ATTENTION IS DRAWN TO THE ORDER PROHIBITING PUBLICATION OF CERTAIN INFORMATION REFERRED TO IN THIS DETERMINATION

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2011] NZERA Wellington 188
5295021

	BETWEEN	PETER SCOTT Applicant
	AND	CHIEF EXECUTIVE, DEPARTMENT OF CORRECTIONS Respondent

Member of Authority:	G J Wood
Representatives:	Barry Henderson for the Applicant Jarryd Alcorn for the Respondent
Investigation Meeting:	4 August 2011 at New Plymouth
Determination:	22 November 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Peter Scott, claims that he was unjustifiably disadvantaged in his employment both by the decision of the respondent (Corrections) to suspend him, and by the length of the suspension. Corrections denies these claims.

[2] There is an order prohibiting the publication of the name of, or any details that may identify, the offender who had breached his parole, leading to the events in dispute. That name is not relevant to these proceedings in any event.

Factual discussion

[3] Mr Scott is a current Probation Officer with more than 20 years experience. One of his principal roles was to act as a prosecutor in Court, and in particular to

prosecute breaches of parole conditions and applications for recall to jail that were defended.

[4] In September 2009 the Parole Board granted interim recall to prison for paroled prisoner X, who had attended a relative in hospital rather than complying with his parole condition, namely by leaving his residence during a curfew period without permission. When he reported in late, recall action was taken.

[5] X's Probation Officer sought Mr Scott's opinion, during a casual morning tea room conversation, about further action that Corrections was taking for permanent recall of X to prison and prosecution of him for breach of his parole. The discussion focused on the appropriateness of the breach and recall actions and whether they were likely to be successful. The substance of that conversation is disputed between X's Probation Officer and Mr Scott.

[6] The Corrections Officer spoke to her manager about how she viewed the conversation with Mr Scott, and subsequently those two made a formal complaint about Mr Scott's behaviour to Mr Garth Newman, the Area Manager of Community Probation and Psychological Services.

[7] Mr Newman decided that Mr Scott's behaviour, if proven, could constitute serious misconduct. Accordingly, he wrote to Mr Scott on 16 October 2009 in a letter headed *Investigation into allegations of serious misconduct*. The letter states, amongst other things:

> … *you may have encouraged a staff member* [the complainant] *to deviate from our standard practices, policies and procedures when we needed to initiate recall action on an offender* …
>
> *Subsequent to this incident you engaged in a conversation with* [the complainant] *telling her that you "thought the recall and breach were inappropriate and unnecessary and should not have gone to the Parole Board". You also advised* [the complainant] *that the offender's lawyer .. was going to call the offender's sick sister,* [the complainant] *and her Service Manager to appear before the Board. I consider this to be inappropriate.*
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> *I am very concerned that these allegations, if proven, may constitute serious misconduct as breaches of the Department's Code of Conduct. Specially, the Code states that "Employees should perform their official duties honestly, faithfully and efficiently, respecting the rights of the public, colleagues and offenders", and with regards to role modelling, your working relationships with other employees, in order to maintain a professional working relationship, must be based on the principles of courtesy and respect.*

> *Further to this, an example of serious misconduct is "failure to comply with any of the Department's safety policies, procedures, operating instructions or rules". Employees should also not bring their employer "the Department" into disrepute through their actions.*
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> *I consider this to be a very serious matter...*
>
> ***Suspension***
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> *It is my preliminary view that you should be suspended for the duration of the employment investigation. My reasons for this view are that the allegations, if proven, would mean that I am unable to have confidence that you will perform the requirements of your role and make the right decisions as a Probation Officer "faithfully and efficiently", ultimately putting public safety at risk.*

[8] Mr Scott was placed on special leave for 48 hours, to give him the opportunity to prepare submissions on why suspension should not occur.

[9] Mr Scott responded during a meeting held on 21 October. He stated that he had been ethical and totally professional during his discussions with his colleague. Mr Scott then gave his version of events, which he stated involved him simply passing on the comments of X's lawyer, with the caveat that if the information was correct then it would seem that X may have a reasonable excuse and the application may not be successful. Mr Scott noted that he regularly held such conversations as a prosecutor of such cases. He accepted that he had mentioned his reluctance to prosecute the matter if asked because of his ethics as a prosecutor. Mr Scott also noted that the other Probation Officer agreed with him that she did not think that the prosecution was necessary. As a result Mr Scott rejected the need for suspension.

[10] After an adjournment, Mr Newman stood by his initial view that suspension was necessary. Mr Scott asked for an estimation of time lines and Mr Newman told him that the investigation would be as timely as possible, but to expect at least two to three weeks.

[11] In evidence Mr Newman made it clear that there were two people involved and to have Mr Scott still at work would not be fair to the complainant and other staff. He noted that the culture in New Plymouth was not positive, as one should have been able to expect, that Mr Scott had influence with others and had previously complained against management, as they had against him.

[12] Mr Newman also was concerned about wrong decisions being made about prosecuting parole breaches because the Department's reputation had suffered from previous failures to pursue breach and recall actions. Mr Newman made it clear that, to be fair to all, an investigation needed to be done. There were no alternative duties for Mr Scott.

[13] Mr Scott's representative wrote on his behalf on 5 November denying that he had encouraged the Probation Officer to deviate from standard practices over recalls, and noting that he was simply advising the Probation Officer, on the basis of his experiences as a prosecutor, as to the likelihood of success. Mr Scott sought immediate reinstatement and raised a personal grievance for unjustifiable disadvantage.

[14] Corrections then appointed an investigating officer, who met with Mr Scott on 12 November.

[15] Mr Scott's evidence was consistent throughout the disciplinary investigation and the Authority's investigation about his involvement in advising the Probation Officer. The only area of inconsistency is that at the investigation meeting he denied knowing at the time that the Department had, as a result of a number of high profile criminal offences being committed by people who were already in breach of their parole conditions, adopted a no tolerance approach to breaches of parole. For the reasons given below I prefer Mr Scott's statements during the Department's investigation, over his later evidence before the Authority. Statements given at the time are often more reliable than evidence given many months later, given the passage of time. At the disciplinary meeting on 12 November 2009, Mr Scott admitted knowing that there was a no-tolerance attitude. He also correctly identified that while that was the Department's policy with regard to prosecutions, the Courts or the Parole Board have statutory decisions to make on the basis of whether there was a reasonable excuse for any breach, and thus a no tolerance approach would not guarantee a conviction.

[16] Mr Scott also noted in the disciplinary meeting that he was approached during his morning tea break, and if there was any appearance of frustration on his part, it was because he did not appreciate that.

[17] On 21 November, some nine days after the last interview was held, the investigating officer produced a draft report. The investigator noted that the disparity in accounts seemed to be over how the conversation was perceived and also the tone of the conversation. The investigator concluded that the allegation of a breach of code of conduct over performing duties honestly, faithfully and efficiently was not upheld. The discussion in the tearoom was not seen to reach the standard necessary to confirm a breach of the code of conduct.

[18] With regard to the second allegation of failing to comply with the Department's procedures and not bringing the Department into disrepute, the allegation was again not upheld in the draft report. The investigator noted that while the recall went ahead and was successful, the breach action was not finalised as it was not followed up by Corrections.

[19] While Mr Scott's response was seen to be *less than professional*, because he had given advice and information based on an earlier conversation with a lawyer, he had not given his colleague an informed view and did not know all the facts.

[20] The issue over comments made about whether Mr Scott would have prosecuted the breach focused on a lack of communication between the principal protagonists and that there were *issues of an historic nature which may have clouded a more reasoned outcome and made it less likely to happen*.

[21] The conclusions were that while the allegations

> … *had not been substantiated in my view I am not confident that Peter Scott acted in a professional way when approached by a colleague for guidance and assistance on a prosecution matter.*
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> *As a recognised prosecutor for the New Plymouth office, with many years experience in the role, it is not desirable for a person in this role to be able to sway a colleague away from a course of action that has been confirmed by operational requirements and the Service Manager. All parties should have considered <u>all</u> the facts pertaining to the case before making such a decisive judgement on it.*
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> *The Parole Board did uphold the Recall Application and set a new release date for [X] and it is likely that a Breach of Parole would have stood up to the standard of proof required by the court although this is speculation.*
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> *Similarly, the Service Manager has the authority to direct the staff member to perform a legal task and this could have happened, but did not.*

> *There are historical matters which have clouded and influenced a more reasoned approach to what was on the surface a reasonably straightforward issue.*

[22] The final report was dated 3 December 2009. The findings were fundamentally the same and the conclusion was exactly the same.

[23] Mr Newman gave evidence, which I accept, that he acted on the report as soon as he received it. Mr Newman wrote to Mr Scott on 7 December enclosing a copy of the report. The letter states, amongst other things:

> *As the decision-maker it is my role to decide whether or not any disciplinary action may be appropriate. I would like to meet with you on Wednesday 23 December 2009 at the New Plymouth Service Centre at 10:00am, to provide you with the opportunity to comment on the findings of the report and my preliminary view. After hearing your comments on the report, should I decide to uphold Mr Clark's findings, my preliminary view is that disciplinary action is not appropriate in this instance.*

[24] Mr Scott complied with the request and arranged for a meeting on 18 December.

[25] On 14 December Mr Scott wrote to the Department wanting to know the date Mr Newman received the report because he believed that Mr Newman knew, at least from the draft, of the conclusions some one or two weeks earlier. I have already rejected that claim.

[26] On 17 December Mr Newman rang Mr Scott lifting the suspension, with effect from his return to work after Christmas. While Mr Newman had previously indicated that he meant to have a face to face meeting with Mr Scott, because of difficulties in integrating him back into the workforce after two months away from work and the historical cultural issues in the New Plymouth, that obviously appeared no longer necessary. That the meeting did not occur until 22 February 2010.

[27] Mr Scott has maintained his claims for personal grievance and the Department has continued to oppose them. Despite mediation, the parties have been unable to come to a resolution that both parties can accept. It therefore falls to the Authority to make a determination.

The law

[28] In *Sefo v. Sealord Shellfish Ltd* [2008] ERNZ 178 it was held at 187:

> *[33] The law on justification for suspension in employment is longstanding and established in several leading judgments. … suspension of an employee pending investigation and determination of allegations of serious misconduct in employment may, and indeed frequently does, affect the employee's employment for one or more conditions of that employment to the employee's disadvantage. This, if it is unjustified, may amount to a personal grievance as defined in s 103(1)(b) of the Employment Relations Act 2000* …
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> *[34] The severity of suspension from employment was recognised by the Court of Appeal almost 25 years ago in a case involving a probation officer,* Birss v. Secretary for Justice *[1984] 1 NZLR 513. In* Birss *Richardson J wrote:*
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> > "Suspension is a drastic measure which if more than momentary must have a devastating effect on the officer concerned. The prejudice occasioned the officer by a suspension can never be assuaged even if he is ultimately vindicated at the disciplinary hearing and is then restored to office and paid his arrears of salary *(P 521)* …
>
> *[37] Since…Parliament has added to the considerations legislatively. Section 4 (* ***"Parties to employment relationship to deal with each other in good faith****") requires an employer contemplating possible suspension to be active and constructive, responsive and communicative: s 4(1A)(b).*

[29] These requirements of good faith continue during the period of suspension and it is axiomatic from the above that a suspension must not continue for any longer than is absolutely necessary. For instance, the Court of Appeal in *Birss* made it clear that delays that led to the extension of the duration of the suspension only made matters worse.

Determination

[30] No issue has been taken with the placing of Mr Scott on special leave without pay while the issue of suspension was considered, and nor should it.

[31] I am conscious of the desire by Corrections to keep Mr Scott away from the workplace because of internal tensions for which he was not solely (if at all) responsible. Such would not have been a justifiable reason for suspension. Ideally, professional tensions of this nature should be dealt with in a collegial manner, without recourse to disciplinary processes and suspension in the first instance. Indeed, that

can be seen as a finding of Corrections' investigator, albeit with the benefit of hindsight.

[32] I accept, however, by the barest of margins, that it was a justifiable decision to suspend Mr Scott while Corrections undertook an investigation. There was a real discrepancy between Mr Scott and the complainant's version of the tearoom conversation. If the Probation Officer and her manager's version of events as set out in their complaint had been upheld in full Mr Scott would have been found to have refused to prosecute an apparent breach of parole on the basis of one conversation with counsel and thus without proper investigation. I accept that this could have constituted serious misconduct under the Code of Conduct. Therefore, suspension was justified. This is particularly so given the difficulties between different staff within the office, including Mr Scott, and the fact that Mr Scott worked in an unsupervised environment. He held very important discretions, which could affect public safety, and therefore placed the Department at risk, especially to its reputation.

[33] In the event Mr Scott was cleared of all claims of serious misconduct and the investigating officer made it clear that historical matters had clouded and influenced a more reasoned approach to what was on the surface a reasonably straightforward issue. In these circumstances, it was incumbent on Corrections acting as a fair and reasonable employer to have caused Mr Scott's suspension to come to an end far more quickly. Corrections was on notice from the outset that Mr Scott was contesting his suspension and that he wanted to return to work.

[34] I conclude that the reason for the delay was not a need for Mr Scott to be reintegrated into the workplace, because that did not occur before the suspension was lifted, but rather the inability of the parties to meet on a logistical perspective. There was a ten day delay between Mr Newman getting the final report and his informing Mr Scott that he was lifting the suspension. Given that Mr Scott was extremely unlikely to be seeking to persuade Mr Newman to pursue disciplinary action against him, it is quite strange that he was not reinstated there and then. In reality, the delay was at least a week too long. Having been cleared, Mr Scott should have been allowed to return to work within a few days.

[35] I therefore determine that Mr Scott was disadvantaged in his employment as although he continued to be paid, he was unnecessary kept away from the workplace when he was able to work and should have been allowed to work.

[36] It is clear from the evidence that Mr Scott had known about the conclusions before the final report was issued, so one of his contacts must have seen the draft report dated 21 November. Mr Scott's concerns were reinforced by the letter that said they would need a meeting and that there could still be disciplinary action. There was evidence from an acquaintance of Mr Scott that he was at his lowest ebb when he had been told by a work colleague that the allegations had not been proved and that he would be returning to work within days, yet this did not happen. That witness said that Mr Scott felt impotent, depressed, isolated and almost at the point of giving up.

[37] In his own evidence Mr Scott stated that although he felt exonerated when he got the letter of 7 December, there was still discussion of disciplinary action. As a result he withdraw socially from nearly all contacts, including invitations to Christmas celebrations.

[38] In all these circumstances, I consider that compensation is appropriate to Mr Scott. I accept his evidence and the evidence of his acquaintance. However, compensation must be directed at the breach, which was not the act of suspension, but rather the failure to reinstate him to work as quickly as Corrections should have. Given that this period was only about a week, I consider that compensation in the sum of $1,000 is appropriate. There can be no issue as to contribution.

[39] I therefore order the respondent, the Chief Executive of the Department of Corrections, to pay to the applicant, Mr Peter Scott, the sum of $1,000 compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.

Costs

[40] Costs are reserved.

G J Wood
Member of the Employment Relations Authority