

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 96/08
5127550

BETWEEN	SECRETARY OF JUSTICE Applicant
AND	SHANE ANDREW GIBBONS First Respondent
	GRAEME TAIURU VERCOE Second Respondent
	LISA JANE PITMAN Third Respondent
	JULIE MARGARET TANGAERE Fourth Respondent

Member of Authority: G J Wood

Representatives: Peter Chemis for the Applicant
Barbara Buckett for the Respondents

Investigation Meeting: 9 and 11 July 2008

Determination: 21 July 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant's department, the Ministry of Justice (Justice) has brought a dispute with its respondent employees over whether it is consistent with their employment agreements for it to advertise for what it considers to be new positions in the Maori Land Court, or whether instead the respondent employees should be appointed to their preference of position. Justice has put its restructuring of the Court on hold while the Authority determines this matter.

[2] The respondents also purported to file personal grievances by way of a counter claim. Because of the urgency of the matter and the fact that the matter was first raised by Justice as a dispute, those matters were not canvassed at the investigation meeting and will not be addressed in this determination.

The Facts

[3] Mr Stuart White is General Manager of the Special Jurisdictions Business Unit of Justice. Mr Shane Gibbons is the Chief Registrar of the Maori Land Court and reports within Justice to Mr White. He is responsible for the operation of the Court. The other respondents, Mr Graeme Vercoe, Ms Lisa Pitman and Ms Julie Tangaere are Regional Directors of the Court.

[4] As a result of the Court having more functions to administer as much as anything, Justice instituted a review of the Court's operations. As members of the Court's senior management team the respondents were all intimately involved in the review until Justice considered that there was potential conflict of interest, because ironically the review was seriously canvassing issues about changing the senior management structure of the Court.

[5] Currently the first three respondents' employment agreements deal with the issue of *management of change* as follows:

Management of Change

Where an employer determines that the manager's position is surplus to its requirements, the manager shall be notified of the Ministry's intention to disestablish his/her position.

Following that notification, the employer and the manager shall meet to discuss an appropriate solution. The aim shall be to appoint the manager to another position that is not dissimilar to his/her current position and which is suitable to the manager's skills and abilities. Where such a position is offered to the manager, the employer shall not be obliged to offer any other alternative. If the manager refuses to accept an offer of a such a position, the manager shall be deemed to have resigned.

However, where a position offered to the manager has terms and conditions of employment (other than remuneration) that are, overall, substantially less favourable than his/her exiting terms and conditions, the manager shall not be obliged to accept that offer.

Where the position accepted by the manager has a base salary less than the manager's current base salary, the manager will be paid compensation by way of a lump sum payment to make up for any loss to his/her base salary for the next two years.

If the above process is unsuccessful, the manager will be provided with at least one month's notice of termination and shall be entitled to a severance payment ...

[6] Ms Tangaere's employment agreement has no such clause. It deals with the issue of redundancy in the following way:

6.3 Redundancy

Redundancy means the situation where your employment is terminated because the duties, responsibilities and powers of your position are significantly altered or are surplus to Ministry requirements due to a change in the size, structure, responsibilities or requirements of the Ministry.

When your position is made redundant, you may be offered a new position within the Ministry. If the new position involves a reduction in your total remuneration and/or a significant change to your terms and conditions of employment, you may decline such a position and still remain eligible for redundancy compensation.

[7] Following widespread consultation with stake holders Justice finalised on a new structure for the Maori Land Court's administration, which involved additional staff and changes to positions in many situations. In particular, Justice chose not to pursue options preferred by the respondents, which would have seen their roles specifically retained but with additional secretarial and administrative support.

[8] The existing structure and the suggested changes can be compared and contrasted in the following way. The Chief Registrar leads and manages the operations of the Court and Tribunals relating to issues of Maori land and fisheries, as well as carrying out the statutory responsibilities of that office. The Chief Registrar is part of the senior management group of the Special Jurisdictions Business Unit of Justice. There are theoretically twelve direct reports although a number of those positions are vacant and a number would not be direct reports were the vacant positions filled. The Chief Registrar is responsible for between 211 and 223 staff of which a significant number are on fixed term agreements.

[9] The Regional Directors report to the Chief Registrar and are responsible for managing business processes, resources and relationships and with leading change in each of their regions. Each Regional Director looks after two or three regions, (where they hold statutory positions as Registrars in seven different districts) and in one case an information office. Again the number of staff reporting to them is influenced by a large number of employees on fixed term agreements that will expire in the next couple of years. The number of staff they are responsible for ranges between 50 and 70 depending on the region and different assessments of the number of staff on the establishment. The Regional Directors are members of the senior management group of the Maori Land Court as well as having independent statutory functions as Registrars.

[10] The structure proposed by Justice involves the appointment at the head of the Maori Land Court of a Director. The Director will be responsible for 240 staff approximately. The focus of the position is said to be more on developing and fostering relationships with Iwi, the Ministry of Justice and other public sector agencies, and thus on vision, strategic direction and leadership.

[11] The senior management group reporting to the Director is said to be enhanced by the appointment of three second tier positions to assist the Director, namely a Manager Planning and Performance, a Manager Design and Information Management and a National Operations Manager. The National Operations Manager will be responsible for achieving national consistency and standardisation across all district offices and Court processes. The National Operations Manager will also hold the statutory authority of Chief Registrar of the Court. The Chief Registrar will have 10-15 direct reports (including those of the new District Managers discussed below) and 160 indirect reports, being the bulk of the staff of the Maori Land Court.

[12] Instead of three regional managers each responsible for two or three districts, the new structure envisages seven District Managers, who will be Registrars in those districts where the Maori Land Court sits. District Managers will be responsible for between 11 and 43 staff depending on the size of the district.

[13] The proposed new jobs have all been sized by Hay. The Director has been banded at the same level as the Chief Registrar, while the National Operations Manager is banded one level below. District Managers are banded one level below the level of Regional Managers.

[14] There is an issue about the degree of consultation with the respondents by Justice. What is clear is that during this process Justice determined that none of the respondents would be re-confirmed into positions in the new structure and that in terms of three of the respondents' employment agreements, Justice considered that the new positions were dissimilar to their existing positions. Furthermore, Justice has declined to offer any of the respondents a position under the new structure until the advertisement process, which it has already commenced, is completed.

[15] This has occurred despite the respondents putting forward to Justice their personal preferences as appropriate solutions to the proposed changes. Mr Gibbons has applied without prejudice to his rights to the positions of Director, National Operations Manager and District Managers Hamilton and Rotorua. He has also agreed to a secondment in the interim to the position of Principal Advisor. His preference is to be re-deployed as District Manager, Hamilton.

[16] Mr Vercoe has applied to become District Manager, Rotorua and Manager Service Design and Information Management. His preference is District Manager, Rotorua, where he currently works and resides.

[17] Ms Pitman has applied to become Manager Service Design and Information Management, National Operations Manager and District Manager, Whangarei, the latter being her preference. She is currently based, as a Regional Director, in Whangarei.

[18] Ms Tangaere has applied to be National Operations Manager, Manager Service Design and Information Management and District Managers Gisborne and Hastings. Her preference is to become District Manager, Hastings, where she currently resides and works.

[19] The parties have been unable to reach agreement by mediation. The matter therefore falls to the Authority for determination.

Determination

[20] In comparing the various positions in issue I have relied on the information provided by the respondents as to the number of staff reporting to different management positions. I have also taken into account the statutory functions of Registrars and the fact that these activities must continue under whatever form the Maori Land Court may take. I have in fact done my assessment on the basis of the evidence proffered by the respondents about all relevant matters.

[21] I first analyse whether the respondents should have been reconfirmed into positions in the new structure. I do so by applying the objective test set out in *McCullough v. New Zealand Fire Service Commission* [1998] 3 ERNZ 378 as to whether the positions of the respondents will cease to exist or whether they will continue in substance, although in a modified guise. I note that all cases will fall on one side of the line or the other. There can be no middle ground and the preferences of either party are not determinative. For instance, there are almost as many cases of employees wishing to be assessed as made redundant as those who resist such a conclusion.

[22] While I accept that (particularly for the Regional Managers) the work the respondents do, particularly as Registrars, continues in the same way, and I also accept all of the respondents' evidence about the skills required and the work done and to be done under both structures, it can not be said that any positions continue in substance for the following reasons.

[23] The Chief Registrar is responsible for the strategic direction of the Court and the statutory functions of the Chief Registrar, as well as mentoring and advising the Registrars. Under the

proposed new structure the position of Chief Registrar is effectively split into two, with the Director having a more strategic focus and the National Operations Manager having an operational focus (containing the bulk of staff responsibilities), as well as the Chief Registrar responsibilities and the mentoring and support for Registrars.

[24] Despite all that was urged on me by Mr Gibbons, I can not see past the fact that his position has effectively been split into two, with the Director's position having the greater strategic focus. In that sense it must be held that his position will cease to exist under the new structure.

[25] As for the Regional Managers, there is no doubt that the work they do will continue. There are undoubtedly an enormous amount of similarities between the positions. However, that is not to say that their positions as Regional Managers will continue to exist in substance. There will be no regional managers. Instead there will be more than twice as many District Managers, each responsible for only one Registry and the Registrar of only one district accordingly. In effect the responsibilities of a District Manager are only half (or even less than half) those of a Regional Manager. They will also not have the same strategic responsibilities or management responsibilities because those positions will not be part of the senior management group of the Maori Land Court. Therefore it can not be said that these positions either have continued to exist.

[26] Ms Tangaere has a different employment agreement and therefore no right to the same treatment as the other respondents. I turn next therefore to assess the management of change clause for each of the respondents, except Ms Tangaere. Given my finding above it follows that each of the respondents' positions is surplus to Justice's requirements. They have been notified of the Ministry's intention to disestablish their positions. I note that the aim of the process is to appoint the respondents to other positions that are not dissimilar to their current positions, and which are suitable to their skills and abilities. I have no doubt that all the positions preferred by the three respondents are suitable for their skills and abilities. In particular, I do not accept that simply because Mr Gibbons is in a more senior role with Justice at the moment, that the Hamilton position is not suited to his skills and abilities. In any event I do not believe that Justice would consider that his skills and abilities are not suitable for that position.

[27] The issue therefore for determination next is whether there are positions in the proposed structure that are not dissimilar to the three respondents' existing positions. For these purposes not dissimilar equates to similar. Similar is defined in the Collins English Dictionary as "alike but not identical".

[28] This matter must also be assessed objectively and (as before) there can be only one answer. I conclude for essentially the same reasons as above that all the positions are dissimilar. This is because the responsibilities are so dissimilar for the Regional Managers and because of the effective split in positions between the position of Chief Registrar Director, compared to Director and National Operations Manager.

[29] It is therefore not necessary to delve deeply into the actual mechanics of the roles in issue, which do show that there are real similarities in the duties (if they are not in effect the same) to be done in the Maori Land Court, albeit by an increased cohort of managerial employees. Even if one excludes remuneration as a difference the fact is that the lower remuneration of several positions in issue relates to the lesser responsibilities of the positions, and these factors remain relevant.

[30] I accept that the Chief Registrar's position, as the leader of the Maori Land Court, is more similar to the Director's position than the National Operations Manager's. The Director's position is, however, dissimilar to the Chief Registrar's position because of the relative change of focus, but more importantly the loss of direct responsibility for the Registrar function and the direct oversight of the workings of the Court and the Registrar's functions, which resides with the National Operations Manager. The same logic applies to the National Operations Manager's position compared to the Chief Registrar's position.

[31] Similarly the District Managers remain dissimilar positions to those of the Regional Managers because of the responsibilities for only one district, not two or three.

[32] In this case it is clear that Mr Gibbons could have refused either the Director or the National Operations Manager as they were significantly different from his position. Similarly the Regional Directors could not have been required to take up the job of District Manager with less managerial responsibilities. I conclude for all the reasons above that these positions are not alike and are therefore dissimilar.

[33] The three respondents in question further claim that clause 15 requires Justice to offer them a new position. I conclude that while Ms Pitman describes the clause as an employee protection clause a close analysis of the clause does not necessarily support this view. It is certainly not a clause that requires Justice to offer the respondents a new position. The language relating to the offering of positions is permissive. It is only once a position is offered by Justice that the agreement mandates what is to occur.

[34] It is also clear, however, that the obligations of the parties under clause 15 (and Justice's obligations to act in good faith and as a good employer) remain. The parties must continue to use

the process contained in clause 15 to meet and discuss an appropriate solution, which can not be severance and therefore must be a new position with Justice. That process has not concluded and the parties must therefore still continue to adhere to their obligations. There is, however, no obligation on Justice in respect of any of the respondents to decline to consider applications from those who have responded to applications for the new positions.

[35] I note in this respect that Ms Tangaere claims that she has been treated inconsistently, and in a disparate manner with other affected staff, because positions they are interested in have been deemed to be not part of senior management and have therefore not been advertised. The other respondents also have concerns over this issue. That is an issue that is best dealt with as part of the personal grievances raised by all of the respondents.

[36] This disposes of the limited matters in issue between the parties and I am therefore not required to consider other arguments raised on behalf of Justice. Thus the dispute is resolved by a declaration that the Ministry of Justice is entitled to continue with the advertising and recruitment process it has initiated in respect of the new positions proposed to be established within the Maori Land Court.

[37] I note also that the respondents' personal grievances remain extant and may be progressed by way of further and proper filing of said grievances in the Authority, if that is what the respondents wish. I would observe, however, that it may be best for all concerned for the restructuring process to take its course first. I am cognisant of the submissions made on behalf of Justice that it wishes to retain the services of the respondents. Furthermore, I expect that the fact that the respondents have resisted the Ministry's interpretation of their employment agreements, and the fact that they have raised personal grievances, will not be held against them. The parties should focus instead on trying to appoint the respondent managers to other positions in the new structure so as to retain their expertise. In this regard I note again that by virtue of their skills, duties and experience all the respondents are suited to District Manager positions in the new structure.

Costs

[38] Costs are reserved.