

Attention is drawn to paragraph 19 prohibiting publication of certain information contained in this determination.

Determination Number: CA 160/05
File Number: CEA 431/04

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN R (Applicant)
AND D McDonald Motors Limited (Respondent)
REPRESENTATIVES Robert Thompson, advocate for applicant
Julian Moran, counsel for respondent
MEMBER OF AUTHORITY Paul Montgomery
DATE OF DETERMINATION 12 December 2005

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] The applicant claims her dismissal from the respondent's employ was unjustified, that she was disadvantaged in her employment and that the respondent owed her arrears of wages. The respondent denies the allegations and declines to provide the remedies the applicant seeks.

The history

[2] The matters giving rise to the alleged personal grievance occurred during a meeting between the parties on 26 January 2004. On 28 January 2004 Mr Thompson, on behalf of Ms R, raised a personal grievance with the respondent. The parties attempted to resolve their difficulties in mediation on 20 April 2004 but were unsuccessful. Ms R lodged her application with the Authority on 24 November 2004, some seven months following the mediation. The respondent's statement in reply was received by the Authority on 20 December 2004.

[3] At a teleconference on 27 May 2005, this matter was set down for investigation on 12 July 2005 and at that time the Authority issued directions in terms of the provision of briefs by each party.

[4] The applicant failed to lodge and serve the necessary statements of evidence as directed, stating that she was in ill health and providing a medical certificate dated 15 June 2005. A further teleconference was convened on 27 June 2005 and orders were made vacating the investigation meeting. The Authority then directed the applicant to provide an updated and more detailed medical certificate before 15 July 2005. The applicant complied by supplying a medical certificate dated 12 July 2005 in which the applicant's doctor said:

I write to confirm that she is unable to attend Employment Court proceedings on medical grounds and thus we ask for a postponement on her hearing.

We have an expectation to review this situation in one month.

[5] A further teleconference on 25 August 2005 resulted in a fixture for an investigation meeting being set down. The investigation meeting was set to begin on 13 October 2005 and the Authority again made directions relating to the lodging and service of the applicant's statements of evidence. In the written notice of direction the Authority stated *the above timetable is to be strictly complied with.*

[6] A further medical certificate dated 25 August 2005 was received by the Authority on 29 August 2005. In that certificate the doctor stated *I write to confirm she is still not well enough to attend employment proceedings. We will review again in one month.* In a letter dated 8 September 2005 Mr Thompson wrote to the Authority advising:

Ms R had instructed I R Thompson Associates Limited to request that her application be placed on hold until she is well enough to attend.

We submit that this may be some time away and therefore this matter should be permanently adjourned until Ms R notifies the Employment Relations Authority.

[7] In reply, by letter dated 12 September 2005, the Authority advised Mr Thompson that it wanted the timetable (statements of evidence and agreed bundle of documents) as set out in the notice of direction to be adhered to. The letter went on to say that in the event that Ms R was not well enough to attend the scheduled investigation meeting then the Authority would deal with that issue closer to the date.

[8] The applicant failed to lodge and serve statements of evidence as directed, again citing her ill health. In a letter dated 30 September 2005 Mr Thompson advised the Authority that his client had been made aware of her obligations to provide evidence and that I R Thompson Associates Limited had drafted documents for the applicant's approval. He was however unable to take instructions due to the applicant's illness. Mr Thompson further advised that he was instructed that the applicant was unable to attend an investigation meeting or give evidence. He also advised that he was unable to take instructions while the applicant was *not of a fit mind.*

[9] That letter was accompanied by a further medical certificate in which the applicant's doctor said:

I write to confirm that since February this year she has been on medication for anxiety issues and depression. She has indicated to me ad it may well be the case that this condition has affected her judgement and ability to think clearly.

I confirm also that she has been seen in the past from 2001 by psychiatric emergency services in Christchurch.

[10] Having considered the matters put before it, the Authority vacated the investigation meeting scheduled for 13 October 2005.

[11] On 9 November 2005 the Authority received an application from the respondent to strike out the proceedings. This, as is appropriate, was accompanied by a memorandum from counsel for the respondent in support of the application. The support officer contacted Mr Thompson and advised him of his requirement to respond to the application. On Friday, 25 November a further teleconference was called. The Authority requested that Mr Thompson take the advice from his

client and advise his client's intention in respect to the application for strike out. In an email to the registry officer at 3.50 pm that same day Mr Thompson advised as follows:

I refer to today's telephone conference regarding CEA 431/04 R & D McDonald Motors Limited.

We have been instructed by the applicant not to respond the Application to strike this matter out. However, the applicant has requested that I advise the Employment Relations Authority that she is still medically unwell.

Discussion

[12] Mr Moran, in his memorandum in support of the application, refers to the omnibus provisions of section 162 of the Employment Relations Act 2000. That section reads:

Subject to sections 163 and 164, the Authority may, in any matter related to an employment agreement, make an order that the High Court or a District Court may make under any enactment or rule of law relating to contracts ...

[13] Further he submits that by analogy the Authority has the jurisdiction to dismiss proceedings for want of prosecution on the same basis as is applied in the High Court and the District Court.

[14] While accepting the validity of these submissions, the inquisitorial nature of the Authority's work contrasts considerably with the adversarial format adopted in both the High Court and the District Court. The Authority is an investigatory body and is empowered under the statute to take whatever steps it considers reasonable and proper bearing in mind the key principles of natural justice, to undertake its tasks. That is in no way to weaken the submissions placed before me by Mr Moran. In his memorandum in support of the application he accepts that the applicant is unwell and has been for some time however, he points to the uncertainty of the prognosis for her recovery and submits that the respondent should not be expected to simply bear the consequences of the applicant's ability to prosecute her claim to resolution. In support of his contention he points to the delay between the mediation conference and the lodging of her claim with the Authority. Further, he cites the series of teleconferences involving the Authority and the representatives of the parties and the vacated fixtures occasioned by the applicant's inability to participate in the investigation.

Determination

[15] In the light of the instructions given to Mr Thompson by the applicant that the respondent's application is not to be opposed I decline to continue the investigation of the applicant's claim as from the date of issue of this determination. For the avoidance of any doubt the investigation is now closed.

Costs

[16] In his memorandum Mr Moran asked that an award of costs in favour of the respondent be made. He acknowledges that the applicant is legally aided and says that his instructions are to also have specified pursuant to section 40 (3) of the Legal Services Act 2000 the amount that the applicant would have been ordered to pay had she not been legally aided.

[17] Under usual circumstances the Authority would not hesitate to do this. However, I am not provided with any evidence of the costs the respondent has actually borne in respect of this matter up until the present application.

[18] I award the respondent the sum of \$50, the amount which the applicant was required to contribute to the legal aid grant.

Suppression order

[19] The identity of the applicant is suppressed to maintain her privacy.

Paul Montgomery
Member of Employment Relations Authority