

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 303
5621182

BETWEEN GARETH SANDS
 Applicant

A N D SERCO NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Simon Greening, Counsel for Applicant
 Hayden Wilson and Jane Traynor, Counsel for
 Respondent

Investigation Meeting: On the papers

Submissions Received: 8 August 2016 from Respondent
 23 August 2016 from Applicant

Date of Determination: 05 September 2016

DETERMINATION OF THE AUTHORITY

- A. The application by Serco New Zealand Limited (Serco) for removal of this matter to the Employment Court to hear and determine is granted.**
- B. Costs are reserved.**

Removal application – on the papers

[1] The Authority has considered the application by Serco to have a matter removed to the Employment Court for hearing and determination without the Authority investigating it.

[2] The application, made under s.178 of the Employment Relations Act 2000 (the Act) is opposed by Mr Sands, the applicant party to the matter currently before the Authority for investigation. Serco, the respondent party to the matter, seeks its removal to the Employment Court.

[3] By consent, the application for removal of this matter was determined on the papers.

Employment relationship problems

[4] The employment relationship problems arose from circumstances in which Mr Sands' employment by Serco was terminated following the intervention of the Department of Corrections (the Department) into Serco's management of Mt Eden Corrections Facility (the Prison).

[5] Mr Sands has filed a statement of problem in the Authority claiming, among other things, that his employment was affected to his disadvantage by the unjustifiable actions of Serco and that he was subsequently unjustifiably dismissed by Serco.

[6] Mr Sands claims that Serco failed to comply with its obligations to him to act in good faith, to consult with him and disclose relevant information prior to removing him from his position as Prison Director and then dismissing him.

[7] Serco denies Mr Sands claims and says his role as Prison Director was no longer required and became redundant following a Disengagement Agreement between Serco and the Department. Serco says Mr Sands was kept informed of developments and attempts were made to redeploy him.

Relevant background information

[8] On 1 February 2011, the Department entered into a prison management contract (the Contract) with Serco whereby Serco would manage the Prison.

[9] Mr Sands was employed by Serco as Contract Director ("Prison Director").

[10] The Contract was entered into under the Corrections Act 2004 ("the Corrections Act") and contained comprehensive conditions agreed by the Department and Serco for the provision of prison management services.

[11] Clause 1.3(d) of the Contract records the critical importance to the Crown and that it was in the public interest for services provided by Serco to be in accordance with the agreed standards of the Contract.

Step - In Event

[12] Under clause 28.1 of the Contract, in the event of a “Step-in Event” the Department was entitled to “*step in and take such actions including by way of performance of some or all of the services as it considers desirable ...*”.

[13] Under clause 28.11, for the purposes of clause 28.1 of the Contract, a Step-in Event occurs where:

(a) a Termination Event occurs;

(b) the Contractor is not performing the Services, or any part of the Services in accordance with the agreement such that there is, or is likely to be, in the Crown’s reasonable opinion, a breach of this agreement that:

(i) has threatened, or continues to or will threaten, in any material way, the health or safety of any person:

(ii) has created, or continues to create or will create, a material risk that a Prisoner will escape: or

(iii) will cause the Crown or Chief Executive to breach a statutory duty...

[14] Termination Events are defined in clause 29.1 of the Contract and include an Insolvency Event and a material breach of the agreement by the Contractor.

Prisoner Fights

[15] Following highly publicised incidents involving organised fights between prisoners at the Prison and complaints by prisoners of violence and an unsafe environment, the Department issued a Step-in Notice under clause 28.2 of the Contract on 24 July 2015.

Step – In Notice

[16] The Step-in Notice stipulated that the Department was to provide a Prison Director from 27 July 2015. The Notice designated the Prison Director as Dennis Goodin and the Deputy Prison Director as Stephen Parr.

[17] The Step-in period was stipulated as commencing on 27 July 2015 and was expected to last until 30 September 2015.

[18] On 24 July 2015, Mr Sands was informed of the Step-in and of his removal as Prison Director with effect from 27 July 2015 for the duration of the Step- in period.

[19] On 12 August 2015, Mr Sands was informed by Serco that he would not be returning to the role of Prison Director.

[20] In a letter from Mr Paul Mahoney, Serco’s Managing Director, Justice and Health, dated 20 August 2015, Mr Sands was informed as follows:

As you know one of the terms of the Step-in is your appointment as Contract Director has been revoked. While the Department will not be drawn on any decisions as to when the Step-in may cease or whether you will have your appointment reinstated, it has become clear to us that any handback plan needs to incorporate a plan for a new director and deputy director.

Break Notice

[21] In December 2015, the Department issued a Break Notice terminating the Contract with Serco, effective from 17 March 2017. A Break Notice is defined in clause 39.1 as a “...notice by one party to the other which states that the party delivering the notice wishes the agreement to terminate on the Break Date.”

[22] Disengagement negotiations between Serco and the Department were entered into and resulted in a Disengagement Agreement on 3 April 2016

[23] Mr Sands’ employment was terminated for redundancy on 4 April 2016.

The removal application

[24] Serco advanced two grounds for removing this matter to the Employment Court without prior investigation by the Authority:

- (a) That three important questions of law were likely to arise in the matter other than incidentally (s.178(2)(a) of the Act); and
- (b) That the Authority should exercise its discretion and remove the matter to the Court (s.178(2)(d) of the Act).

Important questions of law

[25] The three questions of law which Serco states are important and likely to arise in the matter before the Authority, other than incidentally are:

- (a) The scope of s.4(1B)(c) of the Act;
- (b) The interplay between the contractual rights of a third party and the employment relationship between an employer and employee (specifically whether the lawful exercise of contractual rights by a third party may impact on the obligations the employer would otherwise have to comply with); and
- (c) The proper interpretation of s.238 of the Act.

The scope of s.4(1B)(c) of the Act

[26] The submission made on behalf of Serco is that the exceptions under s.4(1B) of the Act are important and have not been directly considered by the Courts. Therefore, the law is unsettled and should be dealt with by the Court and not the Authority.

[27] Particularly, the submission is that there are positive good faith obligations on both employers and employees under ss.4(1) and 4(1A) of the Act. S.4(1B) of the Act sets out exceptions to the good faith obligation on employers to provide employees access to information and to consult when making a decision that may adversely affect ongoing employment. Counsel for Serco submit that the exceptions have not been directly considered in judgments of the Employment Court and the law is accordingly unsettled.

[28] In the current matter, Serco relies on the exception in s.4(1B)(c) of the Act which states:

4(1B) However, subsection (1A)(c) does not require an employer to provide access to confidential information-

- (c) Where it is necessary, for any other good reason, to maintain the confidentiality of the information (for example, to avoid unreasonable prejudice to the employer's commercial position).

[29] Serco submits that the negotiations relating to the disengagement from the Contract with the Department were confidential as was the resulting Disengagement Agreement, including its existence. Serco says this information was confidential information and in order to protect its confidentiality and to avoid unreasonable prejudice to its commercial position, it was unable to provide Mr Sands access to it.

[30] Serco also submits that disclosure or consultation with Mr Sands would have been in contradiction to the express direction from the Department that the existence and contents of the Disengagement Agreement were to be kept confidential until after the Minister's press announcement on 4 April 2016. Serco argues that the scope of s4(1B)(c) in this situation, is an important question of law which would have a significant bearing on the current case and the development of employment law in general.

[31] The submission made on behalf of Mr Sands is that the interpretation of "*good reason*" is narrowly confined to whether Serco should have provided Mr Sands with a copy of the Disengagement Agreement and that the personal grievance claim for unjustified dismissal does not turn on that point. Further, the submission is that Serco did not provide Mr Sands with any information and did not consult with him regarding the possibility that his position might become redundant and those decisions sit outside the exception in s.4(1B)(c) of the Act.

[32] Mr Sands' employment was terminated following the disengagement negotiations between Serco and the Department and upon the conclusion of the resulting Disengagement Agreement. This was a highly sensitive and confidential negotiation and Agreement.

[33] Did Serco have good reason not to provide Mr Sands with access to confidential information which related directly to his personal grievance, in order to maintain its confidentiality and avoid unreasonable prejudice to its commercial

position? In the circumstances of this case, it seems to me to involve an important question of law.

[34] The scope of the exception to the consultation obligation contained in s4(1B)(c), is an important question of law in my view. Guidance from the Employment Court on this matter would be useful.

Do the contractual rights of a third party (the Department) impact, and potentially restrict, obligations between an employer and an employee, namely Mr Sands and Serco?

[35] Serco submits that the contract between it and the Department was a form of public/private partnership (PPP). Serco is of the view that Mr Sands' employment relationship with it was affected by the Corrections Act and that it had no control over Mr Sands' continuation of employment as this was determined by the Department under the Corrections Act.

[36] It seems to me that the relationship appears to fall into the category of a tripartite employment relationship. Mr Sands was employed by Serco and Serco was contracted by the Department to manage prison services at the Prison. The Court has considered tripartite employment relationships on a number of occasions. Counsel for Mr Sands has referred to a number of decisions including *Allied Investments Ltd v Guise*¹, where the Court at para.[50] stated:

This case involves a tripartite employment relationship but it is equally important to note that this factor does not relieve an employer from its statutory obligations under the Act. Indeed s.238 specifically prohibits any form of contracting out ...

[37] Counsel for Mr Sands contends that the contract between Serco and the Department is not a PPP and the law around tripartite employment relationships has been confirmed by the Employment Court, namely that common law obligations between employers and employees continue to apply in full.

[38] While this might be so, the factual situation in this case is novel in that the contract entered into between Serco and the Department relates to the provision of services by a private contractor, services formerly provided by the Department, a public body. The nature of the relationship is defined in clause 1.2 of the Contract and is described as being both a security contract and a prison management contract

¹ [2015] NZEmpC 181

pursuant to the Corrections Act. The case law referred to by counsel for Mr Sands relates to private businesses and does not involve a public entity, such as the Department.

[39] It is possible that the relationship between Serco and the Department could be regarded as a PPP and an important question of law arises as to the impact of the Department's actions on the employment relationship between Mr Sands and Serco.

Section 238 of the Act

[40] The third question of law which Serco contends is an important question of law relates to the interpretation of s.238 of the Act. The submission by Serco is that Mr Sands was removed from his role as Prison Director under s.199(1)(c)(i) of the Corrections Act.

[41] Counsel for Mr Sands denies the application of the Corrections Act but says that even if it did apply, under s.199(2) of the Corrections Act, Serco was bound by the provisions of the State Sector Act 1988 which relates to the application of personnel and equal employment policies.

[42] Section 238 prohibits contracting out provisions in "any contract or agreement". It appears to me that an important question may arise as to the relationship between the Corrections Act and s.238 of the Act.

[43] Even if I am incorrect, there is a need for only one important question of law for a matter to be removed to the Employment Court.

[44] I consider that the application for removal under s.178(2)(a) on the ground that there is an important question of law, should be granted.

[45] Further, it is my view that this is a case in which I should exercise my discretion under s.178(2)(d) of the Act and remove Mr Sands' claims to the Employment Court.

Determination

[46] For the above reasons the application for removal by Serco is granted.

[47] Mr Sands claims brought by him to the Authority under file number 5621182 are to be removed to the Court in their entirety, for hearing and determination without the Authority investigating them.

Costs

[48] Costs are reserved. Serco has 14 days from the date of this determination to file a memorandum as to costs. Mr Sands has 14 days from receipt of Serco's memorandum, to file a memorandum in reply.

Anna Fitzgibbon
Member of the Employment Relations Authority