

[3] PoA concluded that Mr Angus' actions breached the company's Code of Ethics; partially breached the company's Sexual Harassment and Bullying in the Workplace Policy; and constituted serious misconduct under the provisions of the applicable Collective Agreement.

[4] During the disciplinary process Mr Angus accepted that whilst some statements in the letter could be viewed as racist he had intended for such comments to be "*flippant and light hearted and no offense was intended.*"

[5] Mr Angus has filed a personal grievance claim for unjustified dismissal and he has applied to the Authority for interim reinstatement whilst his dismissal grievance was determined.

[6] Mr Angus did not dispute sending the letter to Ms Bush and he accepted "*it was an unwise thing to do*". In his affidavit in support of interim reinstatement Mr Angus stated "*I thought it was funny, but appreciate it could be seen as racist, and that it was a most unwise action.*"

1 April 2011 changes to ERA

[7] On 1 April 2011 changes made by the Employment Relations Amendment Act 2010¹ to the Employment Relations Act 2000 ("the Act") came into effect. For the purposes of this matter, the following changes are relevant;

- a. The s.103A statutory justification test changed;
- b. Reinstatement is no longer the primary remedy, its status as a remedy is now no greater or lesser than other remedies;
- c. Reinstatement is no longer mandatory wherever practicable, it is now just one of a number of discretionary remedies that may be awarded provided it is "*practicable and reasonable to do so*"²;
- d. The Authority may now remove a matter to the Court on its own motion.³

¹ (2010 No 125)

² S.125 ERA

³ S.178(1) ERA

[8] The Authority has issued one determination on an interim reinstatement application which related to a dismissal which occurred subsequent to the 1 April 2011⁴ changes to the Act and one substantive determination on a matter which involved an application of the new s103A justification test.⁵ This determination is the first time the Authority has considered removal on its own motion.

Process adopted

[9] Upon receipt of Mr Angus's application the Authority emailed the parties with its preliminary view that removal of both matters to the Court may be appropriate under s178(2)(a) and/or (d) of the Act given the 1 April 2011 changes. The Authority indicated that it believed removal of both matters would enable the Court to provide guidance on;

- a. How the new s103A justification test should be applied;
- b. How the 'would versus could' distinction applied in practice;
- c. What, if any, significance the change to the status of reinstatement as a remedy should have on the Authority's consideration of interim reinstatement applications.

[10] The Authority set up an urgent telephone conference to discuss these matters. It also asked counsel to be ready to address the following issues during the telephone conference:

- a. Whether one or both parties intended to apply for removal;
- b. If so, whether that would be in relation to one or both matters;
- c. If neither party was going to apply for removal did they agree this was an appropriate matter for the Authority to consider removal on its own motion;
- d. If so, then did they consider one, both, or no matters should be removed.

[11] During the telephone conference Mr Mitchell indicated he would not be applying for removal but that if the Authority was minded to consider removal on its

⁴ *Manoharan v Waiariki Institute of Technology* [2011] NZERA Auckland 352

⁵ *Sigglekow v Waikato District Health Board* [2011] NZERA Auckland 385

own motion then he agreed it would be appropriate to remove the substantive matter only.

[12] Mr Mitchell did not consider it appropriate for the interim matter to be removed for two reasons. First, he said case law under the Employment Contracts Act 1991 provided considerable guidance on how interim reinstatement applications should be dealt with now that reinstatement was no longer the primary remedy, so there was no need for the Authority to seek the Court's guidance on that issue. Second, he was concerned about delay in having the interim reinstatement application heard if the interim application was removed. Mr Mitchell expressed his belief that the Authority was likely to be able to issue a determination on that application earlier than the Court would be able to.

[13] Mr Mitchell also asked that the interim reinstatement application be dealt with by the Authority in advance of removal issues to avoid delay to his client. I declined that request because my preliminary view was that if removal was going to occur, both matters should go to the Court so that it was not in any way constrained in its ability to deal with everything. I believed it would be undesirable for the Court to have to deal with only part of this matter.

[14] Inquiries made by the Authority with the Court staff have indicated that Mr Angus' interim reinstatement application could be dealt with by 30 September 2011, if not sooner. I am therefore satisfied that the application for interim reinstatement would not be unduly or significantly delayed if both matters were to be removed.

[15] Mr Mitchell then asked for the removal issue to be dealt with as soon as possible in order to reduce the delay in the applicant's interim reinstatement application being dealt with. I agreed to give the removal issues urgency.

[16] Mr McIlraith advised that PoA would not be applying for removal and he indicated his preliminary view that the Authority should deal with both matters itself, leaving the parties to challenge if they were unhappy with the outcome. Notwithstanding that preliminary view, Mr McIlraith asked for further time to properly consider and then respond to the Authority's queries in writing, and that was agreed.

[17] In the interim, the parties were directed to mediation to occur on 16 September 2011.

Parties' submissions

[18] Mr McIlraith confirmed in writing this morning that PoA did not oppose removal. He agreed the Authority now had the power under s.178(1) of the Act to remove on its own motion and he stated PoA would abide by the Authority's decision in relation to that issue.

[19] Mr McIlraith agreed that both matters involved consideration of the extent to which the 1 April 2011 amendments to the Act affected the;

- a. s.103A justification test; and
- b. s.125 criteria for reinstatement, should a personal grievance be established.

[20] Mr McIlraith submitted that the above issues applied to both matters currently before the Authority so he said it would not be appropriate to remove one matter or part of a matter only.

[21] Mr Mitchell also responded in writing today. He advised the applicant adopted the same position as PoA, namely he would not be applying for removal but did not oppose it, and would abide by the Authority's decision on removal.

[22] Both parties asked the Authority to deal with the removal issue on the papers.

Grounds for removal

[23] The Authority may only order removal if it is satisfied one of the grounds in s.178(2) of the Act have been met. I find that s.178(2)(a) and (d) are met.

[24] Section 178(2)(a) requires that "*an important question of law is likely to arise in the matter other than incidentally*". The interim reinstatement application and the

substantive dismissal grievance both involve important questions of law which arise other than incidentally.

[25] The Court has not yet considered or applied either the new s.103A justification test or the recent changes that have been made to the s.125 remedy of reinstatement. These new provisions apply to all employers and employees so the interpretation of them clearly involves important questions of law.

[26] Although removal only requires one s178(2) ground to be made out, I also find that removal would also have been appropriate under s178(2)(d) of the Act.

[27] Section 178(2)(d) requires the Authority to be of the opinion that in all the circumstances the Court should determine the matter. I consider it preferable for the Court to provide the Authority with guidance on the application of the new s103A and s.125 provisions in the Act at the earliest opportunity because a number of cases involving these sections are now coming before the Authority for determination.

[28] The wider public interest in obtaining certainty in relation to the recent changes to employment law legislation makes it undesirable for the Court to have to wait for a challenge to an Authority determination involving the new s103A and/or s.125 provisions in the Act. Public interest will be best served by ensuring the Court's views on these provisions is publically available as soon as possible.

[29] This case also involves a good fact situation to remove because it will require detailed consideration of the would/could distinction. That distinction has not yet been considered by the Authority in any depth, because the only substantive determination it has issued so far on the new s103A justification test (see *Sigglekow v WDHD*⁶) had a particular fact scenario which did not require that exercise to be undertaken.

[30] I am also mindful that by removing both matters, the Court will obtain the benefit of the parties being represented by experienced counsel, who are well placed to provide valuable assistance to the Court with its interpretation of the new provisions in the Act.

⁶ Ibid Xx

Order

[31] The Authority orders, on its own motion, the removal of Mr Angus' interim reinstatement application and his substantive dismissal grievance under AEA 5356149 to the Employment Court.

Costs

[32] Costs are reserved.

Rachel Larmer
Member of the Employment Relations Authority

