

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 1/09  
File Numbers 5053525

BETWEEN

Grant Katterns  
Applicant

AND

Attorney-General in respect of  
the Chief Executive of the  
Ministry of Social Development  
Respondent

Member of Authority: Denis Asher

Representatives: Andrew McKenzie for Mr Katterns  
Aaron Martin and Anthea Williams for the Ministry

Investigation Meeting Wellington, 22 April & 4 September 2008

Submissions Received 23 December 2009

Determination: 7 January 2009

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**PRELIMINARY DETERMINATION OF THE AUTHORITY: Proposed Amended  
Statement of Problem**

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**Employment Relationship Problem**

[1] This problem has a long history. The original statement of problem was filed on 19 November 2007. It alleged unjustified actions and a breach of contract in respect of matters occurring between June 2006 and February 2007.

- [2] By notice from his counsel dated 25 July 2008, and after the Authority's first day of investigation on 22 April, Mr Katterns said the problem he now wanted resolved related to his non-appointment to a Manurewa position on 10 January 2007. He alleged he had been unjustifiably disadvantaged by various Ministry actions in respect of his application for that position. In the alternative, Mr Katterns alleged a breach of contract in respect of his non-reassignment to the vacancy.
- [3] The Ministry said there had been no breach of Mr Katterns' employment agreement as he was not entitled to appointment to the vacancy as of right. It also says Mr Katterns grievance was largely not raised within the required 90-day period.
- [4] Following a further investigation on 4 September I distributed to the parties draft findings in an unsuccessful effort to facilitate a resolution of the problem on their own terms.
- [5] During a telephone conference on 1 December Mr McKenzie advised his client now sought a new remedy, that of reinstatement. A written application dated 9 December followed. It specified that Mr Katterns sought reinstatement to either the position of site manager, Manawatu or site manager, Lower Hutt. The letter advised that both vacancies had arisen since the (original) statement of problem was filed and, in the case of the Lower Hutt position, since the last investigation hearing.
- [6] By letter dated 11 December Mr Martin advised that the Ministry opposed the proposed amendment of the statement of problem on the grounds that:
- The investigation was concluded;
  - The case had not been argued as one involving a termination of Mr Katterns' employment and he has remained employed by the respondent;
  - The proposed amendment was far more significant than was acknowledged by Mr Katterns;
  - The claim of seeking reinstatement without indicating the basis of it was insufficiently particularised to allow the Ministry to understand it; and

- The Ministry would be prejudiced by what appears to be a fundamental shift in the claim at this late state.

[7] The Ministry said it was entitled to know the framework of the case it had to meet and it was important for the Authority to also know before its investigation what issues it had to decide. The Ministry had prepared for the investigation and presented evidence on the basis of the original statement of problem. Mr Katterns had never previously claimed he had been dismissed from his position as a co-ordinator manager, Northern Region. The applicant has remained in the respondent's employment and his remuneration has been maintained. He applied for and was appointed to his present position and received relocation expenses.

[8] The Ministry was not prepared to appoint Mr Katterns to the positions identified by him other than by way of the statutory processes that apply in the State Sector. Any application made by Mr Katterns will be considered by the Ministry on merit.

[9] During a further telephone conference on 17 December the parties asked the Authority to make a preliminary determination on whether it would accept or reject the amended remedy now sought by Mr Katterns.

### **Mr Katterns' Submissions**

[10] In a submission dated 22 December Mr Katterns confirmed his wish to amend his statement of problem to include reinstatement to the positions described in par 5 above. As both of the vacancies arose since the last investigation meeting in September there was no opportunity to include them prior to that hearing.

[11] Any prejudice to the Ministry arising out of this late amendment could be remedied by the Ministry leading further evidence arising from the amendment.

[12] Mr Katterns did not claim he was dismissed: reinstatement is a remedy open for a disadvantage grievance. The grievance arises out of Mr Katterns' non-appointment to the role of site manager, Manurewa. Reinstatement as a remedy would have been unremarkable but for the passage in time and the

applicant's relocation to Wellington. Reinstatement is in this instance a fitting remedy. It is for the Authority to determine the appropriate remedy.

### **Ministry's Submissions**

[13] In a submission received on 23 December the Ministry repeated its position as set out in its letter of 11 December (see pars 6-8 above).

### **Discussion and Findings**

[14] I accept Mr McKenzies' submission, that any disadvantage to the Ministry as a result of his client's (very) late amendment to the remedies sought is curable by further investigation.

[15] I note here that the respondent is able of course to address the impact of this late amendment in any costs submission.

[16] I reach this conclusion because, as Mr Martin's submissions make perfectly clear, the Ministry is entitled to know what case it has to meet and present evidence and submissions accordingly. The investigation has not concluded, particularly as it is clear that (unlike Mr Katterns) the Ministry does not accept the draft findings set out in my memorandum to the parties on 29 September: its response of 17 November includes the fair and reasonable request to speak to its submissions set out therein. At least a further day's investigation is inevitable.

[17] I also observe that Mr Katterns could anyway file this matter as a new grievance, separate to these proceedings. Either way he faces similar 90-day issues.

[18] Having accepted that Mr Katterns is able at a very late stage to amend the remedies he seeks it is appropriate nonetheless to express a preliminary view, that – in the event of the applicant succeeding in his claim of disadvantage – it is not clear how the Authority's discretionary remedy of reinstatement can be exercised in his favour so long after and so entirely outside of the precipitating event. It follows that, in the event of succeeding, any likely remedy for hurt or damages experienced by the applicant appears to be a monetary one only. However, I stress these are preliminary views

only and I await the parties' more detailed submissions with a good deal of interest.

- [19] I repeat my view that, as this is an ongoing employment relationship and in light of the risks and costs to them, the parties' interests lie in a realistic resolution of this problem on their own terms.

### **Determination**

- [20] I accept Mr Katterns' very late amendment to the remedies sought, being that of reinstatement. It follows that a telephone conference is required so as to schedule the filing of an amended statement in reply (if deemed necessary), as well as witness statements and/or submissions and a resumed investigation date. Authority support staff will contact the parties shortly.

**Denis Asher**

**Member of the Employment Relations Authority**