

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Ken Merchant (Applicant)
AND Department of Corrections (Respondent)
REPRESENTATIVES Mark Ryan for Applicant
Katie Elkin for Respondent
MEMBER OF AUTHORITY Y S Oldfield
INVESTIGATION MEETING 17 May 2005
CLOSING SUBMISSIONS 24 May 2005, 25 May 2005
DATE OF DETERMINATION 7 June 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] Mr Merchant worked for the respondent (“the Department”) from 1975 until 2 February 2004, when he left his position as Regional Manager Property, Northern Region. His resignation came at the end of a period of restructuring which he says led him to lose faith and confidence in his employer and left him no option but to resign. He considers himself to have been constructively dismissed.
- [2] The Department says that it was eager to retain Mr Merchant’s services and did not constructively dismiss him. On 10 November 2003 it made an offer of reassignment to Mr Merchant. It was expressed to be a “permanent position on a fixed term basis.” On Mr Merchant’s behalf Mr Ryan wrote to the Department on 26 November saying that he would not accept the position which he did not consider “suitable” in terms of the reassignment provisions of the employment agreement.
- [3] On 16 December 2003 after a meeting with Mr Merchant and Mr Ryan, the Department made a fresh offer to him on different terms. The Department does not concede that the first offer breached the employment agreement, but it does say that it believes that the new offer was “suitable” and addressed the concerns Mr Merchant had raised.
- [4] Mr Merchant disagrees. On his behalf Mr Ryan submits that the letter of 10 November 2003 amounted to a repudiation of the contract and that the response of 26 November was a consequential cancellation. As a result he says that no subsequent offer of reassignment could have any effect at all. Instead he says Mr Merchant had become entitled to the severance provisions contained in his individual employment agreement.

- [5] In addition Mr Merchant says that after he had received the letter of 16 December, his immediate manager Chris Wolland told him that it was still planned to re-advertise the new job in a year's time, leading Mr Merchant to believe that the purported offer in the letter was not made in good faith. Mr Ryan says that this gives rise to an alternative grievance based on unjustified disadvantage.
- [6] Mr Merchant says that as a result of all this he handed in his resignation on 23 December 2003. Mr Ryan says that this factual matrix gives rise to a further alternative cause of action in constructive dismissal.
- [7] The employment relationship problem therefore falls into two parts. One is the issue of whether any aspects of the restructuring process up to and including the offer of 10 November were in breach of Mr Merchant's terms and conditions of employment. The other is whether the Department later remedied the situation such that trust and confidence should have been restored.
- [8] With the agreement of the parties, I have begun by investigating the second part of the problem. This has involved consideration of the steps the Department took after Mr Merchant raised his concerns (meeting with him and making a new offer to him) and consideration of whether these steps remedied his concerns.
- [9] The issues for determination therefore include:
- Whether the letter of 10 November 2003 amounted to a repudiation of the employment agreement and if so, whether by Mr Ryan's letter of 26 November the applicant accepted that repudiation;
 - If not, whether the offer of 16 December was "suitable" in terms of the relevant provisions of the employment agreement;
 - Whether any issues remained outstanding between the parties at the time of the resignation in December 2003, including whether the making of the offer of 16 December offer remedied the concerns Mr Merchant had in relation to the Department's conduct towards him;
 - Whether in all the circumstances as at 23 December 2003 Mr Merchant had cause to lose trust and confidence in the employment relationship.

Was the letter of 10 November 2003 a repudiation of the employment agreement and if so, did Mr Ryan's response of 26 November serve to cancel it?

- [10] During September and October of 2003 the Department worked through a change management process which it says was consistent with the relevant provisions of Mr Merchant's employment agreement. Mr Merchant believes that the redundancy process was not open and was poorly managed. However, as explained above, the parties have agreed that at this stage I should put those issues to one side. The restructuring process culminated with an offer to him of reassignment to a new position and that is where I began my investigation.
- [11] The offer was set out in a letter, dated 10 November 2003 and signed by William Whewell, who was National Property Manager and to whom Mr Wolland reported. The relevant parts read as follows:

“Reassignment to an Assets and Property Regional (field) Position

Following our discussion at National Office on Friday, 7 November 2003, I am pleased to formally offer you reassignment to a permanent position on a fixed term basis.

The position offered is Assets and Property Manager, Northern Region, which is a Level II regional management position. The term will be one year from the date of your acceptance of this offer. At the expiry of the term the position will be advertised after further review of the scope of the position.

All other terms and conditions of employment will be as per your existing Individual Employment Contract.

...

We draw your attention to the Management of Change clause in your IEC, that should you choose not to accept this offer the only option available shall be leave without pay.

...

If you wish to accept this offer would you please sign and date the acceptance below and return one copy of this letter, retaining one copy for yourself, by Friday 14 November 2003.”

- [12] Mr Merchant told me that neither a fixed term position nor leave without pay was an acceptable option for him. He therefore believed that the only remaining course of action was to pursue redundancy and a payout. He responded through his solicitor (Mr Ryan) saying:

“We note that the Department in their letter dated 10 November 2003 described the offer of a position to Mr Merchant as a reassignment. However we consider the Department has repudiated the permanent employment contract with Mr Merchant. The offer of new employment is for a fixed term of 12 months only. The Department had taken Mr Merchant from permanent employment guaranteed by his IEC and offered him new employment for a fixed term of one year only.

We are instructed by Mr Merchant that he does not wish to accept the offer of new employment it is not a suitable position for a number of reasons including its lack of permanency.

We note that the IEC between Mr Merchant and the Department provides for payment of severance, the amount of which is dictated by the application of the schedule listed in Mr Merchant’s IEC. In addition to this Mr Merchant is also entitled to payment for cessation leave as well as other statutory entitlements.

We look forward to speaking with you to discuss the final amount that Mr Merchant is entitled to on becoming redundant from his position with the Department.”

Determination

- [13] The phrase “a permanent position on a fixed term basis” was a poor choice of words. Its meaning is not clear and it not surprising that it made Mr Merchant uncertain about his future with the Department. However, I do not accept that the letter of 10 November has the effect of repudiating the employment agreement. The Department purported (rightly or wrongly) to be relying on the provisions of the contract in taking the steps that it took. There is no suggestion in

the letter of any intention to terminate the applicant's employment and nothing from which such an inference can be drawn. The respondent's expressed intention was for the relationship to continue, on the basis of either a reassignment or leave without pay, pursuant to the provisions of the agreement. There was no repudiation of the employment agreement by the letter of 10 November.

[14] Even if I am wrong about this, I cannot accept that the letter of 26 November amounted to a consequent cancellation. In that letter, on Mr Merchant's behalf, Mr Ryan expressed continued reliance on the provisions of the agreement, and claimed what he believed to be Mr Merchant's entitlement, pursuant to that agreement, to severance payments. Far from signalling any intention to cancel the contract, he asserted his right to rely on it. Moreover, Mr Merchant did not give notice of intention to resign his employment for a further month and later agreed to extend the notice period.

[15] In short, the employment agreement remained on foot after the letters of 10 November and 26 November had been exchanged.

Was the offer of 16 December "suitable" in terms of the relevant provisions of the employment agreement?

[16] On 12 December, in response to Mr Ryan's letter of 26 November, Chris Wolland met with Mr Merchant and Mr Ryan. Also present was Human Resources manager, Tim Kelland. Mr Merchant told me he viewed this meeting as an exit interview because he felt that his employment with the Department was effectively at an end. At the meeting Mr Merchant told the respondent that he was not prepared to accept the offer of reassignment because it was for a fixed term only, and so was not "suitable" in terms of the employment agreement. (It is not in dispute that in every other way the position was suitable; it was much the same as his old job and attracted a larger salary.)

[17] Mr Kelland told me that he went to this meeting with the intention of doing everything he could to repair any damage that had been done and ensure that the employment could continue. He said he believed he acted in good faith in a genuine effort to address the issues Mr Merchant had. On 16 December, a few days after that meeting, the Department wrote to Mr Merchant saying:

"Further to the meeting at Auckland on Friday 12 December 2003, I would like to offer you the position of Assets and Property Manager Northern; level one on a permanent basis, on a salary of \$66,635 pa, effective from the date of your acceptance.

I am sorry if you have felt undervalued by the organisation. That has not been our intention, and I trust this offer will resolve any outstanding issues that you have.

The village and farm at Auckland prison are not included in your responsibility at present but it is intended that these areas will become part of the A&P Regional Managers Role at a later date..."

[18] There is no dispute that in relation to its duties and remuneration, the position of Assets and Property Manager, Northern, was "suitable" in terms of the employment agreement. It is also expressed in this letter to be permanent. On its face, then, the offer contained in the letter of 16 December met the requirements of the employment agreement. In addition the letter includes an expression of goodwill that can only be construed as indicating a wish to remedy any distress previous correspondence had caused. There can therefore be no doubt that, provided this offer

were made in good faith (that is, if it were genuine) it served to remedy any prior shortcomings in the process the respondent had followed.

Were there any outstanding issues between the parties at the time of the resignation in December 2003?

- [19] In his witness statement, Mr Merchant said he found the offer of 16 December unacceptable, although he did not explain why. At the investigation meeting, in response to questions from me, he said that despite what the letter said, he did not believe that the offer was genuine. He told me that a day or two after he received the letter he asked his immediate manager, Chris Wolland, to “check the offer out.” He said that Mr Wolland came back to him a couple of days later saying that the position would be re-advertised within 12 months.
- [20] Unfortunately, Mr Wolland was seriously ill at the time of my investigation meeting and could not attend. The respondent cannot therefore confirm or deny any such conversation (there are no records of any communication with Mr Merchant after the letter of 16 December had been provided to him.)
- [21] As the author of the letter of 16 December, Mr Whewell was the person to whom Mr Wolland is most likely to have gone to “check the offer out.” Mr Whewell did attend my investigation meeting. He told me that he cannot recall whether Mr Wolland approached him after the letter of 16 December had gone out, but concedes that it is possible. I was reminded that 120 people were going through the change management process at this time and it was hard for respondent witnesses to recall every discussion.
- [22] He says that he may well have confirmed that the precise future of the position was not clear because of the uncertainty around the way new prisons in the region were to be developed. This uncertainty meant that the scope of the job might change; it was quite likely that it might grow to the point where it was too big for one person. This was the reason that it had initially been offered on a fixed term basis. It is also the background to the reference in the letter of 16 December to the future inclusion of additional duties in the role (the village and farm.) However, he said that there was no question of Mr Merchant’s employment being insecure in a context where services were expected to expand. Mr Whewell emphasised that the Department was anxious to retain the services of experienced personnel like Mr Merchant.
- [23] Mr Kelland was also at the investigation meeting and told me that he does recall discussing these issues with Mr Wolland although he thinks it was in preparation for the meeting of 12 December. He says that he specifically told him that if the new position were to be described as permanent it could not later be re-advertised.
- [24] Aside from whatever may have transpired between Mr Merchant and Mr Wolland, there were no further discussions about Mr Merchant’s future (either directly or through his solicitor) with any representative of the Department before he handed in his notice on 23 December.
- [25] He then remained in his original position until he left on 2 February 2004. There was no suggestion that he should move into the reassigned role or go on leave without pay. He took up a role with his new employer on 15 February 2004 and was able to remain in housing in the prison village at his convenience. (Not all tenants in the village were Department employees.)

Determination

- [26] The first issue here is whether the offer of 16 December was qualified by the additional information Mr Merchant allegedly received from Mr Wolland.
- [27] I conclude that it was not. I am not satisfied that the alleged conversation with Mr Wolland took place as described. Mr Merchant did not mention it in his witness statement. He spoke of it for the first time in response to my asking why he did not take the letter of 16 December on face value. (By which time it was known that Mr Wolland would not be available to give evidence.) Even then, he was hazy as to the details, being unable to tell me where or when the conversation took place and expressing uncertainty as to whether it was by phone or face to face.
- [28] Even if I am wrong about this, and Mr Wolland did tell Mr Merchant that the job would be re-advertised in 12 months time, I do not accept that it was reasonable for Mr Merchant to take this as the definitive position in preference to the written confirmation he had previously received from more senior management. Prior to this, Mr Merchant had engaged professional representation and had had the benefit of a formal meeting with representatives of management. In this context it was not consistent for him to simply up and resign without seeking further clarification. Mr Merchant should have brought any genuine concerns to the attention of Mr Kelland or Mr Whewell.
- [29] In short, I consider the offer of 16 December to have been made in good faith and to have remedied any errors the respondent may have made earlier in the process. No other issues were outstanding at the time of resignation or if there were, they were not brought to the attention of the relevant persons as they should have been.

In all the circumstances did Mr Merchant have cause to lose trust and confidence in the employment relationship?

- [30] Stepping back and viewing as a whole the circumstances in late December 2003, I am not satisfied that there was cause for Mr Merchant to lose trust and confidence in his employer. The Department had made serious efforts in a spirit of good faith to address any concerns Mr Merchant had and to resolve his employment relationship problem. I am satisfied that the Department was keen to see the employment continue. It was Mr Merchant who lacked commitment to this. I can do nothing more to assist him.

Costs

- [31] I leave it to the parties to discuss costs between themselves. If they cannot resolve the issue then any request for the Authority to determine the matter must be made within 28 days of this determination.

Y S Oldfield
Member of Employment Relations Authority