

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

s29(1) application for hearing of an industrial dispute

Andrew Van Harselaar

(T13197 of 2008)

and

The Minister administering the State Service Act 2000

DEPUTY PRESIDENT P C SHELLEY

HOBART, 26 March 2009

Industrial dispute – termination of employment – probationary period – order issued

REASONS FOR DECISION

[1] On 11 August 2008, Andrew Van Harselaar, (the applicant), applied to the President, pursuant to s.29(1A) of the *Industrial Relations Act 1984* (the Act) for a hearing before a Commissioner in respect of an industrial dispute with the Minister administering the State Service Act 2000, (the employer), arising out of a dispute in relation to termination of employment.

[2] A hearing commenced at Hobart on Friday 19 September 2008, continuing on 15 and 16 December 2008 and 8 January 2009.

[3] At the hearing Ms C Serra of the Community and Public Sector Union (State Public Services Federation Tasmania) Inc. with Ms K Tyson represented Mr Van Harselaar. Ms T Banman with Ms J Brazendale and Mr T Witt appeared for the respondent.

BACKGROUND

[4] Mr Van Harselaar applied for a position as Computer Systems Officer (CSO) with the Department of Health and Human Services (the Department) and was successful in his application following an interview in March 2008. He was offered, and accepted, a position in the Information Services section of the Department and commenced work in the service centre, on the basis of a six month probationary period. His background was in management and computer hardware support and service.

[5] The position he was appointed to requires the provision of software applications support by telephone to users of personal computers within the Department, including problem solving and the provision of advice. If problems cannot be resolved in that way, then the second level of support is through the desktop support staff, who travel to where the clients are. There is some dispute as to whether Mr Van Harselaar believed he was appointed to a service centre position or a desktop support position.

[6] It is agreed that Mr Van Harselaar made it clear at the interview that his experience in software applications was limited and that his expertise was in the servicing of personal computer hardware. The interview panel concluded that he had the potential to acquire the skills required for the provision of software applications support.

[7] Mr Van Harselaar commenced work with the Department on 14 April 2008. He claims that, despite his lack of experience, he received minimal training. He also contends that the policies in relation to probation were not complied with, including a failure to review his performance at the specified time. He argues that his performance was improving despite his lack of experience.

[8] His employment was terminated on 28 July 2008, four months into the six months probationary period; the reason given being for poor performance.

[9] Mr Van Harselaar argues that he was unfairly dismissed and is most adamant that the remedy he seeks is reinstatement to his employment, or, in the alternative, re-employment.

EVIDENCE

Documentary Evidence

[10] Tendered into evidence was a probation report for Mr Van Harselaar, signed 24 June 2008, relevant parts of which are included below:

"Section A

...

Andrew's first review meeting was held 30th May 2008, 8 weeks after Andrew commenced his role as CSO1 within Information Services (7th April). An additional 4 weeks above the normal was given due to time lost while Andrew attended training (most of Andrew's first week) as well as to give Andrew reasonable time to understand the range of procedures available within the IS Service Centre.

...

In summary although it was recognised that Andrew was learning and improving in the role, it was the opinion of his manager (Julie Sanders) as well as Brent Feike (Manager, Client Services) that the gap in knowledge was great and that it would take many months or years for Andrew to reach the level of competency required for this position.

...

SECTION B

"Andrew has been provided with substantial support, development and training to support his development in this role. Andrew has not demonstrated that he is able to sufficiently overcome his performance problems...Andrew's progress will be reviewed again Tuesday 24th July 2008.

It is the view of Andrew's manager and mentors that Andrew must continue to improve in [a number of ways that are listed], the Manager Client Services will consider making a recommendation to the Director

*Information Services that Andrew's probationary appointment is terminated...."*¹

[11] Mr Van Harselaar provided a detailed response, dated 1 July 2008. Relevant excerpts are set out below:

"I found my first 2 months working at the dept to be overwhelming there was a lot to grasp in a short period of time, and, as my last position was in a management roll (sic), it seems some of my IT skills were a little bit rusty.

...As I went into my third month the Job started to come together for me and my understanding of the processes and my ability to support applications...

...For the last month I have been very productive easily matching the call rate of more senior staff on the desks, and last stats I saw rated me as resolving 70% of calls offered to me...

...

I find many inconsistency's (sic) in the way my performance is being measure, first reports run in remedy used to prove my lack of productivity and if the figures showed I was a top performer I was told it was the other staff helping me and I hindered their productivity (Which I was not showed any proof of historic figures gathered on the staff I was hindering so much) now I am being told that remedy stats cannot be trusted to measure my performance...

I find I am now rarely leaning on my mentor for advice and find my colleagues ask at times more than I do now...

...

I feel that all these negative comments have come out of my first two months and are not accurate for the last month, and as Aaron is a friend of Matt I believe that his comments were coloured by that relationship with him.

There are many subjective and unsubstantiated comments made by Aaron, Matt and Julie that have no evidence to back them up. As far as Aaron's assessment of my abilities over the last month, how is he measuring my performance? As I work mostly independently of his advice so I cannot see how he can give me a fair assessment. But still say that I have made mistakes as have all the staff on the service desk and I don't think my mistakes are any greater than anyone else. So I would like evidence of this ongoing wrong advice given to clients as I have not been talked to about them until I saw this report, I feel that if this was so then my mentor needs to lift his game and correct me.....

I have had conversations with Matt and Aaron about my abilities of late and both say I have improved greatly over the last month and in fact Matt told me that I am working at the level of a CS01.

¹ Exhibit A2 DHHS Probation Report

I had a conversation with Aaron on Wednesday 24/6/2008...and he shared with me that Brent had alluded that I was being paid a larger wage than Mathew and that on that basis Aaron accessed (sic) my abilities as if to say if I was on a lower wage than Mathew then I would have got a better report (I believe this is why I am being victimised and not been given a fair chance) also Aaron shared with Brent that I have improved substantially over the last month but this was not put in the report which was submitted by Brent.

In summary I am doing the Job I was hired to perform and that I was marked for termination from the first review, Brent and Julie have no interest in seeing me succeeding, and it seems I am powerless to convince them otherwise. I know my rights and you can be assured that every avenue open for appeal will be addressed including the ombudsman and the union.

...²

[12] On 7 July 2008 Section C of the Probation Report (normally not completed until the end of the six month probation period) was completed, which, presumably, would have taken into account Mr Van Harselaar's response of 1 July 2008. This section, signed by Mr Feike, recommended the termination of Mr Van Harselaar's probationary period.

[13] Mr Feike says that, in summary:

"...Andrew is still not demonstrating the breadth and depth of experience expected from CSO1 level positions. Recent evidence provided by Andrew's peers and his Manager continues to indicate a lack of knowledge and experience in basic skills expected from CSO1'S and falls well below expectations from new recruits at this level.

...³

[14] Mr Feike goes on to give a number of examples.

[15] In relation to general conduct, Mr Feike wrote:

"Andrew is punctual and reliable. In reference to his interpersonal relationships with team members, heated discussions between Andrew's first mentor, Matthew Holloway and Andrew have been observed. Further, Andrew behaved inappropriately during meeting held 24th June, claiming insistently that he would be vindicated from any accusations..."

[16] The report records that Mr Van Harselaar has partially resolved previously identified problems but that he *"still has a long way to go to reach expected CSO1 support skills"*.

[17] Mr Feike concludes:

"I recommend Andrew's probationary appointment is terminated based primarily on his lack of demonstrated technical experience and knowledge

² Exhibit A4 Response of Andrew Van Harselaar to Section B of Probation Report

³ Exhibit A5 Section C of Probation Report (Brent Feike)

relative to the assigned CSO1 position. Andrew's work performance does not meet the standards expected of employees in the Tasmanian State Service at a CSO1 level."

[18] Mr Max Gentle, Director Information Services wrote to Mr Van Harselaar on 8 July 2008:

"...

Section A of your probation report was completed on 30 May 2008. While this is generally completed after four weeks, this was extended to eight weeks to provide you with a reasonable time to orient yourself to the range of procedures applied within the IS Service Centre. Further you were provided with a week of training when you first commenced the role.

...

You are currently completed up to the interim point of your probation period. You have worked hard to adapt to the requirements of the Service Centre position. You are reliable and punctual and possess an excellent work ethic.

However, as you are aware, a number of Primary Task areas have been identified as requiring improvement...

...

I am of the view that the problems outlined above represent significant performance issues within your role as a IS CSO1. You have been provided with substantial support, supervision and training to facilitate the improvement within the requisite areas; however I believe that you will be unable to demonstrate sufficient improvement by the end of your probation period to satisfy the requirements of your duties. This being the case, it is unfortunate that I must make the recommendation that your probation is terminated immediately.

...Prior to taking this action I wish to give you an opportunity to provide me with reasons why your probation should not be terminated...

...⁴

[19] Mr Van Harselaar responded in the following terms, received by the department on 14 July 2008.:

"Dear Max

...

Max I don't feel going over and justifying all the comments made about me is going to help me, so I am just going to write to you from my heart and ask you to reconsider.

⁴ Exhibit R5 8 July 2008 correspondence from Max Gentle

Max I have from the date I started with the department have done my best to do my job with honesty and integrity. I always like to do a good job and enjoy being able help people. I have to admit it has been a steep learning curve for me to come to where I am now, and the comments from my mentor has been partially accurate for the first couple of months.

As you know I feel I have come a long way in improving my skills and abilities. I realise I still could and will learn much (as IT is never static). As you can tell by our conversations I feel frustrated and isolated because I am doing my job and improving, but I feel that it's not been noticed. I realize now the way I have responded to the review process has been wrong, and I should been more open to the comments from Brent Julie and Mat. I was most hurt by the first review and as such I wanted to fight back and of course this has not done me any favours.

I do have a confident personality which could be taken for arrogance and pride, but if you got to really know me you would find that this is not the case (although there is much room for improvement) I feel I may have rubbed some people up the wrong way, which is regrettable if I could turn back the clock of time I would have handled myself differently (my how hindsight is so profound and illuminating)

The feel of the last section of your report seem to paint me as somewhat a maverick loner who makes up his own rules. I would like to shed some light on this and maybe give some insight to where I am coming from. I have no problems in following procedures but I have found that the procedures are not hard and fast and mostly undocumented. And depending on who you talk to the procedures differ. It does not help that I was judged to be asking too many questions so I now try to figure out things on my own as I want to improve and not burden the other team members.

I believe in time you would see in me the talents and ability that would be a great asset to the dept. I need a second chance to prove this to you and would be quite willing to work with Julie and Brent to see a turnaround in the way I do things. I am sorry for the stress and time that all this process has burdened all those involved and the unkind comments I have alluded to in my rebuttal.

I believe you to be a fair man and believe you will make the right decision for the department.

...⁵

[20] On 28 July 2008, Mr David Roberts, Secretary, wrote to Mr Van Harselaar, terminating his employment. He said that Mr Gentle had considered Mr Van Harselaar's response and had decided to recommend that his probationary appointment be terminated. Mr Roberts said *inter alia*:

"It is my view that when these are considered in entirety, you have not demonstrated sufficient skills as a CSO1 to merit permanent appointment.

⁵ Exhibit R6 Correspondence from Andrew Van Harselaar to Max Gentle received 14/7/08

...the purpose of probation is to ascertain whether your work performance and conduct meets the standard expected in the State Service. This is directly measured against your statement of duties...⁶

Witness Evidence for the Applicant

Andrew Van Harselaar

[21] Mr Van Harselaar's sworn evidence was that he believed the job that he had applied for was for the provision of support for both hardware and software applications. At the interview the panel appeared to be satisfied even though he knew that he had not answered all the questions correctly. He had told them of his lack of experience in support for software applications. His background was as a hardware service engineer. When he was offered a position with the department it was not the job that he thought he had applied for.

"...So the one you took with the Department of Health and Human Services, was that the same job that they offered you that you applied for?--- Originally, no, it's not. It was not – I didn't apply for a service desk position. I applied for actually the person to actually physically go on site and repair problems, whether it's hardware or software."⁷

[22] He agreed that he did not have the experience in software applications but he thought he could develop the skills. He had thought there would be more hardware involved in the job. He had assumed that the department would provide him with formal training in software applications. He agreed that, with his 20 years' experience, it was reasonable for the employer to assume that he possessed the basic knowledge and ability to undertake the role.

[23] He said that he was offered a basic occupational health and safety training course, and a two and a half day Information Technology Infrastructure Library (ITIL) course, which dealt with procedures and was not a technical course. The rest of the first week was taken up with induction to the workplace. It was not until the second week that he began sitting in with another employee and listening on a set of headphones. At that stage Matthew Holloway listened and advised him, which lasted for only a couple of days before he was told by Ms Sanders that it was time to go solo.

"So how long in total did you have with a mentor; one on one?---...But it was only I think a couple of days, two or three days is my recollection."⁸

[24] He testified that he told Ms Sanders that it was a bit soon and he felt concerned.

"...But she said ...her comment to me was to me, "You have customer service skills?" And I said, "Yes, I have got customer service skills." She said, "Well, you'll be fine." She said, "if you've got any problems, you ask your mentor..."⁹ :

⁶ Exhibit R7 Correspondence from David Roberts to Andrew Van Harselaar re termination of probational appointment 28/7/08

⁷ Transcript P28 Lines 26-31

⁸ Transcript P31 Line 12

⁹ Transcript P31 Line 20

[25] Mr Van Harselaar said that no other training was offered to him excepting for an active directory course which lasted for two days. He said that by the time he did the course he was already doing most of it as part of his everyday duties on the service desk.

[26] His evidence was that he had not used the Knowledge Base [a type of "wikipedia" developed by the section] in the early days of his employment; he had relied upon asking the person next to him. He said that he was not given a copy of the service centre policies and procedures, although there were some online, though not complete.

[27] Whilst he found the work overwhelming at first, after about the sixth week he began to feel confident. His mentor, Matthew, agreed with him that he was starting to pull his weight. He said that he got no feedback from management or his mentors.

*"No, there was no feedback...it seems to be very silent in that area. Nobody offered – nobody warned me or – as a matter of fact Matthew on a couple of time told me that nothing would be expected of me for three months and so it's just a time to get it right and a time to absorb; time to learn and listen. And he said that basically that I would be measured from three months, and that was the information from my mentor to me."*¹⁰

[28] He agreed that he had asked a number of technical questions in the early stages. He was asked in cross-examination:

*"When you found, though, that you were needing to ask the same question of your mentors on a number of occasions about the same issues didn't you reflect on the fact that maybe you should be documenting these things to assist you in recalling it, given the breadth of information required?--- There wasn't a lot, I didn't think, of I've had to have gone back and constantly ask the same questions. It may have been there was a depth there that I didn't quite understand when it was explained the first time possibly. Rather than me having to go back for exactly the same information each time, I would be rather embarrassed to keep doing that myself. So it's not something that I would certainly like to do on a constant basis because it reflects badly on me as well. So it's not my usual way."*¹¹

[29] He recalled having daily one hour "catch-up" meetings with Ms Sanders from 30 April until 9 May, who would sit with him and show him how to add to the Knowledge Base, however, he said, there was no real feedback.

[30] When his first review took place on 30 May, he said that he felt ambushed. Nothing had been mentioned to him for two months, except for one little bit of positive feedback from Matthew. He was flabbergasted. He did not think the report was accurate. No support was offered to him, he said.

[31] At some stage he was given a copy of the State Service Code of Conduct.

"Can you remember the reasons why?---...that there was a heated discussion between myself and Matthew Holloway and because there was a heated discussion he proceeded to give me the Code of Conduct, but I explained what it was all about. And what it was about was I was just having some friendly conversation with – and I can't remember exactly

¹⁰ Transcript P32 Line 30

¹¹ Transcript P76 Line 35

who; it may have been Aaron or somebody else on the service desk who was across from me. And we were just having a bit of a joke. It was something about age. It was – it was in relevance to some call or some person and I was just saying – we were talking about age and I was saying, you know, “It’s like in my church, you know, I’m the oldest in my church”; you know, sort of making a comment about what we were saying. And he had a bit of a laugh, the other person. But then for some reason Matthew got very agitated – totally out of proportion with what I said – and started to tell me that I shouldn’t be trying to push my religious views on other people, and he was really agitated and steamed up. And I basically – I think I – I came back to him and I said, “Well, look, you know, there’s no reason why I can’t mention the word ‘church’. That shouldn’t be against any policy” and yes, I felt quite – he attacked – literally it was an attack...”¹²

[32] Mr Van Harselaar testified that following the meeting of May 30 “*absolutely nothing*” was done to facilitate his development.

[33] He said his performance was measured through his mentors’ feedback and the call statistics which were proven to be wrong when he was able to show, through his own records and the department’s subsequent checking, that his performance was better than the statistics showed.

[34] In his evidence, a meeting on 10 June 2008 followed his expressing to Mr Feike that he thought he was being treated unfairly and was being singled out to be dismissed. His view was that they “*were out to get me*”. At that meeting Mr Feike told him that was not the case. It was decided that they would change his mentor to Aaron Maxwell. He said that no help or training was offered. He was told that he had to reach a certain level, but he did not know what that level was. He said:

“After the first meeting I re-doubled my efforts. I crossed every T; dotted every I. I did my own independent research and I did as best as – I really worked extremely hard because I was under the impression the first three months we’re coming up to speed so maybe I should have worked harder then. But I really re-doubled my efforts to do the work and I was performing very well as far as I was concerned and I was not – I was not relying on my mentor; very rarely going to my mentor for advice.

Why was that, Andrew?--Well, it was made very clear to me that it would be used against me if I was using my mentor to – for technical advice. It got to the stage where I was – even asking procedural things I felt – I felt fearful to ask even procedural things because it would seem that it was going to be used against me. So it was a difficult environment to work in but, you know, by God’s grace I was able to do what I did and I believe I did a good job.”¹³

¹² Transcript P35 Line 14

¹³ Transcript P38 Line 26

[35] When asked why he believed he was being set up for failure, Mr Van Harselaar said:

"My personal opinion? They hired me on the highest increment and...they had a higher expectation for a CSO1. I didn't negotiate for that, they offered that to me which I was quite happy to accept, of course. And I think that was the reason..."

And who do you mean by they?---It would be Brent, I would imagine. He's the one who hired me. And, you know, some hearsay – I also, later on, as I was speaking – you see, Aaron had given me some good feedback. He was my second mentor. And so did Matt who said I was now acting in the position – in the role. I asked him what was said at the meeting with Brent because I wasn't there because I understood that you guys were reasonably happy with what I was doing. And the inference he gave me back was that I was getting paid more than Matt and, therefore, because I was being paid more than Matt he expected me to be better than that. And the inference that was there was if I was on a lower increment level that I would have been given more grace to do my job."¹⁴

[36] Mr Van Harselaar was asked whether, in the meetings with Mr Feike and Ms Sanders, he might have been perceived as being aggressive. He said:

"Quite possibly. Quite possibly. I was reacting also to the way they were treating me. If people treat me in a civil manner and good manner, I'm always the same back, otherwise I might get hurt and I might act out that hurt, I might have been negative back because of that hurt, you know. But that's not the way – my normal nature is not that. It has to be something that's provoked rather than my normal response."¹⁵

[37] A meeting on Friday June 13 was attended by Jacqui Brazendale from Human Resources.(HR). Mr Van Harselaar said that he asked for someone from HR or from the union to be present because he felt that he was being unfairly treated. He was disappointed because he had misunderstood the role of HR; he had thought they were there to help employees, but they were only there to make sure procedures were correctly followed.

"...But I will acknowledge that for the first time – the first few meetings I had with Brent and Julie was very negative and very harsh. There was nothing good they said about me whatever. They just – they just thrashed me. But I must admit when HR was there all of a sudden there was some nice – they were a little bit nicer...They started to give me a few positive feedbacks rather than negative all the time...Once again they said that I'm just not doing the work; I'm just not reaching that level, which I don't know what is – and I still don't know what is – this level that I had to reach to make them happy that I was performing. And definitely the impression was given, "No, there's no chance; you are going to be dismissed." They didn't say it but their body language said it and everything they said said it in a way that I knew that it didn't matter what I did; they'd formed an opinion of my abilities for the first month or so, two months, and that they weren't taking into account my greatly improved performance after the

¹⁴ Transcript P90 Line 17

¹⁵ Transcript P85 Line 31

second month...There was nothing given to me to train me up to reach the level that they expected of me. Now, there was, to be fair – the department had offered all staff online training in Microsoft products which we could use; in our lunch breaks, I suppose, or at home...¹⁶

[38] Mr Van Harselaar testified that the online training (Nuggets) was not able to be done during work time and that, in any event, there was no time during the working day owing to the heavy workload and the chronic understaffing. He said that he would spend time at home using the Microsoft learning database and that there were times he stayed back at work. The training he accessed was in relation to Microsoft Outlook. A record from the Nuggets server showed he had accessed it on 12 occasions on six different days.¹⁷ He said that he would have continued to use it to increase his skills.

[39] At a meeting on 24 June 2008 Mr Van Harselaar again indicated that he felt he was performing at the required level. He said that he had informally approached Mr Holloway on the stairway who had told him that he was now working at CSO1 level. Mr Van Harselaar said that he *“felt elated”* at this.

[40] In relation to the identified areas of skill and knowledge deficiencies, he said that the only support he was offered was to go to his mentor, but he was also told not to go to his mentor so often. He was required to work more independently.

[41] In response to Section C of the probation report [which recommended the termination of his employment], Mr Van Harselaar said that he disagreed with the comment that he needed ongoing high levels of support. He said that the department had recognised that he had improved and had made a bigger effort, but they had said that it was not good enough. He said that his biggest problem was that they had never identified what he was expected to achieve or how it would be measured. He said that he was never told what the key performance indicators (KPI) were.

[42] His response to Mr Gentle’s letter recommending termination was, he said, assertive, forthright, and not pulling any punches, but not aggressive. He thought he would plead for some mercy, and believed that was the tone of the letter.

Witnesses for the Respondent

Mr Brent Feike, Manager, Client Services, Information Services
Ms Julie Sanders, Service Centre Manager
Mr Matthew Holloway, Computer Systems Officer
Mr Aaron Maxwell, Computer Services Officer

Mr Brent Feike

[43] Mr Feike testified that he has been in the IT industry for about 15 years in the public and private sectors, the last ten of which have been in management roles.

[44] Early in 2008 there were a number of vacancies in client services. The agency interviewed people for positions in desktop support and in the service centre, using a generic statement of duties because the functions are similar. Mr Feike was on the interview panel. Over 40 people had applied and 17 were short listed. Mr Van Harselaar had applied for the generic position of Computer Services Officer and was offered the service centre position. He had performed well at the interview, ranking equal fifth

¹⁶ Transcript P39 Line 40

¹⁷ Exhibit R4 Nuggets Report from Brent Feike to Teresa Banman

against the other candidates. Mr Feike said that the statement of duties accurately reflects the required duties. At Mr Van Harselaar's interview:

*"There were some weaker areas but none which gave us, at that point, any reason to think that he could not do the job."*¹⁸

[45] He said that they expected a *"breadth but not necessarily a depth of skills"*.¹⁹

[46] He testified that Mr Van Harselaar was sent a letter of offer and contacted Mr Feike for more information. He told him what the position was, what it entailed, what the section was and what the roles were. Mr Feike testified that:

*"...IT is a very competitive market. It's very difficult to attract good people and we have one big advantage at Health which is we're the largest IT department in Tasmania and did cover often some areas with Andrew around being able to shuffle within the teams that we've got...Andrew also asked about the service centre and I did get the feeling that he wasn't that keen to go to the service centre, that he thought the position was purely for desktop. And we spent some time talking about the role, that it was in the service centre and that I did expect people to stay in the service centre for six to 12 months at minimum to give that a fair shot before we talked about rotations into other areas."*²⁰

[47] Mr Feike said that he could tell that Mr Van Harselaar had a different expectation to the service centre position. It was not made clear at interview which job would be offered, applicants were told that there were a number of positions in different sections.

*"Do you believe there is any doubt as to the position that was being offered to Mr Van Harselaar after your conversation with him on the weekend?--- Not after the conversation on the weekend. I believe Andrew had two – he had in his mind that it was going to be desktop and we offered him one in the service centre and I'm glad we had that phone call over the weekend because that should have explained everything."*²¹

[48] Mr Feike told the Commission that there were five salary levels within the CSO1 classification and that, in recognition of Mr Van Harselaar's 20 years' experience, he was offered a position at the top of the salary range. He said that the salary level did not make any difference to the expectations in relation to the employee's performance.

[49] In cross-examination he said that his expectation was that all new employees would be up to speed within three weeks, and within two weeks for base level support.

"So within seven weeks you would expect someone to be working at level, would you say?---Within the first three weeks. In fact, Julie will probably say two weeks they are on the phones because the types of problems that we work on are that foundation level..."

But that would be for a normal person that came in at a CSO level increment 5, would that not?---No. CSO1 is a CSO1.

¹⁸ Transcript P99 Line 39

¹⁹ Transcript P100 Line 7

²⁰ Transcript P101 Line 31

²¹ Transcript P130 Line 41

...So you would expect a CSO level 1 increment 5 to come in at the level and work at that level within two weeks?---No, I think you – we don't take that banding as you have somehow more information about certain systems within the department.

But you've taken into account the previous experience. I understand how that works, but wouldn't it be normal to suggest that if you are coming in at CSO level 1, okay, forget about the increments, you would expect them to be up to speed within two weeks?---On the base level support, absolutely.”²²

[50] Mr Feike said that the ITIL training is provided to all new staff, and that it was not technical training but was about best practice service. That was provided to Mr Van Harselaar during the first three days of his employment. There was no specific induction training, but there was a checklist of tasks provided to new employees. There is also an orientation program. At the outset he had talked to Mr Van Harselaar about the importance of using and updating the wiki-based system known as the Knowledge Base.

[51] In late May, Ms Sanders talked to him regarding Mr Van Harselaar's performance. He organised a formal meeting with him which took the form of a probation review. At that, the issues were documented. Mr Feike was asked why that did not happen after four weeks [as required by the probation policy].

“...The rationale is that four weeks is an incredibly short period of time for anybody to get a handle on how we do work at DHHS. And, in addition, Andrew was in training for most of the first week...”²³

[52] He said that it was obvious that Mr Van Harselaar was shocked by what he heard. He was very defensive.

“Were you out to get Mr Van Harselaar?---I wanted him as an employee. I mean, it's hard enough at the moment at any point in time trying to recruit IT staff so our aim is not to remove people at the first sign of there being a problem. Throughout this whole process our aim was to see what we could do about that, but I can understand how Andrew would feel that that wasn't the case.”²⁴

[53] Mr Feike gave evidence about the role of Mr Van Harselaar's mentors:

“...part of the induction or coaching process is to sit you with somebody else and observe how that person works first. You are not on the phones; the person who is part of the team is. And through the next number of weeks they are with that person to help them out and you transition from being an observer to being a person who...does the work. And you are given a person's name and you are physically close in terms of where you're located, to give you the ability to put your hand up or reach over the partition and get some help. So the mentoring role is generally something that's there for at least a two-week period but for – as is natural for a number of weeks after that, they become the person they go to for questions.”²⁵

²² Transcript PP128-129 Line 37

²³ Transcript P105 Line 15

²⁴ Transcript P106 Line 30

²⁵ Transcript P107 Line 29

[54] In cross-examination Mr Feike said that there was no training for mentors, but if employees have been there for “*long enough*” then they had the skills and knowledge to do it. It is not a formal role and there is no statement of duties attached to it.

[55] Mr Feike said that he was concerned that there was a character conflict between Mr Van Harselaar and his first mentor, Matthew Holloway, who had been there a number of years and who, like Mr Van Harselaar, was a “*strong character*”, so he changed mentors to Aaron Maxwell.

[56] The feedback the mentors gave Mr Feike was:

“...there was a pattern in what I was hearing. The pattern was that Andrew was not able – first of all, didn’t have a strong background or any background in some very, very common tools that we expect even high school students or college students to know about if you’re interested in IT, common software, common ways of looking at things. And they’re not things one – they’re things that surprised us or them, and that was a common theme throughout it. The second, and probably the more worrying theme for me, was that Andrew seemed to be rote learning. They were repeating the same solutions, or a slight twist on the solution, whereas they know they had already covered off on something very similar.

...What really surprised me was that it would have taken a very, very long time for him to get up to the level of what we expect a CSO1 to be...”²⁶

[57] Mr Feike testified that Ms Sanders had come to see him in June after her first meeting with Mr Van Harselaar and said that she felt uncomfortable meeting with him; that he was very vocal and that she felt intimidated by him. Mr Feike then met with him and found that he was very angry about some statistics that Ms Sanders had presented to him. Those figures had turned out to be incorrect.

“...And he was one, upset by that and felt that we were out to get him.

Did he use those terms?---I honestly couldn’t tell you, but that certainly was my feeling.

Okay?---He was very in my face, if I can say it that way, so lots of finger pointing, very angry. And I recall saying to him, Andrew, you need to stop that, that is inappropriate behaviour, I’m here to work out what happened last Friday and what’s happening now. And Andrew, you could see, was very upset at that point and pulled it back together...”²⁷

[58] Mr Feike said that one of the problems was that Mr Van Harselaar “*was very much in denial about the fact that there were issues.*”²⁸

[59] He said that the reason he recommended that Mr Van Harselaar’s employment be terminated was:

²⁶ Transcript P108 Line 26

²⁷ Transcript PP111-112 Line 46

²⁸ Transcript P113 Line 41

"In essence, I did not feel that Andrew is at the level of a CSO1 and can perform at the level of a CSO1 in the time that we give people, which is six months. If we were to give somebody two years then I think he would probably get there, but I think that would then undermine the whole concept.

*THE DEPUTY PRESIDENT: But you didn't give him six months?---The reason I didn't is because it would take many, many months or years to get to the end of that process."*²⁹

[60] Mr Feike said that the effect on other team members was stressful. Mr Van Harselaar was asking for a lot of advice.

*"Because Andrew was relying heavily on his mentor, that mentor then couldn't do as much of their own work. It's one of the reasons we looked closely at the KPIs, for if one looks at the raw KPIs one would think that Andrew was doing as well as anybody else or better. But when you dig through those numbers the mentor who was sitting with Andrew wasn't doing as well."*³⁰

[61] Mr Feike testified that Mr Van Harselaar had given inaccurate advice to a client in relation to procedures on one occasion and in another in relation to the relocation of personal computers, which showed an underlying gap in knowledge.

Ms Julie Sanders

[62] Ms Sanders testified that she had 16 years experience in the IT support industry and her current position was as service centre manager. She had been employed by the department since August 2007 and had been the service centre manager since February 2008.

[63] She said that the usual process for new employees was that after a week they were on the phone with a mentor listening in until they feel comfortable on their own.

[64] Her evidence was that no one had brought to her attention that when Mr Van Harselaar started he had skill deficiencies compared with the duty statement.

[65] Ms Sanders said that if she had been asked she would have given Mr Van Harselaar half an hour a day during work hours to work on the Nuggets.

[66] She did not recall whether she had told him of what targets he had to meet.

"So from a managerial perspective, what is an expected level?---It's gauged by many things. We expect people to be able to problem solve and analyse a job within 10 minutes or pass it on.

*All right. And when do you expect that person to get to that stage, a new employee?---Most people are probably at that stage in about a month."*³¹

²⁹ Transcript P114 Line 18

³⁰ Transcript P114 Line 37

³¹ Transcript P140 Line 16

[67] In April of 2008 Mr Holloway told her of his concerns regarding Mr Van Harselaar's skills and abilities, which he told her were at a very basic level. After that she met with Mr Van Harselaar and scheduled a number of meetings at his desk to deal with any questions and to see how he was doing. She noticed that his keyboarding skills were a bit slow. Mr Van Harselaar seemed unaware that he was not meeting expectations. She listened in to phone calls and thought that he took a long time to determine what the problem was. She spoke to Mr Feike about her concerns and they met with Mr Van Harselaar on 30 May. The meeting had as its key aim the identification of issues so that Mr Van Harselaar could address them. There was no intention to set him up to fail, she said.

[68] Ms Sanders testified that in the lead-up time to the meeting she was sure that she would have pointed out to Mr Van Harselaar that he needed to work on his skills.

*"How would he be able to take from that that there were concerns about his performance?---I feel sure that I would have said to him, at some point, that we needed to work on these skills. I honestly can't remember if I would have said that the mentors have brought it to my attention, but I'm sure I would have said it to him, that these are issues that we need to deal with."*³²

[69] Ms Sanders testified that she had noticed improvement:

*"Yes. Andrew did improve in certain areas. I must say, Andrew actually put quite a bit of effort into it and that was acknowledged in one of the meetings and commented on."*³³

[70] She noticed that he was trying hard not to rely so much on his colleagues.

[71] Mr Aaron Maxwell also expressed his concerns to her, in relation to Mr Van Harselaar's basic, underlying knowledge.

[72] She met with Mr Van Harselaar on 6 June 2008 and talked to him about the flag call statistics, which she later learned were wrong. It was a genuine mistake and the statistics were wrong for everyone. Mr Van Harselaar was quite distressed by that, she said. Following that, she told Mr Feike that she felt uncomfortable having one-on-one meetings with Mr Van Harselaar.

[73] Ms Sanders said that she supported the termination of Mr Van Harselaar's probationary employment.

"On what basis did you support that?---I felt that the amount of training that he would need to fully function as a CSO1 was – A CSO1 is a job that you are giving to someone who is already competent in that area, and I felt that the amount of training required to bring him up to speed, he would be better suited to a training position.

*Is it your evidence that a CSO is not an entry-level position?---Correct."*³⁴

³² Transcript P139 Line 23

³³ Transcript P136 Line 23

³⁴ Transcript P137 Line 38

Mr Matthew Holloway

[74] Mr Holloway testified that he was a Computer Systems Officer with the department; which role he had held for nearly three years. During that time he had acted as a mentor for about 14 staff. He was Mr Van Harselaar's mentor for a couple of weeks.

[75] The role of mentor involved the new employee listening in on calls, after a while that is reversed and he listens in on the new employee's calls. He sits next to whoever he has been assigned to, which can last anywhere from a couple of weeks to a couple of months.

[76] In cross-examination he said that received one day's training on effectively managing people and how to communicate with clients and staff. He did not consider himself to be a trainer and there was no firm structure in place in regard to mentoring.

*"...do you recall a conversation you had with Andrew that nothing would be expected of him for about three months?---I would have to say yes, that is a fairly standard thing that we would explain to most new employees."*³⁵

[77] It was his view that a new employee should have technical skills at least at post Certificate IV level.

[78] He testified that by the second week he had concerns about Mr Van Harselaar's performance and capacity. The questions he was being asked were very much below what he considered to be the level required for the job. He was asked more technical questions than he thought reasonable.

*"Did you, in that second week, flag with Mr Van Harselaar that you had concerns that there seemed to be a lack of knowledge there? I do recall making a comment where I indicated that his level of knowledge of the position and the agency itself was in single figures, quite low. I think I may have mentioned 1 per cent."*³⁶

[79] Mr Holloway said that very basic questions were repeated and asked several times over a course of weeks. He became frustrated with this. On many occasions they had arguments about the process and the right way to do things. He said that Mr Van Harselaar thought he knew better. He said that Mr Van Harselaar was a very intelligent man with a totally inadequate knowledge of the requirements of the position.

[80] Mr Holloway testified that he informally mentioned his concerns about Mr Van Harselaar's lack of expertise to Ms Sanders, saying that Mr Van Harselaar had no knowledge of IT when he came into the department.

[81] He gave evidence about Mr Van Harselaar seeking feedback on his performance:

*"Did there come an occasion where Mr Van Harselaar approached you?---
Yes*

And asked how you felt he was going?---Yes.

³⁵ Transcript P153 Line 1

³⁶ Transcript P149 Line 1

Do you recall what you said?---I admired the fact that he was putting in a substantial effort to obtain the skills that he didn't have and I definitely wanted him to know that, you know, that effort was noticed by me if nobody else.

*Did he ask you to provide specific information to Ms Sanders or Mr Feike?--
-Yes, he did.*

What was that?---He asked me to approach Julie Sanders and to explain to her that I felt he was operating at a CSO level.

And what did you tell Mr Van Harselaar in regard to that request?---Yes. I advised him I would not initiate that conversation. However, if I was directly asked questions of that nature I would be certainly answering them honestly.

Did you expand on what that honestly would mean?---From our previous conversations I didn't but I'm sure that he would have got the picture."

...

Are you personally out to get Mr Van Harselaar?---No.

*Do you have any reason to see him terminated in his employment?---
No."³⁷*

...

*"...Have you ever told Andrew that he was improving or was performing---
?Yes---*

---towards the appropriate level?---I don't know that I would indicate that last sentence, but I definitely encouraged him to keep on the way that he was going, because he was putting in the hard yards. He was staying back after hours and using a video training tool that we have, called Nuggets."³⁸

[82] Mr Holloway was asked whether he became upset and agitated about a conversation Mr Van Harselaar had with a colleague about him being an older person at his church:

"Yes, I definitely remember that. We all have our own beliefs and the workplace, I don't believe, is an area to either be discussing them in the first place, or pushing your views onto others. I had heard quite a few stories about Andrew and his church mates and it make me feel uncomfortable and I asked him to stop"³⁹.

[83] Mr Holloway said that almost everyone he had mentored had been had a higher incremental level than him and that the level they started at did not change his expectations of them.

³⁷ Transcript P151 Line 16

³⁸ Transcript P153 Line 22

³⁹ Transcript P155 Line 23

Mr Aaron Maxwell

[84] Mr Maxwell testified that he was a Computer Systems Officer with the Department, which position he had held for two and a half years. He had become Mr Van Harselaar's mentor and had noticed that some of his skills initially were not "up to scratch".⁴⁰

[85] He said that on rare occasions he had needed to remind him of things to be done. He had observed that Mr Van Harselaar needed to get information from other staff "a fairly great deal."⁴¹

[86] He was asked what specific skills Mr Van Harselaar lacked:

"..We have certain, you know, quotas that we try to meet on the desk. You know, for example, we should stick to 10 minutes if we can for a call. I noticed that a lot of Andrew's certainly went over that time. Reasons for that possibly being because he didn't feel comfortable coming to us to get the information, or was trying to find it himself and perhaps just not looking in the right places. There were instances where I caught him out just giving incorrect information as well, which is something that could easily be remedied just by getting assistance from someone."⁴²

[87] He recalled an occasion when Mr Van Harselaar asked how he was going, and Mr Maxwell told him that, initially, he was going pretty well, but there were some things that he could have improved on.

SUBMISSIONS

Ms Serra for the applicant

[88] Ms Serra referred to the definition of probation in the Act which requires at section 3(d) that a probationary period is:

"reasonable and appropriate in the context of acquiring the skills and experience necessary to satisfactorily perform the duties of the job."

[89] She submitted that the evidence had shown that the Department had not complied with this in that they had not supported Mr Van Harselaar in a conducive and encouraging manner. They had not fulfilled their obligation under the Act in respect of allowing him to "acquire the skills and experience necessary to satisfactorily perform the duties of the job."

[90] Ms Serra said that Mr Van Harselaar had been very honest at the interview and had been specific about his strengths and weaknesses, making it clear that he had a low level of skills in relation to software applications. His resume clearly stated that his expertise lay in hardware applications. The agency employed him as a Computer Systems Officer anyway. In her submission, the agency really needed a fully-trained CSO.

⁴⁰ Transcript P157 Line 15

⁴¹ Transcript P157 Line 47

⁴² Transcript P157-158 Line 46

[91] She contended that the agency ignored Mr Van Harselaar and had been vague and unclear about what he was required to do.

[92] The agency, she said, had not complied with its own probation policy by not completing section A within the first four weeks of the probation period. They extended it to eight weeks before they told Mr Van Harselaar how he was performing. He suffered humiliation and was confused as a result of the review.

[93] The Department had failed to properly manage his performance according to the State Service Commissioner's Direction No 4 and the State Service Principles

[94] Section B of the probation report states:

"If there are concerns about an employee's work performance the manager is responsible for addressing these issues by developing a timeline action plan to deal with the issues raised."

[95] Ms Serra submitted that the evidence showed that management did nothing to address the issues raised, even though they introduced a strategy of weekly meetings.

[96] The evidence showed that the mentoring system lacks support for both the probationary employees and the mentors. It showed that the reporting structures were flawed and unreliable.

[97] Mr Van Harselaar had a contract for six months which was terminated well short of the contract period.

[98] Ms Serra submitted that the termination was harsh and unfair and that the primary remedy of reinstatement should be applied and that Mr Van Harselaar should be paid for any period for which he was unwaged.

Ms Brazendale for the respondent

[99] Ms Brazendale referred to section 30(3) of the Act which provides:

"The employment of an employee must not be terminated unless there is a valid reason for the termination connected with

(a) the capacity, performance or conduct of the employee."

[100] She submitted that there were valid reasons for the termination of Mr Van Harselaar's employment, which were that he had failed to perform his duties to the required standard and that he did not have the skills and knowledge to do so.

[101] Ms Brazendale said the Mr Van Harselaar was selected based on the merit principle and he accepted the offer understanding the role that was expected of him, which was set out in the statement of duties. He was aware that a probationary period applied. It is the employer's submission that the applicant accepted the position in the knowledge that it was a software-based position. The offer was made in good faith based on the information contained in Mr Van Harselaar's application and his interview.

[102] In Ms Brazendale's submission, a probationary period within the state service is for the purpose of determining an employee's suitability for continuing employment.

[103] She said that the agency had provided him with feedback and support, but the deficiencies in his performance and knowledge were such that he was unable to perform the required range of duties.

[104] The meeting of 30 May 2008 between Mr Van Harselaar and his managers was an interactive meeting at which the concerns were discussed and regular meetings were established. Mr Feike sought feedback from Mr Van Harselaar's mentors in order to ensure accurate information.

[105] Ms Brazendale said that his mentors were changed to ensure that it was not just a problem with one person. The reliance on mentors usually reduces after about three weeks, but the evidence showed that Mr Van Harselaar was still asking the same questions after about seven weeks.

[106] She said that Mr Feike's testimony showed that the reason the review did not take place until after eight weeks was because Mr Van Harselaar lacked skills in software, and that had been recognised.

[107] Internal training packages were available and the evidence showed that the employee had accessed that training.

[108] The agency contended that the were fundamental areas of difficulty and the evidence of Ms Sanders and his mentors was that Mr Van Harselaar asked the same questions many times despite having had processes explained to him. Mr Feike's evidence was that Mr Van Harselaar relied heavily on his mentors, and provided inaccurate technical advice to clients.

[109] Ms Brazendale submitted that the applicant was given every opportunity to respond to the criticisms of his performance as well as given opportunity to attain the level of competence required for the job. He did not respond until 1 July 2008. He did not concede at any of the meetings that there were performance issues. He did not advise management that he had difficulties with the work, nor did he request any specific training.

[110] Ms Brazendale said that Mr Van Harselaar was appointed as a permanent employee subject to a six month probation period as provided for by the *State Service Act 2000*, which was clearly articulated in his appointment letter. She said that the probationary policy document – Exhibit A1 - notes that the purpose of the probationary period is to ascertain whether the work performance of a new employee meets the standards expected in the State Service. During the probation period the employee can expect feedback on their performance and to be provided with relevant training.

[111] In the employer's submission, the weekly meetings were for the purpose of providing regular feedback to the employee about his performance and it was acknowledged that there was improvement and that he had made a significant effort to upskill. The evidence showed that from 30 April until May 8 there were daily catchups between the applicant and Ms Sanders where issues were discussed and procedures reviewed. The applicant agreed that there were opportunities for him to request feedback and to ascertain the department's expectations. He did not seek this information.

[112] The employer submitted that the applicant had not been able to prove that the decision to terminate his employment was unfair.

[113] Ms Brazendale argued that there is no requirement that the full six months of a probation period must be served before the employment can be terminated. The reasons for terminating his employment before the expiry of the probation period were: the applicant's continuing poor performance; his inability to consistently demonstrate the basic skills and knowledge to perform the duties of a Computer Systems Officer; the continued requirement for support and coaching; and the impact of his continuing poor performance on team morale and productivity.

[114] Ms Brazendale submitted that Mr Van Harselaar did not have the basic information technology building blocks. He was given every opportunity, but it was not the role of the department to train him in basic information technology skills. The role of a Computer Systems Officer is that of an experienced information technology officer; it is not an entry level position. The applicant was making progress, but there was an expectation that he would already have those skills. It was the department's view that, even if he had completed the full six months' probationary period, he would not have reached the required level, because he lacked the fundamental information technology knowledge related to software applications and problem solving skills.

[115] Ms Brazendale submitted that the application should be dismissed. If the Commission were not so persuaded, then reinstatement or re-employment were not suitable remedies, given that the evidence showed that Mr Van Harselaar would not be able to gain the level of skills and knowledge to undertake the job within the timeframe. In order to upskill to a CSO1 level, he would require a minimum of 12 months to achieve the required level of knowledge. The employer's submission was that, if re-employment were ordered, then a new period of six months' probation should apply.

FINDINGS

[116] The requirements for managing probationary employment are set out in the Act, the *State Service Act 2000*, the department's *Probation Policy* – Exhibit A1 - and in their *Probation Report* document – Exhibit A2. Together, they form a comprehensive set of guidelines and requirements to be followed for probationary employees in the Department of Health and Human Services. For the reasons which follow, I find that the requirements were breached in a number of important ways.

[117] The Act, at s3 – Interpretation, defines “probationary employment” as:

“...unless prescribed otherwise in an Act, award or agreement, means employment of an employee for a probationary or trial period.

“probationary or trial period” means a period of employment, for the purpose of determining an employee's suitability for continuing employment, which –

- (a) unless prescribed otherwise in an Act, award or agreement, does not exceed 6 months from the date of commencement of employment; and*
- (b) is stipulated in writing at the time of engagement; and*
- (c) is relevant to the work to be performed; and*
- (d) is reasonable and appropriate in the context of acquiring the skills and experience necessary to satisfactorily perform the duties of the job;”*

[118] The period of time established for the probationary period for Mr Van Harselaar was six months. This is a standard period of time in the state service and seems to be unrelated to the particular position. It is reasonable to assume that the employer would expect an employee to be able to demonstrate that they are able to perform the job satisfactorily within that period of time. The employee was not given six months; he was dismissed after four months. That is not to say that a probationary employee can never be dismissed before the probationary period has ceased. However, a probationary employee would have a reasonable expectation that the period of employment would continue for at least six months. Therefore, unless there is a valid reason, that is, a reason connected with capacity, performance, conduct or the operational requirements of the employer, it would be unfair to dismiss the employee during the probationary period.

[119] The requirements of the Act at section 3(d) are such that the employer should set the probationary period as a period that is reasonable and appropriate for an employee to acquire the necessary skills and experience to perform the job. Therefore, since the probationary period in this case was six months, then it is my opinion that six months should be the period of time allowed for that to happen.

[120] It is the employer's position that Mr Van Harselaar's performance was so poor as to warrant the termination of his employment before the expiration of the probationary period and it is the view of the department that he would require at least 12 months to reach the required standards.

[121] Ms Sanders' evidence was that the position of Computer Systems Officer is not an entry level position and that therefore a new starter should already be competent. Mr Feike's evidence was that the position was one level above an entry level position. It was Mr Holloway's view that a new employee should have technical skills and knowledge at least at post Certificate IV level, although that is not a pre-requisite for the position. One of the difficulties in this case is that the applicant did *not* already have the technical skills and knowledge to perform the job, and had made that clear at interview.

[122] It is apparent that the interview process failed. The Commission was told that one of the questions asked by the interview panel was designed to elicit information about an applicant's knowledge of software applications, which Mr Van Harselaar answered in such a way as to persuade them that he either had that knowledge or had the potential to quickly acquire it. It was not suggested that the applicant had misled the interview panel. Clearly, the question did not do what it was designed to do and that is not fault of the applicant. He was employed in a position for which he did not have the technical skills even though it was not a trainee or entry level position. This placed him in a situation where he needed a lot of support to assist him to attain the required level of skills. Management and his colleagues expected that he would already have those skills. The fact that Mr Van Harselaar did not possess the required technical knowledge and experience seems not to have been communicated to the service centre manager, Ms Sanders, whose evidence was that no one had brought that to her attention when he began his employment. Nor does it seem to have been immediately made known to those whose job it was to assist him to become familiar with the job, his mentors, who expressed surprise at his lack of technical knowledge.

[123] The evidence shows that the support given him was inadequate in the circumstances. Mr Holloway's evidence was that the support provided by mentors to new starters was mainly to assist in becoming familiar with the department and its processes. I think it was unfair for Mr Van Harselaar to have been put in this situation without some additional support over and above that normally provided to new employees in the service centre.

[124] There appears to be no clearly defined length of time in which a probationer is expected to receive support before they “fly solo”. In fact, it seems that there are differing expectations in this regard. Mr Feike told the Commission that he expected all new employees to be “up to speed” within three weeks and within two weeks “for base level support”. However, he also said that Mr Van Harselaar’s probation review did not take place after four weeks, as required by the probation policy, because: “four weeks is an incredibly short period of time for anybody to get a handle on how we do work at DHHS.” He also said that they give people six months to perform at the level of a CSO1. Ms Sanders said that the expectation was that most people would get to the stage of being able to solve the clients’ problems in a reasonable time in “about a month.” Mr Holloway testified that the mentoring period could last anywhere between “a couple of weeks and a couple of months”. Mr Holloway agreed that he had told Mr Van Harselaar that nothing would be expected of him for about three months. It seems likely that Mr Van Harselaar would have taken this to be correct information, given that it was provided by his mentor, the person to whom he was to turn for advice.

[125] The *Probation Policy* of the Department says that:

“The purpose of a probationary period is to ascertain whether the work performance and conduct of a new employee meets the standards expected in the State Service.”

[126] Mr Van Harselaar’s evidence was that he was never told what the expected standards were, apart from being given a copy of the state service Code of Conduct some time into his employment. This was a source of some frustration to him, he was told that he was not meeting performance standards and expectations, but he was not told what the expected standards were, apart from reference to the statement of duties. The evidence did not disclose any document or training session which set out what the expected standards were. There were Key Performance Indicators (KPIs) based on, for example, the number of calls taken each day, but the evidence of management was that there are so many variables that it is difficult to judge an employee based on those. Those KPIs showed that Mr Van Harselaar was performing well insofar as the number of calls he was dealing with was concerned. Mr Van Harselaar’s evidence on several occasions was that he thought he was meeting standards and it was also the evidence of Mr Feike and Ms Sanders that Mr Van Harselaar thought that he was meeting expectations and was surprised and defensive when told he wasn’t.

[127] The *Probation Policy* also says:

“It is important that all new employees participate in an onboarding program and receive relevant training and feedback on their performance.”

[128] The applicant strongly contended that he was given no feedback from management until the meeting of 30 May 2008, which was eight weeks after he began. The evidence supports that view.

[129] Section A of the Probation Report says that it should be completed during the first four weeks of the probationary period. The evidence shows that this did not happen until after eight weeks. Exhibit A2 records: “An additional four weeks above the normal was given due to time lost while Andrew attended training (most of Andrew’s first week) as well as to give Andrew reasonable time to understand the range of procedures available within the IT Service Centre.” This was written and signed by Mr Feike on 24 June 2008.

[130] It is my view that any new employee, particularly a probationary employee, and particularly an employee who has already communicated a skills deficit, should be provided with early and regular feedback as to their performance. How else are they to know? Mr Van Harselaar's evidence was that he *"felt ambushed"* when, after two months of no feedback from management, the negative review meeting took place. It is the clearly articulated policy of the department that probationary employees *"will receive feedback on their performance"* and that they will receive *"early feedback"*. It was unfair that this did not happen.

[131] The Probation Policy says:

"A successful onboarding process including induction and orientation ensures that employees are given early feedback on their performance. This, combined with relevant training will enable them to more effectively perform the required duties."

[132] The preamble to the department's Probation Report document – Exhibit A2 says:

"...The probationary period also provides an opportunity for the new employee to adjust to a new work environment and to receive appropriate training."

[133] From the evidence, no effort was made to provide the applicant with any additional training once the skill and knowledge deficits had become obvious to management. There is no evidence that he received any training above that generally offered to new starters. Ms Sanders said that she would have given him time during working hours to work on the Nuggets program, if he had asked. But it was not offered and he did it in his own time. The probation policy and proper employment processes require that relevant training should be provided. That should be training that is relevant to the job *and to the new employee*. Not every employee has the same training needs and identification of skills deficits should be part of performance management processes. Where skills deficits are identified, especially during a probation period, the employee should be provided with appropriate training and be given the opportunity to address those deficits.

[134] When the probation review did take place, albeit it four weeks late, a strategy for dealing with the problems was put in place which involved regular meetings with Ms Sanders. The applicant did not assist himself, and, from the evidence, his responses were angry and defensive. He formed the view that *"they were out to get me"* and that he was being set up for dismissal. There can be little doubt that the relationship between the applicant and Mr Holloway, his first mentor, was volatile and that both employees were frustrated with the situation. The relationship between Mr Van Harselaar and Ms Sanders was also strained; her evidence was that she felt intimidated by him.

[135] Section B of the probation report is required to be completed no later than halfway through the probationary period. It is at this stage that any perceived problems are required to be addressed according to specific procedures. If there are problems with the employee's performance, then:

"...the Manager responsible for addressing these issues by developing a timeline/action plan to deal with the issues raised. Any remedial action must be documented in the Probation Report and the probationer must be given the opportunity to respond to the issues raised."

[136] The timeline/action plan developed was to include regular meetings with Ms Sanders. Unfortunately this did not go well because of the reliance by Ms Sanders on some incorrect statistical information that was used to demonstrate poor performance when, in fact, the statistics were in Mr Van Harselaar's favour. Ms Sanders felt intimidated by Mr Van Harselaar's response. Mr Van Harselaar was frustrated because, and again, the evidence supports his view, he felt that clear expectations as to what he was expected to attain were never articulated to him. There was no evidence before me to show that he had ever clearly been told what was expected of him.

[137] Mr Van Harselaar's written response dated 1 July 2008 was unfortunate and intemperate. In it, he says that he believes that he is being victimised; he suggests that Mr Maxwell's comments were influenced by his friendship with Mr Holloway; he accuses his mentors of making subjective comments against him without evidence; he implies that his poor reports are as a result of resentment by colleagues about his salary level; he alleges that Ms Sanders and Mr Feike have no interest in him succeeding; and he alleges that he was "*marked for termination.*" Whilst, in the circumstances, his frustration is understandable, his responses were inappropriate and, at the very least, unhelpful to his cause. Whilst there may have been tensions in the workplace, I think it extremely unlikely that management would have set him, or any other employee, up to fail. The evidence was that there is a competitive market for IT staff and that the service centre is "*chronically*" understaffed. However, it seems that Mr Van Harselaar was left to "sink or swim", and he sank.

[138] From the evidence I have formed the view that the "mentoring" program in place within the service centre was poorly resourced and supported, with little or no training provided for mentors and no structured program for new employees. In many ways, the mentors were placed in a difficult position in relation to Mr Van Harselaar, especially in view of his lack of experience and skills.

[139] In summary, Mr Van Harselaar, through no fault of his own, was appointed to a job for which he was not equipped. For the first two months he received no feedback from management. All witnesses agreed that he worked very hard and his performance was improving. His own view was that he was beginning to work to the expected level, even though he was not clearly told what that level was. There is no doubt that Mr Van Harselaar felt that he had been unfairly treated. When the issues were raised he vehemently, perhaps aggressively, pleaded his case and laid blame where it did not lie in that he attributed his problems to antipathy towards himself on the part of his colleagues and management. There may or may not have been some antipathy, but I have no doubt that his problems were due to his lack of fundamental underpinning knowledge at the time of his appointment. The employer's decision to terminate was because of perceived poor performance.

[140] Management failed to properly deal with Mr Van Harselaar's lack of skills in a job he should not have been appointed to in the first place. Once appointed, he should have been provided with much more in the way of training, support and feedback. I am of the opinion that Mr Van Harselaar, in view of the enormous effort he was making, should have been given the benefit of the doubt and should have served the full probation period, with proper support and training, before that conclusion was finally reached.

[141] I find that Mr Van Harselaar was treated unfairly and that in all of the circumstances the termination of his employment before the expiration of the probation period was unfair.

[142] It was argued most strongly by Mr Van Harselaar that the only remedy he was seeking was reinstatement or re-employment. However, I am reluctant to make such an order in view of his reactions when the problems were raised with him. The issues in relation to performance and skills deficits remain, and would need to be dealt with. In his letter to Mr Gentle, Mr Van Harselaar pleaded for understanding and acknowledged that he should have handled himself differently when issues were raised, saying that he was hurt, and had wanted to fight back. Nonetheless, I am of the view that the workplace relationships have been harmed and it would be difficult to re-establish the necessary trust. In the circumstances, I have decided that Mr Van Harselaar should be paid compensation in the amount of eight weeks' pay, which is equal to the amount of time that was remaining in his probation period at the time of dismissal.

ORDER

I hereby Order, pursuant to s.31(1) of the *Industrial Relations Act 1984*, in full and final settlement of the matter referred to in T13197 of 2008, that the Minister administering the State Service Act 2000 pay to Andrew Van Harselaar the sum of Seven Thousand Seven Hundred and Ninety Five Dollars and Fifty Five Cents by close of business on 16 April 2009.

P C Shelley
DEPUTY PRESIDENT

Appearances:

Ms C Serra and Ms K Tyson of The Community and Public Sector Union (State Public Services Federation Tasmania) Inc. representing Mr A Van Harselaar
Ms T Banman of the Department of Health and Human Services appearing for the Minister administering the State Service Act 2000 with Ms J Brazendale and Mr T Witt

Date and place of hearing:

2008
September 19, December 16
Hobart
2009
January 8