

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 03/10

File Number: 5142793

BETWEEN Christopher Kirk  
Applicant

AND Chief Executive, Department of  
Corrections  
Respondent

Member of Authority: Denis Asher

Representatives: Nikkii Flint for the applicant  
Megan Richards and Rebecca Wilson for the respondent

Investigation Meeting Wellington, 24 November 2009

Submissions Received By 11 December 2009

Determination: 11 January 2010

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**DETERMINATION OF THE AUTHORITY**

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**The Problem**

[1] Did the respondent (“the Department”) unjustifiably constructively dismiss Mr Kirk? Is he entitled to redundancy compensation? Did the Department breach its duty of good faith to the applicant? Was Mr Kirk subjected to disparate treatment?

## **The Investigation**

[2] During a telephone conference the parties agreed to an investigation on 24 November 2009, timelines for filing witness statements and the provision of a common bundle of documents; all page references are from that bundle. At the conclusion of the investigation the parties agreed on a timetable for filing submissions.

## **Background**

[3] The facts are not disputed.

[4] Mr Kirk was employed by the Department from 5 May 1997.

[5] At the time of his resignation on 11 July 2008 Mr Kirk's position was that of regional finance and planning manager (FPM).

[6] In February 2008 the Department embarked on a structural reorganisation. Consultation was completed and a new structure finalised on 15 May.

[7] By letter dated 12 May the Department wrote to Mr Kirk as an affected employee and invited him to discuss his options under the new structure. Two positions were identified as suitable: area accountant (AA) and regional accountant manager (RAM). As advised during the Authority's investigation, in the same month Mr Kirk began looking for employment outside of the Department.

[8] By letter dated 30 May Mr Kirk advised his manager he did not consider those positions to be suitable for him and requested a severance payment. Mr Kirk also said he considered the business support services manager (BSSM) to be the only comparable role but as it was in the wrong location for him it also was unsuitable.

[9] By email on 4 June the Department noted Mr Kirk's comments in relation to the BSSM and area accountant positions but reiterated its view as to the suitability of the RAM position. The parties met on 9 June.

[10] Later on the same day, or the day before, Mr Kirk was offered and accepted his current employment which he took up on 27 July.

[11] By letter dated 18 June Mr Kirk's manager declined his request for severance and instead proposed to reassign him to the RAM position.

[12] By letter dated 20 June Mr Kirk refused that offer, refused to be placed on leave without pay and resigned; the applicant provided 11 July as his final day of employment.

[13] By letter dated 24 June the Department advised Mr Kirk of its view that the proposed reassignment was suitable and offered to meet with him and discuss other options.

[14] Mr Kirk declined the offer of a further meeting and his employment with the Department ceased on 11 July.

[15] By letter dated 7 August Mr Kirk, amongst other things, raised a personal grievance.

### **Discussion**

[16] Mr Kirk's employment agreement (doc 2 common bundle) contained a restructuring and severance management of change provision (pages 12-15 inclusive).

[17] In the event of his position no longer existing it provided for, amongst other things, reassignment. Reassignment was defined as:

*... placement in a different suitable position. "Suitable" meaning a job that does not involve so significant a change in duties as to be unreasonable when taking into consideration the employee's skills, abilities and potential to be retrained. ... If you are offered a suitable reassignment and choose not to accept it, the only option shall be leave without pay.*

[18] In respect of severance, Mr Kirk's employment agreement provided the following:

*Every effort will be made to place you in alternative employment where your position has been disestablished. However, the payment of severance will be available as a last resort when all the management of change options have been exhausted.*

(page 14)

[19] Mr Kirk's employment agreement also made provision for a review procedure which was "*available if you are unhappy with any action taken during restructuring*" (page 13).

[20] Mr Kirk says the position offered him by way of reassignment was not suitable: the Department says it was.

[21] Mr Kirk says the Department breached its good faith obligations to him, applied disparate treatment and unjustifiably constructively dismissed him: the Department denies these allegations.

#### **Applicant's Position Summarised**

[22] Mr Kirk says of the RAM position, the only one offered to him, that – as confirmed by the evidence put to the Authority – it was at a significantly lower level than the position he occupied at the time of the restructuring.

[23] Mr Kirk accepts he had the skills to do the new RAM position, and says he could have done it "*backward, but that it would have been a backwards step to accept reassignment to the position*" (oral evidence).

[24] In particular, unlike his FPM position, the new role required that he undertake practical accounting functions previously handled by financial and management accountants and other less senior members of his team.

[25] Mr Kirk also accepts that severance was a last option. But, he says, as demonstrated by her eventual appointment to the RAM position originally offered to him, a suitable affected employee had already expressed her interest in appointment to the position he refused. As the position was therefore contestable and as the Department was not obligated to appoint the person who best met the requirements of the role (page 28), it should have been offered to incumbent in the first instance, with redundancy compensation being paid to him.

[26] The Department intended to disadvantage the applicant by forcing him into a situation he would not accept, and breached its own procedures in order to avoid paying Mr Kirk severance.

[27] Remedies sought are \$58,000 redundancy compensation (gross), \$15,210 cessation leave (gross), compensation for hurt, and costs.

#### **Respondent's Position Summarised**

[28] The Department acted throughout in good faith toward Mr Kirk.

[29] In the context of restructurings, and consistent with its contractual obligations, the Department is committed to "*a positive process of change and seeks to place people in jobs as a matter of priority*" (page 26).

[30] It is not Department policy to reassign affected staff into roles considered to be promotions.

[31] The Department's offer to Mr Kirk of reassignment was genuine and it wanted to retain him as an employee.

[32] Mr Kirk appeared to make up his mind early on in the process that there were no suitable reassignment options for him and that he was entitled to redundancy compensation. It now transpires Mr Kirk chose to resign because, by that time, he had been offered and accepted a position with his current employer.

[33] 'Suitability' must be determined objectively: *Auckland Regional Council v Sanson* [1999] 2 ERNZ 597.

[34] Employees are not entitled to reject similar and suitable alternative employment or refuse to do kindred but altered work when lawfully required to do so: *Pilgrim v Director General of New Zealand Department of Health* [1992] 3 ERNZ 190.

[35] There were numerous discussions, correspondence and a meeting with the applicant and his representative in relation to suitable reassignment options for Mr Kirk (see pages 120-123 inclusive, 129-133 inclusive).

[36] The Department was satisfied the position offered to Mr Kirk was suitable on the grounds of: its similarity to his then position as FPM; its location; Mr Kirk's skills and experience; similarity and remuneration; and its policy of retaining people in employment. Mr Kirk's comments about the suitability of the proposed reassignment were also taken into account. Mr Kirk's manager was party to the Department's reassignment offer to Mr Kirk: she had a detailed knowledge of his skills and experience and the new RAM position: she was well equipped to assess and compare his suitability.

[37] Mr Kirk was offered the reassignment notwithstanding an expression of interest by another affected employee, an acting-FPM, because he was the more senior, suitable and substantive FPM within the region.

[38] At the Authority's investigation Mr Kirk confirmed he had the skills, experience and knowledge required to carry out the new RAM role. To preserve his ongoing employment, the Department changed the location of the new RAM role so as to accommodate Mr Kirk's concerns about location.

[39] While Mr Kirk had made it clear he was not interested in the new role, the Department had a contractual obligation to make the reassignment offer that it did.

[40] The reassignment offer was suitable because, amongst other things:

- a. The new role was not a demotion but was on the same grade as Mr Kirk's old position;
- b. The RAM role had a bigger budget than MR Kirk's existing FPM role;
- c. The key accountabilities of the old and new positions were largely consistent with each other, both being predominantly finance-based roles;
- d. The RAM role covered a larger geographical area than the FPM role, although the travel required would be more or less the same;
- e. The RAM role involved managing budgets and processes and did not have less overall responsibility than the FPM role;
- f. Strong leadership was required for the RAM position;
- g. The RAM and FPM roles had similar financial delegations and the same requirement for strategic thinking, leadership responsibilities, managing compliance activities, staff management and systems development;
- h. Mr Kirk would continue to be part of the regional management team; and
- i. As in his FPM role, Mr Kirk could continue to decide how various components of the new role would be carried out.

[41] The same number of accountants would be reporting to the RAM as reported to the RFM: the RAM would allocate tasks across the team to ensure all financial activities were completed accurately and on time (page 132).

[42] While the salary offered for the RAM position was slightly lower (a difference of \$3,061) Mr Kirk's terms and conditions included salary equalisation for two years. As it happened, the RAM's salary band was increased as part of the Department's overall salary process in October 2008: had Mr Kirk accepted reassignment to the new role his salary would have increased by \$4,500 rendering salary equalisation unnecessary.

[43] In resigning Mr Kirk elected to bring his employment to an end after a suitable offer of reassignment had been made and before all options, including a further meeting, had been exhausted. In the circumstances the last resort of redundancy is not payable to the applicant.

[44] Mr Kirk has not been subjected to disparate treatment.

### **Findings**

[45] In *Air New Zealand Ltd v V* (unreported, Colgan C J, Travis, Shaw and Couch JJ, AC 15/09, 3 June 2009) at para [37] it was made clear that the Authority is required to objectively review all the actions of an employer up to and including the decision to dismiss, against the test of what a fair and reasonable employer would have done in all the circumstances.

[46] As both parties acknowledged in their submissions, suitability must be objectively defined. That is an inherently difficult exercise because, as is inevitably the case in these disputes, the two positions are similar but different; an apples with oranges comparison is therefore required.

[47] In making the comparison it is appropriate to bear in mind the parties' mutual commitment to placing affected employees in alternative employment (page 14), including to different but suitable positions (page 13,) while paying severance as a last resort (page 14).

[48] Mr Kirk said that if his FPM position was ranked 10 out of 10, then the RAM position rated 6 on the same scale; a witness called by the applicant placed the RAM position at 8. For the Department, Mr Kirk's former manager agreed on the numerical assessment of 8, but said the position offered the applicant had significantly similar responsibilities and it was therefore a suitable reassignment option.

[49] As measured by the applicant's former manager, some of the significant differences included lessened staff responsibilities (from 25, who were not direct reports, to 2) and "*the potential for an increase in lower tasks*" (Mr Kirk's manager, oral evidence). However, counterbalancing those losses were a growth in the budget Mr

Kirk would have been responsible for, with increased related management responsibilities as a result of being accountable for a much bigger geographic area (two regions combined).

[50] In its 4 June communication with Mr Kirk, the Department accurately anticipated that (by way of a subsequent job sizing exercise) the RAM position size and salary would be found to be similar to his then role (page 122).

[51] By way of an objective comparison, albeit one necessarily involving differing comparators, and consistent with its contractual obligations to the applicant, I am satisfied that the RAM position offered Mr Kirk – narrowly but sufficiently – was a “*different suitable position*” (page 13).

[52] As it happened, Mr Kirk initially disputed the suitability of the new position but, rather than invoking the review procedure in his employment agreement (page 13) and arguably in breach of his obligations under s. 4 of the Act (including, at ss (1A) (b), to be “*active and constructive ... responsive and communicative*”), the applicant resigned his employment before resolving that dispute.

[53] This was a problem that “*cried out for an attempt at resolution either by resort to the disputes procedure referred to in the contract or, if that was ... too long winded, by a speedier means. Such an approach to the issue which had arisen between the parties may well have resolved it without matters reaching a point at which the mutual confidence or trust of the parties, often said to be an essential of the employment relationship, had been destroyed*”: *Sky Network Television Ltd v Duncan* [1998] 3 ERNZ, 917, 924.

[54] Failure by Mr Kirk to exercise the review procedure(s) open to him is no basis for alleging he has been treated unjustifiably by the Department and constructively dismissed.

[55] There is no evidence of Mr Kirk being subjected to any unjustifiable action: the steps taken by the Department were those of what a fair and reasonable employer would have done in all the circumstances. There is no evidence of predetermination or that the Department set out to deny Mr Kirk his contractual entitlements.

[56] In particular, in managing the restructuring process, the Department acted fairly and reasonably and at all times in accord with its contracted obligations to Mr Kirk, as set out in his employment agreement and as required by the Employment Relations Act 2000 (the Act).

[57] The Department's preference to appointing Mr Kirk to the RAM position, rather than the person who originally expressed an interest in the position and now occupies the role, was not in breach of the provisions of the applicant's reassignment provisions, or the respondent's change management protocols.

[58] There is no evidence of disparate treatment: the circumstances of the cases raised by Mr Kirk, of other affected employees who were paid redundancy, were either materially dissimilar and/or the employer has shown an adequate explanation. These employees were either not suitable for the RAM role, or that role was not available and all options other than severance had been exhausted: *Samu v Air New Zealand Ltd* [1995] 1 ERNZ 636 applied.

[59] No remedies are available to Mr Kirk.

### **Determination**

[60] Mr Kirk's claims are dismissed.

[61] Costs are reserved.

**Denis Asher**

Member of the Employment Relations Authority