IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 83/08
5075384

	BETWEEN	JOHN PROFFITT Applicant
	AND	CHIEF EXECUTIVE, DEPARTMENT OF LABOUR Respondent

Member of Authority:	Yvonne Oldfield
Representatives:	Ken Nicolson for Applicant Kevin Morgan for Respondent
Submissions received:	6 December 2007 from Applicant 20 December 2007 from Respondent
Determination:	11 March 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In a determination dated 24 August 2007 I disposed of a disadvantage grievance brought by Mr Profitt by concluding that he had been justifiably warned for serious misconduct in September 2006. That determination was the subject of a de novo challenge to the Employment Court where it is now awaiting hearing.

[2] The disadvantage grievance relating to the warning was only one part of the employment relationship problem Mr Proffitt had lodged under this file number. The present determination deals with a removal application relating to that part of the employment relationship problem which was not disposed of in my determination of 24 August 2007. Mr Nicolson relies on s. 178 (2) (c) as grounds for removal. Essentially he says that since the first part of the employment relationship problem has been challenged and is now before the Court, it is more practical and expedient to remove the second part of it to the Court as well, so that both matters can be disposed of there together.

[3] The respondent opposes the application for removal.

[4] Both parties have had a change in representation (in the respondent's case, several changes) since the problem was lodged. For this reason, before discussing the merits of the removal application I set out some background about the subject matter of the part of the problem to which it relates.

[5] As I explained in the opening paragraphs of the determination of 24 August:

> *"On 21 December 2006 Mr. Proffitt lodged an employment relationship problem with the Authority. It was in two parts. One part, a disadvantage grievance, related to a warning issued to Mr Proffitt on 29 September 2006. The other related to matters associated with his individual employment agreement. Because the parties were engaged in continuing attempts to resolve the issues relating to the agreement I have so far investigated only the matter of the warning and this determination disposes only of that.*
>
> *I understand from the Authority support officer that the attempts to resolve the other matter continued for some time but have not succeeded. A telephone conference will be arranged shortly to discuss the investigation of that matter."*

[6] Upon lodging the employment relationship problem Mr Proffitt requested urgency which was declined in a Minute dated 21/12/07 (attached.) He was not, at that time, professionally represented. His original statement of problem contained these particulars of the second part of his problem (in their entirety):

> *"(b) DOL failure to negotiate individual employment contract agreement."*

[7] In a statement in reply received 15 January 2007 the Department gave the following response to the relevant part of the problem:

> *"The Department and the applicant have agreed to an individual employment agreement dated 20 December 2006 and the Department understands this issue is no longer in dispute."*

[8] The parties proceeded to mediation in February 2007 but subsequently advised that it had been unsuccessful. I therefore convened a conference call with them on 1 March 2007. During the conference Mr Proffitt advised that contrary to what the

respondent had stated in the reply, the second part of the problem had not been resolved. He indicated that he wished it to be investigated along with the first. I outlined to the parties the limits on my jurisdiction in relation to matters relating to the fixing of terms and conditions of employment (referring them to s. 161 (2) of the Employment Relations Act 2000) and requested further particulars from Mr Proffitt to clarify the issues (within the Authority's jurisdiction) relating to the individual employment agreement. A timetable was discussed and agreed to accommodate provision of further particulars and the investigation of both parts of the problem.

[9] In due course I received the following particulars of the second part of the problem:

> *"Issues:*
>
> 1. *the Department of Labour failed to honour the letter of 26 August 2002, as part of the agreement, to discuss a variation with terms and conditions of the (IEA) Individual Employment Agreement, "after the 30 day period."*
>
> 2. *That the (IEA) Individual Employment Agreement would be <u>no less favourable</u> than the terms of employment of which are the same as those of the Collective Employment Agreement.*
>
> 3. *The Department of Labour made no effort to discuss or negotiate any variation with the applicant until the 16 December 2005. (At this time the department ordered a 4% increase to all employees working for the department)*
>
> 4. *That on the 26 October 2006, the Department of Labour presented a new (IEA) Individual Employment Agreement to the Applicant that did not include the agreed variation signed by the Applicant on 9 February 2006.*
>
> 5. *The new IEA disadvantaged the applicant, as it did not include the terms and conditions in the applicant's existing IEA and the subsequent recent agreements to the staff collectively."*
>
> *Remedies:*
>
> 1. *The Department of Labour to re-negotiate a variation to the (IEA) Individual Employment Agreement with the applicant that is no less favourable in terms and conditions to the collective employment agreement.*
>
> *(That the agreement is between the applicant and the department only and will comply with the Employment Relations Act 2000.)*

2. *That a date is agreed to at the time of negotiation or what is a mutually agreed time for any new variation to the agreement.*

3. *That any loss of funds by the applicant due to being disadvantaged in his employment arrangement will be awarded from between 2002 to 2007.*

4. *The Applicant requests a written apology from the Department of Labour.*

5. *That there will be no reprisals from the Department to the employee as a result of him trying to resolve this employment agreement."*

[10] A very large volume of documentary evidence had already been provided to the Authority and references in these particulars appeared to relate to correspondence contained there.

[11] Meanwhile the parties resumed discussions on these issues and advised that they wished me to proceed to investigate and determine only the first part of the employment relationship problem according to the agreed timetable, which I did.

[12] On 12 June Mr Proffitt wrote to the Authority support officer asking that a further amendment be added to the second part of the problem, as follows:

> *"The Department of Labour have failed to honour employment agreement in regards to clauses and agreements.*
>
> *"Competent rate not paid at Page 35 of existing agreement. This would increase salary amounting by $3,633 per annum x 4 years leaving an arrears in access [*sic*] of $14,652.00."*

[13] The progress of the proceedings in the Authority from this time on is recorded in a series of Minutes (attached.) The final of these (30 November 2007) details the issues for determination as clarified by Mr Proffitt during an Investigation Meeting on 23 November 2007. The part of the employment relationship problem which is subject to this removal application is therefore particularised by what has been set out in this determination and by what is set out in my Minute of 30 November 2007. (I have also suggested to Mr Nicolson that now that Mr Proffitt is represented an amended statement of problem would be useful to clarify any remaining uncertainty about the nature of the claim.)

[14] I now turn to the removal application itself.

Argument on removal application

[15] Mr Nicolson's removal application identified the matter for removal as:

> *"To interpret the meaning of an employment agreement as it relates to outstanding salary and bonuses and the job description expressed in that agreement as it relates to the justification of a warning."*

[16] He went on to say that the application was made on the grounds that:

- The parties are already before the Employment Court on a closely related matter pertaining to the same employment relationship problem, namely a de novo challenge to the determination dated 24 August 2007;

- The issues in the two matters are interrelated and should be considered together, by the Employment Court;

- Jurisdictional issues arise in relation to the second part of the problem and the Employment Court is the "*correct forum*" for those;

- If the matter is heard in the Authority it "*would have to be heard all over again"* in the Court, increasing costs, and finally,

- *"If both matters were dealt with in the Employment Court at the same time, this would also give the parties more time without tainting the process with preliminary outcomes which harden legal positions, to consider settling this matter amicably."*

[17] In submissions Mr Nicolson argued that these grounds satisfied the criteria set out in s. 178 (2) (c) of the Employment Relations Act 2000. He said the Authority should exercise its discretion to remove this matter because the Court has before it proceedings between the parties of a similar or related nature, and to do so would be more practical and expedient. The proceedings are similar or related, he says because they rely on "*the very same employment agreement*" and because*:*

"The Court will have to interpret the authority and functions expressed in that agreement related to the warning in much the same way as the Authority has to consider the meaning of the contract as it relates to the issue of disadvantage and loss of salary due to a breach and variations to a future agreement which are sought as remedies by the applicant…

*Also because [*the applicant*] is seeking to address issues related to a future agreement, claiming it to be disadvantageous compared to the applicant's present employment agreement, then it is submitted that any future issues are beyond the scope of the Authority's jurisdiction…*

*This is also the case in regards to the remedies that Mr Profitt seeks as he seeks to rectify a future agreement making it equitable to his original agreement … [*he*] makes a claim for lost benefits and seeks to have these reflected in a new agreement or "variations" to his contract…this lack of negotiation or resolution by the respondent has resulted in these…proceedings coming before the Authority…again these are issues about a new and future agreement...and are therefore beyond the jurisdiction of the Authority."*

[18] For the respondent it is submitted that the circumstances of the present application do not meet the criteria of s.178 (2) (c). Mr Morgan says that the Court has before it proceedings which are between the same parties but which involve issues which are clearly different. He says:

"*The matter before the Court concerns an alleged disadvantage grievance related [*to*] disciplinary proceedings and a warning issued to Mr Proffitt on 29 September 2006. The matter before the Authority concerns issues regarding the negotiation of his individual employment agreement. The two matters arise out of quite separate factual nexuses and different periods of the applicant's employment and are unrelated…*

Although the applicant had filed a de novo challenge to the Authority's determination in the Court on 19 September 2007 no application was made to remove the matter until the day of the Authority hearing when the respondent had appeared and was ready to proceed. The Authority had now partially heard the case and the scope of the case had been redefined as an arrears claim for $18,165.00. As such this is an issue clearly within the scope of the Authority…

The issues do not involve an important question of law, nor are they of such a nature that it is in the public interest that the matter be removed to the Court."

Determination

[19] Section 178 (2) provides;

> *"The Authority may order the removal of the matter, or any part of it, to the Court if-*
>
> *(a) an important question of law is likely to arise in the matter other than incidentally; or*
>
> *(b) the case is of such 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 involve the same or similar or related issues; or*
>
> *(d) the Authority is of the opinion that in the circumstances the Court should determine the matter."*

[20] The first limb of s. 178 (2) (c) requires that the proceedings in the Court and the Authority are between the same parties. That criterion is met. However the section also requires that they involve "*the same or similar or related issues."* Mr Nicolson says that the similarity here lies in the fact that they both relate to the same employment agreement. I do not consider that sufficient. Employment relationship problems involving the same parties will usually relate to the same employment agreement or series of agreements.

[21] One part of this employment relationship problem is a disadvantage grievance relating to an employment warning. The other (it would now appear) is primarily about progression through remuneration scales. The two parts are neither related nor similar. I accept the respondent's submission. The criteria set out in 178 (2) (c) have not been met.

[22] However, Mr Nicolson's submissions went further than the grounds set out in subsection (2) (c.) He also appears to be suggesting that jurisdictional issues in the second part of the problem amount to an important question of law, such that the matter meets the criteria in subsection (2) (a.) As the history of these proceedings shows the nature of the second part of the employment relationship problem has evolved over time. Without an amended statement of problem it remains uncertain

whether there are live jurisdictional issues. I cannot therefore say that an important question of law "*is likely*" to arise in the matter.

[23] Mr Nicolson also refers to a range of circumstantial factors which he says indicate that the Court should determine the matter. I have therefore considered whether the grounds set out in subsection (2) (d) are met in this case. Relevant circumstances include:

- albeit that it is not "similar or related" the parties are already before the Court in relation to another employment relationship problem;

- both parts of the problem were originally filed as one set of proceedings in December 2006;

- the matter has had an extraordinarily (and unacceptably) long history in the Authority;

- Mr Proffitt has contributed to those delays by declining to join telephone conferences with the Authority and Department representatives;

- the progress of the proceedings has also been delayed and made more difficult by changes in the representation of the respondent, although I stress that the individuals who have represented the Department have made every effort to minimise any consequent inconvenience to the Authority or to Mr Proffitt. I thank them for their assistance;

- the issues for determination in respect of the second part of the employment relationship problem were not clearly identified by the applicant from the outset of the proceedings. Since receiving Mr Nicolson's submissions, I have a concern that the issues may be wider than stated by Mr Proffitt on 23 November;

- it can be inferred from Mr Nicolson's submissions that he considers it likely that any determination of the Authority is likely to be challenged by one or other party.

[24] Taking all these factors into account I consider it will expedite the final resolution of the overall employment relationship problem if all aspects of it are placed before one forum. I am of the opinion that in all the circumstances the Court should determine the second part of the matter along with the first.

[25] **To this end, all proceedings currently before the Authority under file number 5075384 are removed to the Court pursuant to subsection (2) (d.)**

[26] Costs are reserved.

Yvonne Oldfield
Member of the Employment Relations Authority

File Number: 5075384

MINUTE OF YVONNE OLDFIELD – 21 DECEMBER 2006

John Victor Profitt & Department of Labour

The Authority has today received an application from Mr Profitt relating to an alleged disadvantage grievance (an employment warning which Mr Profitt says was unjustified.) It was accompanied by a request for urgency.

Because the Authority closes tomorrow for the Christmas break and will not reopen until 3 January, I respond now to the request for urgency.

Clause 17 of Schedule 2 to the Employment Relations Act 2000 provides that;

"Where any person applies to the Authority to accord urgency to an investigation, the Authority must consider that application and may, if satisfied that it is necessary and just to do so, order that the investigation takes place as soon as practicable."

The effect of this provision is that, if the particular circumstances of the employment relationship problem warrant the granting of urgency, the investigation of that problem will be prioritised over other matters filed earlier.

The reason Mr Profitt gives for seeking urgency is that "*this is causing stress to the applicant and is unacceptable situation."*

These circumstances apply in most if not all applications the Authority sees, and do not by themselves justify the prioritising of Mr Profitt's case over others. **Urgency is declined.**

However, the Authority is not currently experiencing extended timeframes for the investigation of employment relationship problems. I can advise Mr Profitt that I can hold a telephone conference at any time after 3 January, subject to the availability of the parties, in order to discuss the need for mediation and the timetable for my investigation.

I can also advise that I will be in a position to conduct an investigation meeting in early April. It is my expectation that the parties will use the intervening time to attempt mediation, and I remind them that they are free at any time to approach the mediation service to arrange this.

Yvonne Oldfield,
Member, Employment Relations Authority

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

5075384

	BETWEEN	John Profitt
	AND	Chief Executive, Department of Labour.

Member of Authority:	Yvonne Oldfield
Representatives:	Mr Profitt in person Kevin Morgan for respondent
Date:	13 November 2007

MEMBER'S MINUTE

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[27] Mr Profitt's employment relationship problem was lodged with the Authority on 21 December 2006. The application comprised two parts and by agreement between the parties, I proceeded to investigate and issue a determination on only one part.[1] Meanwhile the parties attempted to resolve the other matter between themselves.

[28] By September 2007, as I was advised by the Authority support officer managing the file, the remaining matter was still "live" but no resolution had yet been achieved by the parties. I requested that a telephone conference be set up so that I could discuss with the parties whether and potentially how the matter was to proceed. Both parties confirmed that they remained in discussion but Mr Profitt, as I understand it, declined to join a teleconference. I continued therefore to communicate with the parties through the support officer. I understand that the respondent further indicated that if the current discussions did not prove fruitful it wished the matter to proceed to an investigation meeting.

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[1] Determination dated 24 August 2007, AA 258/07.

[29] On my instructions the support officer responded by telling the parties that I proposed to set the matter down for an investigation meeting in late November 2007. My purpose in doing so was to allow sufficient time for the parties to complete discussions and then if the matter was not resolved to ensure that it could be investigated before the holiday period, and within a year of being lodged with the Authority.

[30] By email dated 6 September Mr Profitt advised the Authority support officer that the file was to "*remain suspended until further notice from me*."

[31] It is of course the applicant's prerogative as to whether the matter proceeds to investigation. At any time Mr Profitt may withdraw the matter. It is also open to the Authority to suspend an investigation. However, it is not normally the Authority's practice to suspend investigations for an indefinite period unless both parties agree to this. To do so would not generally be consistent with the Authority's obligations to promote good faith behaviour and support successful employment relationships, particularly in the case of an on-going employment relationship, as this is. [2] On my instructions notices were therefore sent out for an investigation meeting on Friday 23 November.

[32] I am now advised that the matter has not been resolved. I am told that the respondent wishes the investigation meeting to proceed while Mr Profitt has confirmed that his "*earlier instructions to hold the matter still stand*."

[33] At this stage in the history of these proceedings I consider that I can best progress the resolution of the employment relationship problem, and support the success of this employment relationship, by meeting with the parties. The investigation meeting scheduled for Friday 23 November will proceed. I note however that the meeting will not conclude the investigation unless both parties are satisfied that all relevant material is before me.

[34] I remind the parties that they are under an obligation to facilitate the Authority's investigation, to act in good faith towards each other during the

[2] S. 157 (2) Employment Relations Act 2000.

investigation, and to participate in the investigation in a manner designed to resolve the issues between them.[3]

[35] I also address one further issue here. In his 6 September email to the Authority Support Officer, Mr Profitt advised: *"I request that Yvonne Oldfield has no further involvement in the matter."* I note that the parties may not choose who will or will not investigate any particular employment relationship problem, and I am not aware of any reason why I might need to consider recusing myself from this matter. I therefore continue as the Member assigned to investigate it.

Yvonne Oldfield
Member of the Employment Relations Authority

[3] S.181 Employment Relations Act 2000.

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

5075384

	BETWEEN	John Proffitt
	AND	Chief Executive, Department of Labour

Member of Authority:	Yvonne Oldfield
Representatives:	Ken Nicholson for applicant Kevin Morgan for respondent
Date:	21 November 2007

MEMBER'S MINUTE

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[1] This matter is set down for an investigation meeting this Friday, 23 November. My Minute of 13 November (attached) refers.

[2] Today I received an application for adjournment from Mr Nicholson who is now acting for Mr Profitt. Mr Nicholson makes the application upon the following grounds:

1. *"That the applicant has been given insufficient notice of the investigation (4 days) and has not had time to prepare or instruct counsel who is not familiar with this aspect of the claim.*
2. *That the applicant is involved in another commitment during the whole of this week beginning on 20th November and running each day until and including the 23rd November 2007, which is the day of the proposed investigation. This is an important training course for Mr Proffitt.*
3. *The training that Mr Proffitt is doing is a four day, stage 5 Mobility IT Training. He has been selected to be taught to operate new equipment in the field. He is also being trained up to be a trainer of other staff members in the DOL. He cannot just drop out of the course on the last day.*

4. *Also Mr Proffitt's attendance on the course prevents him from preparing for the investigation in advance and therefore he would be disadvantaged.*
5. *Thus it is respectfully requested that an adjournment be granted for both practical and legal reasons as Mr Proffitt is not available to attend and any compulsion at this late stage would only disadvantage and prejudice his preparation and his right to a fair hearing.*
6. *In addition the applicant has a bereavement memorial service to attend to on Friday 23rd and the stress involved in that event alone is in itself a lot to expect of Mr Proffitt without also asking to attend an investigation on the same day at short notice.*
7. *Based on the above grounds, the applicant seeks leave to adjourn the hearing set down for Friday 23rd November 2007 so that appropriate preparation can be done."*

[3] The respondent opposes the application, noting that the meeting has been set down for some time, that it has arranged for the attendance of a witness who is no longer employed by the Department, and that it is keen to address the issue because it has been outstanding for some time.

Determination

[4] The file indicates that notice of the investigation meeting was sent to Mr Profitt on 14 September 2007. It is my understanding therefore that Mr Profitt has had over two months' notice of it. In addition the Authority Support Officer for the file has been in regular email correspondence with Mr Profitt regarding the meeting both before and after it was formally set down. My own Minute of 13 November was indeed a response to a request by him that the fixture be vacated.

[5] The employment relationship between these parties is ongoing and the Department of Labour has confirmed that it opposes the adjournment. I take from this that as his employer, the Department wishes Mr Profitt to attend the investigation meeting ahead of training or other work duties he may have intended to complete on the day in question. I also note that since Mr Profitt has known about the meeting for over two months he has had ample time to ensure that other commitments do not

conflict with his good faith obligations to this process. I take the same view in relation to the question of preparation. Finally I note, as set out in my Minute of 13 November, that I intend this meeting to move the investigation forward but not to complete it unless both parties are satisfied that they have provided me with all relevant information. I am satisfied therefore that Mr Profitt will not be prejudiced in any way by my convening the investigation meeting set down for 23 November.

[6] I have not been advised of the time of the memorial service to which Mr Proffitt and Mr Nicholson have referred. From the submission as a whole I infer that Mr Profitt had planned to attend the day's training before making his way to the service. I reiterate (as set out in my Minute of 13 November) that I will ensure that the investigation meeting is concluded in time for him to meet his commitment to attend that service.

[7] For all these reasons, the application for adjournment is declined.

Yvonne Oldfield
Member of the Employment Relations Authority

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

5075384

	BETWEEN	JOHN PROFITT
	AND	CHIEF EXECUTIVE, DEPARTMENT OF LABOUR
Member of Authority:	Yvonne Oldfield	
Representatives:	Ken Nicolson for applicant Kevin Morgan for respondent	
Date:	30 November 2007	

MEMBER'S MINUTE

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[1] This matter was the subject of an investigation meeting on Friday 23 November. Before convening the meeting I had declined two applications for adjournment (on 13 and 21 November respectively and both from the applicant). On the morning of the meeting Mr Nicolson tabled an application for removal. Mr Morgan advised that the respondent opposed the removal application.

[2] Mr Nicolson then made a further application for adjournment, arguing that the removal application should be dealt with before the Authority's investigation into the substantive matters was progressed any further. The respondent opposed an adjournment, as it had consistently done since the matter was first set down in September.

[3] I declined that adjournment application also. My principal reason for doing so was that I considered it useful to proceed as planned to hear from Mr Proffitt as to the particulars of his outstanding grievance. In March 2007 Mr Proffitt had at my request provided further particulars of his grievance however he had not had the benefit of professional representation at the time and I remained unclear as to the precise nature of the issues between the parties. In addition by letter to the Authority support officer (12 June 2007) Mr Proffitt had provided details of an amendment to the statement of problem. This also required further clarification.

[4] Without clear identification of the outstanding issues between the parties it would not be possible for me to determine the removal application. In addition, in the event the matter did remain before the Authority, I would require greater clarity about those issues before I could complete my own investigation. Finally, overall, I was very concerned that this matter was lodged with the Authority nearly a year ago, and wished to take the opportunity to progress it.

[5] Although the meeting was set down for 10.00 am Mr Proffitt did not attend until 1.45pm. In the interval before his arrival I took the opportunity of discussing

with the representatives a timetable for dealing with the removal application. The following was agreed:

i. The standard timeframe would apply for lodging a statement in reply;
ii. The matter would be dealt with on papers;
iii. The applicant would have until 7 December to lodge submissions in support of the application;
iv. Upon receipt of submissions the respondent would have a further 14 days in which to respond;
v. Should anything arising out of submissions lead either party to consider that an investigation meeting was needed the Authority would be advised immediately. Otherwise, the Authority would proceed to determine the removal application as soon as possible.

[6] After Mr Proffitt joined the meeting at 1.45pm I questioned him in regard to the nature of his claim. He confirmed that the outstanding elements of the employment relationship problem currently before the Authority were as follows:

i. The respondent's alleged failure to meet its alleged obligation to renegotiate his terms and conditions of employment with him at the conclusion of his first 30 days of employment;

ii. The respondent's breach of an alleged undertaking to place him on the "competent rate" for his position, precise arrangements for which he alleges he was given to understand would be discussed with him when his terms and conditions were renegotiated at the conclusion of his first 30 days of employment;

iii. The respondent's alleged ongoing failure to remedy these breaches;

iv. The respondent's failure to meet with him face to face during negotiations for a new individual agreement in the period since October 2006.

[7] Mr Proffitt quantified his losses at $18,165.00 being the difference between salary paid and the "competent rate" for a period of five years. By way of remedy he seeks arrears of wages in this amount.

Yvonne Oldfield
Member of the Employment Relations Authority