



reinstatement to the position he had been offered. However in the course of the Authority's investigation he withdrew this claim.

[2] The Department denies that an offer of employment was ever made to Mr Bolland.

### **The issue for determination**

[3] The single issue for determination in this matter is whether or not Mr Bolland was offered and accepted a position with the Department of Corrections. If such an offer was accepted then, in terms of section 6(1)(b)(ii) of the Employment Relations Act 2000 (the Act) Mr Bolland was an employee (*a person intending to work*) and the withdrawal of the offer of employment by the Department amounted to a dismissal. The Department withdrew the purported offer of employment without undertaking any form of investigation and without any consultation with Mr Bolland. Under the circumstances such a dismissal would almost certainly be unjustified and Mr Bolland would be entitled to the remedies he seeks.

### **A brief history**

[4] In July 2009 Mr Bolland applied for the position of Probation Officer in Dargaville. The application form which he completed asked the question: *Have you ever been convicted of any offence against the law in New Zealand or overseas?* In response Mr Bolland indicated that he had been convicted of the offence of *DIC* in January 1984 and January 1993 and on both occasions had lost his driver's license.

[5] During July Mr Bolland went through a series of interviews and assessments. On 16 August 2009 the Department's Service Manager in Dargaville, Mr Stanley Pilbrow, wrote to his Area Manager, Mr Garth Newman, recommending Mr Bolland for appointment as a probation officer. On 17 August 2009 Mr Newman advised Mr Pilbrow that his recommendation had been accepted and that he should *arrange for admin to carry out all necessary arrangements*.

[6] There is a disagreement between Mr Bolland and Mr Pilbrow regarding the number, dates and content of a various telephone conversations between them. They agree that on or about 18 August 2009 Mr Bolland contacted Mr Pilbrow by phone. During that conversation the parties also agree that Mr Pilbrow advised Mr Bolland that he was the preferred candidate and that Mr Pilbrow was waiting for final check and sign off. The parties disagree about whether or not they discussed Mr Bolland's criminal convictions during that conversation. Mr Bolland says that Mr Pilbrow had indicated that he was aware that Mr Bolland had omitted to mention two (additional) convictions from his application form but that this omission did not appear to be an issue. Mr Pilbrow says that he could not have discussed Mr Bolland's convictions at that time because he did not receive a formal police check on Mr Bolland until after that date (the printout is dated 24 August 2009 and appears to have been faxed to Mr Pilbrow on 25 or 26 August)

[7] Again there is no dispute between the parties that a further telephone conversation took place on 25 August 2009. Mr Bolland's recollection is that Mr Pilbrow told him that he wanted him to start as soon as possible and discussed the question of how much notice he would be required to give his current employer and, Bolland says, after discussion they agree to a start date of 1 October. Mr Bolland is insistent that, during this conversation, Mr Pilbrow formally offered him the position. Mr Pilbrow is equally insistent that he did not offer Mr Bolland a position. He says he can clearly recall the specific language he used including that Mr Bolland was the preferred candidate but that any final offer was subject to a security check and any offer would take the form of a formal "offer of service". Mr Pilbrow says that this is language that he had always used in similar circumstances.

[8] When questioned by the Authority at the investigation meeting Mr Bolland conceded that Mr Pilbrow had not, at any time, specifically stated that he was offering Mr Bolland the position of Probation Officer. He does say however that Mr Pilbrow had inquired about the period of notice he was required to give and discussed and agreed a start date. He says Mr Pilbrow at no time informed him that the Department's normal practice was only to make written job offers and that, in his experience with other government departments, verbal offers were always made prior to written confirmation. He says that he advised Mr Pilbrow that he would hand in his notice immediately and Mr Pilbrow did not indicate that he should not do so.

[9] In any event Mr Bolland says that he was thrilled to have been offered the job and the next day, 26 August 2009, resigned from his current position. He says that his employer immediately took steps to fill his position and that within a few days alternative arrangements were in place making it impossible for him to withdraw that resignation.

[10] On 27 August 2009 Mr Pilbrow says he became aware of Mr Bolland's Ministry of Justice criminal conviction check. This report revealed that Mr Bolland had 4 convictions for driving offenses in December 1983, October 1985, June 1985 and August 1998. Three of these convictions involved in driving with excess breath alcohol. Mr Pilbrow says that he still felt that Mr Bolland was a good candidate but, in the light of the additional convictions, he discussed Mr Bolland's proposed appointment with Mr Newman and an HR Advisor. He was advised that Mr Bolland's appointment would need to be approved by the Regional Manager but that four convictions was probably too many for a probation officer.

[11] On 28 of August Mr Pilbrow called Mr Bolland and advised him that, because of the additional convictions, he was unlikely to be offered a position. Mr Pilbrow says that it was during this telephone conversation that Mr Bolland indicated that he had resigned from his previous position. Mr Pilbrow then pursued the possibility of Mr Bolland's appointment with the Regional Manager, Mr Alastair Riach. However Mr Riach declined to approve Mr Bolland's appointment and, on 14 September 2009 Mr Pilbrow advised Mr Bolland that the Department were not able to offer him a position.

## **Discussion**

[12] Simply put the fundamental question in this matter is whether or not Mr Pilbrow offered Mr Bolland a position. Unfortunately for Mr Bolland, after considering all of the evidence available to me, I have reached the conclusion that he did not. Mr Bolland himself accepts that Mr Pilbrow did not use the specific words "I am offering you the position of...". It is clear that Mr Pilbrow felt that Mr Bolland was a suitable candidate and that, even after learning of the additional convictions he

would have appointed Mr Bolland if he was able. I accept his evidence that he used words such as "subject to sign off" and/or "subject to police check" when he spoke to Mr Bolland. It is regrettable that he chose to discuss issues such as office accommodation, start date etc, before Mr Bolland's appointment had been formally approved. Mr Bolland, on his part was keen to take up a new position and was excited at the prospect. Perhaps, in his excitement, he read into Mr Pilbrow's comments more than was intended. However Mr Pilbrow did not have the authority to offer Mr Bolland an appointment and, on balance, I find that he did not do so.

### **Determination**

[13] I have found that the Department of Corrections did not offer Mr Bolland a position. It follows that he was not an employee of the Department, was not therefore unjustifiably dismissed, cannot have a personal grievance and is not entitled to the remedies he seeks.

### **Costs**

[14] Costs are reserved and the parties are requested to attempt to resolve the issue between themselves in the first instance. Under the circumstances I would indicate to the parties that this may be a case where it is equitable that costs be left to lie were they fall. However if the Department of Corrections wishes to pursue costs against Mr Bolland they should file and serve submissions within 28 days of the date of this determination. Mr Bolland will then have 14 days in which to file and serve a response. I will not consider submissions filed outside this time frame except with leave

James Wilson

Member of the Employment Relations Authority