

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 76  
5453231

BETWEEN

JESSE KENMARE  
Applicant

A N D

FULTON HOGAN LIMITED  
Respondent

Member of Authority: Helen Doyle

Representatives: Anjela Sharma, Counsel for Applicant  
Blair Scotland, Counsel for Respondent

Submissions Received: 9 May 2014 orally and in writing

Date of Determination: 12 May 2014

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**DETERMINATION OF THE AUTHORITY ON APPLICATION  
FOR REMOVAL TO THE EMPLOYMENT COURT**

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- A The application for removal to the Employment Court is declined.**
- B Costs on the application for removal are reserved until after a substantive determination.**
- C Counsel are to advise the Authority as soon as possible if the investigation meeting is to proceed on 20 and 21 May 2014 so travel arrangements can be made.**

**Employment relationship problem**

[1] Jesse Kenmare was a construction labourer for Fulton Hogan Limited (Fulton Hogan) from 29 October 2007. Fulton Hogan dismissed Mr Kenmare effective from 11 March 2014 for serious misconduct following a random test for cannabis under the company drug and alcohol policy which was positive. The company rules provide that recording a positive result under the company alcohol and drug policy may be serious misconduct.

[2] Mr Kenmare says that his dismissal was unjustified and that there have been unjustified actions on the part of Fulton Hogan that have caused disadvantage.

[3] The Authority has already determined Mr Kenmare's application for interim reinstatement under s.127 of the Employment Relations Act 2000 (the Act). The Authority did not grant the application for interim reinstatement and that determination has been challenged to the Employment Court.

[4] There is an application before the Authority for determination to remove this matter to the Employment Court without prior investigation by the Authority. The application is made in reliance on the three grounds in s.178(2)(a)-(c) and further that the Authority should properly exercise its discretion under s.178 (2)(d) and remove the matter to the Employment Court. The grounds are as below:

- (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.*

[5] The application for removal to the Employment Court is opposed by the respondent which says that none of the grounds relied on are made out and that the Authority should not remove the matter.

[6] The parties agreed that the Authority could deal with the removal application on the basis of the application and the notice of opposition, oral submissions delivered on 9 May 2014 on a telephone conference with the Authority and written submissions provided after the telephone conference.

### **Issues**

[7] The Authority needs to determine whether one or more of the grounds in s.178 (2)(a) to (d) of the Act are made out. As Ms Sharma correctly submits there is no requirement for all of the grounds to be made out and if one ground only is established that may be sufficient for removal.

### **An important question of law is likely to arise in the matter other than incidentally.**

[8] In *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1 it was held that an important question of law is one that arose other than incidentally. It was held on page 7 of the judgment that the importance of a question of law is a relative matter. Its importance has to be measured in relation to the case in which it arises. *A question of law arising in a matter will be important if it is decisive of the case or some important aspect of it or strongly influential in bringing about a decision of it or a material part of it.*

[9] I accept Mr Scotland's submission that the main question before the Authority is whether Mr Kenmare was unjustifiably dismissed or disadvantaged applying the test in s. 103A of the Employment Relations Act 2000.

[10] The first question of law I find posed in the application for removal is in two parts. Firstly whether Fulton Hogan can rely on changes made to the collective agreement and the staff handbook when it is Mr Kenmare's position that the changes were made without consultation with Nelson Collective Union Incorporated (the Collective). Secondly whether in those circumstances the policy is invalid.

[11] On the face of the untested affidavit evidence before the Authority lodged in support and opposition to the interim application for reinstatement it is apparent that there is a dispute about the facts giving rise to the question now posed for the Authority. There will be evidence given on the matter and whilst an important matter

for determination I do not find that it gives rise to an important question of law other than incidentally.

[12] The second question of law is posed in the application for removal and elaborated on in oral submissions during the telephone conference on 9 May. That is whether a positive drug test alone, without reliance on impairment, is grounds for serious misconduct. Additionally whether then Fulton Hogan could justifiably dismiss an employee for having a positive test from a random drug testing process. There is another question, whether Fulton Hogan can justifiably dismiss an employee without observing the agreed process in a matter concerning the random name selection of individuals for drug testing.

[13] These are questions that form part of the consideration of substantive and procedural justification of the dismissal pursuant to the test in s. 103A of the Act and what a fair and reasonable employer could have done in all the circumstances at the time. The decision to dismiss and any reliance placed on the relevant policies and the collective agreement in these circumstances will be an important matter evidentially and in submissions. They are matters though that rely in the main on the facts and only incidentally on the law.

[14] The third question of law is about Mr Kenmare's unpaid leave and/or suspension during the disciplinary process and an interpretation issue concerning the provisions of the collective agreement and the appendix to the collective agreement.

[15] Ms Sharma clarified that the collective agreement provisions on random testing only applied to employees of Fulton Hogan in Nelson because she had earlier understood when making the application for removal that it may have wider implications to other Fulton Hogan employees throughout New Zealand. The interpretation issues will be relevant to 115 employees covered by the collective agreement in the Nelson region. Ms Sharma also referred to a further 65 employees on individual employment agreements although it is not clear how determination of the interpretation issue would impact on their terms and conditions.

[16] I accept that the interpretation of the collective agreement is an important issue but ultimately it is an interpretation issue and no question of law arises other than perhaps incidentally.

[17] I do not find that the first ground is made out that an important question of law is likely to arise in this matter. I have found such a question of law is more likely to be incidental.

**The case is of such a nature and of such urgency that public interest requires it be removed to the Employment Court.**

[18] The Authority has recognised the urgency of this matter as reinstatement has been sought by Mr Kenmare. It has already heard an application for interim reinstatement on 14 April 2014 and has available dates for a substantive investigation on 20 and 21 May 2014. The Authority can properly conclude on the information before it that the Employment Court is not in a position to give the matter an earlier date for a substantive hearing.

[19] Mr Scotland does not accept that the case is of such a nature and of such urgency that it should be removed to the Court.

[20] Ms Sharma submits that the invasive nature of random drug testing engenders strong public interest which has wide implications for employees beyond simply curiosity.

[21] I accept that drug testing at workplaces does engender some public interest and general curiosity. There have been cases before the Authority and Employment Court on these issues before so it is not the first time such matters have been before the employment institutions. I do not find this case will have wider implications beyond the specific provision of the policies, the collective agreement and specific facts to persuade me that public interest requires this case to be removed to the Employment Court.

[22] Ms Sharma submits there are issues of good faith bargaining. She submits that the significant number of individuals covered by the collective agreement means there is interest from the Collective and that the issues spill over to the wider public interest and welfare of other employees working for Fulton Hogan not covered by the collective agreement. Ms Sharma submits that the public is entitled to be afforded protection of their employment rights and that would be more appropriately directed by the Employment Court around construction and interpretation of the relevant documentation.

[23] I accept that the Collective has an interest in the interpretation issues that will arise in determining Mr Kenmare's personal grievance including whether the Fulton Hogan national drug standard policy is relevant in the circumstances where there is random drug testing. Ultimately I am not persuaded that there is wider public interest though in the issues of interpretation that requires the matter should be directed to the Employment Court in the first instance.

[24] An ESR scientist provided affidavit evidence in support of the opposition to the application for interim reinstatement in which he set out conclusions from the information he was provided about Mr Kenmare's drug tests. Ms Sharma submits that this adds to the public interest element and whether the grounds relied on could justifiably formulate ground for dismissal.

[25] There may be some public interest and curiosity in any expert evidence heard as a result of this matter about THC-COOH levels but the Authority and Employment Court often hears from experts including in these types of cases. This is not a persuasive reason to remove to the Employment Court.

[26] I do not find that the ground that this case is of such a nature and of such urgency that in the public interest it should be removed immediately to the Court is made out.

**The Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues.**

[27] Ms Sharma submits that because the determination of the application for interim reinstatement has been challenged to the Employment Court, the Court now has before it proceedings between the same parties which involve the same or similar or related issues.

[28] This was not a matter in the original application for removal because at the time that was lodged there was no such challenge. I am satisfied that Mr Scotland has had an opportunity to respond to this ground and has anticipated the possibility of reliance on the ground in his written submissions.

[29] Ms Sharma refers to overlapping time-tables between the Authority and the Employment Court particularly given the proposed dates for a substantive

investigation in the Authority. She submits that two processes running alongside each other creates some difficulty.

[30] The challenge to the interim application is between the same parties. There is a difference though between an application for interim reinstatement under s. 127 and a substantive investigation meeting held to determine a personal grievance. The focus in the application for interim reinstatement is on whether or not there should be an order for interim reinstatement until a substantive meeting or hearing. In the substantive investigation the focus is on the personal grievance or grievances as well as remedies. Whilst it cannot be said that there is no relation at all in the issues arising from the challenge in the Court to the interim application and the personal grievances in the Authority for substantive investigation the focus is quite different.

[31] Any difficulties with over-lap in this case seem to have arisen because the Authority was able to give the parties such a prompt investigation meeting date for the substantive matter. I do not find that a ground for removal to the Employment Court.

[32] I am not satisfied that a challenge to the determination of the Authority under s.127 of the Act between the same parties is a persuasive reason to remove the substantive matter to the Employment Court.

[33] This ground is not made out.

### **Should the Authority otherwise remove the matter?**

[34] Judge Couch in *Vice-Chancellor of Lincoln University v Stewart (No 2)* [2008] ERNZ 249 at [43] stated that the scheme of the Act is clear that personal grievances are to be dealt with by the Authority in the first instance in all but the very few cases in which one or more of the grounds in s.178 (2) are established.

[35] I have not found any of the grounds for removal in s.178 (2) of the Act established. This is the sort of case that Parliament intended the Authority to investigate and determine.

[36] Removing the personal grievance to the Employment Court to be dealt with at first instance will deprive the parties of a level of challenge.

[37] I am not otherwise minded to remove the matter to the Employment Court.

**Determination**

[38] The application for removal to the Employment Court is declined.

[39] Costs in respect of the application are reserved until after the substantive determination.

[40] The Authority would be grateful if Ms Sharma and Mr Scotland could confirm whether the investigation meeting is proceeding on 20 and 21 May in Nelson as soon as possible to enable the Authority to make travel arrangements.

Helen Doyle  
Member of the Employment Relations Authority