

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN William Rackham (Applicant)
AND New Zealand Fire Service (Respondent)
REPRESENTATIVES Kerry Single, Advocate for Applicant
Paul McBride, Counsel for Respondent
MEMBER OF AUTHORITY R A Monaghan
INVESTIGATION MEETING 21 February 2006
SUBMISSIONS RECEIVED 24 and 27 February, 2 March 2006
DATE OF DETERMINATION 13 March 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] William Rackham says he was ‘wrongfully dismissed’ from a position as a firefighter with the New Zealand Fire Service Commission (“the Fire Service”) at Rotorua. At the relevant time he was already employed by the Fire Service as a firefighter at Takapuna. He says he was appointed to the Rotorua position, but before he could start in the position the Fire Service cancelled the appointment unjustifiably.

[2] Mr Rackham seeks reinstatement to the Rotorua position, or compliance with the agreement that he take up that position.

[3] The Fire Service refers to the provisions of the Fire Service Act 1974, and the express terms of the applicable collective employment agreement, particularly as they related to the review of appointments. It says it acted correctly under those provisions, with the result that following a review process there was a valid cancellation of Mr Rackham’s appointment. It says further that it acted correctly in making the appointment it did to the Rotorua vacancy when the vacancy was re-advertised following the cancellation of Mr Rackham’s appointment.

Applicable statutory and contractual provisions

[4] Section 65(1) of the Fire Service Act provides:

“The Chief Executive, in making an appointment under this Act, shall give preference to the person who is best suited to the position.”

[5] Section 67 provides in part:

- (1) The Chief Executive shall put into place for the Fire Service a procedure for reviewing those appointments made within the Fire Service that are the subject of any complaint by a member of the Fire Service.
- (2) The procedure shall comply with the guidelines prescribed by the State Services Commission for such review procedures.”

[6] Mr Rackham’s terms and conditions of employment were contained in The New Zealand Fire Service and New Zealand Professional Firefighters Union Collective Agreement for Uniformed Operational and Communications Centre Employees (“the cea”). The agreement came into force on 1 July 2003 and remains in force until 30 June 2006.

[7] Schedule 6 of the cea contains a set of national employment policies, expressed to have been developed in consultation with the New Zealand Professional Firefighters Union (“the union”).

[8] One of these policies is the Review of Appointments Policy, which the parties agreed with reference to the obligations in s 67 of the Act.

[9] The formal review process requires the submission of written requests for review within 14 days of the publication of an appointment in the Fire Service Gazette or other written notification of the outcome of the appointment process, whichever is earlier. On receipt of such a request, the Chief Executive appoints a review committee to consider whether the requirements of s 65 of the Act were met, and whether relevant guidelines and policies were complied with in making the appointment in question. On completing a review the committee must make recommendations, which may include the confirmation or the cancellation of the original appointment.

[10] Another applicable policy is the Transfers, Notification of Vacancies and Appointment Policy. Where, as here, a vacancy is notified outside the Fire District in which it occurs, Section 3 of the policy applies. It provides as follows:

“(i) ... the following criteria (in order of priority) will be followed to determine the person who is best suited to the position:

1. The specific skills and experience necessary for the vacancy as determined by the Chief Fire Officer.
2. Where more than one applicant meets the skills and experience required, the best suited may be determined by the applicant with the highest rank.
3. Where more than one applicant meets the two criteria above, the best suited may be determined by total length of service.

(ii) ...

(iii) When a vacancy has been notified ... and an employee has genuine and compelling compassionate grounds for appointment (see Section 4), that employee shall be given priority over other applicants.”

[11] Section 4 of the policy provides:

“In order to gain priority over other applicants due to compassionate grounds, the employee must demonstrate –
 . a compelling domestic or personal situation (which requires the worker to live in, or close to the District within which the vacancy arises).

That either

. must NOT have existed at the time that the worker was engaged ...

or

. must NOT be of the worker’s choice.

(i) ...

(ii) In the event that a worker is denied transfer from another District on compassionate grounds, the worker may appeal this decision by referring the matter to the Director of Human Resources. The Director of Human Resources shall review the decision by appointing a panel ... to consider the request.”

Mr Rackham's application

[12] During 2005 Mr Rackham and his wife sought to move their family from Takapuna, Auckland, to Tauranga. In July 2005 Mrs Rackham applied for, and obtained, a job in Tauranga. Her start date was to be 15 September 2005. The plan was that she move to Tauranga, and the rest of the family would follow when Mr Rackham was successful in obtaining a transfer to the area.

[13] Mr Rackham duly applied for vacancies in Rotorua and Tauranga in August and September 2005. In or about late August the family home was put on the market, an unconditional offer was received on 2 September 2005, and the settlement date was 16 September 2005.

[14] The vacancy with which this application is concerned was advertised on 26 August 2005 and had a closing date of 9 September 2005. It was for a firefighter's position in Rotorua. On 16 September Mr Rackham was invited to attend an interview which went ahead on 17 September. By then the die was cast as far as the sale of the Rackham family home was concerned. The same was true of Mrs Rackham's move to Tauranga.

[15] It is unfortunate that correspondence emanating from Mr Rackham and his advisors in November and December 2005 did not make that clear. Instead the correspondence made it appear events such as the sale of the home and Mrs Rackham's move to Tauranga were in anticipation of or in reliance on Mr Rackham's actual appointment to the Rotorua vacancy. The inaccuracy was not helpful and cannot have assisted in the parties' attempts to settle this matter.

[16] The Chief Fire Officer of the Rotorua Fire District, Wayne Bedford, conducted the 17 September interview together with his deputy John Booth and a senior firefighter. After the interview process Mr Bedford matched the applicants against the criteria set out in [10] above as follows:

(1) Skills and experience necessary for the vacancy.

Since training for all firefighters of the same rank is the same nationwide, unless a vacancy expressly requires otherwise applicants of the same rank are treated as having the same skills and experience. That is an agreement or understanding between the Fire Service and the union. There was no express requirement regarding additional skills here.

Nevertheless Mr Bedford believed that Mr Rackham's background as a mechanic and his extra driving and related skills could be of use. He took them into account.

(2) Applicant with the highest rank

Mr Rackham is a senior firefighter, as was the person who sought a review of Mr Rackham's appointment. As between them, the next applicable criterion was who had the longer period of service.

(3) Length of service

The standard application for transfer form required applicants to record their date of entry into the Fire Service and their 'length of service as paid firefighter'. Mr Rackham's period of service was recorded as 9 years, while the person who sought a review recorded his period of service as 9 years and 6 months. However Mr Bedford believed that person's service incorporated a period in a non-operational position (that is, it was not service as a paid

firefighter) so did not count that period. He concluded Mr Rackham had the longer period of service.

[17] There were several applications on compassionate grounds. One of the applicants was the person who appealed his non-appointment to the Director of Human Resources. Mr Bedford said in evidence he did not consider the compassionate grounds to be made out sufficiently to give priority to that applicant, who held the rank of firefighter and whose period of service was only 17 months. He reached this conclusion with the assistance of advice from a Fire Service human resource consultant in Auckland.

[18] On 29 September 2005 Mr Bedford telephoned Mr Rackham to say he had been successful in his application. He did not say anything about the review provisions because he knew Mr Rackham had a relatively long period of service and expected Mr Rackham to be aware of the provisions. He confirmed the advice in a letter which read:

“I am now in a position to confirm the outcome of the recent process to appoint a Firefighter in Rotorua.

Therefore I have much pleasure in advising that you have been appointed to the position of Firefighter Rotorua Fire District as discussed by telephone. The appointment will be advertised in the next Gazette.

I will be contacting your Chief Fire Officer to organise a release date. ...”

[19] There was no mention of the review provisions in the letter either.

[20] In early October, discussions between the respective Chief Fire Officers began over the date on which Mr Rackham would begin his duties in Rotorua. The discussions identified a date of 19 November 2005.

[21] Meanwhile the other applicants had been notified of their non-appointment. On or about 10 October Mr Rackham received a call from the president of the union, saying there was an appeal against his appointment by a person whose application for a transfer to the Rotorua position on compassionate grounds had not been successful. On 12 October Mr Rackham was advised that two people had challenged his appointment. One concerned the appeal on compassionate grounds, and, although Mr Rackham was not told this at the time, the other was from the person saying he had longer service than Mr Rackham. The advice was confirmed in the following email from Mr Booth:

“I have just been formally notified that there are two firefighters appealing our decision regarding your transfer to Rotorua.

Until these appeals have been heard I suggest that you defer any arrangements you need to make regarding your transfer. ...”

[22] Vincent Arbuckle, the Director of Human Resources, appointed a panel comprising himself and the union secretary to address the appeal based on compassionate grounds. The panel reviewed the decision not to appoint that person, as well as the entire recruitment process, forming conclusions on matters that went well beyond the complaint in front of it. However, it upheld the complaint.

[23] Steven Fraser, the Human Resources Legal Adviser, conducts reviews of appointments as part of his duties. He conducted the review sought by the person with longer service than Mr Rackham and completed a report dated 2 November 2005.

[24] Mr Fraser’s report was expressed to have been based on the interview panel’s documentation and the relevant applications. The report concluded that policy was not followed in that the

applicant for review had longer service than Mr Rackham, without discounting the possibility that specialist skills might be relevant provided they were expressly raised. Bearing that in mind, as well as the existence of the second complaint, Mr Fraser recommended that Mr Rackham's appointment be cancelled and the vacancy be readvertised. In turn, and following consultation with the union, the Chief Executive decided to readvertise the vacancy.

[25] In an email message dated 9 November 2005 Mr Bedford advised Mr Rackham he was 'very sorry for the position you now find yourself in', that the vacancy would be cancelled and a recruit would be taken on instead. The appointment of recruits involved the application of different policies in some material respects, and Mr Bedford's advice was his reaction to the problems being experienced with Mr Rackham's appointment. Mr Bedford's plan did not prevail and the vacancy was not cancelled, rather it was readvertised as recommended. Mr Bedford was not involved in this recruitment process.

[26] Mr Rackham's original application was considered again. He was not re-interviewed, except that this time his family circumstances meant the application incorporated the possibility of appointment on compassionate grounds. A human resources consultant contacted him on 15 January 2006 to discuss that aspect.

[27] Mr Rackham was not appointed, and has not invoked the review or the appeal policies. The successful applicant was the person who appealed against Mr Rackham's appointment on compassionate grounds, with those compassionate grounds prevailing when the vacancy was re-advertised.

Determination

[28] Mr Rackham's personal grievance was originally framed as a 'wrongful dismissal'. However his employment relationship problem does not concern a termination of employment, rather it concerns a transfer which was cancelled. If there is a personal grievance in that, it must amount to a disadvantage grievance as defined in s 103(1)(b) of the Employment Relations Act 2000. By the time submissions were filed I did not understand either party to be proceeding on the basis that there was a dismissal. Indeed submissions on behalf of the Fire Service directly addressed the possibility of a disadvantage grievance, as did the submissions in reply on behalf of Mr Rackham.

[29] Accordingly I have proceeded on the basis that I am considering a disadvantage grievance, and have taken both parties' submissions into account accordingly.

[30] Mr Rackham's position relies substantially on the apparently unconditional offer of appointment to the Rotorua position, which was accepted.

[31] That position overlooks the fact that the cea continues to set out Mr Rackham's terms and conditions of employment too. As I have set out, those terms and conditions incorporate the review of appointments policy and the associated review process. I do not accept that mere discussion and correspondence which omits to refer to the policy over-rides or amends those terms and conditions, although the circumstances of this employment relationship problem illustrate how unwise such an omission can be.

[32] Secondly, although there was no evidence it happened here, I would not accept that the Fire Service and an individual bound by the cea can enter into an agreement effectively contracting out of the review provisions. Aside from the duty of the Fire Service to observe its statutory obligations regarding the review of appointments, such an agreement would be inconsistent with the terms and conditions in the cea. It would therefore breach s 61 of the Employment Relations Act.

[33] Accordingly I do not accept that the exchanges of 29 September amounted to a concluded and unconditional agreement that Mr Rackham be transferred to Rotorua.

[34] Mr Rackham also complains about the conduct of the review and the appeal in respect of his appointment. Since the decision-making process is founded in statute, although developed in detail in the employment agreement, there is a limit to how far the Authority can look into the matter.

[35] To the extent the complaint is based on the terms of the employment agreement, particularly the policies in the cea, I say this. The applicant who invoked a right to priority on compassionate grounds did so on the basis of information the Fire Service accepted was genuine. There has not been any real dispute about the essential content of that information. The issue, instead, has been with the significance that should have been accorded to it. Mr Rackham, and to a lesser extent Mr Bedford, tended to be of the view that it is too easy to invoke compassionate grounds to gain priority in the appointment process. Here, Mr Bedford found the information less compelling and attributed less significance to it than the Fire Service panel did on the appeal. It is not the role of the Authority to substitute its opinion for that of the Fire Service on such a matter.

[36] Regarding the review based on length of service, on the face of the completed application for transfer forms Mr Rackham did not have the longer period of service. On both forms, the applicant's current Chief Fire Officer had certified as correct the information contained in the form. It was reasonable for the Fire Service to rely on the information in those circumstances.

[37] However I observe that the form asks about 'length of service as a paid firefighter', while the transfer policy refers to 'total length of service'. The latter can incorporate non-operational service. I suggest this inconsistency be tidied up. Even if at present the Fire Service and the union have a mutual understanding of what is intended, as individuals come and go from their staff there is a high risk that will not always be the case and there is already potential for confusion.

[38] Next, Mr Rackham says he had a right to be heard in the review process. Further to that, the Review of Appointments Policy provides:

"Process for Review Committee

...

The Review Committee will consider any request by the reviewee to appear in person. The Review Committee may also decide that it needs to interview the reviewee, the appointee or any other person connected with the appointment."

[39] The provision does not amount to a contractual right to be heard. If there was such a right, the Authority could address it. Otherwise the right to be heard, and whether the right was breached, concerns the review process in the context of the Fire Service Act. That is a matter for judicial review rather than for the Employment Relations Authority.

[40] Obviously the Fire Service has mishandled aspects of Mr Rackham's appointment, and the cancellation of it. At the same time, Mr Rackham did not take into account what he knew or should have known about the full range of his terms and conditions of employment. He had completed the sale of the family home, his wife had started or was about to start a new job in Tauranga, and he saw what he wanted to see when it came to his own move.

[41] For these reasons, although he has been disadvantaged, I am not persuaded that Mr Rackham's terms and conditions of employment were affected by an unjustified action of his employer's.

[42] Accordingly none of the remedies attaching to a personal grievance is available. It is important that Mr Rackham be aware, too, that it is rarely a good idea to refuse to attempt to mitigate a loss on the ground that the attempt would prejudice an existing personal grievance. It was not a sensible strategy to purport to be protecting his rights under the present grievance by declining to exercise his own right to seek a review of the appointment to the readvertised Rotorua vacancy, and declining to apply for another advertised vacancy in the Bay of Plenty region. Both of those could have been pursued on the basis that they were without prejudice to his position on his grievance.

[43] Turning to the remaining remedies sought, there will be no order for compliance with the allegedly unconditional offer of appointment, because I do not accept the offer was unconditional.

Costs

[44] Costs are reserved. The parties are invited to agree on the matter. If they are unable to do so they shall have 28 days from the date of this determination in which to file and serve memoranda on the matter.

R A Monaghan
Member, Employment Relations Authority