



10 SEP 1999

OFFICE OF THE
~~C~~ONTROLLER AND AUDITOR-GENERAL
Te Mana Arotake

7 September 1999

Our Ref: LG03-0013

Mr Howard Stone
General Manager
Wellington Regional Council
PO Box 11-646
WELLINGTON

Dear Mr Stone

LOCAL GOVERNMENT ACT: REAPPOINTMENT OF CHIEF EXECUTIVES

I have attached for your information a copy of the opinion we have received from the Solicitor-General. The opinion is unambiguous and confirms the view we had taken earlier that councils are not able to extend contracts beyond five years without going through a public notification process.

We would expect councils, for any future contracts, to act in accordance with the Solicitor-General's advice. Although it would appear that existing contracts entered without public notification are illegal, we will not be taking any action in respect of them. Councils may wish to take their own advice on whether a court would be likely to permit enforcement of the contract (under the Illegal Contracts Act 1970), despite the illegality. Otherwise, those arrangements could be left to expire and the process tidied up for the next appointment.

We appreciate there are a number of policy issues that surround this matter.

If we can provide any assistance or further advice please let me know.

Yours sincerely

Kevin Brady
Assistant Auditor-General



FAXED

SOLICITOR-GENERAL

3 September 1999

Mr Robert Buchanan
Assistant Auditor-General - Legal
Office of Controller and Auditor-General
P O Box 3928
WELLINGTON

Dear Mr Buchanan

Local Government Act: Reappointment of Chief Executives
Our Ref: OAG183/31

Introduction

1. You have asked whether the Local Government Act 1974 requires a vacancy in the position of a local authority chief executive officer (in this opinion referred to as a “chief executive”) to be notified before the incumbent in the position is reappointed. My view is also sought on whether certain practices in relation to variations of contracts of appointment avoid the need for notification.
2. In providing this advice I have considered Part VIA of the Local Government Act, Parts III-V, VIIA and VIIB of the State Sector Act 1958, your own opinions, the opinions of solicitors acting for Local Government New Zealand and the Dunedin City Council. I have also read Mr Brady’s summary of practical issues that might arise if the reappointment of chief executives were invariably to require prior notification. Finally, I have had helpful discussions with the solicitor acting for Local Government New Zealand, Mr Salter.

Summary of advice

3. As can be seen from the several opinions which have been given there are markedly different views as to when a “vacancy” arises in the position of a local authority chief executive and, consequently, whether the process of notification is required.
4. For the reasons set out below, however, I conclude:
 - 4.1 That the key provisions of Part VIA of the Local Government Act require a local authority to notify a vacancy in the office of chief executive at least once every

LEGAL:JJM:248600

five years. That is because s 119E imposes a statutory maximum of five years on the term of appointment of chief executives and senior executive officers employed by a local authority - refer s 119E.

- 4.2 That a vacancy occurs and notification is required whenever a fixed term of appointment expires once it is decided or the local authority moves to fill the vacancy.
- 4.3 That general contract law principles apply to such contracts of appointment, provided that in any case their application is not inconsistent with the statute, its scheme and purpose. In my opinion, the extension of a chief executive's contract during the currency of its term so that the total term did not exceed five years, would not be contrary to the language, scheme, or what I see as the clear purpose of the Act. This *is* to ensure that local authority chief executives are to be held accountable by a specific mechanism involving fixed term appointments with a!! appointments and reappointments beyond the maximum term of five years to be made by the stipulated open application and merit selection process. Refer ss 119E, 119H and 119I.
- 4.4 It is not permissible to contract out of the Act's requirements. To amend the term of appointment in a manner contrary to the purpose of Part VIA of the Act is also impermissible as it would be exercising powers for a purpose contrary to that of the Act. It is accordingly not possible to extend a term of appointment beyond the statutory five year maximum without following the open merit based appointment process provided for unless circumstances render it impracticable to do so.
- 4.5 The practical considerations outlined in Mr Brady's memorandum - of cost and matters that might impede a chief executive in carrying out his functions independently and those that may make the office of local authority chief executive less attractive - do not of themselves render it "impracticable" to notify a vacancy in the office of chief executive. They rather go to whether the policy of legislation is desirable which is a question for Parliament. As long as it remains possible, even though inconvenient, to comply with the statutory requirement of notification, it is practicable to do so.

Statement of facts

5. Mr Brady's memorandum of 24 June 1999 records:
- 5.1 that approximately 32 current local authority chief executives have held their positions since 1989/1990; the likelihood is that a!! of this group will have had their contracts rolled over at least once without notification (i.e. public advertisement) of the positions;

- 5.2 that a similar number of local authorities during this period have had only two chief executives; the likelihood for this group is that one or both chief executives have had their contract rolled over again without notification at least once;
 - 5.3 that for the other local authorities it is possible that one of three or four chief executives serving in the same period has had a contract rolled over.
6. You have further advised:
- 6.1 that chief executives of local authorities have traditionally been appointed for fixed terms of 3 to 5 years but there may also be circumstances in which contracts are renegotiated and renewed for an extended term during the currency of the agreement without notification;
 - 6.2 that the practice adopted in the local government sector, since Part VIA of the Local Government Act was enacted in 1989, has often been to reappoint local authority chief executives without notification provided that appropriate performance standards have been achieved.

Relevant provisions of the Local Government Act 1974

7. The employment of all staff of local authorities, including chief executives, is covered by Part VIA of the Local Government Act 1974. This part of the Act, which was inserted by the 1989 amendment, is closely similar to provisions for employing staff and, in particular chief executives, in the public service and chief executives of tertiary education institutions. As to public service chief executives, see Parts III to V of the State Sector Act 1958. As to chief executives of tertiary education institutions, see Parts VIIA and VIIB of that Act. The provisions affecting the latter group, like those affecting local authority chief executives, were amended significantly in 1989 when Parts VIIA and VIIB of the 1988 Act were inserted.
8. The key provisions in the Local Government Act are:
- 8.1 Section 119C of the Local Government Act which provides for the appointment of a single chief executive or group of senior executive officers and identifies qualities needed for those positions to which the local authority must have regard when making appointments.
 - s.2 Section 119E which provides for a maximum term of appointment of five years for local authority chief executives and senior executive officers. It further provides that such officers are eligible for reappointment from time to time.
 - s.3 Section 119H requires a local authority, in making an appointment, "to give preference to the person who is best suited to the position".

- s.4 Section 1191 imposes a duty on local authorities to notify a vacancy or prospective vacancy in a manner which is sufficient to enable suitably qualified persons to apply for the position.
- 8.5 Section 1195 provides that a local authority may enter into a written agreement with any employee or proposed employee outlining the grounds of removal from office. Subsection (2) provides that such contracts “may from time to time be renewed for any period not exceeding five years at any one time from the date of the renewal”.

Issues

9. The following issues arise:
- 9.1 When does a vacancy or prospective vacancy in the office of local authority chief executive arise requiring notification of the vacancy under s 1191 of the Act?
- 9.2 Is it permissible during the term of a local authority chief executive’s contract to extend the current term of appointment so that the extended term exceeds five years?
- 9.3 Is it permissible during the term of a local authority chief executive’s contract that is less than five years to extend that term to a total period not exceeding five years?
- 9.4 In what circumstances would it not be “practicable” to notify a vacancy in the office of a local authority chief executive?

Reasons for Opinion

Issue I: When does a vacancy arise?

10. Section 1191 expresses an obligation to “notify” vacancies or prospective vacancies in local authority positions. By implication, that obligation includes filling the vacancy by an open process of application which enables suitably qualified persons to have a sufficient (i.e. a genuine) opportunity to apply. At the level of chief executive in a local authority, this implicitly requires, in my opinion, that there be some form of public notification of the position. That is because the obligation to notify is linked to the obligation to appoint the person best suited to the position, by virtue of s 119H. Realistically, in my view, notification will never be sufficient to enable suitably qualified persons to apply for a position at chief executive level unless it is by some form of public advertisement.
11. For the duty of notification to arise under s 1191, however, two circumstances must be present. First, there must be a vacancy or prospective vacancy in the position of chief executive. Secondly, it must be “proposed to fill (the) position”.

12. A vacancy in a chief executive's position will arise when a contract term expires or has been terminated. In the present context, there is an issue as to whether it is open to the parties to a contract of appointment as a chief executive to extend the term of appointment during its currency so that it does not expire. If that course is open, the duty, to the extent it is triggered by an actual vacancy, might not arise for many years. I address this issue in paragraphs 14 and 21 below.
13. The duty may, however, also arise in the context of a prospective vacancy - i.e. where the position is to become vacant. This will be the case when it is clear that on a specific date in the future there will be a vacancy. In a sense, it can be said there is a prospective vacancy from the moment a chief executive is appointed as a!! must be appointed for a fixed term. In the context of s 1191, however, something imminent, in my view, is implicit i.e. that a position is *shortly* to become vacant. This is reflected in the context of the section by the requirement that "it is proposed to fill the position". This phrase, in my view, means that the stage has been reached where the course of filling the vacancy has been decided or acted on or has at least been put forward as an aim or object for consideration by the local authority. At this point, provided there is an actual vacancy or a certain date when one will arise, the duty to notify is triggered.

Issue 2: Extension of terms beyond five years

14. Under the general rules of contract any contract, including an employment contract, may be varied during its currency by agreement of the parties. If such a variation extends the term of the contract of a local authority officer, no vacancy in the position concerned would arise at the end of the original term, nor indeed until the expiry of the extended term, subject, of course, to earlier termination in accordance with the contract. The question here is whether it is open to a local authority and chief executive under the 1974 Act, to agree to extend a term of appointment in this way so that the chief executive's term exceeds the five year maximum for appointment specified under s 119E.
15. The starting point is that, subject to the 1974 Act, the ordinary principles of contract law apply. These include the power, by agreement, to extend a contract term, as discussed above. However, this power is subject to the provisions of the 1974 Act. Restrictions of the ability to contract, which are explicit or implicit in the Act, cannot be waived by the parties; nor may the parties contract out of them. *Principal of Auckland College of Education v Hagg* [1997] 2 NZLR 537,548 is an instance of application of this principle in an employment contract albeit in the context of different statutory provisions.
16. In considering the relevant provisions of Part VIA of the 1974 Act, three sections, in my opinion, are pivotal. The first, s 119E, stipulates a maximum term of appointment of five years. Secondly, ss 1191 and 1191 respectively require that appointments, including those of chief executives, be made on merit with the vacancies being sufficiently notified. I have indicated above, my view that at the level of chief executive "sufficient" means publicly notified as without public advertisement suitably qualified persons will not be able to apply. Read together, as in my view the context requires, these provisions

demonstrate a statutory object of providing a scheme for accountability of chief executives. The scheme provides for appraisal of the performance of a local authority chief executive who wishes to continue in office, at the end of the fixed term of appointment. The mechanism requires that reappointment for a fresh term be made against open competition from others suitably qualified for appointment who are to have a genuine opportunity to apply in what must be a merit based selection process.

17. In my opinion, in this context, s 119E is to be read as requiring both that appointment be for a term not exceeding five years and that any further period of service in the position be solely by a fresh appointment (reappointment) for which appointment the chief executive is eligible but cannot have any pre-emptive right or legitimate expectation. To read the section as allowing scope for contract law principles to be applied to extend the term of appointment beyond the five year maximum is to ignore the context and in particular the specific statutory scheme for accountability. It would be to read a section intended to ensure accountability through a specific mechanism involving reappointment against open competition as permitting arrangements by the parties that would convert the process to one involving, in effect, appointments for indefinite terms with something less than the open application and merit based appointment process being applied. In my view, the provisions concerned are to be read as a matter of necessary implication as excluding underlying powers of contract to extend, to this extent, the term of appointment by agreement.
18. There is support for my analysis in a comparison of the provisions in Part VIA of the Local Government Act which were inserted in 1989 with those in two other statutes dealing with public sector terms of appointment enacted around the same time. I refer first to the provisions in relation to reappointment of government department chief executives under the State Sector Act 1988. Section 36(2) was substituted in 1989 but in both its original and present form it provides *expressly* that chief executives may be reappointed at the expiry of their terms of appointment without notifying the vacancy, or undertaking other stipulated procedures required for initial appointment. So does s 771C of the State Sector Act inserted in 1989 in relation to chief executives of universities and other tertiary educational institutions.² The comparison is telling, first, in that it suggests Parliament in 1989 would have made similar express provision if it had intended to allow local authority chief executives to be reappointed without public notification beyond the initial maximum fixed term. Parliament, in fact, was told that Part VIA provisions were “closely modelled” on the comparable provisions in the 19SS Act.² Secondly, the relevant provisions in the Acts are otherwise closely similar and were enacted at similar times indicating that a comparative analysis here is a legitimate method of interpretation of the principal provisions in Part VIA. In making that point, I do not overlook the fact that the Local Government Amendment (No. 2) Act 1989 provisions were part of a major piece of law

¹By s 22 of the State Sector Amendment (No. 2) Act 1989.

²See second reading speech of Hon Dr Bassett, Minister of Local Government, during the second reading of the Local Government Reform Bill on 23 May 1989 ((1989) 498 NZPD 10702).

reform which Part VIA was only part. Nor that it was enacted in considerable haste.’ The significance of what was provided in relation to chief executive terms of appointment may not, in those circumstances, have been fully appreciated by those most closely involved in scrutinising the Bill. However, my responsibility is to determine objectively the meaning of the words used by Parliament in their context. Here, that is clarified by the provisions in those statutes enacted around the same time dealing with closely similar matters.

19. In relation to the State Sector Act provisions, there is support for my view that fixed term limitations are stipulated in terms of a scheme of accountability. During the second reading speech in the course of the passage of the State Sector Bill through the House in 1988 the Minister of State Services said:

“Under the present system departmental heads are also appointed without any opportunity for a regular review of their own performance in the job, and without any review of whether they should continue to be employed. That is hardly consistent with a system in which departmental heads are truly accountable for their performance. Hence, the Bill provides for Chief Executives to be employed on five-year contracts.” ((1988) 497 NZPD 2785)

20. I have not overlooked s 1195 including s 119J(2).⁴ It applies “notwithstanding anything to the contrary in any enactment...” which must include the provisions of the Act in which it appears. But I have concluded that on its terms s 119J does not alter the position outlined above. It is to be read as enabling the parties to agree that an employee, including a chief executive, is not to be removed from office during the term of an **employment** contract other than on grounds specified in the agreement. In other words, it reinforces the contractual ability of the parties to provide for secure tenure *within* the maximum term of appointment of any employee but does not enable them to give protection that would extend that maximum term.
21. I note also that I find some support for my approach to the interpretation of the language of ss 119E, 1191-1 and 1191 in the majority decision of the Court of Appeal in *Hagg*, at p 548, although I appreciate the Court was interpreting a different statutory code and one not requiring fixed term contracts.

³The Local Government Reform Bill was introduced in December 1988. SOP 107 containing provisions that became Part VIA was introduced on 2 March 1989. The second and third readings took place on 23 May 1989 and the Bill received the Royal Assent on 6 June 1989.

⁴Summarised in para 8.5 above.

Issue 3: Extension to a five year term.

22. On the other hand I do not see that the Act presents the same problem for extensions of a term of appointment during the term which do not extend the contract period, since the position was filled by open process, beyond five years. Such an extension is not, in my view, prevented by the statutory language of s 119B read in its context. In my opinion, the underlying power to contract permits that course subject to whatever processes the local authority considers appropriate. I am aware that extension practice in this respect is closely linked to performance assessment.

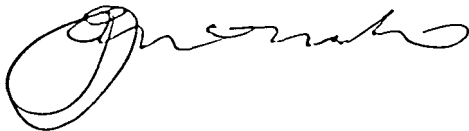
Issue 4: In what circumstances is it 'impracticable' to notify a vacancy in the office of a local authority chief executive?

23. The obligation to notify a vacancy under s 1191 arises only where new notification is "practicable". I refer to Mr Brady's memorandum setting out various practical implications for local government if notification is required. I will not address each point separately, but make the following general comments.
24. Mr Brady's memorandum mentions the cost of recruitment and advertising and the impact that the need to advertise might have in terms of making the office of chief executive less attractive because of uncertainty over reappointment, perhaps leading to incumbent chief executives being "less frank and fearless" in carrying out their responsibilities. This raises the important question of the stability and continuity chief executives provide in the administration of local government and the risk that they might not be reappointed by reason of factors unrelated to an objective assessment of their performance.
25. I acknowledge this element of the public interest but must face the fact that the words "wherever practicable" set a high standard. The word covers all situations where notification can be carried out in that it is feasible to do it. It is difficult to see how cost implications and the other practical issues identified can render it impracticable to notify if it remains possible, albeit highly inconvenient, to comply with the statutory requirements. Circumstances in which it would be impracticable to notify a vacancy do not come to mind readily. One might be if there were a strike affecting the newspaper industry for a period. They do not, in my opinion, fit a situation where the local authority feels there is very good reason not to advertise a vacancy due to factors affecting the merit or special suitability of the incumbent in a position.
26. The words "wherever practicable" are, accordingly, in my opinion, a minor qualification on the statutory requirement to notify a vacancy. In the context of the Local Government Act, the requirement of an open merit based appointment process which covers reappointments at the end of fixed terms is made a paramount policy.

Conclusion

27. I am not insensitive to the difficult and very important role of chief executives of local authorities. Nor is it clear to me why Parliament did not provide for such chief executives in the same manner it did for those in the public service and tertiary education sectors. The answer may lie in the view taken by those responsible for drafting the legislation of the different appointment processes in the State sector and in particular the role of the State Services Commissioner. In the tertiary education sector the historical link between academic freedom and tenure possibly played a part in the policy, expressly provided for, that reappointment of chief executives does not require public notification. All one can say for certain is that while there are similarities there are also differences between the sectors concerned and their governance structures which Parliament may have thought relevant in relation to appointments. What cannot be avoided is the language of the Act and the general context of State sector employment reform against which that language must be interpreted. For local authorities, these provisions were part of a much broader restructuring but I do not see that as assisting interpretation of the provisions concerning the reappointment process. For reasons that are understandable, the local authority sector has not earlier perceived any difficulty in this area but, in my opinion, the statute is clear in what it requires.
28. For the reasons outlined above, I conclude that a vacancy occurs and notification is required whenever a term contract expires. A contract may be extended provided that it is done during its currency and provided that the five year statutory maximum term of appointment is not exceeded. It is not permissible to extend a local authority chief executive's contract beyond five years without notification.

Yours faithfully



J J McGrath
Solicitor-General