

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 132
5298672

BETWEEN IAN SMITH
Applicant

AND CHIEF EXECUTIVE OF THE
DEPARTMENT OF
CORRECTIONS
Respondent

Member of Authority: Vicki Campbell

Representatives: Anamika Singh for Applicant
Jarryd Alcorn for Respondent

Investigation Meeting: 10 February 2011

Submissions Received: 24 February 2011

Determination: 5 April 2011

DETERMINATION OF THE AUTHORITY

A Mr Smith's employment was not affected to his disadvantage by any unjustifiable actions on the part of Corrections.

B Costs are reserved.

[1] Mr Ian Smith was employed by the Department of Corrections (Corrections) on 25 August 2008 as a Corrections Officer at the Spring Hill Corrections Facility.

[2] In October/November 2009 Mr Smith applied online for the vacant position of Catering/Laundry Instructor at Waikeria Prison. He was successful to the extent that he was invited to an interview which he attended on 10 December 2009 and was identified as the "preferred candidate" for appointment.

[3] At a meeting with Mr Leonard Phillips (Mr Smith's union representative) and Mr Robert Pepperell (the Principal Instructor for the Corrections Inmate Employment section (CIE)), Mr Smith was advised he was the preferred candidate for the position and that CIE just needed to tie up a few loose ends.

[4] A possible transfer date for Mr Smith was sought on 16 December 2009 and provided on 17 December 2009. The information from Mr Smith's manager, Mr Gavin Dalziel (Prison Manager for Spring Hill) was that Mr Smith could be released from Spring Hill to commence at Waikeria on 18 January 2010. As events transpired Mr Smith did not commence employment at Waikeria and remained in his position as a Corrections Officer at Spring Hill

[5] Mr Smith claims the actions of Corrections in not appointing him to the vacancy disadvantaged him in his employment and he seeks remedies. Corrections denies Mr Smith's claims and says Mr Smith was never offered and neither did he accept, the position of Catering/Laundry Instructor.

[6] The issue for the Authority is whether Mr Smith was disadvantaged in his employment by an unjustifiable action by Corrections and if so, what (if any) remedies should be awarded.

Unjustified disadvantage

[7] There is a two step test to establish a disadvantage grievance. Firstly, I must ascertain whether Corrections actions disadvantaged Mr Smith in his employment, and secondly, whether that disadvantage has been shown to be justified or unjustified pursuant to section 103A of the Act.¹

[8] Disadvantage alone is not prohibited by law. It must be a disadvantage that is unjustified. If Corrections can establish justification for a disadvantageous action, there is no grievance.²

[9] Finally, disadvantage is not identified narrowly and solely in terms of wages and conditions of employment. Rather it broadly considers effects on the total environment of the employee's employment. A claim for disadvantage depends upon

¹ *Mason v Health Waikato* [1998] 1 ERNZ 84

² *McCosh v National Bank*, unreported, AC49/04, 13 September 2004

an act or omission by an employer causing disadvantageous consequences, not merely an employee's subjective dissatisfaction at their circumstances.³

[10] Corrections has two key roles in its recruitment processes. They are:

- **Appointing Manager** who has delegated authority for approving vacancy advertising and, after receiving a "Recommendation to Appoint Report", to make the final decision as to whether a candidate is appointed or not; and
- **Hiring Manager** who is responsible for managing the recruitment selection and appointment process, including convening the panel for interviews, conducting referee checks, and writing the "Recommendation to Appoint Report".

[11] It is only after the Recommendation to Appoint Report has been approved by the Appointing Manager, that a provisional offer of appointment is made in writing to the preferred applicant. The offer includes a copy of the applicable employment agreement. It is only after the offer is accepted, that the appointment is finally confirmed.

[12] Mr Brent Maughan, Corrections National Manager for CIE was the Appointing Manager for the Catering/Laundry Instructor position. The Hiring Manager role was shared between Mr Len Wood, and Mr Robert Pepperell.

[13] It was common ground that Mr Smith was interviewed for the position and on 10 December 2009 was advised by Mr Pepperell that he was the preferred candidate. In anticipation that Mr Smith would be the applicant to be recommended to the Appointing Manager, Mr Pepperell made enquiries of Mr Smith's current manager as to when he may be released from Spring Hill.

[14] Where a candidate for a new position comes from within Corrections it is usual for release date information to be contained in the Recommendation to Appoint Report. Mr Pepperell emailed Mr Dalziel, to ascertain a date for Mr Smith's transfer to Waikeria. Mr Pepperell expressed his preference for a start date of 18 January 2010. Mr Dalziel approved the 18 January 2010 as being the transfer date and enquired whether Mr Smith had been advised he was the successful candidate.

[15] Mr Dalziel suggested Mr Pepperell check Mr Smith's personal file, which he then did. On checking, Mr Pepperell discovered that Mr Smith's employment was

³ *NZ Storeworkers IUW v South Pacific Tyres (NZ) Ltd* [1990] 3 NZILR 452; *Bilkey v Imagepac Partners*, unreported, AC65/02, 7 October 2000

subject to a final written warning which had been issued four months earlier, on 25 August 2009.

[16] On 15 December 2009 Mr Pepperell met with Mr Smith and Mr Phillips to obtain further information about the final warning. Having heard from Mr Smith, Mr Pepperell advised Mr Smith that he was satisfied with his explanation and that there were some loose ends to tidy up. From the evidence produced to the Authority I am satisfied it is more likely than not that Mr Pepperell also told Mr Smith that he could not offer him the position as it was outside his delegated authority.

[17] Mr Russell Baker is the Assistant Internal Services Sector Manager for CIE. His role is to receive draft recommendations for appointments from hiring managers. Mr Baker reviews all of the Recommendation to Appoint Reports to ensure all relevant information is contained within it including information about possible release dates. Once Mr Baker is satisfied the report is complete, he writes a recommendation to appoint memorandum and presents it, together with the Report to the Appointing Manager, in this case, Mr Maughan.

[18] On 15 December 2009 Mr Pepperell called Mr Baker to advise him that upon checking the personal file of Mr Smith, he discovered Mr Smith's employment was subject to a final written warning. The warning related to inappropriate interactions with prisoners. Mr Pepperell sought Mr Baker's advice as to what, if any, implications the final written warning would have on Mr Smith's application. Mr Pepperell told Mr Baker that irrespective of the final written warning, he was still of the view that Mr Smith remained the preferred applicant. Mr Baker did not respond at that point but was to seek further advice from Mr Maughan.

[19] Despite the final written warning, Mr Pepperell and Mr Wood advised Mr Baker formally on 16 December 2009 that they were still satisfied that Mr Smith should be recommended for the appointment.

[20] Mr Baker, concerned about the final written warning, sought direction from Mr Maughan as to whether the Interview Panel needed to take the warning into account. Mr Maughan's view was that the warning was relevant and ought to be taken into account by the selection panel. Mr Maughan advised Mr Baker that the presence of a final written warning may make it inappropriate for Mr Smith to be appointed to the role.

[21] Mr Baker believed the panel's recommendation needed to be reconsidered as it was Mr Baker's view that Mr Smith should not be appointed. Mr Baker raised his concerns in a conversation with Mr Woods on 16 December 2009. Despite Mr Baker's misgivings, on 17 December 2009 a formal report recommending Mr Smith for appointment was provided to Mr Baker for forwarding to Mr Maughan.

[22] The report received by Mr Baker did not mention the final written warning, therefore it did not, in Mr Baker's opinion, contain all the relevant information as required. Mr Baker returned the report to Mr Wood and asked him to include all information including information pertaining to the final written warning, so that Mr Maughan was fully informed when he came to deciding whether Mr Smith should be appointed.

[23] After receiving the returned report, Mr Wood advised Mr Dalziel that it was looking unlikely that Mr Smith would be appointed to the role. In turn, Mr Dalziel notified a number of Prison staff not to action the transfer of Mr Smith.

[24] Mr Smith received copies of the email correspondence between the Corrections Managers on or about 18 December 2009. The communications were copied to Mr Phillips, who had acted as Mr Smith's support person at the meeting on 15 December 2009. Mr Phillips forwarded the email correspondence to Mr Smith. Mr Smith then became aware that there was an issue with respect to his final written warning and that it was impacting on the recommendation that he be appointed to the position.

[25] Mr Smith emailed Mr Wood and Mr Dalziel on 18 December 2009 requesting that the panel reconsider the decision not to recommend him for the position and seeking an explanation as to why the decision was made not to recommend him.

[26] Then on 21 December 2009 Mr Smith emailed Mr Maughan and told him that after being advised he was the successful candidate, he was then told the decision had been reversed without any explanation. Mr Smith raised his concerns that the process had been unprofessional, unethical and unfair. Mr Maughan advised Mr Smith that he was seeking further information from Mr Baker and would be in contact once he had had time to consider that further information.

[27] Mr Maughan then proceeded on a period of leave, however, in his absence, on 20 January 2010 Ms Ruth Turner the Acting National Manager for CIE (in Mr Maughan's absence) advised Mr Smith that she had been asked to provide a response

to the matters he raised in his email on 21 December 2009. Ms Turner outlined for Mr Smith the recruitment process followed by Corrections for its appointments. She also advised Mr Smith that as at that date, the recruitment process for the Catering/Laundry Instructor role was still current and had only reached the recommendation to appoint stage.

[28] When Mr Maughan eventually received and reviewed the Recommendation to Appoint Report it was accompanied by a briefing paper written by Mr Baker on request from Mr Maughan. In his briefing paper Mr Baker accepted that the communication with Mr Smith and to Prison Services fell below the required standard. Mr Baker made it clear to Mr Maughan that he did not support the recommendation to appoint Mr Smith.

[29] Mr Maughan did not to approve Mr Smith's appointment. Mr Smith was advised on 10 February 2010 that his application was unsuccessful.

[30] Mr Smith says that the actions taken by Corrections throughout the appointment process were unjustified because he believed he had been told that he was the successful applicant and therefore the decision not to appoint him was equivalent to a dismissal.

[31] However, Mr Smith's complaint seems to ignore the fact that he never received an offer of appointment to the new position. In answer to questions at the investigation meeting Mr Smith conceded that he had never received an offer to take on the job and neither had he ever accepted such an offer. It was common ground at the investigation meeting that what Corrections had done was to notify Mr Smith that he was the preferred applicant and nothing more.

[32] This is consistent with Mr Pepperell's evidence that at the meeting on 15 December 2009 he made it clear to Mr Smith that while he accepted his explanation regarding the final written warning, he did not have the authority to appoint Mr Smith.

[33] In accordance with Corrections policy and procedures, Mr Smith was the preferred applicant and his appointment was recommended to the Appointing Manager. Mr Maughan, having received a full briefing paper regarding the process used by Corrections and having considered the recommendation, exercised his authority not to appoint.

[34] I have also given consideration to the question of whether, if the appointment process was defective, it would give rise to a personal grievance for unjustified disadvantage.

[35] However, the Court of Appeal has held that the words used in section 103(1)(b) “employees employment” relate to the physical conditions of employment, the environment in which the work is required to be performed, the amenities and facilities available to the worker, the payment to which the worker is entitled and matters of that kind.⁴ This is referred to as the “on the job” situation.

[36] Following the line adopted by the Court in *Haddon*, I find that Mr Smith’s existing employment was not affected to his disadvantage, rather, it was the prospect of securing a new position that was affected and this does not come within the wording of s 103(1)(b).

[37] Given my conclusions I find Mr Smith does not have a personal grievance.

Costs

[38] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If they are not able to reach agreement on the matter of costs, Corrections may lodge and serve a memorandum as to costs within 28 days of the date of this determination. Mr Smith will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[39] In order to assist the parties with resolving costs themselves, I can indicate (subject to any submissions) that a tariff based approach to costs is likely. In which case the usual starting point would be around \$3,000 (GST inclusive) per day. That figure would then be adjusted in light of the particular circumstances of this case.

Vicki Campbell
Member of Employment Relations Authority

⁴ *Victoria University of Wellington v Haddon* [1996] 2 ERNZ 139 p 147 line 3.