

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Richard Howe (applicant)
AND	Reserve Bank of New Zealand (respondent)
REPRESENTATIVES	Alan Cressey for the applicant Stuart Dalzell for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Wellington, 27 January 2005
DATE OF DETERMINATION	1 February 2005

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. The applicant, Richard Howe, says the respondent (the Bank) disadvantaged and constructively dismissed him – amended statement of problem received on 17 November 2004. He seeks payment of compensation for lost salary of \$98,875 (gross) and for humiliation, etc of \$15,000 and costs.

2. The Bank says that Mr Howe has no basis on which to claim any personal grievance – statement in reply received 3 December.
3. The parties underwent mediation but their employment relationship problem remained.

Investigation

4. During a telephone conference held on 28 October the parties agreed to a one-day investigation in Wellington commencing on Thursday 27 January 2005. The parties usefully provided written statements in advance of the investigation and an agreed bundle of documents.
5. Efforts by the parties during the investigation to settle this matter on their own terms were unsuccessful.

Background

6. Key background details can be summarised as follows.
7. The applicant was employed by the Bank from January 1983 until 10 December 2004.
8. Mr Howe's most recent written individual employment agreement is dated 1 April 2001 (document 1 in the agreed bundle). That agreement was for the position of Market Co-ordinator, Collectors Coin.
9. In November 2001 Mr Howe was appointed to the position of Team Leader, Currency and Building Services (Team Leader). A position description was provided (document 2). From late 2003 to 18 June 2004 the applicant also enjoyed the title of Project Manager, Silver Coin Review. No employment agreement or position description was provided or agreed in respect of the Project Manager task.
10. In 1997/98 the Bank undertook a major review of New Zealand's silver coinage. Various proposals were considered but did not proceed.

11. In early 2003 the Bank commenced another review of New Zealand's silver coinage (the Review). From around April 20203 Mr Howe commenced preliminary work in respect of the Review. The Review initially contemplated two phases – the first a feasibility study, and – if adopted – the second, an implementation phase, following the presentation to the Governor of the Bank of a business case by the end of September 2004 (document 13). As it happened, the business case was presented to the Governor on 8 October 2004.
12. As a matter of policy, and because of its cost and magnitude, the Review was undertaken by way of the Bank's recently established project management methodology (document 15). The methodology requires a hierarchical management structure including a project sponsor, a project owner and a project manager. As document 15 makes clear (at page 57 in the agreed bundle), and from December 2003, Mr Howe was identified both within and outside of the Bank as the Project Manager and his manager, Mr Brian Lang, as the project owner. By the time the applicant assumed the role of Project Manager he had already been working on the Review for some time.
13. Mr Howe says he was appointed to the position of Project Manager whereas the Bank says it was an extension of his existing Team Leader role: the parties' different view on this matter is very much the nub of their employment relationship problem.
14. Prior to undertaking the role of Project Manager, Mr Howe had been of the view for some time that his actual job had evolved significantly away from those referred to in his employment agreement and position description. He was of the view that, because of resignations and other changes, he had greater responsibilities that what he was being paid for. He says he asked Mr Lang several times for a new position description and that his role be re-evaluated. Little or no change resulted. Mr Howe became increasingly unhappy with what he saw as a lack of recognition by the Bank of his increased responsibilities. He says he repeatedly put his concerns to his manager, Mr Lang. The applicant says Mr Lang told him not to worry, that the Bank would be re-visiting the Review, that Mr Howe would have a new position description and his pay would be adjusted accordingly. The applicant says he also agreed with Mr Lang's suggestion that it made practical sense to not press for a re-evaluation until the Governor approved the second phase of the Review, when it would move

from a feasibility study to an implementation phase. Mr Howe accepts his manager did not have the authority to increase his pay rate and that any adjustment lay with the Bank's human resource section.

15. Unsurprisingly, Mr Lang has a different recollection of relevant events: he says he considered the applicant throughout as essentially still performing the same job, that of Team Leader. He saw Mr Howe's work on the Project as an extension of his existing role and technical skills. For that reason Mr Lang says he was reluctant to accommodate Mr Howe's request to provide a new position description as Project Manager of the Review and to have his salary reviewed accordingly. Mr Lang says he told the applicant there was no formal position of Project Manager and that the Bank was reluctant to make any appointment until the Review went ahead. He says he encouraged the applicant to undertake the project as it would develop his skills and enhance his career prospects. He did undertake to review Mr Howe's work on the Review should it go ahead and, if appropriate, would then submit his effort to the Bank's human resources.
16. On 18 June 2004 Mr Lang approached the applicant and advised him that the Bank had decided to appoint another of its employees to the position of Project Manager of the Review. Advice to that effect went out by email to Bank staff on 22 June (document 25). Mr Howe described the advice as a bolt from the blue. He says that – in breach of clause 3 of his employment agreement – he was not consulted about the change and that it was presented, instead, as a *fait accompli*. He promptly sought a meeting with the relevant Assistant-Governor, so as to raise his employment relationship problem (document 20). A meeting took place in which Mr Howe put his concerns: he saw himself as having been replaced, that he felt embarrassed and humiliated and was of the view others would see him as having failed in the role (par 57 of his first statement). The Assistant-Governor did not accept Mr Howe's concerns and encouraged him to continue to provide technical input to the Review and to also return to his Team Leader position.
17. Mr Howe remained deeply aggrieved. He therefore sought a meeting with the Bank's human resources section. The parties agree than an accurate record of the meeting is set out in document 24. The meeting failed to resolve Mr Howe's concerns. He remained deeply aggrieved. He says he felt used and had difficulty motivating

himself to continue his work; his health and home-life suffered. He filed a personal grievance. The applicant also decided to look for work elsewhere. Mr Howe submitted his resignation on 12 November and signed up for another job on 26 November 2004.

Parties' Positions

Applicant's Position

18. Counsel for the applicant, Mr Alan Cressey's, closing submissions emphasised amongst other things the following:
19. Mr Lang expressly offered the applicant the position of Project Manager of the Review. This was to be for the duration of the whole project. A new job description would be prepared and an appropriate salary determined. The Bank breached those promises.
20. Various documents and accounts of meetings made it clear that within and outside of the Bank that the applicant was the Project Manager (e.g. documents 13, 14 & 15).
21. In breach of the applicant's own employment agreement and its own policies failed/refused to formalise the arrangement – this is an unjustified action.
22. By failing to consult with him prior to 18 June when he was advised he would no longer project manage the Review, the Bank was in breach of clauses 2 & 3 of the applicant's employment agreement. The latter provided,

*The Bank will consult with you over matters that have **a significant impact on your position and duties**. Consultation means providing you with relevant and accurate information, retaining an open mind and listening to your views before making any decision.*

(applicant's emphasis – document 1)

23. Similarly, clause 4 provided,

*Your position description is a summary of your role and provides a general description of the work to be performed by you initially. Your position may evolve with changing business needs, and as noted in clause 1 you may be transferred to a comparable position. **Consequently, your position description may be amended after consulting with you.** The Bank is committed to excellence and you are expected to perform all tasks relevant to achieving business needs and to use your best endeavours and due diligence to perform these tasks professionally, competently and to a high standard.*

(applicant's emphasis – document 1)

24. The respondent is in breach of clause 10 of Mr Howe's employment agreement, which requires a remuneration review to ensure consistency between the job size and remuneration offered in the event of a transfer to a new position. The Bank is also in breach of its written remuneration policy (document 3) which requires, at page 4, amongst other things, that jobs require a re-evaluation when there has been a significant and substantial change in a job role. Mr Howe was required to relinquish almost all of his Team Leader duties so as to focus exclusively on his Project Manager work, but – despite repeated requests and in breach of its own policy and contractual commitments – it refused to consider doing so until after the second phase. The applicant's agreement to this delay was not true consent as it was not freely given.

25. Without consultation or forewarning, and without regard to his feelings, Mr Howe was demoted and another employee was formally appointed to the role – another unjustified action. Mr Howe raised a personal grievance but it was not resolved. The unresolved grievance ate away at the applicant to the point where it began to affect his mental and physical well being, his family life and his ability to continue working for the Bank. To break that negative cycle he resigned. The resignation constitutes a constructive dismissal in that it was caused by the unjustified actions of the Bank. Those actions were serious breaches such that it was reasonably foreseeable to the Bank the applicant would resign. However, in terms of remedies it is irrelevant as to whether this matter is viewed as an unjustified dismissal or unjustified actions as the remedies are the same.

26. The applicant should be compensated for, amongst other things, lost wages at the level at which his replacement was paid. Taking account of estimated earnings in his new position he calculates his lost wages as totalling \$98,875 gross.

Respondent's Position

27. The Bank says that at all times Mr Howe's employment was not affected to his disadvantage but rather was continued in accordance with his employment agreement until ultimately terminated on his own volition. The Bank neither promoted nor promised to promote Mr Howe to a position of Project Manager of the Review: no such position previously existed until another employee was seconded to it, i.e. on or about 18 June 2004.
28. The Bank's action of seconding another employee to the position therefore had no affect on the applicant's employment and it was not affected to his disadvantage. The matters in which Mr Howe was involved in respect of the Review were well within his expertise and existing position description as Team Leader. Following the addition of another employee to the Review the Bank expected Mr Howe to continue to contribute his expertise as he did and could not have reasonably foreseen his resignation on 12 November 2004.
29. The Bank was not obliged to consult with Mr Howe about the secondment of the other employee as it was a matter that did not have a significant impact on his position and duties.

Discussion and Findings

Offer and Appointment as Project Manager Claim

30. I do not accept that Mr Howe was ever offered and/or promised a position as Project Manager of the Review. I do accept he undertook a significant body of work as part of, or an adjunct to, or an extension of, his role as Team Leader. I reach this conclusion for the following reasons.

31. The parties agree that no written terms were ever settled in respect of Mr Howe project-managing the Review, nor are there any written records of the discussions between the applicant and Mr Lang as to the terms and conditions of the former's appointment as Project Manager. The true nature of the relationship between the parties must therefore be deduced by regard to their conduct and any other relevant objective evidence.

32. Clause 1 of the applicant's employment agreement (document 1) provides (emphasis added) *inter alia* that,

*The terms and conditions of this agreement can only be amended ... by both parties agreeing in writing, **although over time the Bank may vary the duties and responsibilities of your position, or transfer you to a comparable position.***

33. I am satisfied that Mr Howe's appointment or secondment to the position of Project Manager of the Review was consistent with clause 1 of his employment agreement particularly as it sought and obtained the applicant's agreement to the change.

34. One of the competencies/skills/experience required of the applicant as set out in his position description is that of "*project management skills*" (page 14 in the agreed bundle, document 2). It was therefore within the contracted relationship for the applicant to project-manage the Review.

35. I note here that the applicant's existing Team Leader position description was first drafted by Mr Howe, amended by his manager, Mr Lang, and then submitted to the Bank's human resources where it was approved. At any point it was available to the applicant to repeat the same with his role as Project Manager, i.e. to draft a position description and to put it to his manager for referral to human resources.

36. Mr Howe agrees that he concurred with Mr Lang's reluctance to provide him with an updated job description and to initiate a pay evaluation until after the Review entered its second phase. He also agrees he all along accepted that Mr Lang had no authority to determine what the pay of his job was worth and that Mr Lang made no promises of a pay increase. I find Mr Howe consented not to press for an amended position description because he agreed with the sensible position articulated by Mr

Lang that it made no sense to consider such a step until the Review went beyond its second phase. This is evidence that no contract had been entered into by the parties other than to adopt a pragmatic, and entirely appropriate, 'wait and see' approach.

37. I do not accept the suggestion that the applicant did not freely agree to this course of action: there is no evidence to support a claim that Mr Howe was brow-beaten or intimidated into accepting what he did not like. There is every evidence instead of Mr Howe being an intelligent and articulate individual, and well-able to protect his own interests.
38. In his evidence to the Authority Mr Howe explained that his appointment as Project Manger came about when Mr Lang advised him he would be the Review's Project Manager, so as to make use of his skills and experience; i.e. the applicant did not apply in any formal way for the position. The position was not advertised, either internally or outside of the Bank. The Authority's investigation established that the Bank employee who replaced Mr Howe as Project Manager was similarly seconded to the position, i.e. it was not advertised and he did not apply for it but – like the applicant – was instead approached by the Bank. The Bank's unchallenged evidence is that the terms and conditions of employment of the new Project Manager are unaltered and that he will return to his existing position as the conclusion of the review. That the other employee's existing pay rate was superior to Mr Howe's is evidence in support of the Bank's claim it was injecting greater expertise into the Review, rather than evidence of what the applicant should have been paid.
39. The Bank advised it adopts a flexible approach to seeking either in-house or advertising for external expertise in respect of staff shortages. All of the above is further evidence, I am satisfied, that Mr Howe's appointment to the position was within the terms and conditions of his Team Leader's contract of employment with the Bank and is consistent with the latter's normal practices.
40. Mr Howe's evidence during the investigation was that he had managed two smaller projects, the first in 1998 and the second in 2002/03. In other words, it was a feature of his employment with the Bank both before and during the currency of his last position description (document 2) for the applicant to undertake project management. Mr Howe described his earlier project management tasks as significantly smaller than

the Review. Significantly I find, he did not regard himself as having been ‘appointed’ to either of the two earlier projects. Mr Howe saw the Review as different because, once it was underway, it became – in his view – a role in itself. He says he gave up his core Team Leader role as a result. He says that, out of a scale of 10, 8 or 9 of his old job went. Mr Lang puts the same figure at 6. That assessment is at odds with his description in a memorandum dated 26 November 2003 to the Governor (document 13) that,

I have freed up Richard's time so he can work on the project virtually full-time over the next few months.

41. Nonetheless, I am satisfied from the evidence that, on a balance of probabilities basis, there was no promise to work in a new job by the applicant and no promise by the respondent to pay him wages for services rendered: no unilateral contract where the promise of one party was supported by the executed consideration of the other was ever formed. The arrangement claimed by Mr Howe is lacking in certainty, absent also is a sufficiently definite statement of the terms by which – the applicant alleges – the parties agreed they would be bound. Just as it was within the scope of the existing contract between Mr Howe and the Bank for him to be required to undertake project managing, it was open to the respondent to transfer that work to another employee – subject, that is, to any contractual obligations between the parties in respect of such a change.
42. I found both Mr Howe and his manager, Mr Lang, to be equally impressive and credible witness. However, for similarly genuine reasons, both arrived at markedly different understandings as to what had been agreed between them in respect of the same set of circumstances. As is made clear already, I do not accept that Mr Howe’s understanding amounted to a contractual entitlement enforceable under the Employment Relations Act 2000.

Constructive Dismissal Claim

43. It follows from the above that, in the absence of any contractual entitlement to continue in the role of Project Manager, and that as his existing position as Team

Leader continued to be available to him without any unjustified disadvantage, the applicant's claim of constructive dismissal must fail.

Disadvantage: Failure to Consult

44. For the following reasons I find that the Bank acted in breach of its contracted obligations to Mr Howe when it elected – without consultation – to replace him as Project Manager, of the Review, with another employee.
45. The Bank does not accept that it is in breach of clause 2 of its employment agreement with the applicant, on the ground that the appointment of another employee to project-manage the Review did not significantly impact on Mr Howe's position and duties. Mr Lang's evidence does not support that claim: instead, as I record above, he "... freed Richard's time up so that he (could) wok on the project virtually full-time ...". However, having regard only to Mr Lang's verbal advice to the Authority that it was a 60/40 split satisfies me that that alone is clear objective evidence of the applicant's position and duties changing significantly when he was appointed Project Manager. It follows that, having been consulted into a position (when Mr Lang first proposed he project-manage the Review), Mr Howe was entitled to expect to be consulted out of the same, when the respondent elected to appoint a different Project Manager. The respondent properly consulted with Mr Howe at the time it (Mr Lang) proposed that the applicant undertake the role of Project Manager. It was therefore contractually bound to do the same when it turned its mind to replacing the applicant, in that role.
46. I believe it largely self-evident that being replaced as Project Manager amounted to a "*significant impact on (the applicant's) position and duties*" (document 1). This is because, amongst other things, Mr Howe would no longer be publicly identified as the Project Manager. Indeed, the public nature of his replacement would inevitably attract speculation at to the reason for his departure. The abruptness of the change raised, I am satisfied, the applicant's legitimate concern that it could be seen as indicative of non-performance on his part. The reality was, regardless of Mr Howe's continued involvement in the project, that another employee was taking over a lead role, would be making key recommendations and taking important initiatives: this was all the more so as the change from Mr Howe to another employee was prompted by the

Governor's decision to make the Review a priority and to increase the resourcing of it accordingly.

47. By failing to consult Mr Howe the Bank missed an important opportunity to address his legitimate concerns. Consultation does not mean negotiation, so it cannot be said the substantive outcome would have been any different, however the chance to address matters such as the perception of others, Mr Howe's actual role under a new Project Manager, etc was unjustifiably denied the applicant.

Other Disadvantage Claims

48. The applicant also claims he was unjustifiably disadvantaged by the respondent's alleged breaches of its contractual obligations to review his new position. As is made clear above, I find that any failure in this regard was consequential to an agreement reached between Messrs Howe and Lang, that a review was best undertaken in the context of a post second phase environment.

Remedies

49. The applicant gave compelling evidence of the impact and effects on him of the bolt from the blue advice to him on 18 June that another employee was being appointed to project manage the Review. His reaction and continued distress were entirely understandable: those feelings were exacerbated by the respondent's breach of its contracted obligation to consult with Mr Howe. The applicant had been identified, both within and outside of the Bank as the Review's Project Manager. He experienced comment, and other behaviour, to the effect of, 'but isn't that your job?' His peers' reaction was the result of the effect of various communications and, in particular, document 15 and the diagram of the project's structure (page 57 in the agreed bundle). Mr Howe had legitimate reason to feel his competence had come under, unfair, question. Consultation would not, of course, have necessarily addressed all of Mr Howe's concerns – but it would have given the Bank an opportunity to address and alleviate the applicant's legitimate concern that the change was because of his performance shortcomings. Other strategies, including an internal statement about Mr Howe's involvement and the quality of his performance, could have been agreed on.

50. Support for the legitimacy of Mr Howe's concerns about others' perceptions of his can be seen in document 24, where it records an evidently sincere and genuine proposal being put forward by the Bank's representative to re-title his position, as "*Co-Project Manager*".
51. Having regard to the above I am satisfied that an award of \$4,000 is an appropriate level of compensation for the humiliation and distress occasioned Mr Howe by the disadvantageous process – in breach of the employment agreement - employed by the respondent, in failing to consult with him in respect of a matter having a significant impact on his position and duties.

Contributing Behaviour

52. The investigation disclosed no evidence of any action by Mr Howe that contributed towards the situation that gave rise to his personal grievance: s. 124 of the Act applied.

Determination

53. For the reasons set out above I find only in favour of Richard Howe's claim that the respondent, the Reserve Bank of New Zealand, acted in breach of its contracted obligation to consult with the applicant and thereby unjustifiably disadvantaged him. I therefore direct the respondent to pay to the applicant \$4,000.00 (four thousand dollars) compensation for humiliation, etc.
54. Costs are reserved.

Denis Asher

Member of Employment Relations Authority