New Zealand Employment Relations Authority Decisions

Appleton v Waikato Institute of Technology AA371/10 (Auckland) [2010] NZERA 679 (24 August 2010)

Last Updated: 9 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 371/ 10 5303831

BETWEEN ELIZABETH APPLETON

Applicant

AND WAIKATO INSTITUTE OF

TECHNOLOGY Respondent

Member of Authority: Representatives:

K J Anderson

S Scott, Counsel for Applicant S Hood, Counsel for Respondent

Investigation:

On the papers

Submissions received:

20 July 2010 from Applicant
22 July 2010 from Respondent

Determination:

24 August 2010

DETERMINATION OF THE AUTHORITY

Application for Removal of a Matter to the Employment Court

[1] On 15th March 2010, the Authority held an investigation meeting pertaining to an employment relationship problem brought before it by Mrs Appleton. In summary, the problem that Ms Appleton sought a determination of was; that her employer, the Waikato Institute of Technology ("Wintec"), had failed to provide her with adequate details of certain complaints that had been made against her. Hence, Mrs Appleton alleged that she was not able to provide an informed response in a disciplinary setting. In summary, via a determination issued 11th May 2010 (AA 222/10), the Authority found that on the evidence available to it, it was not possible for Wintec to provide Mrs Appleton with the name of the Chinese students whom had made complaints pertaining to Mrs Appleton, in regard to her role as a tutor. The Authority accepted that Wintec could not provide the names of the students, as given the manner in which the complaints emanated; it did not know the identity of each student. The Authority also concluded that the totality of the information that had been provided to Mrs Appleton was adequate for her to provide at least an initial response for the consideration of Wintec, albeit it was problematic as to how much weight Wintec could place on the information received from the students, given the disparate manner in which the information was gathered. The Authority also made some observations about the Wintec procedures whereby students (including foreign students) can make a written complaint.

[2] On 28th May 2010, the applicant filed a *Statement of Claim* with the Employment Court (ARC 56/10) challenging the determination of the Authority and seeking a de novo hearing. The relief that Mrs Appleton is seeking from the Court is: *An order instructing the defendant* [Wintec] *to obtain the information that I requested.*

[3] In the intervening period between the investigation meeting of the Authority (15th March 2010) and the issuing of its determination (11th May 2010), unfortunately, Mrs Appleton was dismissed from her employment; on 16th April 2010. The Authority received a *Statement of Problem* on 27th April 2010 wherein Mrs Appleton alleged that she was unjustifiably dismissed and sought interim reinstatement. Following a conference call on 29th April 2010, the parties were directed to mediation which took place on 13th May 2010. The matter was set down for a substantive investigation meeting on 27th and 28th May 2010. However, due to Mrs Appleton being unavailable because of sickness, the investigation meeting was adjourned; awaiting the recovery of Mrs Appleton .

[4] On 9th June 2010, the Authority received an application to remove to the Court, the matter pertaining to Mrs Appleton's dismissal. A *Statement in Reply* from Wintec was received by the Authority on 23rd June 2010.

The grounds for the removal

[5] The power of the Authority to remove a matter to the Court emanates from s.178 of the Employment Relations Act 2000 ("the Act") whereby the Authority may order the removal of the matter or any part of it, to the Court, if:
(a) an important question of law is likely to arise in the matter other than incidentally; or

> (b) the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Court; or
> (c) the Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or
> (d) the Authority is of the opinion that in all the circumstances the Court should determine the matter.[1]

[6] The application for removal is made on the ground that: *the Court already has before it proceedings which are between the same parties and which involve the same or similar issues.[2]* The proceedings before the Court being the de novo challenge referred to above (ARC 56/10).

[7] In its *Statement in Reply,* Wintec opposes the removal on the grounds (paraphrased) that:

> (a) Mrs Appleton failed to file the removal application prior to the Authority commencing its investigation and scheduling a prompt investigation meeting.
> (b) The proceedings before the Court do not involve the same or similar or related issues as required by s.178(2)(c) of the Act. This is because the proceedings before the Court relate to the disclosure of information and the remedy sought from the Court is an order that Wintec *"obtain the information"* requested by Mrs Appleton, and that this information is no longer relevant given that Mrs Appleton has been dismissed for serious misconduct. And the proceedings in the Authority relate to an alleged personal grievance where remedies are sought pursuant to s.123 of the Act.
> (c) The *"real dispute"* [the dismissal] is currently before the Authority and should remain within its jurisdiction, particularly given that the Authority is familiar with the background facts.

[8] The further submissions for Wintec expand considerably on the reasons why the Authority should decline the application for removal. Firstly, Mr Hood sets out an analysis of the comparative factors relating to proceedings in the Court and those in the Authority, pertaining to whether the respective proceedings involve the same orsimilar or related issues as required by s.178(2)(c). The Authority is referred to *Ashfield v Xclamation Ltd. [3]* While some of the factors in that case have relevance to this matter i.e. it was argued for the applicant that the Court already had before it proceedings between the same parties involving the same or related issues, there were several other more complex issues involved such as estoppel, a counterclaim and indeed some doubt as to whether there were proceedings properly before the Court regarding some of those issues. There was also an issue about whether the Authority has jurisdiction over certain matters. In the event, Ms Monaghan declined to remove the matter to the Court mainly on grounds due to the dissimilarity between the issues involved. But in any event as will be revealed below, I have found that in Mrs Appleton's case, if I were to decide whether removal to the Court should occur only by the criteria set out by s.178(2)(c), given the lack of a tangible nexus between the respective proceedings, an order for removal would be unlikely.

[9] Mr Hood has also set out in some detail various matters that the Authority should take into account in regard to exercising its residual discretion. In particular, there is a reference to *Brookers Commentary to the Employment Relations Act 2000:*

Section 178(1) envisages that any application for removal should be made before the Authority commences its investigation, or certainly early in the process.

The Authority is also referred to *ADHB v X (No 2)* [2005] NZEmpC 62; [2005] ERNZ 551. Both of these references go to the

argument for Wintec that because the Authority has determined the disclosure matter, the investigation of the matter regarding the dismissal of Mrs Appleton, is so far advanced, that it would be a proper exercise of its discretion not to remove the matter to the Court. Apart from this argument being contrary to Mr Hood's earlier argument that the proceedings are not similar, I do not accept that the investigation into the matter of Mrs Appleton's investigation is so far advanced as to prevent removal. While an investigation meeting was set down, this was adjourned because of illness, hence the Authority has not investigated the evidence pertaining to the dismissal. Nonetheless, I am bound to say that that Mrs Appleton has left her run in regard to removal, late enough and it is only marginally allowed on this ground.

Analysis and Conclusions

[10] The discretion of the Authority to order the removal of a matter to the Court begins with an analysis of whether this matter involves firstly; *proceedings which are between the same parties* and *which involve the same or similar or related issues.* Clearly the proceedings involve the same parties. Then, an examination and comparison of the Authority's determination under challenge (AA 222/10), the *Statement of Claim* (28th May 2010), and the *Statement of Problem* with the attached affidavit from Mrs Appleton (27 April 2010), reveals that there is some mention of similar issues, albeit it could be said that the information provided relates more to background facts rather than the substance of Mrs Appleton's claims. I conclude that the nexus between the proceedings before the Court and the Authority is so tenuous that it would be a considerable stretch to satisfy the second of the criteria required by s.178(2)(c).

[11] However, while the parties have not made mention of it, given my experience with the facts of the matters before the Authority and the Court, it seems to me that s.178(2)(d) of the Act also has some relevance. This is because I am cognisant of the fact that a relatively ordinary matter, that began its life as an investigation into the general performance of Mrs Appleton, and that may have led to disciplinary action being visited upon Mrs Appleton in the form of; "a *first and final warning,"* has now, inexplicably, led to a situation whereby Mrs Appleton has been dismissed, apparently on the grounds of serious misconduct that are largely unrelated to the original performance concerns.
4 The letter from Wintec to Mrs Appleton dated 18th February 1010.

[12] So, even if the matter of the dismissal of Mrs Appleby was to be first determined by the Authority, there is a distinct possibility the parties will arrive at the Court's door sooner or later with substantial costs being incurred along the way, notwithstanding that there may be a less than satisfactory outcome for all concerned, particularly from a financial perspective. It seems to me that it will be a more effective use of the resources of both parties for this particular matter to be removed to the Court. Pursuant to s.178(2)(d), I am of the opinion that given all of the circumstances, particularly the appetite of the parties for litigation rather than resolution, it seems appropriate that the Court should determine all matters.

[13] I also take into account the residual discretion provided by s178(2) whereby:

The Authority may order the removal of the matter or any part of it to the Court ... (emphasis added)

It has been held by the Employment Court that this residual discretion should be exercised to determine whether there are any relevant factors against removal of a matter:

Further, the inquiry must not be on the desirability or undesirability of removing cases, generally, because Parliament has decided some should be removed. Rather, it should be on whether it may be undesirable to remove a particular case.[4]

I do not find that there are any substantive grounds that make it undesirable to remove this particular case. It seems to me that it will be a more effective use of the resources of both parties for this particular matter to be removed to the Court. [Having said that, I would suggest the parties should perhaps revisit their perceptions of the outcome they are wishing to achieve, vis a vis the cost of doing so.]

Determination

[14] Having weighed the respective merits for and against removal to the Court, I conclude that on balance, it is appropriate that this matter be removed to the Court. It is so ordered.

Costs: Given the nature of the proceedings related to the application for removal, it is appropriate that costs should lie where they fall. It is so ordered.

K J Anderson

Member of the Employment Relations Authority

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[1] Section 178(2) Employment Relations Act 2000
[2] Section 178(2)(c)
[3] AA 235C/03, Member Monaghan, 5 November 2003 (AEA 1208/02).
[4] Auckland District Health Board v X (No 2) [2005] NZEmpC 62; [2005] ERNZ 551 at 561.