IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 458
5400885

	BETWEEN	TANIA CHRISTENSEN Applicant
	AND	THE MONTESSORI FOUNDATION Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Scott McKenna, Counsel for Applicant Vinay Deobhakta, Advocate for Respondent
Submissions received:	27 September 2013 from Applicant 30 September 2013 from Respondent
Determination:	3 October 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Tania Christensen, claims that she was unjustifiably dismissed and unjustifiably disadvantaged by the Respondent, the Montessori Foundation (MF).

[2] The Authority issued a preliminary determination, [2013] NZERA Auckland 366, in which it found that Ms Christensen had raised her personal grievances within the statutory 90 day time period pursuant to s 114 of the Employment Relations Act 2000 (the Act). That determination is the subject of an appeal by the Respondent to the Employment Court.

[3] The Respondent now applies for what it terms an adjournment of the substantive matter which is set down for an Investigation Meeting on 10 and 11 October 2013. I find that although the application has been termed an adjournment, it is in fact an application for a stay of proceeding pursuant to s 180 of the Act and I shall address it as such.

[4] The Respondent is also seeking a transfer of the entire matter to the Employment Court on the basis that an appeal of the preliminary matter is before the Employment Court and it would be convenient to have the whole matter heard by the Employment Court.

[5] The Respondent further seeks that I recuse myself from hearing the substantive matter on the basis that:

- I made findings of credibility against two of the primary witnesses for the Respondent thereby indicating future bias;

- I allowed Mr Alex Hope, who had previously acted in the capacity of counsel to the Applicant, to provide evidence at the preliminary Investigation Meeting;

- I required witnesses to be present to provide their evidence in person at the Investigation Meeting;

- I had indicated steps to be followed to progress the substantive matter should the application for a stay not be granted;

Application for a stay

[6] The grounds on which the Respondent is seeking a stay are:

- That convening an investigation meeting before the appeal on the preliminary issue is heard would either render nugatory the appeal or result in a wasted Authority hearing which would not be in the interests of justice.

- If a stay is refused the substantive decision could be appealed resulting in delay until the application is heard, resulting in further expense to both parties.

Opposition to the stay

[7] The Applicant opposes any adjournment of the substantive matter on the basis that:

- the Applicant will be adversely affected by further delay should the stay application be granted and from resolving what should have been a relatively straightforward personal grievance claim which was filed with the Authority on 8 February 2013, some eight months ago;

- the prospects of the appeal on the preliminary matter being granted are marginal at best, and the application for a stay should be viewed in light of the conduct of the Respondent from the outset of the matter, which has been designed to prevent or frustrate the Applicant from pursuing her personal grievance claim. As such the appeal of the preliminary matter is a further attempt to delay and frustrate the personal grievance claim process.

[8] The principles of stay application are set out by Judge Couch in *Superior Motor Cycles Ltd v Patterson*[1] in which he restated the observations he had made earlier in *North Dunedin Holdings Ltd v Harris*[2]*:*

> *[5] The starting point must be s 180 of the Act [the Employment Relations Act 2000]:*
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> ***180 Elections not to operate as stay***
>
> ***The making of an election under section 179 does not operate as a stay of proceedings on the determination of the Authority unless the Court, or the Authority, so orders.***
>
> *[6] It is clear from this provision that the orders of the Authority remain in full effect unless and until the Court sets them aside. The defendants are entitled to enforce those orders unless a stay of proceedings is granted ….*
>
> *[7] The discretion conferred by s 180 is not qualifies by the statute but must be exercised judicially and according to principle. I note two key principles. There must be evidence before the Court justifying the exercise of the discretion. The overriding consideration in the exercise of the discretion must be the interests of justice.*

[9] In *Assured Financial Peace Ltd v Pais*[3] the Chief Judge set out seven considerations which may apply, to a greater or lesser extent, in exercising discretion in relation to a stay application as being:[4]

- *If no stay is granted, whether the applicant's right of appeal will be rendered ineffectual;*
- *Whether the appeal is brought and prosecuted for good reasons, in good faith;*

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[1] [2012] NZEmpC 196 at [6]
[2] [2011] NZEmpC 118
[3] [2010] NZEmpC 50
[4] Ibid at para [5]

- *Whether the successful party at first instance will be affected injuriously by a stay;*
- *The effect on third parties;*
- *The novelty and importance of the question involved in the case;*
- *The public interest in the proceedings; and*
- *The overall balance of convenience.*

[10] Having considered the submissions of the parties, I observe that the Respondent's right of appeal on the preliminary matter will not be rendered ineffectual in the event that a stay is not granted because it will proceed regardless of whether or not a stay is granted.

[11] This matter has been the subject of some delay to date, and the application for a stay, although mooted at the case management conference on 2 September 2013, was only received by the Authority on 27 September 2013, nearly 4 weeks later. Moreover, this is just 5 working days prior to the date when the Respondent's witness statements for the substantive matter are to be filed and served, and less than 2 weeks before the first day of the Investigation Meeting on the substantive matter. On this basis, I am not persuaded that that the stay application is being brought and prosecuted for good reasons, in good faith.

[12] I do not find that the Respondent would be affected injuriously if a stay is not granted on the basis even if the appeal on the preliminary matter is successful, which means it would overturn a decision made in favour of the Applicant on the substantial matter, it would be a simple procedural step to have that decision set aside. Moreover in the event that the Respondent is successful in the substantive matter as well as the preliminary appeal, a costs award would address both matters.

[13] I do not find that the issues presented which are in relation to a relatively straightforward personal grievance claim present either novelty or importance, or that there is an argument in support of public interest in the proceedings.

[14] Given that the Applicant's briefs of evidence have already been filed and served, and the expectation on the parties is for the substantive matter to proceed shortly, I find that the balance of convenience favours the Applicant against granting a stay.

[15] I decline to grant the Respondent's application for a stay of proceedings.

Removal to the Employment Court

[16] The Respondent applies for removal to the Employment Court on the basis that, as there is an appeal on a preliminary determination before the Employment Court, it would be convenient to have the whole matter heard by the Employment Court.

[17] The Applicant does not support the application, but neither does she oppose a transfer to the Employment Court, on the basis that she wishes to avoid further delay in having the matter heard.

[18] The Authority may, pursuant to s 178 of the Employment Relations Act 2000 (the Act), order removal of a matter to the Employment Court without the Authority hearing it provided that the Authority is satisfied that one of the grounds of s 178(2) of the Act have been met. The grounds as set in s 178(2) of the Act are

> *a. an important question of law is likely to arise in the matter other than incidentally;*
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> *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;*
>
> *c. the court already has before it proceedings which are between the same parties and which involve the same or similar or related matters; or*
>
> *d. the Authority is of the opinion that in all the circumstances the court should determine the matter.*

[19] In the event that the party or parties applying for removal satisfy the tests set out in s.178 (2) of the Act, the Authority has residual authority to determine whether or not the matter should be removed to the Court. In so doing the Authority must determine whether or not there are any relevant factors against removal of proceedings to the Court[5].

[20] In *Auckland DHB v X (No2)*[6] the Court provided guidance on how the Authority's residual discretion in s 178(2) must be exercised:[7]

> *[T]he 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.*

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[5] *NZAEPMU Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 74 at p [83]
[6] [2005] ERNZ 551
[7] Ibid at para 29

[21] In terms of s 178(2)(a) of the Act, I find that this case involves no important question of law, it is a straightforward personal grievance claim and as such, conforms to what may be termed 'usual business' in the Authority.

[22] In terms of s 178 (2)(b) of the Act, I find that there are no matters of urgency, or in the nature of the case, that means that it would not be in the public interest to have it removed immediately to the Employment Court.

[23] Having considered s 178 (2)(c)and 9(d), in this instance I consider that there has been delay in this matter proceeding to a substantive hearing and that it would be undesirable to remove it given the close proximity to a substantive hearing, the readiness of the Applicant to proceed, and as already set out above, the fact that in the event of the preliminary appeal being successful, the substantive matter can be set aside without the necessity of a hearing in the Employment Court.

[24] In all these circumstances, I find that there are relevant factors against removal to the Court, such that I am not satisfied that it is appropriate for the Authority to exercise its discretion to remove in accordance with s. 178(2)(d) of the Act.

[25] I determine that the Application for Removal should not be granted, but that the matter should be proceed as scheduled to the Investigation Meeting in relation to the substantive matters to be held on 10 and 11 October 2013.

Recusal

[26] The highest recent authority on the question of disqualification is that of the Supreme Court decision in *Saxmere Company Ltd v Wool Board Disestablishment Co Ltd*[8]*:*

> *Whether a fair-minded lay observer might reasonably apprehend that the judicial officer might not bring an impartial and unprejudiced mind to the resolution of the question the juridical offer is required to decide.*

[27] However that test must be further qualified in that apprehended bias is to be assessed by how it would appear to an ordinary sensible member of the public with appropriate knowledge of all the relevant circumstances, including the general workings of the legal system, rather than of a particular party to the proceedings who may not be disinterested or objective.

[8] [2010] 1 NZLR 76 (SC)

[28] There must moreover be an apprehension of real, not remote, possibility of bias. The test therefore requires further the identification of what it is said might lead a judicial officer to decide a case other than on its legal and factual merits, and second, an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The apprehension of bias must therefore be founded on proper principles having a real and not fanciful connection to the possibility of bias.[9]

[29] I consider that a fair-minded lay observer reasonably informed of the relevant circumstances would not apprehend bias in the findings as set out in my preliminary determination, which is based on, and was investigated in accordance with, well-established legal principles.

[30] It is frequently the case in the conduct of an Investigation Meeting that the Authority Member has to make a decision on credibility where there is a conflict in the evidence as presented. A finding of credibility on one part of a case, in this case a narrow preliminary issue, does not indicate an effective bias towards one party or another.

[31] Although a lawyer must not act in a proceeding if required to give evidence of a contentious nature in the matter in accordance with s 13 of the Lawyers and Conveyances Act (Lawyers Conduct and Client Care) Rules 2008, at the time of the first Investigation Meeting, Mr Hope had ceased to act as the Applicant's legal counsel in the matter some time prior to the Investigation Meeting on the preliminary issue and was thus not barred from giving evidence to the Authority.

[32] The initial number of witnesses for the Respondent had been reduced in agreement with counsel for the Respondent,- and I note that the requirement regarding having witnesses provide evidence in person at an investigation meeting accord with the investigative nature of the Authority's role and the right of the parties to cross-examination.

[33] For the above reasons, I see no basis in principle arising from any of the grounds presented by the Respondent for recusing myself, or from continuing with and completing, the investigation in this case.

[34] I also decline to exercise any discretion I might have to step aside from this case of my own volition.

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[9] Cf: Justice Toogood in *Siemer v Attorney-General* [2013] NZHC 1111

Costs

[35] Costs are reserved until this matter has been concluded with a final determination of the Authority.

[36] For the sake of clarity the Authority confirms that the Investigation Meeting scheduled to take place on 10 and 11 October 2013 will proceed.

Eleanor Robinson
Member of the Employment Relations Authority