

**IN THE EMPLOYMENT COURT
AUCKLAND**

**AC 50/08
ARC 54/05**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	KEN MERCHANT Plaintiff
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Defendant

Hearing: 19-23 May 2008
(Heard at Auckland)

Appearances: Paul Pa'u, advocate for plaintiff
Les Taylor and Katie Elkin, counsel for defendant

Judgment: 17 December 2008

JUDGMENT OF JUDGE A A COUCH

[1] Mr Merchant was a long standing employee of the Department of Corrections ("the Department"), working in property services. In 2003, there was a restructuring which affected Mr Merchant's position. He was made offers of reassignment but did not accept them. Instead, he resigned and took up alternative employment.

[2] Arising out of these events, Mr Merchant pursued personal grievances alleging that he had been unjustifiably disadvantaged in his employment, that he had been dismissed and that he had been constructively dismissed. As finally presented to the Court, a key element of these claims was an allegation that the Department had acted in bad faith in making its offers of reassignment by taking into account historic complaints about Mr Merchant of which he was unaware.

[3] The Authority investigated Mr Merchant's claims and, in its determination dated 7 June 2005 (AA207/05), dismissed them. Mr Merchant challenged the whole of that determination and proceedings were commenced in the Court on 8 July 2005. Since then, the matter has had a long and difficult history. In the course of nearly 3 years, numerous interlocutory issues were raised and judicially determined but I need refer to only 2 which directly affected the hearing before me:

- a) Mr Merchant made a claim for damages arising out of lost superannuation rights. Judge Travis directed that the issue of quantum of that claim be reserved for hearing if and when liability was established.
- b) The parties held a meeting on 12 December 2003 in an effort to settle their differences. Judge Travis decided that what happened at that meeting was privileged and could not be the subject of evidence.

[4] The matter proceeded before me by way of a hearing de novo.

Background and sequence of events

[5] Mr Merchant began working for the Department of Corrections in 1975 and remained with the Department until he left on 2 February 2004. Throughout that time, much of his work related to the Auckland Prison at Paremoremo where he and his wife lived in a Department house in the adjacent staff village.

[6] From October 1997, Mr Merchant and the Department were parties to an individual employment contract which continued in effect until Mr Merchant left the Department in February 2004. In 1997, Mr Merchant held the position of Manager, Property Services. He had responsibility for Auckland Prison at Paremoremo, where he was based, and for Mt Eden Prison. His position was then part of the Public Prison Service within the Department.

[7] In November 2002, there was a restructuring of property services relating to prisons. Members of the property services team of the Public Prison Service,

including Mr Merchant, were transferred into the Assets and Property division of the Department. This had little effect on Mr Merchant's day to day work but did involve a change in management responsibility for his position. Following the restructuring, Mr Merchant reported to Phil Butter, the Field Services Coordinator for Assets and Property, who was based in Wellington. Mr Butter reported to William Whewell, whose position was National Property Manager, Assets and Property, Systems and Infrastructure. He was also in Wellington. Mr Whewell had been with the Department in this or a similar role since 1997. In May 2003, Mr Butter was replaced by Christopher Wolland who then became Mr Merchant's immediate manager.

[8] Mr Merchant was generally regarded as a capable and effective member of staff. Performance reviews showed that he achieved expectation in most aspects of his work and was commended from time to time. He received an annual salary of \$64,463.

[9] Beginning in mid-2003, a further restructuring of prison maintenance services was undertaken. A key aspect of the proposal put to staff was to alter the regional structure from six regions to four. This meant that the existing facilities management roles, including that of Mr Merchant, were to be disestablished and four new Assets and Property Regional Manager roles created. During September and October 2003, the Department conducted a consultation process with affected staff including Mr Merchant. Subject to some minor alterations, the proposal was confirmed on 24 October 2003.

[10] In the course of the consultation process, two differing position descriptions were developed for the Regional Manager positions. These were described as Level One and Level Two, the difference being the degree of responsibility associated with the position and some consequential differences in functions.

[11] The Department operated a detailed management of change policy which was incorporated into the employment agreements of staff. The relevant part of that policy, as it appeared in Mr Merchant's employment contract was:

Management of Change

The process of change is continuous and should form part of the organisation's continuous improvement. When organisational changes are being considered that immediately affect you, you will have the opportunity to be involved and consulted and your views taken into account before decisions are finalised.

If as a result of organisational change, your position no longer exists or you can no longer be employed at your current position, grade or work location the following options will be considered.

The following options are not to be applied in any order of priority (with the exception of severance, which is a last resort). If agreement can not be reached as to which option to apply the Department will determine which option is to be applied.

Reconfirmation

Reconfirmation means placement to a position where the duties are the same (or very nearly the same), the salary is the same, the location is the same and the terms and conditions of employment are no less favourable.

If you are offered a suitable reconfirmation and choose not to accept it, the only option shall be leave without pay.

Reassignment

Reassignment means placement in a different suitable position. "Suitable" mean a job that does not involve so significant a change in duties as to be unreasonable when taking into consideration the employee's skills, abilities and potential to be retrained.

Salary equalisation is available where an employee is reassigned to a new position at a lower salary for up to two years.

If you are offered a suitable reassignment and choose not to accept it, the only option shall be leave without pay.

Retraining

The terms and conditions of retraining may involve retraining without pay or on pay and are subject to discussion and agreement with you.

Special Leave With or Without Pay

Special leave with or without pay may be agreed with or without a guarantee of job placement at the end of the period

Job Search

Job Search may be agreed between you and your manager. This means that the Department will undertake to assist you to find

alternative employment outside the Department. Criteria for a suitable position is agreed before the job search begins and if the criteria is met, you are committed to accepting a suitable appointment if it is offered to you.

Part time employment

You may voluntarily change to part time employment if this is available. Any compensation is subject to agreement between you and your manager.

Temporary Employment

You and the Department may agree to you undertaking alternative work for a temporary period, at the end of which, you will be entitled to a consideration of the other management of change options.

Review Procedure

A review procedure will be available if you are unhappy with any action taken during restructuring.

Severance

Every effort will be made to place you in alternative employment where your position has been disestablished. However the payment of severance will be available as a last resort when all the management of change options have been exhausted. ...

[12] As part of the restructuring, six positions were to be disestablished, including that of Mr Merchant. Accordingly, the Department had regard to the management of change options set out above. By comparing the tasks the affected staff were currently carrying out with those of the new positions, the Department established that one person could be reconfirmed in the new role in the Southern region. This was not the case with the other five incumbents including Mr Merchant. There were significant differences between their existing roles and the new roles which eliminated reconfirmation as an option.

[13] The Department gave the five staff whose regional positions were to be disestablished first consideration for appointment to the remaining three new roles. One decided he did not wish to be considered which left four who were interviewed, including Mr Merchant.

[14] The appointments were to be made by Mr Whewell who established a panel to interview the candidates and make recommendations to him. That panel included Mr Butter and Mr Wolland. The other two members were Rob Stevens and Karin Duncan. Mr Stevens was a senior manager from the Department's head office. Ms Duncan was Senior Coordinator, Assets and Property, Finance. In this role, she was Mr Whewell's personal assistant and was coordinating the restructuring process.

[15] The interview panel followed a well structured process. A list of questions had been prepared in advance to test the level of competence of each candidate with respect to 50 different criteria. The candidates were scored in relation to each criterion by each panel member and the results tabulated as a matrix.

[16] The interviews were conducted on 29 and 30 October 2003. When they were completed, the panel discussed their views and decided on recommendations. Those recommendations were put in a report to Mr Whewell which also included the score matrix and a summary of the areas in which the candidates had shown strength or weakness. Of the four candidates, two were clearly unsuitable. Mr Merchant was not one of those. In relation to the 50 criteria, the panel scored Mr Merchant's ability as being at the expected level in 34 areas, below the expected level in 14 and well below the expected level in 2. Mr Merchant was not scored above the expected level in any area. The scores of the fourth candidate were significantly better than those recorded for Mr Merchant. The panel recommended that Mr Merchant be appointed as Regional Manager, Level Two, Northern. The fourth candidate was recommended for appointment to a Regional Manager, Level One position.

[17] Although the panel's role was to only make a report and recommendation to Mr Whewell as the final decision maker, Mr Wolland told Mr Merchant immediately that he had been recommended for appointment. It appears this was at about the same time as the panel's report was sent to Mr Whewell on 3 November 2003. It was certainly before Mr Whewell had considered the report. Mr Merchant regarded what Mr Wolland told him as confirmation that he would be appointed and developed expectations accordingly.

[18] When he considered the panel's report, Mr Whewell had no difficulty in agreeing that the fourth candidate be appointed as recommended. When it came to Mr Merchant, however, Mr Whewell had reservations. He wrote at the foot of the report:

Ken is only to be appointed under strict performance measures. Check if this can be as "acting" RM with the ability to terminate after probation period. If this is not possible then Ken should not be appointed and then has full opportunity over management of change.

[19] This note reflected Mr Whewell's concern about Mr Merchant's suitability for the position of Regional Manager. The nature and reasons for that concern were the subject of a conflict of evidence to which I return in more detail later. There was also a measure of uncertainty about changes to the scope of the Northern Regional Manager role with new prisons then under construction. Mr Whewell took advice from a member of the Department's human resources team about his options.

[20] The advice Mr Whewell received was that it was not appropriate to have Mr Merchant "acting up" in the new Regional Manager role but that an available option was to appoint him to the position for a fixed term in the first instance to assess his suitability. Mr Whewell decided to take this option. Specifically, Mr Whewell decided to offer Mr Merchant appointment to the position of Regional Manager, Level Two, Northern for a period of 12 months.

[21] A meeting was then arranged to make this offer to Mr Merchant. That meeting took place on 7 November 2003. Present were Mr Whewell, Mr Merchant, Mr Wolland and Mr Butter. Immediately prior to the meeting, while Mr Merchant was waiting for it to begin, Mr Wolland spoke privately with him to say that the offer to be made to him was not what he may have been expecting.

[22] At the meeting which then took place, Mr Whewell told Mr Merchant he was to be offered appointment to the Regional Manager, Northern position for an initial period of 12 months and gave the reasons for the offer being in this form. Mr Whewell described the position as a "big step up" from Mr Merchant's existing role which would require him to improve his existing skills and to develop new skills. They discussed Mr Merchant's strengths and weaknesses. Mr Whewell assured Mr

Merchant that the Department would give him training and other assistance. It appears that the uncertainty about the future size of the role was also discussed.

[23] Following that meeting, Mr Wolland suggested to Mr Merchant that the reasons for the offer of appointment being only for a limited period were not what they seemed. Mr Wolland said he believed that Mr Whewell had doubts about Mr Merchant's integrity and that it was these concerns which really motivated the offer of fixed term appointment. The basis for this suggestion was a another contested issue to which I will return.

[24] Mr Whewell confirmed the offer of appointment he had made at the meeting on 7 November 2003 in a letter to Mr Merchant dated 10 November 2003:

...

Reassignment to an Assets and Property Regional (field) Position

Following our discussion at National Office on Friday, 7 November 2003, I am pleased to formally offer you reassignment to a permanent position on a fixed term basis.

The position offered is Assets & Property Regional Manager, Northern Region, which is at Level II regional management position. The term will be one year from the date of your acceptance of this offer. At the expiry of the term, the position will be advertised after further review of the scope of the position.

All other terms and conditions of employment will be as per your existing individual Employment Contract.

This offer is made to you looking forward, and takes into account the significant scope changes envisaged in the Northern Region as new facilities are commissioned. It is our intention that you have every opportunity to meet the challenge of managing an enhanced region in the future, though establishing the current region as a centre of excellence for asset management.

As discussed with you, Assets & Property are committed to providing all the support necessary for your personal growth and development and that of the Northern Region team.

As advised the salary for this position will be \$61,016, which is the 105% rate of the scale. Salary equalisation will be paid for the term of the offer.

We draw your attention to the Management of Change clause in your IEC, that should you choose not to accept this offer, the only option available shall be leave without pay.

You should make sure that you fully understand the conditions contained in this letter and the attached agreement. Please advise the Department if you are suffering from any circumstances or condition that might limit your ability to do this. You are entitled to seek independent advice about the conditions and you should advise us if you require more time to do this.

If you wish to accept this offer would you please sign and date the acceptance below and return one copy of this letter, retaining one copy for yourself, by Friday, 14 November 2003.

Subject to the above, this reassignment will take effect on Monday, 17 November 2003.

I look forward to you taking the [sic] up the role of Assets & Property Regional Manager, Northern Region.

...

[25] Mr Whewell undoubtedly intended the offer he made to Mr Merchant to be one of appointment to the new Regional Manager position for a period of 12 months in the context of on-going employment. If Mr Merchant was not confirmed in the position after 12 months, the full range of management of change options would again be available. The letter was given to Mr Merchant by Mr Wolland at a meeting on 11 November 2003 at which Mr Wolland explained the meaning of the letter. Mr Wolland made a detailed file note of that discussion. It read:

Tuesday 11 November

File note re: discussion with Ken Merchant at Auckland Prison A&P Office on 11/11/03.

Discussed with Ken the offer made to him in Wgtn HO on Fri 7 November, in a meeting with WW, PB and CW, reassignment on a fixed term basis. Handed Ken the letter of offer. Talked through the letter. One error in the letter, first paragraph of page two states "and the attached agreement". There is no attached agreement, this one struck out and initialled by CW on Ken's original letter.

Explained to Ken his original IEC is in place. If At the end of the 12 month fixed term he was not successful in securing the position then his original IEC were in place, he would still be a full time employee, with all the benefits of his IEC.

Ken stated that he was considering the offer. Wanted to know what the self-development entailed. CW explained later that this involved Ken attending any training courses set by CW, and this would be specified in his PMS. It did not involve doing an MBA or Certificate in Management or the like, but would include seminars and short training course's specifically on asset management. The onus would be on A&P to provide these.

Ken talked about "things getting a lot harder around here soon". CW asked what this meant and Ken said that he could not discuss it any further than the comment he had made.

[26] Despite the content of the letter itself and Mr Wolland's explanation, Mr Merchant understood it differently. He believed the letter recorded an offer of fixed term employment and that, if he accepted the offer, his employment as a whole could end after 12 months. This greatly concerned Mr Merchant who saw a risk of his employment being terminated without his receiving a severance payment. He was also concerned about the effect this might have on his superannuation. As a result, Mr Merchant was aggrieved.

[27] Mr Merchant sought legal advice and eventually instructed Mr Ryan, then of Haigh Lyon. On 26 November 2003, Mr Ryan wrote to Mr Whewell. After setting out a brief history of the restructuring process from Mr Merchant's point of view, Mr Ryan said:

...

We advise that due to restructuring carried out by the Department, Mr Merchant's position has been disestablished.

We note that the Department in their letter dated 10 November 2003 described the offer of a position to Mr Merchant as a reassignment. However, we consider the Department has repudiated the permanent employment contract with Mr Merchant. The offer of new employment is for a fixed term of 12 months only. The Department has taken Mr Merchant from permanent employment guaranteed by his IEC and offered him new employment for a fixed term of one year only.

We are instructed by Mr Merchant that he does not wish to accept the offer of new employment. It is not a suitable position for a number of reasons including its lack of permanency.

We note that the IEC between Mr Merchant and the Department provides for payment of severance, the amount of which is dictated by the application of the schedule listed in Mr Merchant's IEC. In addition to this, Mr Merchant is also entitled to payment for cessation leave as well as other statutory entitlements.

We look forward to speaking with you to discuss the final amount that Mr Merchant is entitled to on becoming redundant from his position with the Department.

[28] As is apparent from its content, this letter closely reflected the view Mr Merchant had formed that the offer contained in the letter to him of 10 November 2003 was of employment for a fixed term rather than reassignment in the course of his existing employment. Whether this was a reasonable view for Mr Merchant to adopt is a matter I also return to later.

[29] On receiving Mr Ryan's letter, Mr Whewell sought further advice through the Department's human resources team. On this occasion, the matter was handled by Tim Kendall. In his evidence, Mr Whewell said: *"I was advised that putting Ken into a fixed term position was not compatible with Ken's employment agreement."*

[30] Mr Whewell then authorised Mr Kendall and Mr Wolland to meet with Mr Merchant and Mr Ryan to discuss the matters of concern to Mr Merchant. That meeting took place on Friday 12 December 2003.

[31] On Monday 15 December 2003, Mr Wolland and Mr Kendall reported the outcome of the meeting back to Mr Whewell. They told Mr Whewell that a revised offer was to be made to Mr Merchant. That offer was incorporated into a letter initially drafted by Mr Wolland and revised by Mr Kendall. The letter was signed off by Mr Whewell on Tuesday 16 December 2003 and sent to Mr Merchant. The letter was as follows:

...

Offer of Permanent Employment

Further to the meeting at Auckland on Friday 12 December 2003, I would like to offer you the position of Assets & Property Regional Manager Northern, level one on a permanent basis, on a salary of \$66,635 pa, effective from the date of your acceptance.

I am sorry if you have felt undervalued by the organisation. That has not been our intention, and I trust this offer will resolve any outstanding issues that you have.

The village and farm at Auckland Prison are not included in your responsibility at present, but it is intended that these areas will become part of the A&P Regional Managers role at a later date.

Please would you contact Chris Wolland to complete the appropriate documentation.

...

[32] Mr Whewell expected Mr Merchant would immediately accept the revised offer made in this letter but he did not do so. After the offer was made, Mr Wolland suggested to Mr Merchant that this offer was also not made in good faith and that Mr Whewell wanted him gone from the Department. Mr Wolland obtained Mr Merchant's agreement not to speak to Mr Whewell about these suggestions or what he had told him earlier regarding issues of integrity.

[33] On 22 December 2003, Mr Merchant received a written offer of employment from Opus International Consultants Limited for a position as Security Consultant and Project Manager. The following day, 23 December 2003, Mr Merchant accepted the offer from Opus and gave notice of his resignation to the Department.

[34] Mr Merchant finished work for the Department on 4 February 2004 and started work for Opus on 16 February 2004.

[35] The terms of Mr Merchant's employment agreement with Opus provided him with a remuneration package superior to that offered by the Department in Mr Whewell's letter of 16 December 2003. The base salary was \$1,365 greater. Mr Merchant was to have private use of a motor vehicle with all running costs paid by Opus. Opus agreed to maintain the level of employer's contributions to Mr Merchant's superannuation with the Government Superannuation Fund or to pay an equivalent contribution in the form of an allowance.

The plaintiff's claims

[36] Although there were four successive statements of claim filed on behalf of Mr Merchant, the precise nature of some of his claims remains unclear. Various allegations are made of unjustifiable conduct on behalf of the Department and various remedies are claimed but the facts alleged are not linked to specific causes of action. Rather, general claims are made as part of the relief sought for declarations that Mr Merchant was dismissed, that he was constructively dismissed and that he was disadvantaged in his employment. Linking the various aspects of the third amended statement of claim in a more conventional way, it appears the specific claims made by Mr Merchant are:

- a) Mr Whewell did not act in good faith in making the offer contained in his letter of 10 November 2003 in that he took into account matters adverse to Mr Merchant which had not been put to Mr Merchant for comment or correction. As a result, Mr Merchant's employment was affected to his disadvantage.

- b) Mr Whewell's letter of 10 November 2003 constituted a repudiation of Mr Merchant's employment agreement with the Department and an unjustifiable dismissal.
- c) The offer contained in Mr Whewell's letter of 16 December 2003 was not made in good faith and, as a result, Mr Merchant's employment was affected to his disadvantage.
- d) Mr Merchant's resignation was in response to breaches of duty by the Department. Those breaches were such that it was reasonably foreseeable that he would resign as a result of them. Accordingly, the termination of Mr Merchant's employment ought to be regarded as a constructive dismissal which was unjustifiable.

[37] The third amended statement of claim also contains several other allegations of breaches of good faith by the Department. In his final submissions, however, Mr Pa'u clarified that these allegations do not form part of any separate cause of action. Except to the extent that they bear on the four claims set out above, therefore, I do not discuss them.

[38] In order to discuss and resolve Mr Merchant's claims, it is necessary to consider further aspects of the evidence specific to each one. In addition, there is a thread of evidence which is woven through the case as a whole. This is the evidence relating to allegations of misconduct by Mr Merchant. Those allegations were made in what came to be known as the Shetland report. I deal firstly with that report and the issues arising directly out of it.

The Shetland report

[39] Shetland Properties Limited ("Shetland") was a major contractor to the Department in the Auckland area. In 2001, Shetland was undertaking a project to refurbish the Paremoremo village which was owned by the Department. Management and maintenance of the village properties was then part of Mr Merchant's responsibilities.

[40] On 19 July 2001, a representative of Shetland sent a detailed report to Glenn Brough who then held a position in the Assets and Property division of the Department. I was not told exactly what Mr Brough's position was but it appears he reported to Mr Butter who, in turn, reported to Mr Whewell.

[41] The report from Shetland described the condition of all aspects of the village property and made numerous criticisms of the manner in which it had been managed and maintained. It described the property as being in a poor state of repair with a great deal of deferred maintenance.

[42] The document also contained criticism of Mr Merchant. This fell into four categories. Firstly, there was implicit criticism of Mr Merchant as the person responsible for maintenance which had been neglected or improperly carried out. Secondly, there were specific suggestions that Mr Merchant had manipulated the manner in which maintenance was done or left undone for personal reasons. Thirdly, there were specific complaints about Mr Merchant's attitude towards Shetland staff including allegations that he was uncooperative, abusive and threatening.

[43] Finally, there were allegations relating to the particular house occupied by Mr and Mrs Merchant. In summary, these were:

- a) Additional electrical wiring, some of which by-passed the electricity meter.
- b) Electric light fittings in the ceiling space.
- c) An unusually high fence around the property.
- d) Mr Merchant declined to have his garage door repaired.
- e) Mr Merchant resisted having garden sheds removed.

[44] Although it detailed defects which ultimately cost more than \$4 million to repair, the Shetland report was not widely circulated in the Department, even amongst senior management. Mr Whewell said that he became aware of it and its

contents some time in 2002 but did not have a copy of it and had not seen it for several years prior to it being discovered in these proceedings in 2005.

[45] While he was employed by the Department, Mr Merchant was never shown a copy of the Shetland report or told of its content. None of the specific allegations made in the report about Mr Merchant were ever put to him and no enquiry made about the truth of those allegations. There was no reference in Mr Merchant's personal file to any of the matters raised in the Shetland report and his performance assessments do not appear to have been influenced by those matters.

[46] Mr Wolland and Ms Duncan both said that they had never seen the Shetland report at the time of the events in question. Mr Wolland said that all he knew of it was that, when he was employed by the Department, Mr Whewell told him in broad terms about the Shetland report and the fact that it contained certain criticism of Mr Merchant. Ms Duncan said that she saw the Shetland report for the first time during the hearing.

Was the offer of 10 November 2003 made in good faith?

[47] The allegation that Mr Whewell did not make the offer contained in his letter of 10 November 2003 in good faith rests on the proposition that he took into account the allegations made in the Shetland report in a manner adverse to Mr Merchant.

[48] Mr Whewell gave detailed evidence of the reasons why he made the offer of reassignment for an initial period of 12 months. The position of Regional Manager was significantly different to the position Mr Merchant then occupied. More particularly, it required some skills and experience Mr Merchant had not demonstrated and would have to acquire. Mr Whewell described the move as "*a big step up*" for Mr Merchant and he had doubts about Mr Merchant's ability to make the transition successfully. In deciding to offer the position to Mr Merchant for a fixed period of time initially, Mr Whewell said he had regard to the interests not only of the Department but also of Mr Merchant. If Mr Merchant was found to be unsuited for the Regional Manager role after 12 months, the management of change options would all be available again. This would include the option of placing Mr

Merchant in a less responsible position with salary equalisation or, as a last resort, the option of severance. If Mr Merchant was reassigned to the role permanently and failed to achieve the necessary level of performance, those options would not be available. In an effort to assist Mr Merchant to fill the role successfully, Mr Whewell undertook to provide him with training and other assistance.

[49] The other factor Mr Whewell said he took into account was that the size of the Regional Manager, Northern role was likely to change in the foreseeable future but when and to what extent it would change was uncertain.

[50] The only challenge to this explanation came from Mr Wolland. He said that Mr Whewell told him he believed the allegations made about Mr Merchant in the Shetland report and warned Mr Wolland to be cautious of Mr Merchant for this reason. Mr Wolland also said that he repeatedly urged Mr Whewell to investigate those allegations but he refused to do so. When Mr Whewell was reluctant to appoint Mr Merchant permanently to the position of Regional Manager, Mr Wolland inferred from this that Mr Whewell was taking the Shetland report allegations into account. Mr Wolland also said in his evidence:

Mr Whewell told me that the reason for the fixed term offer was so that the Plaintiff would have a 12 month period to prove himself and in particular for there to be no negative reports about the Plaintiff over that probation period. He also told me it would allow the Defendant to terminate the Plaintiff's employment if negative reports were received during that period.

[51] Mr Wolland also suggested that his view was supported by the note Mr Whewell had written on the panel's report:

Ken is only to be appointed under strict performance measures. Check if this can be as "acting" RM with the ability to terminate after probation period. If this is not possible then Ken should not be appointed and then has full opportunity over management of change.

[52] Mr Whewell contradicted much of Mr Wolland's evidence on this issue. In particular, he denied saying that he believed the allegations made in the Shetland report or that he had doubts about Mr Merchant's integrity. To the contrary, Mr Whewell said that he regarded Mr Merchant as a man of integrity and that, if he had any doubts, he would not have offered the appointment to Mr Merchant on any basis.

[53] I accept Mr Whewell's evidence about the reasons for making the offer contained in his letter of 10 November 2003. His evidence on this issue was detailed and internally consistent. It was also consistent with other evidence.

[54] One of the criteria on which the interview panel had to score the candidates was "*Acts with integrity at all times*". Mr Wolland and Ms Duncan scored Mr Merchant "*At expected level*" but Mr Butter and Mr Stevens both scored Mr Merchant "*below expected level*". As a result, the panel's report specifically noted this as one of Mr Merchant's weaknesses. A copy of the report was provided to Richard Morris, the Department's Chief Financial Officer to whom Mr Whewell reported. He questioned why Mr Whewell was considering appointing Mr Merchant at all if, as the panel's report disclosed, there were doubts about his integrity. The fact that Mr Whewell then went ahead and made an offer of reassignment to Mr Merchant supports Mr Whewell's evidence that he had no concerns about Mr Merchant's integrity and that this was not a factor in his decision.

[55] Mr Whewell's evidence was also consistent with three contemporary documents; an email he sent to Mr Wolland on 5 November 2003, the notes he used at the meeting with Mr Merchant on 7 November 2003 and his letter to Mr Merchant of 10 November 2003.

[56] The essential facts on which Mr Whewell said he made his decision were confirmed by other witnesses. Mr Wolland, Ms Duncan and Mr Merchant himself all accepted that the Regional Manager position was a "*step up*" from the position Mr Merchant then occupied and that it would require new or improved skills. Other witnesses also confirmed or accepted that new prisons were going to come on stream in the Northern area and that there was doubt about when that would happen.

[57] The note Mr Whewell made on the interview panel report is consistent with what Mr Whewell said were his reasons for wanting to appoint Mr Merchant on a restricted basis. It may also be said to be consistent with Mr Wolland's view of matters in that the word "*terminate*" could refer to either termination of employment, as Mr Wolland read it, or termination of the assignment to the Regional Manager position as Mr Whewell said he meant.

[58] A significant factor in my assessment of the evidence on this issue is that it would have made no sense for Mr Whewell to reassign Mr Merchant to the Regional Manager position on any basis if he did not genuinely want him to succeed in that role. Other positions were available including supervisory positions for which Mr Merchant was well qualified. Equally, if Mr Whewell no longer wanted Mr Merchant in the Department, he could have offered him severance. That was the option chosen for at least one other person in a position similar to that occupied by Mr Merchant.

[59] A key part of Mr Wolland's evidence on this issue was illogical. He said that Mr Whewell wanted to appoint Mr Merchant for a 12 month period so that his employment could be terminated if any adverse reports were received during that period. For reasons which I expand on shortly, it is abundantly clear that the offer made to Mr Merchant was not an offer of fixed term appointment. It follows that it would not have been an option for Mr Whewell to have simply allowed Mr Merchant's employment to expire if he had been dissatisfied with his performance.

[60] I have also taken into account on this issue my general assessment of the reliability of Mr Wolland and Mr Whewell as witnesses. For reasons I expand on later in this judgment, I had reason to seriously doubt Mr Wolland's reliability on this and other issues. I had little reason to doubt what Mr Whewell said.

[61] In conclusion on this issue, I find that the offer made in Mr Whewell's letter of 10 November 2003 was made in good faith. I therefore reject this aspect of Mr Merchant's case.

Was Mr Merchant dismissed?

[62] The second aspect of Mr Merchant's claim was that the letter of 10 November 2003 constituted a repudiation of his employment agreement with the Department and amounted to a dismissal.

[63] The suggestion of repudiation was first raised by Mr Ryan in his letter of 26 November 2003. It relies on the proposition that the offer made in Mr Whewell's

letter of 10 November was an offer of fixed term employment. That proposition pervaded the whole case presented for Mr Merchant, both in his evidence, the lines of cross examination of other witnesses and in the submissions of Mr Pa'u.

[64] I reject that proposition. It is untenable both in terms of the content of the letter and in terms of the context in which the letter was sent and received.

[65] Looking firstly at the letter itself, it is headed ***“Reassignment to an Assets & Property Regional (field) Position”***. The reference to “reassignment” is repeated in the first paragraph of the letter which reads: *“Following our discussions at National Office on Friday, 7 November 2003, I am pleased to offer you reassignment to a permanent position on a fixed term basis.* What these references make clear is that the subject matter of the letter is an offer of reassignment, not fresh employment. Also in this first sentence of the letter is the only use of the expression *‘fixed term’*. It is clear from its use in that sentence that what is to be for a fixed term is the reassignment. Nowhere in the letter is it suggested or inferred that Mr Merchant’s employment was to be for a fixed term. To the contrary, after the position is described more fully, the letter goes on to say: *‘All other terms and conditions of employment will be as per your existing individual Employment Contract’*. Mr Merchant’s existing terms of employment were open ended.

[66] The meaning of the letter itself was reinforced by what Mr Wolland explained to Mr Merchant at the meeting on 11 November 2003 where the letter was given to Mr Merchant. The key part of Mr Wolland’s contemporaneous note of that meeting records the following:

Explained to Ken his original IEC is in place. If At the end of the 12 month fixed term he was not successful in securing the position then his original IEC were in place, he would still be a full time employee, with all the benefits of his IEC. [sic]

[67] This shows that Mr Wolland made it perfectly clear to Mr Merchant that what he was being offered was fixed term appointment to a position in the course of his existing permanent employment. Mr Wolland confirmed in his evidence that this is what he said to Mr Merchant and Mr Merchant accepted that this is what was said to him. While I accept Mr Merchant’s evidence that he believed the offer made in the

letter of 10 November 2003 was of fixed term employment, I can only conclude that this belief was irrational and unreasonable.

[68] In reaching that conclusion, I am mindful that Mr Merchant said he received legal advice which reinforced his belief. If that is so, Mr Merchant may have been poorly advised but the quality of advice can be no better than the quality of instructions and I note Mr Merchant said he obtained some of the advice on which he relied over the telephone. When the matter at issue is the construction of a document, that will rarely be safe. I note also that Mr Ryan was careful in his letter of 26 November 2003 to record some of the views expressed as being those of Mr Merchant rather than his own.

[69] As a matter of construction, I find that the offer made to Mr Merchant in Mr Whewell's letter to him of 10 November 2003 did not offer fixed term employment. Rather, it offered appointment to a position for a finite term in the context of on-going employment on otherwise unaltered terms.

[70] Mr Taylor made detailed submissions to the effect that an offer of reassignment for a defined period was an option open to the Department under the management of change provisions in Mr Merchant's employment contract. Mr Pa'u did not take issue with this. I accept Mr Taylor's primary submission in this regard. The option of reassignment is not qualified in the contract. By its nature, reassignment contemplates significant change to the position description of the employee. Reassignment for a defined period is not inconsistent with the ordinary meaning of the words used in the contract and there is no reason to restrict that meaning. The availability of temporary appointment to a position as an option suggests that a fixed term appointment was acceptable to the parties as a concept.

[71] On the basis of these conclusions, I reject the proposition that the Department repudiated its employment agreement with Mr Merchant. Nothing contained in Mr Whewell's letter of 10 November 2003 was inconsistent with the employment contract between the parties. It follows that I also reject the proposition that Mr Merchant was dismissed.

[72] Although I need not detail them for the purposes of this decision, I note that the claim of dismissal based on repudiation would inevitably have failed on other grounds also.

Was the offer of 16 December 2003 made in good faith

[73] The third aspect of Mr Merchant's claim was that the offer made to him in Mr Merchant's letter of 16 December 2003 was not made in good faith and that he was thereby disadvantaged in his employment. I reject this claim for two reasons.

[74] The letter of 16 December 2003 is brief and framed in unequivocal terms. It makes an offer of employment which is unconditional and immediately available for acceptance. The terms of that offer are undoubtedly consistent with the management of change options in the employment contract between the parties. It is common ground that the salary offered was greater than Mr Merchant was then receiving and the terms of appointment would otherwise be the same as he then enjoyed. On its face, the offer was entirely appropriate and conventional.

[75] Mr Whewell's evidence is that the offer was made following the meeting on 12 December 2003 held to address the issues raised by Mr Ryan in his letter of 26 November 2003. Mr Whewell said that he made the offer in good faith and following advice that the offer he made in his letter of 10 November 2003 was inappropriate.

[76] The suggestion that the offer was not made in good faith again came from Mr Wolland. He said that Mr Whewell told him of a plan to deprive Mr Merchant of any new responsibilities in order to "*reduce his sphere of influence*" and to disillusion him to the point of resignation. Mr Wolland also suggested that Mr Whewell rejected the alternative of severance, which was what Mr Ryan had been seeking on Mr Merchant's behalf, because the management of change process had ended and any payment would have to come out of the Department's operating budget.

[77] In his evidence, Mr Whewell accepted that he had discussed the future workload of the Regional Manager, Northern position with Mr Wolland but rejected the interpretation Mr Wolland put on that discussion. In particular, Mr Whewell rejected the suggestion that he wanted Mr Merchant to leave. He also pointed out logical inconsistencies in Mr Wolland's evidence. An example was that all costs of the management of change process were debited to the Department's operations budget, regardless of when they were incurred. Mr Whewell also said that, while the particular management of change process would have been concluded by the appointment of Mr Merchant to a Regional Manager position, the process could always be reopened by a member of senior management.

[78] On this issue, I again prefer the evidence of Mr Whewell. I accept his evidence that he made the offer of 16 December 2003 to Mr Merchant in good faith.

[79] In any event, there was no evidence from which I could conclude that Mr Merchant's employment was affected to his disadvantage by the reasons for making the offer of 16 December 2003. As I have said, the offer was unequivocal and unconditional. If Mr Merchant had accepted the offer, the Department would have been bound in exactly the same way, regardless of what may have motivated it. It is also significant that Mr Merchant said he decided to resign prior to receiving the offer of 16 December 2003.

[80] This aspect of Mr Merchant's claim also fails.

Constructive dismissal?

[81] The main claim made by Mr Merchant was that, although he resigned, the termination of his employment ought to be regarded as a constructive dismissal.

[82] The law relating to constructive dismissal was authoritatively restated by the Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers' Union* [1994] 1 ERNZ 168 where, at page 172, they said:

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the

resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach

[83] The first inquiry must be whether Mr Merchant's resignation was caused by a breach of duty by the Department. That requires a finding of fact about what the cause of Mr Merchant's resignation was. It also requires a finding of fact about when Mr Merchant made his decision to resign because, as a matter of logic, his resignation cannot have been motivated by events which occurred after the decision was made.

[84] Dealing firstly with when Mr Merchant decided to resign, his evidence in chief gave the impression that he made that decision shortly before communicating it to the Department on 23 December 2003. In the course of cross examination and in answer to questions from me, however, Mr Merchant clarified that he made the decision shortly after 12 December 2003 and probably on 14 or 15 December 2003. A feature of Mr Merchant's evidence on this issue was that he repeated several times that he did not make the decision to resign lightly and that, having made it, he would not have gone back on it.

[85] On the basis of this evidence, I find that Mr Merchant made his decision to resign during the period 12 to 15 December 2003 and that, once he had made the decision, he was firmly committed to it. It follows that it cannot be said that his resignation was caused by events which occurred after 15 December 2003.

[86] Turning to the reasons for his resignation, Mr Merchant was again vague in his evidence in chief. He spoke only in very broad terms, saying that his resignation was motivated by "*...breaches to my employment agreement, the examples of bad faith, and the lack of good faith*". When pressed in cross examination to explain exactly what he meant by this, Mr Merchant returned repeatedly to the terms of the offer contained in the letter of 10 November 2003 and suggested little else. Although he referred on occasions to a belief that the Department was not acting in

good faith towards him, he gave as the principal reason for that belief his understanding that the offer made in the letter of 10 November 2003 was of fixed term employment.

[87] As to the significance of what he was told by Mr Wolland, Mr Merchant's evidence was equivocal. He initially said that he believed and relied on Mr Wolland's suggestions that Mr Whewell was not acting in good faith. In answer to a question in re-examination, however, he said that he was not influenced in his thinking by his discussions with Mr Wolland. Later, in answer to a question from me, he reverted to his original position that he believed Mr Wolland and relied on what he said.

[88] Mr Merchant's wife also gave evidence. When asked about the reasons for Mr Merchant's resignation as she understood them, she also focussed on his perception that the offer made in Mr Whewell's letter of 10 November 2003 was of fixed term employment. As to the importance of this she said "*We wouldn't have moved but for the fixed term offer.*" Later she said that Mr Merchant discussed with her the reasons he had lost trust in the Department. When asked to say what they were, she said "*That they had broken his contract by offering him a fixed term contract and he said they couldn't do that.*" She then confirmed that this was "*a very big feature*" in Mr Merchant's thinking, that this "*was the big issue for him*" and that he was "*very disappointed*" by the initial offer of appointment to the Regional Manager position for 12 months.

[89] When I asked Mr Wolland about his understanding of Mr Merchant's reasons for resigning, his evidence was similar to that of Mrs Merchant. He initially confirmed his understanding that the reason was the offer of appointment for 12 months and said that the main reason for Mr Merchant's unhappiness was that he did not understand why that offer had been made. There was then the following exchange:

Q. ... is it fair to say that the making of that 12 month offer was at the heart of Mr Merchant's dissatisfaction or sense of grievance.

A. Yes sir.

Q. Did he ever express to you any other reason.

A. For his dissatisfaction?

Q. Yes.

A. No it was about why such an offer would be made and why wasn't there permanence in the offer.

[90] Part of the Department's case was that a factor in Mr Merchant's decision to resign was that he had received a better offer from Opus. It was clear that, as a matter of fact, the remuneration package associated with the position Mr Merchant took up with Opus was more valuable than that he would have received had he accepted the offer made to him by the Department on 16 December 2003. The more difficult issue is when Mr Merchant began to seriously seek alternative employment.

[91] In his written brief of evidence, Mr Merchant did not mention that he had sought or taken up alternative employment. In oral evidence in chief, Mr Merchant said that he began making casual inquiries about alternative employment prospects during the restructuring process and prior to the interview on 29 October 2003. He described having an informal meeting at that stage with Mr Shears, a senior manager from Opus. He explained to Mr Shears that a major issue would be maintaining his superannuation. Mr Merchant said that the matter then lay with Opus until he decided in mid-December 2003 to resign. At that stage, Mr Merchant said he contacted Mr Shears, told him he was going to leave the Department and then actively pursued employment with Opus.

[92] Mr Shears was called as a witness. He produced diary notes from 14 October 2003 onwards relating to the possibility of employing Mr Merchant. In particular, Mr Shears recorded in his diary on 4 November 2003 making enquiries about whether Mr Merchant could continue in the Government superannuation scheme if he was employed by Opus and confirmed that he knew at the time this was an important issue for Mr Merchant. Mr Shears then gave evidence of subsequent meetings and discussions with Mr Merchant culminating in the written offer made on 22 December 2003. Mr Shears produced notes he made of a meeting with Mr Merchant on 19 December 2003 at which details of the remuneration package to be offered to Mr Merchant were discussed and amended.

[93] On the basis of this evidence, I cannot accept the proposition advanced by the Department that Mr Merchant resigned because of the position he was offered by Opus. Mr Merchant made his decision to resign in mid-December 2003. Mr Shears' evidence and his contemporary notes confirm Mr Merchant's evidence that he only engaged in serious discussions with Opus after he made that decision to resign. While there is a clear inference that the offer made by Opus on 22 December 2003 affected the timing of Mr Merchant's resignation, it cannot be said that the terms of the employment agreement offered by Opus were a factor in Mr Merchant's decision to resign.

[94] I find that the predominant reason for Mr Merchant's resignation was his dissatisfaction with the terms of the offer made to him in Mr Whewell's letter to him of 10 November 2003 which Mr Merchant regarded as an offer of fixed term employment. To the extent that Mr Merchant was also motivated by a belief that the Department was not acting towards him in good faith, that belief was also based very largely on his interpretation of the same offer.

[95] I have already concluded that the offer made in Mr Whewell's letter of 10 November 2003 was consistent with the employment contract between the parties and was made in good faith. Making that offer, therefore, did not involve any breach of duty by the Department. It follows that Mr Merchant's resignation was not caused by any breach of duty by his employer and his claim of constructive dismissal must fail. In light of that conclusion, I need not consider any other issues in relation to this aspect of the claim.

Mr Wolland's evidence

[96] A significant factor in this case was the evidence given by Mr Wolland and his reliability as a witness. On most contested issues, I have preferred the evidence of the Department's witnesses to that of Mr Wolland. That is for several reasons.

[97] On some issues, Mr Wolland was clearly wrong. A clear example of this was the assertion by Mr Wolland that Mr Whewell specifically authorised him to tell Mr Merchant what the interview panel had recommended following his interview. Mr

Whewell denied this and it was challenged strongly in cross examination. In reply, Mr Wolland was adamant that his evidence was correct and said that the reason Mr Whewell had authorised him to do this was to avoid the situation which arose when delays in communicating an offer to another employee caused him to leave.. It emerged that the issue with the other employee did not arise until December 2003.

[98] Although presented as an independent witness, Mr Wolland's evidence in chief was patently partisan in many respects. A striking example was that he repeatedly described the offer made to Mr Merchant in the letter of 10 November 2003 as an offer of fixed term employment. Mr Wolland was well aware that was not the case as it was he who explained that fact to Mr Merchant on 11 August 2003. He eventually conceded this later in his evidence.

[99] In other aspects of his evidence, Mr Wolland was far from neutral in his attitude towards the Department. It emerged in the course of his cross examination that Mr Wolland had himself had a major dispute with the Department as his employer and that he had pursued a strongly contested personal grievance.

[100] On a number of issues, Mr Wolland asserted as facts what were really inferences he chose to draw. Many of those inferences were inappropriate and I declined to adopt them.

[101] In answer to questions in cross examination and from me, Mr Wolland's evidence changed significantly in many respects from his evidence in chief. On some issues, his final position was entirely inconsistent with his starting point. This was not the case with Mr Whewell or Ms Duncan. In the course of lengthy and thorough cross examination, Mr Whewell made some concessions but the substance of his evidence remained largely unaltered. Ms Duncan was untroubled by cross examination.

[102] A further factor which was noticeable from time to time throughout Mr Wolland's evidence was his reluctance to answer difficult questions. This required me on more than one occasion to direct him to answer the question he had been asked.

Comment

[103] A great deal of evidence was given in this case and many documents provided to the Court. Detailed submissions were also made on behalf of both parties. In deciding the issues, I have referred to only those aspects of the evidence and submissions necessary for that purpose. I have, however, reviewed all of the evidence and reconsidered all of the submissions in the course of my deliberations.

Conclusions

[104] In summary, my conclusions are:

- a) The offer made in Mr Whewell's letter to Mr Merchant of 10 November 2003 was an offer of reassignment in the context of on-going employment. It was not an offer of fixed term employment.
- b) That offer was consistent with the terms of the employment contract between the parties.
- c) In making that offer, Mr Whewell was not motivated by inappropriate considerations.
- d) That offer was made in good faith
- e) The Department did not repudiate the employment contract between the parties.
- f) Mr Merchant was not dismissed.
- g) The offer contained in Mr Whewell's letter to Mr Merchant of 16 December 2003 was made in good faith.
- h) Mr Merchant was not constructively dismissed.

[105] Mr Merchant's challenge is dismissed. Pursuant to s183(2) of the Employment Relations Act 2000, however, the Authority's determination is set aside and this decision stands in its place.

Costs

[106] I encourage the parties to confer about costs with a view to settling them by agreement. If they are unable to do so, Mr Taylor should file and serve a memorandum by 4pm on Friday 30 January 2009. Mr Pa'u is then to have until 4pm on Friday 20 February 2009 to file and serve a memorandum in reply. Should it be necessary to provide such memoranda, the representatives' attention is drawn to the principles applicable to the award of costs in this jurisdiction which are based on costs actually and reasonably incurred and the need to provide material on which the Court may properly assess whether costs actually incurred are reasonable.

A A Couch
Judge

Judgment signed at 9.30am on 17 December 2008