

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

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CA 111/09

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BETWEEN HILLYERS OF LINCOLN
2006 LIMITED
Applicant

AND JULIE PATEMAN
Respondent

Member of Authority: James Crichton

Representatives: Grant Slevin, Counsel for Applicant
Jeff Goldstein, Counsel for Respondent

Submissions received: 10 June 2009 from Applicant
19 June 2009 from Respondent

Determination: 22 July 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Hillyers) applies for a stay of the Authority's investigation of the respondent's personal grievance claim until criminal charges relating to the same subject matter have been dealt with.

[2] The respondent (Ms Pateman) resists the application and seeks to have her personal grievance claim for unjustified dismissal brought on promptly irrespective of the timing of the hearing of criminal charges against her (if any).

[3] Ms Pateman filed a statement of problem in the Authority on 16 April 2009 in which she alleges that she was unjustifiably dismissed and unjustifiably disadvantaged by the applicant in the present proceedings (Hillyers).

[4] Hillyers responded with a statement in reply filed on 30 April 2009 in which it resisted Ms Pateman's allegations in their entirety.

[5] In a telephone conference I convened on 25 May 2009, the question of whether Hillyers would apply for a stay was raised. A timetable was established for the filing of any application in respect of a stay, any response to that application from Ms Pateman and then any substantive fixture for the investigation in the event the stay was not applied for or not granted. The present proceedings emanate from those directions made by the Authority on 25 May.

[6] Hillyers says that Ms Pateman faces criminal charges for the same conduct that resulted in the termination of her employment. The issue is, effectively, the ability of the Authority to investigate the employment relationship problem without prejudicing either party in respect of the employment problem or Ms Pateman in respect of her alleged criminal prosecution.

[7] Critical to the employment dispute between the parties is an issue of credibility. Hillyers says that Ms Pateman made a frank admission about her guilt in respect of the criminal allegations, that she agreed she could not continue working for Hillyers, that she cooperated with Hillyers' planning for a replacement person to be hired and that at the last minute changed her mind and alleged that she was being dismissed unjustifiably.

[8] Conversely, Ms Pateman says that she never made an admission of wrongdoing in respect of the criminal allegation, never said she would necessarily be charged, never made admissions to Police and was simply unjustifiably dismissed on the basis of a spurious allegation with no real substance.

[9] While referring to the need for the Authority to carefully avoid prejudice to Ms Pateman in any criminal proceedings that issue against her, the real thrust of Hillyers' application for a stay is its contention that it is prejudiced in the employment claim brought against it by Ms Pateman if the employment investigation by the Authority proceeds before the criminal matter has been dealt with.

[10] As a matter of fact, the proposal is that the substantive investigation meeting by the Authority take place on 24 and 25 August 2009, some six weeks before a depositions hearing in respect of the criminal proceedings is allegedly to be held. Because of the factual matrix (where it is alleged by Hillyers that Ms Pateman made full admissions of criminal wrongdoing to its governing director and then agreed to resign her employment), the Authority will of necessity, according to Hillyers, have to

investigate whether or not such admissions were made and those admissions, and discussion or debate about them, will be in the public arena. It is pointed out that Ms Pateman could maintain her right to silence in the Authority but even if she did that, the issue of whether she made admissions or not is still, according to Hillyers, relevant to its defence of her unjustified dismissal claim.

[11] What is more, Hillyers points out that it is conceivable that it would be disadvantaged by the outcome of any investigation by the Authority where, by virtue of the other issues allegedly facing Ms Pateman, there will be, of necessity, pressures on Ms Pateman to act appropriately to protect her wider interests which will make it difficult for the Authority to reach sustainable conclusions.

[12] For her part, Ms Pateman says simply that the Authority's obligation is simply to require proof of employment, proof of dismissal and then, in effect, the onus reverts to Hillyers to justify what it has done. To say that is, of course, no more and no less than to state the legal position, but the simplicity of that formulation belies the complexity of the evidence. Hillyers' defence to Ms Pateman's claim is significantly based on allegations that Ms Pateman admitted to the criminal offending and actively assisted Hillyers to recruit a replacement for her own position on the footing that she would relinquish that position shortly. Hillyers says that when Ms Pateman suddenly changed her mind and complained about being unjustifiably dismissed, it was then forced to undertake a formal disciplinary procedure but that, even in those circumstances, to some extent it must have relied on the admissions allegedly made by Ms Pateman to Hillyers' governing director.

[13] Ms Pateman also alleges that it would be unjust of the Authority to grant the stay on the footing that she has been without income since her dismissal, needs income obviously to live and would be unreasonably deprived of her right to vindication in the Authority and access to compensation if there was a deferral of matters until after the criminal proceeding has been disposed of.

[14] On the face of it, Ms Pateman's concern about the delay to be occasioned by the granting of a stay is well made. If the depositions hearing proceeds on 5 October as is alleged, and Ms Pateman pleads not guilty to the allegations, then a jury trial could be some considerable way off. If the jury trial were to proceed to conclusion by, say, the end of 2010, a delay until after that date for Ms Pateman's personal grievance claim to be brought on, does seem quite unrealistic.

[15] However, the real question is whether, if the Authority were to deal with the matter now, it could reach viable and sustainable conclusions which would not either prejudice Ms Pateman in her criminal proceeding or disadvantage Hillyers in its defence of the employment claim.

Determination

[16] I have reached the conclusion, on the balance of probabilities, that the only proper course of action for the Authority is to grant the stay application on the basis that I am not satisfied that the Authority would be able to successfully avoid prejudice either to Ms Pateman or to Hillyers, or both, and produce a sustainable determination of the employment relationship problem.

[17] In reaching that conclusion, I have had to balance Ms Pateman's right to have her employment relationship problem dealt with as promptly as the normal resources of the Authority would allow, with the need to satisfy myself that by proceeding, I am not putting at risk the Authority's ability to make a viable determination and, in the process, prejudice either Ms Pateman or Hillyers, or both.

[18] However, because I am troubled by the lengthy delay that an unlimited stay might occasion, I think the proper course is to direct that counsel revert to the Authority after the depositions hearing in order for the matter to be reviewed. I wish to be clear that I am not indicating an intention to lift the stay at that point; only a willingness to review this decision.

Costs

[19] Costs are reserved.

James Crichton
Member of the Employment Relations Authority