

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Paul David Gillespie (Applicant)
AND Tertiary Education Commission (Respondent)
REPRESENTATIVES Paul Gillespie in person
Carolyn Murphy for Respondent
MEMBER OF AUTHORITY Vicki Campbell
INVESTIGATION MEETING 9 August 2005
FURTHER INFORMATION RECEIVED 16 August 2005 and 6 September 2005
DATE OF DETERMINATION 16 September 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Paul Gillespie is employed by Tertiary Education Commission (TEC) as a skills advisor. Mr Gillespie had previously been a union member, but left the PSA in 2000. His employment is therefore subject to the terms of an individual employment agreement based on an expired Collective Employment Contract entered into pursuant to the Employment Contracts Act 1991 and dated 1 December 1996 to 30 November 1998.

[2] In May 2004 TEC adopted a policy to reward its employees recognising "Total Remuneration" and moved away for a single salary package. Mr Gillespie says that despite assurances provided to employees that no disadvantage would arise as a result of the change of policy, he has been disadvantaged. Mr Gillespie says that his disadvantage arises when a comparison is made with between his total remuneration and that of his peer group.

[3] Mr Gillespie says that prior to the implementation of a total remuneration package the employers contribution to the government superannuation fund (GSF), of which he was a member, was not factored into his salary package and the payment made to the GSF was over and above his

salary. He says that the amount paid to GSF created a difference between him and his peers which no longer exists. Mr Gillespie claims that this gives rise to a personal grievance for unjustified disadvantage.

[4] In resolution of his employment relationship problem Mr Gillespie seeks reimbursement for lost wages, interest, expenses and compensation for unnecessary anguish.

[5] TEC says the total remuneration package was implemented following extensive consultation with all employees and that the implementation of the new policy resulted in Mr Gillespie receiving an increase in his base salary and therefore his total remuneration. TEC disputes Mr Gillespie has suffered a disadvantage.

[6] The issue for determination is whether Mr Gillespie has suffered a disadvantage in his employment and if so, whether the actions of the employer are justified.

Did Mr Gillespie suffer a disadvantage?

[7] Mr Gillespie is required to show on the balance of probabilities that one or more of his conditions of employment are affected to his disadvantage by an unjustifiable action by TEC (s.103(1)(b) Employment Relations Act 2000).

[8] The Employment Court has found that disadvantage grievances arise out of the employment activity, the on the job situation. The words “are affected” are related to physical conditions of employment, the environment in which the work is carried out, the amenities and facilities available, the payment to the employee and matters of that kind (*Wellington Area Health Board v Wellington Hotel IUOW* [1992] 2 ERNZ 466).

[9] In determining whether Mr Gillespie’s employment was affected to his disadvantage, it is necessary to focus on the employment, considering the changes that occurred and assessing their impact on the employee (*Matthes v New Zealand Post Ltd* [1994] 1 ERNZ 994).

Mr Gillespie’s employment

[10] Mr Gillespie’s individual employment agreement based on the expired collective contract provided for TEC to review its salary and performance reward policy. The agreement also provided minimum and maximum salary ranges for each position covered under the agreement. In addition,

the agreement provided for eligible employees to contribute to GSF pursuant to the Government Superannuation Fund Act 1956.

[11] The agreement included recognition that the employer has the right to ...plan, manage, organise and finally decide upon ... operations and policies... together with a recognition that joint working parties would be established as required.

[12] Appendix 4 of the agreement placed a priority for TEC to develop an enhanced performance management system and an agreement to consult about the strategic HR direction of the Agency.

[13] In 2002 a project team was established to review TEC's remuneration policy and systems. The project team consisted of representatives from the employees, PSA delegates, management and HR. Information about the project team was circulated to all staff via TEC's intranet. It is common ground that TEC utilise the intranet as the most common source of providing information to its employees.

[14] In January 2003 an update advising all employees of the progress of the Remuneration Project was made available for all staff on TEC's intranet.

[15] On 23 April 2004 a draft report was posted on the intranet outlining the progress of the project to date and seeking feedback from all employees regarding the contents of the report. The covering email contained hyper-links to provide quick and easy access to the document. The draft report outlined the intention of TEC to use a total remuneration based pay system. Total remuneration is defined in the report as including base salary and other cash benefits including superannuation.

[16] In June 2004 the draft policy was approved for implementation. All employees were once again advised of the policy by email. The covering note to the email identified that the remuneration policy would see all employees move to a total remuneration package which would consist of a base salary plus benefits including the employer contribution to superannuation. The effective date of the change over to a total remuneration package was notified as being 24 May 2004. Again, the covering note contained hyper-links to provide easy and quick access to relevant information contained on TEC's intranet.

[17] Mr Gillespie says that he did not find out that his total remuneration would include the employer contribution to his GSF until after the implementation of the new policy. While I accept that may be the case, the documents provided to Mr Gillespie and made available through TEC's intranet stated that the intention was to move to a total remuneration package for pay purposes which incorporated employer contributions to superannuation funds. He was, therefore provided with every opportunity to become enlightened prior to the implementation of the new policy if he had so desired.

What changed?

[18] In *Attorney-General v Sears* [1995] 1 ERNZ 627 the Court of Appeal found that total remuneration is not salary. It includes two components, base salary and benefits. The Court of Appeal also found that the employer contribution to GSF is not a deduction from salary, it is therefore a benefit over and above base salary.

[19] An important point about the policy change at TEC is that the organisation has moved from simply offering a base salary, to identifying and taking into account the value associated with other benefits provided to its employees, such as the employer contribution to superannuation. Mr Gillespie has chosen to remain a member of the GSF, he could equally choose to resign from GSF and receive the full benefit of his total remuneration as a base salary without additional benefits.

[20] Mr Gillespie says that unlike the *Sears* case he has not agreed to the change in policy and therefore it should not apply to him. While Mr Gillespie did not specifically consent to the change in the remuneration policy, his employment agreement recognised and provided for TEC to review its salary and reward policy and also recognised that TEC has the right to decide upon policies. That right, of course, is countered with the obligation on TEC to consult with its employees about the change.

[21] The Court of Appeal stated in *Wellington International Airport Ltd v Air NZ Ltd* [1993] 1 NZLR 671, "consultation" is a quite different process from "negotiation":

The word 'negotiation' implies a process which has as its object arriving at agreement. There is no such requirement in the present case. The airport company is given the power to fix charges. Before doing so it must consult, and for consultation to be meaningful, there must be made available to the other party sufficient information to enable it to be adequately informed so as to be able to make intelligent and useful responses.

[22] Mr Gillespie complains that he was never consulted with, regarding the development and/or implementation of the new total remuneration policy. TEC say it did consult. It consulted widely with the PSA and consulted with other staff through employee representatives, feedback at

team meetings and through the intranet. Mr Gillespie accepted he received information through email, at team meetings and through his discussions with a PSA delegate, Mr Tony Tooman, who was part of the working party.

[23] I have reviewed all of the correspondence relating to the development and implementation of the new remuneration policy which was provided for Mr Gillespie. I am satisfied Mr Gillespie was aware there was a new remuneration policy being developed and that there was sufficient information to enable Mr Gillespie to be adequately informed to enable him to make intelligent and useful responses to the draft policy if he so desired.

What was the impact of the change on Mr Gillespie?

[24] Evidence provided to the authority shows Mr Gillespie has received regular increases in his base salary following the implementation of the new remuneration policy. No other conditions of his employment have been affected by the implementation of the policy. Mr Gillespie was in the enviable position prior to May 2004, of receiving a benefit in the form of an employer contribution to his superannuation fund to which he will one day be the beneficiary. This advantaged him over his colleagues who were not eligible for GSF and who received the same base salary as Mr Gillespie.

Determination

[25] I find that the recognition of employer contribution to GSF in a total remuneration package does not constitute a disadvantage. I am unable to assist Mr Gillespie any further.

Costs

There will be no order for costs as the parties represented themselves in this matter.

Vicki Campbell
Member of Employment Relations Authority