

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 158/10
5050649

BETWEEN

MIRIAM CLARK
Applicant

AND

NELSON MARLBOROUGH
INSTITUTE OF
TECHNOLOGY
Respondent

Member of Authority: M B Loftus

Representatives: Claire Nickalls, Counsel for Applicant
Maree Kirk, Counsel for Respondent

Investigation Meeting: On the papers

Determination: 6 August 2010

DETERMINATION OF THE AUTHORITY

The issue

[1] This is an interlocutory matter concerning the issue of where Ms Clark's grievance should be heard and decided - the Authority or the Employment Court.

Background

[2] In September 2006 the applicant, Ms Miriam Clark, filed a Statement of Problem in the Authority. Her grievance related to various concerns over her remuneration and, in particular, the respondent's refusal to grant an increase. She claims that the issues crystallised at a meeting on 26 May 2005 and that she raised the grievance by letter dated 22 July 2005.

[3] The respondent, the Nelson Marlborough Institute of Technology (NMIT) replied by denying that the letter of 22 July 2005 constituted the raising of a grievance and therefore asserting that the grievance has not been raised within the 90 day period prescribed by s.114 of the Employment Relations Act 2000.

[4] The issue of whether or not the grievance had been validly raised become the subject of a separate preliminary hearing.

[5] In a determination issued on 12 November 2007 [12/11/07, P Montgomery (member), CA135/07] the Authority concluded that:

[15] ... Ms Clark raised an employment relationship problem relating to her grading and remuneration with the respondent but elected, at that time, not to raise a formal personal grievance.

[16] The first definitive indication that a personal grievance was being formally raised with the employer came in the solicitor's letter of 7 June 2006. This is clearly well outside the required 90 day period.

[6] Ms Clark took issue with that conclusion and challenged the determination in the Employment Court. Her challenge proved successful [19/8/08, Couch J, CC12/08] with the Court concluding that:

By sending her letter dated 22 July 2005 to the defendant, the plaintiff raised a personal grievance for the purposes of s114 of the Employment Relations Act 2000. [paragraph 38].

[7] The Court, in its decision, observed that the 90 day issue may be irrelevant in respect to some of the issues being argued as:

This matter proceeded on the assumption that the causes of action relied on by the plaintiff were all personal grievances. By deciding the issue on that basis, it should not be inferred that I have decided that this was so. The attention of the parties is drawn to subsection (3) of s103. This effectively excludes from the definition of "personal grievance" claims arising out of the interpretation, application or operation of an employment agreement. While some of the complaints made by the plaintiff in her letter of 22 July 2005 clearly do fall within the scope of s103 as a whole, others may be excluded by subsection (3)... [paragraph 41].

[8] The Court then went on to draw the parties attention to a decision of the full bench, *Abernethy v Dynea New Zealand (No 1)* [2007] ERNZ 271 before stating:

It is not clear to me from the material I have whether that is so in this case [ie: whether Abernethy v Dynea applies]. It is therefore a matter the plaintiff will need to consider before proceeding further.

[9] *Abernethy v Dynea* deals with the issue of what is before the Employment Court when there is a challenge to a determination of the Authority that had disposed of the litigation on a preliminary point.

[10] Mr Abernethy claimed that he had been both unjustifiably disadvantaged and unjustifiably dismissed by Dynea. Dynea responded by arguing, as a preliminary point, that Mr Abernethy was precluded from pursuing his claims by virtue of having previously entered into an agreement which had the effect of resolving the grievance. The Authority considered that argument as a preliminary matter and found in Dynea's favour. Mr Abernethy successfully challenged that "narrow" finding, which gave rise to further litigation over where the substantive grievance should then be heard.

[11] In *Abernethy v Dynea*, The Court stated that:

The issue for the full Court is whether, on his challenge to the determination of the Employment Relations Authority that his personal grievance had been settled, the plaintiff is also entitled to have the Court determine his application for interim reinstatement and the substantive questions of justification or disadvantage and/or dismissal and remedies for these (para 9).

[12] The Court held, amidst other findings, that:

(4) The Authority's finding that an accord and satisfaction barred the grievant from proceeding with his personal grievance, had effectively determined the proceedings in that forum. No part of the employment relationship problem remained before the Authority. (para 34) ...

(7) Where a party elects to challenge a preliminary determination of the Authority which has had the effect of resolving the employment relationship problem before it, the entire employment relationship problem is then before the Court for resolution. If the employment

relationship problem survives a challenge to a preliminary point, then it is for the Court to resolve it. (paras 59,60)

(8) The situation is different where, for example, the Authority had determined a preliminary point in favour of a grievant and stated that it will continue to investigate the substance of the employment relationship problem. Where an employer unsuccessfully challenges such a determination, the problem will still be before the Authority for resolution. (para 62)

(9) If the Court decides there was no accord and satisfaction, the plaintiff's application for interim reinstatement and any other matters arising out of the employment relationship problem were to be heard in the Employment Court as part of the challenge. (para 66).

[13] By letter dated 20 May 2010, Ms Nickalls advised the Authority that the parties remained unable to resolve either the substantive dispute or the matter of costs incurred in the original Authority investigation. The letter requested a telephone conference with a view to timetabling exchange of evidence and the setting of an investigation meeting.

[14] The parties were contacted and asked to participate in a telephone conference to discuss whether or not *Abernethy v Dynea* precluded the Authority from hearing the substantive matter.

[15] Suffice to say opinions differed. The Applicant was of the view that the matter remained the Authority's while the Respondent contended *Abernethy v Dynea* applied and that it should be removed to the Court.

[16] The parties were then asked, and agreed, to make written submissions on the issue. Unfortunately this did not occur with Ms Nickalls advising that notwithstanding the differing views, her instructions were *not to argue the point further*. Whilst not stated, comments made during the telephone conference would suggest this decision is cost related.

[17] Upon receipt of this advice the respondent notified that it would advise likewise and abide by any decision of the Authority.

Determination

[18] Were this clearly a personal grievance, the decision would be easy. The original 90 day determination precluded the applicant from pursuing the matter in the Authority. *Abernethy v Dynea* applies perfectly. The matter was determined as far as the Authority was concerned and the subsequent reversal of that determination removes the whole proceeding to the Court [see *Abernethy v Dynea* paragraphs 7, 59 and 60 cited in 12 above].

[19] This matter is not, however, that simple. There is the issue of whether or not this is a personal grievance [see 7 above]. If it is, *Abernethy v Dynea* applies and the matter is removed. If not, then as pointed out by the Court, there is no 90 day limitation. The matter could have proceeded in the Authority as a dispute and the 90 day argument was irrelevant. It therefore follows that the 90 day argument could not be used to dispose of the matter and it remains the Authority's.

[20] As the Court observed at paragraph 41 of its decision, some of the complaints made by the plaintiff clearly fall within the scope of s103 while others concern the interpretation and application of her employment agreement. In other words there are elements of the claim that can be considered a personal grievance (s103) and elements that are in the nature of a dispute (s129). This means there are elements that must be removed to the Court in accordance with *Abernethy v Dynea*, while others remain within the jurisdiction of the Authority.

[21] It would be a nonsense to proceed on the basis outlined in 20 above. There is no sense in proceeding with a matter knowing that it can not be disposed of in its entirety, which would be the case if it were to proceed in the Authority, when the Court can give it complete consideration. If nothing else, two hearings, when one would suffice, would impose unreasonable cost on the parties. Given that and the fact that the applicant has continued to approach the matter as if it were a personal grievance, I believe it appropriate that the Court hear and determine the matter.

Conclusion

[22] For the reasons given, it is my conclusion that this matter should be determined by the Employment Court and not the Authority.

Costs

[23] The question of costs was also raised in Ms Nickalls letter. I consider it inappropriate to determine them. It was the respondent who was successful in the Authority and who applied for costs. That success was subsequently reversed and I doubt the propriety of considering the award of costs award to a party that was, ultimately, unsuccessful in respect to the matter for which they are seeking costs.

[24] I consider it prudent to leave the issue to the Court to consider. It will be in a far better position to give the matter proper consideration informed by the final level of success.

Mike Loftus
Member of the Employment Relations Authority