

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 422
5357505

BETWEEN GRAHAM MCKEAN
 Applicant

AND PORTS OF AUCKLAND
 LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Simon Mitchell, Counsel for Applicant
 Richard McIlraith and Kylie Dunn, Counsel for
 Respondent

Investigation Meeting: On the papers

Determination: 23 September 2011

DETERMINATION OF THE AUTHORITY

A Mr Graham McKean’s claims under AEA 5357505 are removed to the Court pursuant to section 178(2)(a) and (d) of the Employment Relations Act 2000.

Employment Relationship Problem

[1] On 20 September 2011 Ports of Auckland Limited (“PoA”) dismissed Mr Graham McKean from his employment as a Stevedore on the grounds he had engaged in serious misconduct which justified his summary dismissal.

[2] Mr McKean is an Executive member of Local 13, which is the Auckland Branch of the Maritime Union of New Zealand (“the union”) which represents Stevedores and other employees at PoA. The Auckland Branch of the union publishes quarterly a magazine called Port News. Mr McKean contributes a column to the Port News which is published as “Coach’s Comments”.

[3] PoA said it lost trust and confidence in Mr McKean as a result of the comments he made about identifiable employees and former managers in the “Coach’s Comments” column in the September 2011 issue of the Port News. PoA concluded that Mr McKean’s column was offensive, had damaged its reputation, and undermined its values and standards.

[4] Mr McKean filed a personal grievance claim for unjustified dismissal and he has applied to the Authority for interim reinstatement whilst his dismissal grievance was determined.

[5] In his affidavit in support of interim reinstatement Mr McKean stated that Port Company management were not the audience for his column and that in writing it he had been acting as a union official. During the disciplinary process the union told PoA it would take responsibility for what Mr McKean had written.

[6] Mr McKean accepted that some people may have been offended by the contents of his column but he believed there were serious issues to be raised in the workforce about the way workers were treated, and such issues had always been raised by the union.

1 April 2011 changes to ERA

[7] On 1 April 2011 changes made by the Employment Relations Amendment Act 2010¹ to the Employment Relations Act 2000 (“the Act”) came into effect. For the purposes of this matter, the following changes are relevant;

- a. The s.103A statutory justification test changed;
- b. Reinstatement is no longer the primary remedy, its status as a remedy is now no greater or lesser than other remedies;
- c. Reinstatement is no longer mandatory wherever practicable, it is now just one of a number of discretionary remedies that may be awarded provided it is “*practicable and reasonable to do so*”²;
- d. The Authority may now remove a matter to the Court on its own motion.³

¹ (2010 No 125)

² S.125 ERA

[8] The Authority has issued one determination on an interim reinstatement application which related to a dismissal which occurred subsequent to the 1 April 2011⁴ changes to the Act and one substantive determination on a matter which involved an application of the new s103A justification test.⁵

[9] The Authority has previously removed a matter on its own motion to the Court which involved detailed consideration of the new s.103A and s.125 provisions which came into effect on 1 April 2011.⁶ I understand the interim reinstatement aspect of that matter will be heard on 30 September 2011 and that the Court is trying to arrange a full Court to hear the substantive dismissal claim in February 2012.

Process adopted

[10] Upon receipt of Mr McKean's application the Authority emailed the parties with its preliminary view that removal of both matters to the Court may be appropriate under s178(2)(a) and/or (d) of the Act given the 1 April 2011 changes.

[11] The Authority indicated that it believed removal of both matters would enable the Court to build up an early body of jurisprudence on;

- a. How the new s103A justification test should be applied;
- b. How the 'would versus could' distinction applied in practice;
- c. What, if any, significance the change to the status of reinstatement as a remedy should have on the Authority's consideration of interim reinstatement applications.

[12] I also indicated that the Court would be able to hear the interim reinstatement application before the Authority could because the Authority would wait for the Court to issue its decision on the *Angus* interim reinstatement claim it removed on 15 September 2011 before it would hear this matter.

³ S.178(1) ERA

⁴ *Manoharan v Waiariki Institute of Technology* [2011] NZERA Auckland 352

⁵ *Sigglekow v Waikato District Health Board* [2011] NZERA Auckland 385

⁶ *Angus v Ports of Auckland Limited* [2011] NZERA Auckland 401

[13] The Authority set up an telephone conference and in advance of that asked counsel to be ready to address the following issues during the telephone conference:

- a. Whether one or both parties intended to apply for removal;
- b. If so, whether that would be in relation to one or both matters;
- c. If neither party was going to apply for removal did they agree this was an appropriate matter for the Authority to consider removal on its own motion;
- d. If so, then did they consider one, both, or no matters should be removed.

[14] During the telephone conference Mr Mitchell indicated the applicant would not be applying for removal but that if the Authority was minded to consider removal on its own motion then he agreed it would be appropriate to remove both matters. He stated that removal was not opposed.

[15] Mr Mitchell also submitted that there was an important question of law which arose in this case, which may make removal desirable. He said that Mr McKean's actions in relation to the issuing of the column had been undertaken in his capacity as a union official, rather than as an employee, and that the article had been published by the union, not Mr McKean.

[16] Mr Mitchell submitted that there was an issue of law as to whether actions taken by a union official, who is also an employee, can be treated as misconduct by an employer. He said the applicant will be submitting that there was a tension between the roles of employee and union official and that it could not be misconduct for a union official to act contrary to the interests of their employer, and that they could not be disciplined for doing so.

[17] During the telephone conference I referred to the Court of Appeal's decision in *Smith v The Christchurch Press Co Limited*⁷ which involved an employee being justifiably dismissed for outside work misconduct. I suggested the principles in *Smith* would apply to this matter and noted that the *Smith* test had subsequently been applied by the Employment Court in a number of cases.

⁷ [2001] 1 NZLR 407

[18] Mr Mitchell stated that the applicant would be submitting that cases such as *Smith* are not applicable, because they are about the private actions of individuals, rather than about the actions of union officials. Mr Mitchell confirmed the applicant's position in writing on 23 September 2011 during which he stated he had been unable to find any Employment Court authority in relation to the employee/union official distinction.

[19] Mr McIlraith asked for further time to take instructions and then respond, and his response was provided today. The respondent adopted the position that it would not be applying for removal but it did not oppose removal and would abide by the Authority's decision. Mr McIlraith did not respond to Mr Mitchell's submissions that this case concerned "an issue of law".

Outcome

[20] The Authority now has the power under s.178(1) of the Act to remove a matter to the Court on its own motion. Both the interim and substantive matters require consideration of the extent to which the 1 April 2011 amendments to the Act affected the s.103A justification test and the s.125 criteria for reinstatement, should a personal grievance be established.

[21] The Authority may only order removal if it is satisfied one of the grounds in s.178(2) of the Act have been met. I find that s.178(2)(a) and (d) are met.

[22] Section 178(2)(a) requires that "*an important question of law is likely to arise in the matter other than incidentally*". The interim reinstatement application and the substantive dismissal grievance both involve important questions of law which arise other than incidentally.

[23] Although the Court currently has the *Angus* matter before it, it has not yet had an opportunity to consider or apply either the new s.103A justification test or the recent changes that have been made to the s.125 remedy of reinstatement. These new provisions apply to all employers and employees so the interpretation of them clearly involves important questions of law.

[24] I consider that Judge Travis' decision in *Game v Northland Co-Operative Dairy Company Limited*⁸ provides authority for the issue Mr Mitchell has raised, so I have concluded that removal on that ground would not be appropriate.

[25] Although removal only requires one s178(2) ground to be made out, I also find that removal would also have been appropriate under s178(2)(d) of the Act.

[26] Section 178(2)(d) requires the Authority to be of the opinion that in all the circumstances the Court should determine the matter. I consider it preferable for the Court to put in a position where it can build up a body of jurisprudence on the post 1 April 2011 changes as soon as possible.

[27] The wider public interest in obtaining certainty in relation to the recent changes to employment law legislation makes it undesirable for the Court to have to wait for a challenge to an Authority determination involving the new s103A and/or s.125 provisions in the Act. Public interest will be best served by ensuring the Court's view of these new provisions is publically available at the earliest opportunity.

[28] Like the *Angus* matter, this case also involves a good fact situation to remove because it is not complex but will require detailed consideration of the would/could distinction. That distinction has not yet been considered by the Authority in any depth, because the one substantive determination it has issued so far on the new s103A justification test⁹ did not require that exercise to be undertaken in any detail.

[29] I am also mindful that by removing both matters, the Court will obtain the benefit of hearing from experienced counsel. The same legal representatives are involved in this matter as the *Angus* matter, which I anticipate is likely to result in some efficiencies for the parties in both matters. It may also assist the Court in timetabling both substantive matters together.

⁸ 10 April 2011, Travis J, AC28/01

⁹ *Sigglekow v Waikato District Health Board* [2011] NZERA Auckland 385

Order

[30] The Authority orders, on its own motion, the removal of Mr McKean's interim reinstatement application and his substantive dismissal grievance under AEA 5357505 to the Employment Court.

Costs

[31] Costs are reserved.

Rachel Larmer
Member of the Employment Relations Authority

