

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Auckland District Health Board (Initiating party)

AND Mr X (Responding party)

REPRESENTATIVES Bernard Banks, Counsel for Initiating party
Penny Swarbrick, Counsel for Responding party

MEMBER OF AUTHORITY Dzintra King

INVESTIGATION MEETING 7 June 2005

DATE OF DETERMINATION 10 June 2005

DETERMINATION OF THE AUTHORITY

The respondent, The Auckland District Health Board (the ADHB), has applied to have the matter removed to the Employment Court pursuant to s.178 (1) Employment Relations Act 2000. The applicant opposes the application. The respondent seeks removal on the grounds that that “an important question of law is likely to arise other than incidentally”. The respondent maintains that s.178(2) (a) is applicable because the proceedings will necessarily involve the correct interpretation of the new justification test, s103A, which is central to the issue in the case and therefore arises other than incidentally. The respondent contends that this legal question will be decisive of the applicant’s claim. The applicant disputes this.

The applicant says that the circumstances of the case, which are known in reasonably full detail to the Authority, are not finely balanced and that, even applying the Oram test, the dismissal was unjustified; if that test has changed as a result of the amendment, the result would simply be that the applicant’s claim to have been unjustifiably dismissed would be even stronger. Ms Swarbrick submitted that this was not a case where, were Oram applied, the dismissal would be justified but application of a new test would render it unjustified. It was simply a matter of whether the decision to dismiss was one which a fair and reasonable employer could have reached in the circumstances. The interpretation of s.103A would be a matter which would arise incidentally to the issues to be determined and would not be decisive of the case.

Can the substantive matter be removed?

The issue is complicated in this case by the fact that I have already heard and determined the interim reinstatement application so, arguably, I have already started to investigate the matter. Section 178 (1) provides:

Where a matter comes before the Authority, any party may apply to the Authority to have the matter, or part of it, removed to the Court for the Court to hear and determine it without the Authority investigating the matter.

While I think there may well be merit in the submission that I cannot remove the matter (the matter being the overall issue of Mr X's alleged unjustified dismissal), I nonetheless will assess whether, were I able to remove the matter, the criteria for removal would be satisfied.

Question of Law

The parties agree, as I also do, that the interpretation of s.103A is potentially an important question of law which would affect litigants in personal grievance proceedings across the board.

The ADHB contended that the substantive reason for the dismissal was that the applicant's actions had irreparably destroyed the Board's necessary trust and confidence in him; and that a fair procedure had been followed. In his decision on the appeal from my interim reinstatement determination Travis J said that allegations of loss of trust and confidence in work ability were easily asserted but often difficult to prove. The determining of whether or not a person's actions have actually undermined trust and confidence will not in itself require the application of s.103A.

Another issue which will need to be fully considered and the evidence about it tested is that of disparity of treatment. This will not require the application of the amendment.

Section 178 (2) requires me to identify the question of law, then to assess the importance of that question and then to decide whether it is appropriate to exercise my discretion to transfer the proceedings: Hanlon v International Educational Foundation (NZ) Inc [1995] 1 ERNZ 1, applied recently in McAlister v Air NZ ARC 11/05, AC22/05, Judge Shaw.

Mr Banks submitted that in terms of interpreting the justification test in s.103A one of the relevant questions would be that there is only one possible reasonable outcome in any given state of facts. If so, then the next question would be whether it was for the judicial body in the first instance to determine what that singular outcome would be.

However, if the Authority were to find that there was not a range of possible options but simply that it that the dismissal was unjustified, on an Oram basis, then the need to consider s.103A would not arise. It may be that this is not a case where the employer had a choice of options.

As I have indicated, the question of law that might arise is that of the interpretation of the justification test in s.103A. Should that question arise it would be important and would be decisive of the case. Is this question of law likely to arise? It is certainly possible that it will arise. Something that is likely is something is probable or expected. Probability is more certain than possibility. I do not think I will be in a position to assess whether the interpretation of s.103A is "likely" until I have heard evidence and looked at making an assessment based on the facts.

Assuming I am wrong and there is a likelihood that the justifiability test would arise and that s.178 (2) (a) applies I need to consider whether this would be an appropriate case for me to use my discretion to transfer the proceedings.

Discretion

In Hanlon (supra) Goddard CJ said:

...there must be many situations in which, notwithstanding that one of the criteria in s.94(2) is made out, no useful purpose would be served by ordering the removal of the proceedings to the Court at first instance. Indeed, sometimes adverse consequences could

flow, including that of additional expense..., to which could be added the deprivation of one of the rights of appeal presently available

In NZ Amalgamated Engineering, Printing & Manufacturing Union Inc v Carter Holt Harvey Ltd [2002] 1 ERNZ 74 the Employment Court identified a number of discretionary factors which weighed against removal even though at least one of the statutory tests was met.

It is clear that, even if the statutory tests are met, discretion needs to be exercised.

1. Objects of the Act

The Act requires the building of productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment and of the employment relationship by, inter alia, promoting mediation as the primary problem solving mechanism and reducing the need for judicial intervention.

The Authority is an informal, fact-finding body with powers to obtain evidence and to set its own proceedings. There is still an ongoing employment relationship and the procedures used in the Authority and the mode of questioning may well be better suited to the maintenance of that relationship. It is possible to have discussion between the parties, witnesses, counsel and the Authority in a manner that is not possible in the Court. That sort of exchange can be beneficial to the parties in some instances and very often helpful to the Authority in assessing people's reactions and therefore the veracity of their evidence. It can also lead, sometimes with prompting from the Authority, to a decision to consider further mediation.

The objects of the Act would be best satisfied by having the matter heard in the Authority at first instance.

I accept the applicant's submission that he should not be deprived of the right to an assessment by the Authority which is a problem solving body whose procedures will enable ongoing reassessments of the parties' positions, with the opportunity for further mediation

I also accept the submission that s.143(fa) as inserted by the Employment Relations Amendment Act (No 2) 2004 further reinforces the legislative intent that the Authority should deal with matters before it in their entirety before the higher court exercises its jurisdiction.

2. Expeditiousness

Although the applicant has interim reinstatement it is best for all concerned that the matter is dealt with expeditiously and that the anxiety created by being in a state of limbo is resolved as soon as possible. I was informed that enquiries had been made and that the Employment Court would not be able to hear the substantive matter, if it were removed until, possibly, at the earliest, September. I can hear the substantive matter this month and have time available in both July and August.

If the matter is to be heard in the Authority it would be a two day hearing.. It is clear that it would be possible to have the matter heard and determined before the Court could set aside what would be a longer period, possibly four or five days, to hear the matter. Costs in the Authority should also be less for both parties.

In David v AE Tilley Ltd [2001] ERNZ 93 Goddard CJ said at p.101 "In view of the fact that it is possible to have the hearing promptly, I am satisfied that this is a proper case for removal

notwithstanding the Authority's views to the contrary." In this case, the fact that I can hear and determine the matter before the Employment Court is a factor that goes to not removing the matter.

3. Adversarial Process versus Investigative Process

Mr Banks submitted that this was a case that would benefit from formal cross examination in a Court setting because issues of credibility would arise. There are advantages and disadvantages in different respects to both adversarial and investigative or inquisitorial systems. Having worked as an adjudicator in both the adversarial Employment Tribunal environment and now in the Authority I see little basis for the submission that an adversarial process is per se better at reaching the truth. The Authority deals with credibility issues on numerous occasions and I am not aware of any evidence that the asking of questions by the investigator is less successful at eliciting the truth than the asking of questions by counsel. In any event, as I noted during the Investigation Meeting, it is my usual practice to give representatives the opportunity to ask additional questions, and I can see no reason why I would depart from that practice in this case. Mr Banks told me this was not a factor to which much weight was attached by the respondent .

The fact that the Authority is "informal" does not mean that the process is not structured and orderly or that relevant questions are not posed and pursued with diligence. Furthermore, the Authority can obtain evidence it thinks it needs and is not dependant on the parties' assessment of the case.

4. Likelihood of Appeal

I have taken account of the fact that the respondent says there is a strong likelihood that this matter will be appealed. I certainly accept that at some point the new justification test will go to the Court. I do not think it can be said that this is the case that will be the test case. Decisions to appeal are based on a number of factors, not simply points of law. By that I mean that the desire to be vindicated, costs, emotional as well as financial, need to be taken into account.

5. Loss of a level of appeal

The removal will mean the loss of a level of appeal. Even if the Authority's decision were to be appealed it may well be that the hearing of the matter by the Authority at first instance would have enabled the parties to crystallise the issues and narrow them and issues that are now seen as contentious may subsequently be agreed. That would also result in a lesser time needing to be spent in the Employment Court should the matter be appealed.

6. Referral of question of law.

This was raised by the applicant and it seems to me to be a valid and necessary consideration. There was considerable discussion about the possibility of a referral and how it might be phrased. The fact that a referral is possible is a factor going against the removal.

7. Disputed facts

There are a number of disputed facts which would be best dealt with in the Authority which has the ability to seek whatever evidence it thinks necessary to enable it to make a determination.

Decision

I decline the application to remove the matter to the Employment Court.

Costs

Costs were reserved. At this stage I think it might be best to leave the determination of costs until the substantive matter has been heard and determined. If the parties think otherwise I am happy to hear from them on this issue.

Dzintra King
Member of Employment Relations Authority