Hughson says Mr Rawiri was vague about his intentions, but did suggest that he might look for work in Hamilton in the future. Mr Hughson says that Mr Rawiri discussed the perception that somehow he was being treated inequitably and that Inland

Revenue were unilaterally introducing a new condition to his employment agreement by requiring that he leave the workforce permanently, because Inland Revenue would not agree to a retirement date. He was also concerned that he had not been consulted about his circumstances or the reasons for his decision to retire, and that mistaken assumptions had been made about his intention.

[18] It is common ground that Mr Rawiri did not disclose his intentions to work for Gen-i. This is because Mr Rawiri says he was not asked. Mr Hughson says Mr Rawiri misled and lied to him.

[19] Mr Hughson says that he asked Mr Rawiri whether he intended to leave the workforce permanently. He says he directly asked Mr Rawiri whether or not he would look for work in Hamilton and that Mr Rawiri replied that although he did not intend to work for a good while, he could not rule out working in Hamilton in the future.

[20] Mr Hughson denied that he was angry and vindictive in applying Inland Revenue's view of retirement.

[21] On 2 April 2008 Mr Hughson confirmed his decision declining Mr Rawiri's request on the basis that Inland Revenue did not accept that Mr Rawiri intended to leave the workforce permanently and retire. This was based on the ambiguous and vague reasons given by Mr Rawiri when he was interviewed and questioned by Mr Hughson and that Mr Rawiri did not indicate that he had any intention to leave the workforce permanently.

[22] On 2 April Inland Revenue offered Mr Rawiri resigning leave and although he was required to give three months' notice of resignation and had not done so, IRD was prepared to waive that notice period because Mr Hughson says Mr Rawiri had made it clear that he would not change his last day at Inland Revenue (11 April 2008).

[23] Mr Rawiri responded in writing in a letter dated 2 April where he advised that he considered he was still entitled to retiring leave and asked that the same custom and practice be applied to him as it was to other Inland Revenue employees in similar situations. He did not identify those employees at the time.

[24] From this point the dispute between Mr Rawiri and Inland Revenue concerning the payment of resigning/retiring leave was not able to be settled.

[25] Shortly after Mr Rawiri left Inland Revenue Mr Hughson says he discovered that instead of Mr Rawiri shifting to Hamilton to care for his whanau, as he had led Mr Hughson to believe, he found out that Mr Rawiri was in fact working fulltime in Wellington.

[26] Mr Hughson says he came to the view that Mr Rawiri deliberately misled him regarding his intentions with a view to creating an impression he was going to retire, and this misleading impression in regard to his intentions was the reason why later he considered that it would not be possible to resolve the matter and it would not therefore be worthwhile to attend mediation.

[27] However, the parties attended mediation after the intervention of the Authority, but now the matter requires a determination from the Authority.

The parties' cases

[28] Mr Rawiri is pursuing a personal grievance that is based on Inland Revenue not meeting what Mr Rawiri considers are his contractual entitlements. Mr Rawiri says that Inland Revenue acted unjustifiably by refusing to agree to a date of retirement under his employment agreement and refused to pay him retiring leave as set out in the contract.

[29] The parties agree that the amount owing, should Mr Rawiri be entitled to retiring leave, is a gross payment of \$21,812.74 (SOP). The resigning leave would be worth \$11,564.23.

[30] Mr Rawiri says that IRD did not properly communicate its interpretation and application of his employment contract and that its decision was not reasonable and was unjustified.

[31] It is argued that, in the absence of any statutory definition of *retirement*, Mr Rawiri is entitled to his retirement payments. It was submitted on his behalf, that the entitlement to receive the contractual retiring leave arose out of his decision to retire. It is accepted that the meaning *retirement* cannot be readily discerned from the contract. The eligibility for retirement benefits was clear cut when a qualifying age was lawful. However once that was removed the failure of the parties to agree to any threshold criteria has left the application of the retirement leave provision open to interpretation.

[32] It was submitted on Mr Rawiri's behalf that the applicable entitlement should be payable. He also relied on the failure of IRD to apply consistent policy and criteria about its approach to retirement.

[33] Other complaints from Mr Rawiri include

- That he was not consulted about the purported policy;
- That IRD failed to fairly and accurately inform him about the purported policy and criteria;
- That IRD acted on assumptions about his reasons and intentions in relation to retirement and possible future employment without fully disclosing and discussing those factors;
- That IRD has not exercised its discretion fairly on the facts known at the time and what had been disclosed to the applicant;
- That IRD has discriminated against him where it took his age into account as the predominant factor in declining to accept retirement and his retiring benefits;
- That he was treated differently from other employees;
- That it was unfair of IRD to put to him a take-it-or-leave-it basis for receiving resigning leave; and
- That it did not act in good faith by declining to agree to attend mediation until the Authority directed it to do so.

[34] Inland Revenue denied all of those claims and based its submission on a policy, which while it was not in writing, made commonsense in regard to the usual and widely-held meaning of *retiring*. IRD maintained that the prerequisite to the eligibility for retiring leave was that an employee must generally be intending to retire, i.e. permanently leaving the workforce.

The protected provisions

[35] The **retiring leave** provision that Mr Rawiri and IRD are in dispute over reads as follows –

Employees having reached agreement on their date of retirement, apart from those covered in the Government Service Equal Pay Act 1960, shall accrue retiring leave as follows:

<i>Service</i>	<i>Entitlement</i>	<i>Max Entitlement</i>
<i>Up to 10 years' service</i>	<i>Nil</i>	<i>Nil</i>
<i>10 years' service</i>	<i>22 days</i>	<i>22 days</i>
<i>10-20 years' service</i>	<i>22 days plus 4.3 days per year for each year after 10 years' service</i>	<i>65 days</i>
<i>20-25 years' service</i>	<i>65 days</i>	<i>65 days</i>
<i>More than 25 years' service</i>	<i>65 days plus 4.4 days per year for each year after 25 years' service</i>	<i>131 days</i>

[36] Mr Rawiri's terms also included **resigning leave** that provided for –

Resigning leave is payable only to those employees who have given three months' notice of resignation, and where the work record is satisfactory. Resigning leave may be granted to employees who have not reached their eligibility to retire at the following rates:

<i>Service</i>	<i>Entitlement</i>	<i>Max Entitlement</i>
<i>Up to 20 years' service</i>	<i>Nil</i>	<i>0</i>
<i>20 years' service</i>	<i>32 days</i>	<i>32 days</i>
<i>20-39½ years' service</i>	<i>32 days plus 1.44 days per year for each year after 20 years' service</i>	<i>60 days</i>

[37] The eligibility for retiring leave required 20 years service. The eligibility for resigning leave required three months notice and a satisfactory work record after 20 years service.

Issues

[38] There are three broad issues. These are:

- a. Is Mr Rawiri entitled to receive 'retiring leave'? Has a right to retiring leave been established by custom and practice?
- b. Was IRD justified in declining Mr Rawiri's request for 'retiring leave'? Has there been disparate treatment over the application of the retiring leave provision?

- c. What causes of action are available to resolve the employment relationship problem?

Determination

[39] Mr Rawiri has clearly taken an opportunity to maximise an entitlement because he had sufficient service to claim retiring leave. He decided to retire from IRD and the public service. He has claimed that there is an absence of a written definition in his employment agreement and that there is no written policy or any published criteria that apply under his terms of employment. He says that the only requirement was that he had to reach agreement with the IRD as to the date of retirement, which he believed he had done. I accept that there are no eligibility criteria, except for the service requirement in the employment agreement. However, there are documents that cover the matter that IRD have relied upon and I will refer to these later.

[40] Mr Rawiri's stated intention was to end his career with IRD and the public service, but in circumstances where on one hand he was explaining to IRD what he envisaged doing, and where on the other he had obtained another job (starting on 11 April). He set his reasons out in correspondence and discussed it with his manager, whom he believed would make the decision. The knowledge that he had arranged another job came to light later.

[41] There is no meaning attributed by the parties to 'retiring' and this has been affected by the removal of a qualifying age, when that became unlawful. Eligibility was a clear cut situation when there was a qualifying age, but that is not so now where retirement does not necessarily mean permanent retirement from the workforce because there are examples where people have retired and who have resumed paid work later. However, IRD has continued to apply the meaning of retirement by relying on permanent withdrawal from the workforce as a reference point to make a decision. In fact there is no discretion that IRD can control as the provision is an entitlement, except to agree on the date. An employer cannot in good faith unreasonably deny the employee the right to retire by refusing to accept a date for that to happen. That was not the case here because IRD did raise with Mr Rawiri a number of issues that related to its understanding of what retirement means and applied the 'retiring' leave provision based on the notion of permanently leaving the workforce. In the end IRD accepted Mr Rawiri's last day even although it declined to

accept that he was retiring for the purposes of obtaining retiring leave. IRD assumed that he was not permanently retiring from the workforce. It made other offers to him that he declined.

[42] Mr Rawiri's position is supported by *Brooker v State Insurance Ltd* [2000] 2 ERNZ 274. This was a case heard by Chief Judge Goddard where the parties' employment contract did not prohibit post-retirement employment and the employer could not rely on using that reason not to pay retirement leave. This was a matter not included in Mr Brooker's statement of claim, but seems to have arisen incidentally during the hearing in the Employment Court. In that case State Insurance Ltd failed to pay Mr Brooker a retiring allowance. The failure to pay was not adequately explained. One of State Insurance's witnesses relied on Mr Brooker not retiring from the workforce but had taken on work at a local service station. The Court commented; "*That was irrelevant because the contract does not prohibit post retirement work...*". I have distinguished that case because the facts were different on the employment ending where Mr Brooker's position was disestablished. There were no details provided by the Court on the full terms of the contract. There was no mention made of any resigning leave provision.

[43] Another way of looking at this problem is that Mr Rawiri could have asked for both retiring and resigning leave because the agreement does not say that he cannot have both. This analysis presupposes that the provisions are separate and must be distinguished because Mr Rawiri deliberately made a choice. In this case Mr Rawiri did not give three months notice to resign when he could have. Clearly his work record was satisfactory to meet that requirement to resign because of the offer made by IRD.

[44] I was requested by IRD to apply the interpretation of the words 'retiring' and 'resigning' from *Auckland Local Authorities Officers IUOW v Glen Eden Borough Council* [1983] ACJ 476 and *Auckland District Local Authorities Officers Union v Takapuna City Council* [1978] ACJ 153 where 'retirement' implies the end of a career or a working life. The facts of these cases of course can be distinguished. However they are important for the principles that have been laid down in regard to the interpretation of what retirement means.

[45] This narrow definition is reinforced by the words of the resigning leave provision that says:

Resigning leave may be granted to employees who have not reached their eligibility to retire...

[46] That is a very important point and is an overwhelming factor supporting IRD's position. The existence of the two provisions must relate to something or otherwise they become meaningless. They are stand alone provisions and do not apply in circumstances where the employee can 'resign or retire'. Thus, I accept that IRD is permitted to put a meaning to the word 'retire' and that in doing so is able to assess whether or not an employee is permanently leaving the workforce.

[47] However, there are no written and agreed eligibility criteria to apply to the meaning of the word 'retire' since the removal of the age requirement and the only condition that now has to be met is the length of service. Mr Rawiri meets that requirement. For this reason it is perhaps understandable that Mr Rawiri says he had not agreed to the meaning IRD applied to what is meant by retiring. However, IRD did outline to him the meaning it understood applied, albeit he did not agree.

[48] Mr Rawiri has relied on other evidence in which IRD has permitted retiring leave, including his manager's understanding of the matter and that he believed he was entitled to what he understood was his protected terms and conditions of employment. His genuineness and integrity have been questioned by IRD. I do not need to rely on the issues raised about those matters because the dispute can be resolved having regard to the interpretation and application of the retiring leave provision. The factors that support the meaning given to retirement by IRD include:

- The Human Resources manual deals with protected entitlements. Sections 7 and 13 make provision for employment ending, notice, phased retirement and protected entitlements. Any consideration of age is prohibited. The manual requires IRD assess on going employment "on the basis of capability". Furthermore there are references alluding to leaving the workforce.
- The general meaning that can be ascribed from these provisions is that 'retire' means... *...to retire from work...*" The New Zealand Oxford Dictionary Oxford University Press 2005.

- The thrust of the cases¹ I was referred to is that retiring means to disengage from the workforce as opposed to disengaging from an employee's current employer.
- The protected entitlements, which include retiring and resigning leave, are based on length of service, and must relate to different circumstances or otherwise the existence of both provisions would be meaningless.
- The historical situation backs up the narrow interpretation. The withdrawal from the workforce test is about a pragmatic assessment. The existence of resigning and retiring leave provisions in the protected entitlements leaves it up to an employer to make such an assessment.
- An employer is entitled also to expect an employee to be open and communicative to enable a proper and sound decision to be made: S 4 of the Employment Relations Act. In this case Mr Rawiri was not open and communicative because later IRD found out he had another job and was not leaving the workforce permanently. It was not enough for Mr Rawiri to rely on not answering a question that was not put to him when the new job and his application for retiring leave are inextricably linked.
- It is open to a fair and reasonable employer to consider whether or not the employee is genuinely retiring permanently from the workforce. The retiring leave and resigning leave are separate provisions in the protected terms and are not a 'retiring or resigning' option. This latter option was illustrated in *Lower Hutt City Council v Martin* [1987] 1NZLR 321. That case is distinguishable on its facts in regard an issue on the payment of a gratuity on retirement. It is only for completeness that I include the reference otherwise it is not very helpful.

¹ *Auckland Local Authorities Officers IUOW v Glen Eden Borough Council* [1983] ACJ 476, *Auckland District Local Authorities Officers Union v Takapuna City Council* [1978] ACJ 153 and *Radford v Westreef Services Limited (unreported) Employment Relations Authority Philip Cheyne 9 May 2008 CA 51/03*.

- A publication available supporting that retirement means a genuine intention to retire, i.e. permanently leave the workforce: ‘Age and Retirement in the Public Service’ published by the State Services Commission (1998).
- Another useful document is the Public Service Manual published by the State Services Commission (1994). This is useful to explain the genesis of the retiring leave provisions in the Public Service.

[49] In accepting the IRD position on the meaning of retirement I have concluded that Mr Rawiri was not retiring because he had another job to go to. This had been arranged despite his advice to IRD regarding his intention. I accept that he believed he was entitled to ‘retire’ from IRD and the public service. Unfortunately for him that belief does not necessarily mean he would be entitled to ‘retiring leave’ where an employer would be allowed to make a principled assessment on whether or not the employee was genuinely retiring by permanently leaving the workforce. In other words it was open to IRD to apply a principled assessment on the protected terms.

[50] I have rejected the argument that custom and practice supports Mr Rawiri where IRD has treated some employees as retiring and where they have gone to work for another employer. These are individual cases based on their own circumstances. There is no common thread and application to the cases. They cannot be relied upon to establish any lack of a principled approach as to how IRD has applied the protected provisions.

[51] IRD accepted that a small number of employees received retiring leave and then went to get other employment. The situations involved examples (1) of a change of intention after leaving IRD, (2) IRD being misled and (3) wrong decisions being made on the application of the protected provisions. Such cases do not meet the test for disparity as laid down in *Chief Executive of Inland Revenue v Buchanan* (No 2) [2005] 1ERNZ 767. The statistics produced by IRD suggest that the vast majority of the IRD employees have been treated in the same manner (326 employees have received retiring leave from 943 potential employees). Reasons have been provided to explain any differences in treatment. Different decisions from different managers in different circumstances do not lead to rendering a decision as unjustified. Mr Rawiri has been treated the same as a vast number of employees.

[52] I accept that there have been variable practices applied by IRD over time because of the delegated and decentralised nature of the decision making in the department. Any inconsistencies in IRD's approach have been supported by explanations, such as the policy and approach not being correctly applied and erroneous decisions being made. Also there are examples where people have been allowed to retire, but have chosen later to get further paid employment. I have not found the evidence from the witnesses called relating to such situations as being particularly helpful because their circumstances all differ.

[53] I have not accepted that IRD took into account age as the predominant factor in making a decision. Mr Hughson's reasoning was based on not being convinced that Mr Rawiri was intending to leave the workforce permanently for the reasons: (1) Mr Rawiri had not said anything to indicate he genuinely intended to leave the workforce. (2) Mr Hughson considered that Mr Rawiri had been vague. (3) Mr Hughson says that Mr Rawiri had indicated that he might look for work in Hamilton in the future.

[54] Finally I do not consider that IRD put a take-it or leave-it offer to Mr Rawiri. That offer followed a decision made by Mr Hughson that Mr Rawiri was not entitled to retiring leave, but properly put an offer to him since he had the required service and would be entitled to resigning leave when IRD chose to waive the requirement for three months notice to be given. Nothing less would be expected from a fair and reasonable employer to make such an offer.

[55] I therefore have decided that Mr Rawiri does not have a personal grievance for unjustified disadvantage. The IRD has relied upon a genuine issue of interpretation and application of the terms and conditions of employment under which it decided not to pay out retiring leave. IRD has not acted unjustifiably as I have found IRD used principled reasoning and IRD engaged Mr Rawiri in a process for him to have his input before the decision was made.

[56] Costs are reserved.

P R Stapp
Member of the Authority