

23 SEP 1999

Barristers

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Solicitors

21 September 1999

Mr Ted Maguire
Wellington Regional Council
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BY FAX 385 6950

Dear Sir

RE: REAPPOINTMENT OF CHIEF EXECUTIVES

Thank you for your material which you sent last Thursday and which we discussed with you by telephone yesterday.

As indicated to you yesterday, the writer has been in the process of finalising submissions for the Court of Appeal with a deadline of today and that task has precluded us from providing you with a detailed opinion in relation to the matters raised in the memorandum of 15 September from Mr Macguire to Howard Stone. We can however provide you with some brief comments having undertaken some initial research and considered the opinion from the Solicitor General.

We consider that the Solicitor General is correct in his conclusions that a "vacancy" does arise in the Chief Executive's position on the expiry of a 5 year term of employment as provided in the Local Government Act. We will not, in this opinion, detail our reasons for reaching that conclusion which largely coincides with those set out by the Solicitor General. We consider that that conclusion is almost inevitable following the decision of Principal, Auckland College of Education v Hagg [1996] 1ERNZ 150. That case is referred to by the Solicitor General but there are two particular passages in the judgment of Richardson P. which emphasise the point. Although he was referring to the provisions contained in the State Sector Act and the Education Act the principle applies in the Local government context because there is a similar obligation to notify vacancies and select the person best suited for a position. The president of the Court of Appeal said at page 156 in relation to the expiry of Mr Hagg's fixed term contract:

"From its perspective the College had no legal option but to allow the term contract to expire and to advertise any position".

Further, he went on to say:

"He [counsel for Hag] submitted that non renewal of a nominally fixed term contract in Mr Hagg's situation warranted the conclusion that the College had no genuine reason for making that second contract a short term fixed contract, than to allow it to expire and not roll it over, which

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was signalled in the letter of 10 September 1993, would amount to dismissal; or alternatively, that by the time the present grievance was heard before the Employment Tribunal that contract with that taint had run out, constituting dismissal for the purposes of s. 27(1) (I). There are obvious counter arguments, not least that the award and the State Sector Act 1988, s. 77G, required advertising and assessment and the selection of the person best suited for appointment to any permanent position”.

(The underlining is ours).

We have read the comments made by Simpson Grierson and while we consider there may be an argument in relation to what constitutes a vacancy, we consider that the Solicitor General’s opinion in that regard is correct given that s. 1191 not only uses the term “vacancy” but also the term “prospective vacancy”. We agree with the Solicitor General that a “prospective vacancy” would cover the impending expiry of a Chief Executive’s fixed term contract.

The second issue of concern to you is the consequence of the conclusion reached by the Solicitor General.

A decision by a Local Authority to reappoint a Chief Executive for a further term beyond the five year tenure provided in the Local Government Act will be ultra vires if the notification and appointment process required by s.119I was not followed. Arguably therefore any such decision will be a nullity and the resulting contract will be tainted by that illegality.

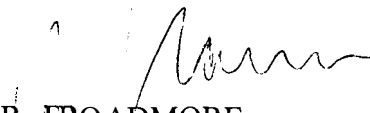
The only way in which a decision of a Chief Executive could be challenged by third parties would be way of judicial review in the High Court. It is important to note that the remedies available on judicial review such as declaration, injunction etc. are discretionary remedies. Accordingly it certainly does not follow that because a contract with a Chief Executive was ultra vires the power of the Local Authority, that all decisions of the Chief Executive subsequently become unenforceable. Certainly, that is a theoretical possibility but the matter would only be tested through judicial review of a particular decision. We consider that it is highly likely that a Court would decline to exercise its discretion to void decisions of a Chief Executive solely on the grounds that the parties to his employment contract misunderstood the basis on which they could enter into that contract.

In our opinion, therefore, the perceived difficulty arising from the situation outlined by the Solicitor General, are more perceived than real. Having said that, now that the situation has been brought to the attention of Local Authorities, a failure to properly deal with the situation in future would mitigate against a Court exercising its discretion in favour of the Local Authority in a future situation.

The issue of the status of the Chief Executive's contract, i.e. whether it is a nullity from the outset or has some other status, and a Court's likely reaction to that factual situation, are matters which require some quite substantial research and investigation and the view that we have expressed above is a preliminary one based on our initial research only. We would be happy to investigate the matter further should that be of assistance to you.

We hope our above comments are of assistance. We would like to provide you with a full opinion on this matter and would be happy to do so if that would be of assistance.

Yours faithfully



D.R. EROADMORE