

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 145
5353422

BETWEEN PETER D'ARCY LORIGAN
 Applicant

A N D INFINITY AUTOMOTIVE
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: David Fleming, Counsel for Applicant
 Rob Towner with Susannah Maxfield, Counsel for
 Respondent

Investigation Meeting: On the papers

Date of Determination: 16 May 2016

THIRD DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Lorigan) applies to the Authority for leave to remove a matter to the Employment Court and the respondent (Infinity) opposes that application.

History

[2] By determination dated 13 November 2015 and issued as [2015] NZERA Auckland 357, (my second determination in this matter), I determined that some of Mr Lorigan's purported personal grievance claims had not been raised within time and that in consequence Mr Lorigan was not entitled to pursue them further.

[3] The portions of that determination which made that finding have been challenged in the Employment Court by a statement of claim filed in that Court at Auckland on 11 December 2015.

[4] However, an application to the Authority for leave to raise a grievance out of time had not been made at that point and by virtue of s.114(3) of the Employment Relations Act 2000 (the Act), such an application may only be initiated in the Authority.

[5] Accordingly, if the Court were to find that Mr Lorigan has not raised his disadvantage grievance within the 90 day statutory period, in the absence of the concurrent application for leave to raise a personal grievance out of time, that argument could not be advanced. It is for that reason then that Mr Lorigan has caused an application for leave to raise a grievance out of time to be filed in this Authority on 18 February 2016.

[6] On 17 March 2016, Infinity caused a notice of opposition to the application for leave to be filed together with a notice of opposition to the application for removal.

[7] The notice of opposition regarding the application for removal proceeded on the footing that the Authority is in a better position to investigate the matter than the Court is to hear the question, in part because the Authority has commenced its investigation and is therefore familiar with the issues between the parties and in part because the Authority can attend to its investigation more expeditiously than the Court can schedule hearing time.

[8] In respect to the opposition to the application for leave to raise a grievance out of time, Infinity says that the delay was not occasioned by exceptional circumstances and that the Authority ought not to exercise its discretion to allow Mr Lorigan to proceed with his grievances because that would cause prejudice and hardship to Infinity given the passage of time and the absence of witnesses who are no longer in Infinity's employment.

[9] The Authority then had to deal with an application from Mr Lorigan that the notices of opposition I have just referred to were themselves filed out of time. It is true that they were filed 28 days after the initiating notices were filed, but I was satisfied that Infinity had filed its notices of opposition within 14 days of the applications being served on it.

[10] I conducted a telephone conference with counsel on 18 March 2016 at which I timetabled the receipt of submissions and agreed to issue my determination on or before 31 May 2016. Because the Court is also seized of the matter through the challenge filed by Mr Lorigan to material parts of my second determination in this matter, counsel for Mr Lorigan undertook to advise the Court of the progress of this matter in the Authority.

The issues

[11] The only issue for the Authority to determine in the current matter is whether Mr Lorigan should be granted the right to remove the matters presently in the Authority to the Employment Court without the Authority needing to investigate the matters further.

[12] It will be convenient if the Authority considers that question by reviewing the arguments advanced for each of the parties.

Mr Lorigan's arguments

[13] Mr Lorigan says first that there are live proceedings in the Employment Court (his challenge to parts of my second determination) but that those Court proceedings are on hold pending this current determination of Mr Lorigan's application for removal.

[14] Mr Lorigan says that if the matter is not removed to the Court, he will either have to progress both the Court challenge and the Authority's investigation concurrently or have the Court's hearing of his challenge further delayed.

[15] I interpose at this point my observation that I do not accept those are the only options available to Mr Lorigan and Infinity although I agree that those are two of the options available.

[16] Mr Lorigan continues that case law establishes that it is desirable that there not be an overlapping of jurisdictions as that would offend public policy: *New Zealand Harbour Workers Union v Lyttleton Port Company Ltd* [1995] 2 ERNZ 177.

[17] The consolidation of all these matters in the Court is urged on me as being in accordance with the statutory scheme and with precedent. That view is also

supported, it is said, by the fact that this matter has dragged on in the Authority, something for which Mr Lorigan is not responsible.

[18] Again I interpose at this point to observe that it is the case that this file was discovered in the office of the former Chief of the Authority, the late Rosemary Monaghan, after her death and I have dealt with the matter since the file was recovered from Ms Monaghan's office.

[19] It is fair to observe that Mr Lorigan is not responsible for the fact that Ms Monaghan did not attend to the matter because of her rapidly deteriorating health although it might be said that Mr Lorigan's then counsel could perhaps have pursued the matter more diligently.

[20] In any event, Mr Lorigan says there is no compelling reason for the matters presently before the Authority to not be removed to the Employment Court so that the Court can hear the whole matter and decide the question.

Submissions for Infinity

[21] Infinity agrees that there are proceedings in the Court involving the same parties and related issues but disputes that that is a strong basis for removal and maintains that it is not appropriate for the Court to determine the matter.

[22] The central submission made for Infinity is that, contrary to Mr Lorigan's claim that the Court can deal with all of the matters currently in dispute, the correct position is that the Court has refused to deal with all of the matters in dispute because the Court quite properly identified that it did not have jurisdiction to deal with an application to raise a personal grievance out of time pursuant to s.114(3) of the Act. That subsection refers specifically to such an application being made to the Authority and the Authority alone.

[23] It follows from that submission that if only the Authority can deal with that part of Mr Lorigan's claim, then the argument for a consolidation of all of these preliminary issues in the Court rather falls away.

[24] Put another way, Infinity submits that the statutory scheme requires an aspect anyway of Mr Lorigan's claim to be dealt with in the Authority and therefore the

submission made for Mr Lorigan that it is consistent with the statutory scheme that all matters be dealt with in the Court, cannot stand.

[25] Next, Infinity says that this is essentially a factual dispute and that the Authority is in the best position to investigate a factual matrix. In that regard, I venture to agree with the observations made in *Hall v. Westpac New Zealand Ltd* [2012] NZERA Auckland 407 where the Authority observed that Parliament intended factual disputes to be determined at first instance by the Authority.

Determination

[26] I have not been persuaded that I ought to exercise my discretion to remove this matter to the Employment Court without the Authority investigating the matter and determining it in the usual way.

[27] I reach this conclusion first because it is apparent that the Employment Court has already identified that a ground pleaded in the statement of claim before it at paragraph 40.3, relates to a matter that the Court does not have originating jurisdiction over and on that basis alone, it is difficult to see how the Authority can properly consider removal to the Court. On the face of it, the Authority could only consider removal of part of Mr Lorigan's claimed relief and that seems a clumsy use of the employment institutions.

[28] Moreover, there are no complex legal questions in this matter. The dispute is essentially a factual one even on the basis of Mr Lorigan's pleadings in the statement of claim at paragraph 40, looking at the entirety of that paragraph.

[29] Moreover, I am satisfied that the Authority is able to deal with this matter reasonably quickly. I am embarrassed that the matter languished unattended in Ms Monaghan's office during her final illness and I have accepted the obligation to deal with this matter personally in order to now give it the urgency it deserves.

[30] I am conscious of the parties' rights to challenge this determination and I will take no steps in the matter until both parties have considered their position on a challenge but as soon as that period is over, or in the alternative the parties have determined that they not challenge this determination, I stand ready to engage with counsel to deal with the next steps.

Costs

[31] Despite Infinity's request that I determine costs now, I decline to do so and reserve costs. Whatever is the outcome of the current part of the proceedings, as Mr Lorigan's counsel correctly observes, the substantive personal grievance or personal grievances remain for investigation by the Authority.

James Crichton
Chief of the Employment Relations Authority