

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 169  
5353422

BETWEEN PETER LORIGAN  
Applicant

A N D INFINITY AUTOMOTIVE  
LIMITED  
First Respondent

A N D SIME DARBY MOTOR  
GROUP (NZ) LIMITED  
Second Respondent

**AND** 5404586

BETWEEN INFINITY AUTOMOTIVE  
LIMITED  
Applicant

A N D PETER LORIGAN  
Respondent

Member of Authority: James Crichton

Representatives: Catherine Stewart, Counsel for Peter Lorigan  
Rob Towner and Anna Holland, Counsel for Infinity  
Automotive and Sime Darby Group (NZ) Limited

Investigation Meeting: On the papers

Submissions received: 28 February 2013 from Peter Lorigan  
18 February 2013 from Infinity Automotive and Sime  
Darby Group (NZ) Limited

Date of Determination: 12 June 2015

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**DETERMINATION OF THE AUTHORITY**

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**Delay**

[1] Determination of this matter has been unreasonably delayed and I apologise to the parties and to counsel for that delay.

[2] Counsel will be aware that both files were allocated to the former Chief of the Authority, Rosemary Monaghan, that Ms Monaghan became seriously ill last year and died on 19 April this year.

[3] The files were discovered when Ms Monaghan's office was being cleaned out and it is apparent that the two matters have simply been lost sight of.

### **Issues**

[4] There are only two issues that the Authority is intent upon dealing with in this determination. The first is an application by consent for the two matters to be consolidated and the second is an application by Mr Lorigan for the removal of both matters to the Employment Court. That application for removal is resisted by Infinity Automotive (Infinity) and Sime Darby Group (NZ) Limited (Sime Darby).

### **The consolidation application**

[5] I am satisfied there is no reason in principle for the Authority to resist what amounts to a consented application to consolidate the two matters.

[6] Accordingly, I now direct that the two matters be consolidated such that, if the matters remain to be investigated in the Authority, they are investigated at the same time or one after the other and conversely if I decide that the matters ought to be removed to the Court for hearing without the Authority investigating either matter, then I would remove both matters.

[7] I am satisfied that consolidation achieves the outcomes identified by Infinity and Sime Darby in the application they filed in the Authority to that effect dated 18 February 2013.

[8] Nothing in the responding submission from Mr Lorigan resists the propositions advanced in support of consolidation and accordingly I am satisfied the application for consolidation ought to be granted.

### **The removal application**

[9] The removal application advanced for Mr Lorigan rests squarely on the contention that three important questions of law arise other than incidentally in

respect to Mr Lorigan's proceedings against Infinity and Sime Darby (the first proceeding): s.178(2) of the Employment Relations Act 2000 (the Act).

[10] The parties disagree about the position in respect of the proceeding brought by Infinity against Mr Lorigan (the second proceeding). While Infinity and Sime Darby maintain that the second proceeding weakens the overall case for removal because it assumes that the consolidation of matters will have been directed by the Authority, and there are no important questions of law involved in the second proceeding, Mr Lorigan maintains that if the Authority removes the first proceeding on its merits, then pursuant to s.178(2)(c) of the Act, the Authority could properly remove the second proceeding as well.

[11] Having considered the matter, and for the avoidance of doubt, I accept the proposition that the second proceeding does not of itself contain any important questions of law.

[12] The first proceeding, according to Mr Lorigan, raises three important questions of law, other than incidentally. The first of these is said to be the question of damages for breach of good faith. I am not persuaded that that raises an important question of law. Indeed, it seems to me the law on that matter is now settled: damages can be awarded for a breach of good faith.

[13] The second issue raised by Mr Lorigan is whether the law allows the Court or the Authority to take into account good faith considerations when modifying or cancelling a restraint of trade. Here, I am persuaded by the argument for Infinity and Sime Darby to the effect that any legal issue would arise only incidentally.

[14] This is because the real issues at play in relation to the restraint are factual ones. Particularly resonating with me is the fact that, whatever the position in respect to the negotiation of the restraint (and the parties are at odds on that matter), the factual position is that no contemporaneous issue concerning the restraint was raised and indeed, even on Mr Lorigan's view of matters, no issue was taken with the restraint until more than a year after the end of the restraint period. Mr Lorigan's employment terminated on 31 January 2010, the restraint was for three months and even on Mr Lorigan's view of matters, the first issues about the restraint were raised on 21 December 2011.

[15] That analysis hardly suggests the matter is front and centre in the applicant's consciousness.

[16] Moreover, I agree with the submission of Infinity and Sime Darby that the real issue is whether the loss Mr Lorigan claims was caused by bargaining failures, another factual rather than legal issue.

[17] The third issue on which Mr Lorigan relies as an important question of law arising other than incidentally is the question whether the Court or the Authority can assess the business decision made by the employer when it implemented the redundancy.

[18] Of course, the answer to that important legal question has already been given by the Court. For instance, in *Michael Rittson-Thomas t/a Totara Hills Farms v. Hamish Davidson* [2013] NZ EmpC 39 ( *Rittson-Thomas* ) His Honour Chief Judge Colgan makes clear that the effect of s.103A of the Act, in a redundancy situation, is to require the Authority or the Court to consider the basis on which the employer made the decision to declare redundancy because the test that the Court or the Authority must apply is whether what happened was what a good and fair employer could have done in the particular circumstances of the case.

[19] The only basis on which the Court or the Authority can assess if that test of justification is made out or not is by looking behind a bare allegation that the redundancy was genuine, and in particular by assessing the business efficacy of it.

[20] It follows that it is not enough for an employer party declaring redundancy to simply say that the business required the disestablishment of a position or positions; that contention has to be demonstrated to the satisfaction of the Court or the Authority.

[21] In *Rittson-Thomas* Chief Judge Colgan said:

*It will be insufficient under s.103A, where an employer is challenged to justify a dismissal or disadvantage in employment, for an employer to say that this was a genuine business decision and the Court ( or Authority ) is not entitled to enquire into the merits of it. The Court ( or Authority ) will need to do so to determine whether the decision, and how it was reached, were what a fair and reasonable employer would/could have done in all the relevant circumstances.*

[22] That is the law and I see no basis on which the present application by Mr Lorigan can be sustained using an argument about law which is now settled.

### **Discretionary considerations**

[23] I am satisfied that none of the grounds identified by Mr Lorigan as important questions of law are made out and as a consequence, there is no need for me to consider my residual discretion.

### **Determination**

[24] I direct that the first and second proceeding be consolidated such that the Authority investigates them together or in the alternative investigates them one after the other.

[25] I have not been persuaded that there is a proper basis on which these two matters ought to be removed to the Employment Court to be dealt with there without the necessity for the Authority to investigate them first and accordingly, I intend to organise a telephone conference with counsel once the challenge period in respect of this determination has expired.

### **Costs**

[26] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority