



New Zealand Employment Relations Authority Decisions

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Lorigan v Infinity Automotive Limited (Auckland) [2017] NZERA 239; [2017] NZERA Auckland 239 (16 August 2017)

Last Updated: 29 August 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2017] NZERA Auckland 239
5353422

BETWEEN PETER D'ARCY LORIGAN

Applicant

A N D INFINITY AUTOMOTIVE LIMITED

Respondent

Member of Authority: James Crichton

Representatives: Applicant in person

Rob Towner with Susannah Maxfield, Counsel for

Respondent Investigation Meeting: On the papers Date of Determination: 16 August 2017

FIFTH DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] By application filed in the Authority on 18 July 2017, the applicant (Mr Lorigan) applies to this Authority for the removal to the Employment Court of the outstanding proceedings between these parties, for the Court to decide those matters without the Authority first conducting an investigation into the employment relationship problems.

[2] Mr Lorigan's proceedings also seek to have the Authority's four determinations set aside. In fact, there are two challenges before the Employment Court at present in respect to part of the Authority's decision-making on this matter and the practical effect of any agreement by the Authority to remove the remaining matters to the Employment Court would be to allow the Court to dispose of the balance of the matters the Authority is still seized of.

[3] For the avoidance of doubt, I observe that Mr Lorigan initially proceeded on the mistaken understanding that by seeking to have me recuse myself from hearing the matters the Authority is still seized of, the practical effect would be that the Court would then automatically have the ability to decide those matters as well.

[4] When Mr Lorigan was disabused of that and told that the effect of my recusing myself (assuming I were minded to do that) would be that another Authority Member would simply pick up the files and investigate them, Mr Lorigan filed the present application for removal of the remaining matters to the Employment Court and it is on that footing that this determination proceeds.

[5] The basis of Mr Lorigan's application is that important questions of law arise other than incidentally: [s.178\(2\)\(a\)](#) of the [Employment Relations Act 2000](#) (the Act).

[6] For its part, the respondent (Infinity) consents to the application to remove the two proceedings to the Employment Court but disagrees on the ground. Infinity's view is that the two matters ought to be removed to the Court, not because important questions of law are involved (that claim by Mr Lorigan is resisted) but on the ground set out in [ss.178\(2\)\(c\)](#) and (d) of the Act,

that is, there are already two sets of proceedings between the same parties involving the same or similar issues before the Court and the Authority is of a mind in all the circumstances to refer the remaining matters to the Court as well.

History

[7] The history of this matter is a relevant consideration in my view in determining whether the Authority ought to continue to investigate these matters or whether the matters should be referred to the Court for decision.

[8] As will be evident from the intituling, this is the fifth determination of the

Authority. Mr Lorigan filed his statement of problem in the Authority on 21

September 2012 alleging unjustified dismissal, unjustified disadvantage and breaches of statutory and contractual agreements.

[9] The file was allocated to the late Member Monaghan who conducted a telephone conference with counsel on 29 January 2013. For whatever reason, the matter was then completely lost sight of and the file was not active again for fully two years when I discovered it in Member Monaghan's office after she had died.

[10] I offered to deal with the matter and I issued the first determination on 12 June

2015 in which I agreed to consolidate the two cross-claims into one action (Infinity having brought its own proceedings against Mr Lorigan in the meantime) but rejected Mr Lorigan's application for the removal of the whole matter to the Employment Court as I was not persuaded there was a proper basis in law in which I could agree to the removal then.

[11] Then, in the second determination, I dealt with a series of preliminary questions which had been identified by the parties. Those matters needed to be disposed of before the Authority could investigate further.

[12] Those matters included a claim there was an accord and satisfaction between Mr Lorigan and Infinity which precluded his making any further claim concerning his employment or in the alternative that there was a binding agreement to the same effect. I rejected both of those arguments.

[13] The second issue was that while there was an acknowledged raising of a personal grievance for dismissal by Mr Lorigan, the majority of Mr Lorigan's claims for disadvantage had not been raised within time and were therefore not able to be investigated by the Authority. I agreed with that submission and made a finding accordingly.

[14] Finally, in the second determination, I dealt with a claim that Mr Lorigan had never had an employment relationship with the second respondent, Sime Darby, and I agreed with that view, striking out the claim against Sime Darby such that that entity ceased to be involved in the proceedings from that date forward.

[15] Then at the beginning of calendar 2016, Mr Lorigan filed an application for removal of the whole matter to the Employment Court and a contemporaneous application for leave to raise a personal grievance out of time. A challenge to the part of the second determination which was adverse to Mr Lorigan was filed in the early part of 2016 as well. This concerned Mr Lorigan's contention that he had raised disadvantage grievances within time.

[16] My third determination, issued on 16 May 2016, declined to remove the whole matter to the Employment Court at least in part because of the failure to persuade me that there were any complex legal questions involved.

[17] In the fourth determination of the Authority, which issued on 5 October 2016, I declined Mr Lorigan's application for leave to raise a personal grievance out of time while noting that the substantive personal grievance for unjustified dismissal remains to be investigated.

Removal

[18] This is a case where the application to remove the matter to the Court is not contested although there is a difference between the parties as to the grounds on which the removal ought to be contemplated. The very absence of opposition to removal is, I am satisfied, a factor which I ought to consider in respect of the residual discretion that I have to remove matters to the Court in terms of [s.178\(2\)\(d\)](#) of the Act.

[19] Moreover, the history of this matter which I have just sketched above also seems to me to be a factor which ought to be considered. Amongst other things, it is self-evident from the history of the matter that Mr Lorigan has consistently sought to have this proceeding removed to the Employment Court although it has always been on the footing that important questions of law are involved and I have never accepted that that is in fact the position. Indeed, as I have argued consistently throughout the chain of determinations, I am satisfied that the principles involved in this matter are stock standard and do not constitute any particular legal or factual difficulty.

[20] That said, the present application for removal is no longer opposed by Infinity and it is on that basis, as I have noted

above, that the present application needs to be considered.

Determination

[21] I am satisfied that the proper course of action in the instant case is for the whole of the matter comprised within the employment relationship problem between these parties to be removed to the Court for hearing and disposition by the Court, without the necessity for the Authority to investigate the matter.

[22] In effect, the Court would then be seized of the challenge to the Authority decision not to grant leave to raise personal grievances for unjustified disadvantage out of time, the Authority having earlier decided that those personal grievances were not raised during the justiciable period, together with the as yet unconsidered claim of personal grievance for unjustified dismissal.

[23] I reach this conclusion because the Court has before it proceedings involving the same parties and traversing the same or similar issues and it would make little sense to the parties, nor make proper use of decision-making resources, to have part of the matter dealt with in this Authority and part of the matter dealt with by the Employment Court.

[24] I am influenced to reach the conclusion I do because the application to remove is not contested but as I have made clear, I am not persuaded now any more than I was persuaded in my earlier consideration of this matter in the initial determinations, that this matter involved complex issues of law.

[25] The referral to the Court is exclusively on the basis that the Court is already seized of some matters between these parties involving the same facts or similar facts and that it is expeditious for the Court to deal with the whole matter.

[26] There is one final issue that is relevant. Mr Lorigan has made a significant number of allegations of the most serious nature against some of the witnesses put up by Infinity to resist his claims. Mr Lorigan has alleged that certain witnesses for Infinity perjured themselves and/or that counsel for Infinity misbehaved or misled the Authority. These allegations are most serious, going to the heart of the administration of our judicial system.

[27] I have consistently sought to explain to Mr Lorigan where he should go with those allegations and tried to be clear with him that this Authority has no power to deal with allegations of perjury or indeed allegations of misbehaviour by counsel. For the sake of completeness, it is also the position that Mr Lorigan has been roundly critical of me, alleging I have misdirected myself as to the law, misunderstood the evidence and exhibited bias against him. In that general connection, Mr Lorigan has, on more than one occasion, sought to have me recuse myself from dealing with this matter.

[28] I am persuaded that the more robust environment of adversarial trial in the Employment Court, together with the existence of all the other powers available to a Judge for discovery and the like, will assist in getting this matter appropriately disposed of.

Costs

[29] Costs are reserved.

James Crichton

Chief of the Employment Relations Authority