

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN William Leigh Hodgson (Applicant)
AND Department of Internal Affairs (Respondent)
REPRESENTATIVES Leigh Hodgson on his own behalf
Peter Gunn for Respondent
MEMBER OF AUTHORITY G J Wood
INVESTIGATION 23 November 2004
MEETING
SUBMISSIONS RECEIVED
BY 10 December 2004
DATE OF
DETERMINATION 12 January 2005

DETERMINATION OF THE AUTHORITY

1. The applicant, Mr William Leigh Hodgson (“Leigh Hodgson”) claims that his 2001/2002 performance assessment was not conducted fairly and properly by the respondent (“the Department of Internal Affairs”) and that the assessment given was not valid. Mr Hodgson also seeks a comprehensive review of his designation, grading and remuneration.
2. The Department considers that Mr Hodgson’s claims have no merit. However, in an effort to resolve matters, it made an open offer following mediation to resolve Mr Hodgson’s personal grievance on the basis that:

“Your performance assessment rating for the year 2001/2002 will be amended to a level 2 rating. The wording of the 2001/2002 assessment shall be reviewed and if warranted amended to reflect a level 2 rating. Consequent upon the increased performance rating, an increase in your salary of 2% per annum with effect from 1 July 2002. The regarding of your position from Grade 17 to Grade 18 with effect from September 2003. A written apology to you for the shortcomings in the process relating to the finalisation of your 2001/2002 personal assessment.”

3. This offer was made on the basis that acceptance would constitute full and final settlement of the personal grievance. Mr Hodgson declined this offer. The matter now requires a determination by the Authority as subsequent negotiations between the parties have also broken down.

The Facts

4. Mr Hodgson started employment with the Department of Internal Affairs as a solicitor in Wellington in 1990. Since 1 July 1991 his terms and conditions of employment have been covered by a collective employment agreement (long since expired), but on an individual basis. This is because the Department and Mr Hodgson have been unable to conclude any new arrangements in relation to his employment. Mr Hodgson is employed as part of the legal occupational class. Mr Hodgson is employed within that class as a solicitor. With effect from 11 May 1990 the salaries to be paid to solicitors was between the ranges of \$29,279 and \$49,122 per year. Progression between grades is to be by appointment to an established position.
5. Under the agreement, the Department is required to place an employee within the upper and lower salary limits of the appropriate grade taking into account a number of factors. Such a salary review must take place at least once every year and may not result in any reduction in salary paid to employees. Clause 5.5 of the agreement headed "Review Procedure" states the following:

"At the initial and subsequent salary review, any employee is entitled to discuss the result with his/her controlling officer and have a copy of any assessment papers relating to his/her placement. If not satisfied following such a discussion, the employee may formally request a review through a review procedure established in consultation with the PSA. The matter of PSA participation in the review procedures will be considered."
6. These are the only terms of Mr Hodgson's written terms of conditional employment that are relevant to this matter.
7. Despite what was in his employment agreement, by June 2001 Mr Hodgson's remuneration had increased to \$49,860 plus an assessed superannuation benefit of \$3,740. This is thus above the maximum salary payable pursuant to his employment agreement for a solicitor of \$49,122. It therefore follows that Mr Hodgson can have no claim under his employment agreement in relation to any salary review process as

contained in that agreement. In any event, Mr Hodgson never sought to invoke that process.

8. As a result of the passage of the Employment Relations Act 2000, the Department sought to ensure that all employment agreements and conditions were applied consistently to all employees. In this regard, the Department wrote to Mr Hodgson on 15 October 2001 offering to negotiate with him over an individual employment agreement whose terms and conditions were not inconsistent with the collective agreement. As part of this process, a new remuneration system based on total remuneration was also introduced. In this regard, it was noted that Mr Hodgson was employed as a solicitor within the strategic support area of the Department. His position was evaluated as a Grade 17 position, the total remuneration for which was set between three levels, namely \$50,305-\$59,182-\$68,059. It was noted that Mr Hodgson's current base salary was \$49,860 and that he was entitled to superannuation benefits of \$3,744. Thus his total remuneration was above the minimum as evaluated. He was also advised that *"as part of the 2001/2002 performance review your performance will be assessed and you will be assigned to the appropriate level of the new range based on your performance assessment"*.
9. Whilst Mr Hodgson accepted the offer to negotiate, unfortunately he and the Department could not agree on a new individual employment agreement and so he remained under his expired collective employees agreement as set out above. In fact Mr Hodgson at some point translated to a different scale for the Department's assessment of him which meant that he was paid at grade 17.
10. However, Mr Hodgson was also subject to the 2001/2002 performance pay review which clearly forms part of his terms and conditions of employment. For employees like Mr Hodgson covered by an expired collective employment contract, salary reviews were to be conducted within the remuneration framework contained in the relevant expired collective contract. The Department had instituted a four level assessment table. For the purposes of this case, the important levels are level 2 – strong contributor – entirely satisfactory; and level 3 – contributor – developing, completely acceptable performance. Those on level 2 were said to be people who performed very well in their positions and made a noticeable positive contribution to

the functioning of the overall team. People on level 3 for the purposes of this case were assessed as having made a steady reliable contribution over the full range of competencies for the role. The way the Department applied the policy to all employees was that those employees receiving a grade 2 assessment would get 2% greater total remuneration than those assessed at grade 3.

11. The performance management system in place in 2001/2002 provided for annual performance reviews. Following the performance review, consideration was then given by management to remuneration. That was done following the setting of performance levels as set out above. Mr Hodgson went through the process as envisaged with his supervisor at the time, Mr Alan Munroe. Mr Munroe intimated to Mr Hodgson that he would receive a level 2 rating as he had for the past several years. Mr Hodgson was relaxed about this prospect as it was the level he expected to be rated at. However, there was some discussion between Mr Munroe and Mr Hodgson about comments that Mr Munroe put in the assessment which related to the findings of an external review which was strongly critical of the Department's legal service unit. In this respect, it was noted by Mr Munroe that the team goal of overall client satisfaction was not achieved, which Mr Hodgson was unhappy about. Mr Hodgson did not consider that he was responsible for any of this failure.
12. I accept from Mr Munroe's evidence that although Mr Hodgson was unhappy with some of the wording of the assessment, he was prepared to live with it. This is consistent with his signing the document on 3 July 2002. I do not accept that Mr Hodgson, an experienced solicitor, would have signed any document that he was not comfortable with and not prepared to accept.
13. The rating level had not been set at this point. This is clearly provided for in the form. This is a matter that had to be dealt with by Mr Gerald Scanlon, Mr Munroe's boss, as the Director of Strategic Support at the Department. Although Mr Scanlon did not undertake the performance assessment, he had to ensure there was relativity between areas under his control and that he agreed with the supervisor's assessment.
14. Mr Scanlon determined on a level 3 rating for Mr Hodgson, compared with Mr Munroe's preference for a level 2 rating. He did so on the basis of comparisons with

other staff under his control (most of who were not solicitors) and that he had concerns over Mr Hodgson's productivity, thus justifying a level 3 instead of level 2 rating. Having heard from Mr Scanlon, I accept the conclusion he made was one that was reasonably open to him as a fair and reasonable employer, even although one could probably also justify a level 2 rating. In fact that was the view of Mr Hodgson and Mr Munroe and one that the Department was prepared to implement in order to settle this personal grievance. However, these are matters for subjective assessment (on which reasonable individuals may come to different answers). Therefore my conclusion is that Mr Scanlon's assessment was a genuine one and one that was reasonably open for him to take, even if it could be viewed as not being a generous assessment.

15. That conclusion can be supported by the fact that Mr Hodgson signed off his assessment, albeit in order, as he saw it, to receive a pay increase. Again, as an experienced solicitor, Mr Hodgson would have known the implications of signing such a document, as he did on 12 August. Again I note Mr Scanlon's evidence that he believed that although Mr Hodgson was not happy with the outcome, he was prepared to accept it.
16. Around this point, Mr Hodgson's longstanding concern over the grading and pay for his job, which he had raised generally with the Department on many occasions, extended to specific concerns over the performance review process. As a result, he formally raised for the first time with the Department, on 30 October 2002, an employment relationship problem over the performance assessment process. In his letter he stated:

"The process was not conducted in a way it ought to have been and I seek a new assessment and a determination of an appropriate performance level and an appropriate salary review with adjustment of salary to take effect from 1 July 2002."
17. There was no mention at this point of his ongoing concern about the grading of his position.
18. The letter Mr Hodgson sent was referred to human resources for action. Mr Hodgson was invited to meet to specify the problem more fully and articulate the remedy sought. However, Mr Hodgson took no action on this matter until 14 May 2003. At that point, he extended the remedies sought to include a review and reassessment of

his remuneration, grading and designation with a salary adjustment to the “market rate” from 1 August 2002.

19. A meeting was then held in May 2003 between Mr Hodgson, his manager and an HR representative. This meeting was held pursuant to the problem resolution processes put in place by the Department after the introduction of the Employment Relations Act. The problem was not resolved and the matter further went to mediation. An offer of settlement was then made as set out in the introduction. That was rejected by Mr Hodgson.
20. I again point out that Mr Hodgson has no right to any review and reassessment under his expired employment agreement. It is certainly open to him as an employee to at any time seek a review and reassessment of his remuneration and grading. I am sure that a good employer such as the Department of Internal Affairs will take such a request seriously. However, it is not a matter for the intervention of the Employment Relations Authority. That is a matter for the parties to determine through the bargaining processes set out under the Employment Relations Act. The Authority is expressly prevented from determining remuneration and other key terms of employment in the absence of any contractual entitlement for intervention by a third party. No such provision exists in this case.
21. Unfortunately, this is an area which Mr Hodgson has sought continually to force the Department and the Authority to address as part of his grievance. I again note that this is not a matter within the Authority’s jurisdiction and is the reason for many of the constraints placed on the investigation by the Authority following requests by Mr Hodgson. It was also not an area raised by him as an employment relationship problem within 90 days. I further note that all of the requests related to these sorts of issues, including Mr Hodgson’s wish for the Authority to consider an undertaking allegedly given by the Department in 1993 to pay legal staff market rates. I have constrained myself to investigating what is provided for in the terms and conditions of employment between the two parties. In this context, that is the way his performance review was conducted.

Determination

22. It is clear from the above that Mr Hodgson can not succeed in his personal grievance claim. There has been no breach of his terms and conditions of employment in terms of his individual employment agreement. Furthermore there has been no breach of the Department's policies for performance review assessments, as has also been made clear above. Whilst Mr Scanlon's assessment could perhaps be seen as not generous, it was an assessment that was open to him and he is the only person who is able to make that assessment. The process subsequently adopted by the Department has been to try and resolve concerns Mr Hodgson had, but it has unfortunately not been successful.
23. There is therefore no unjustified action on behalf of the Department. I therefore dismiss this application.
24. What is really unfortunate about this case is that the parties have been unable to agree on terms and conditions of employment for Mr Hodgson that reflect the different employment realities which both parties face in 2005 compared with 1990. Because of this Mr Hodgson will face difficulties in generating the outcomes he seeks until the parties can agree on new terms and conditions of employment. Similarly, the Department will also, certainly over time at least, face problems in operating under such an outdated set of terms and conditions of employment.

Costs

25. Costs are reserved.

G J Wood
Member of Employment Relations Authority