

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Christine Kathryn Rankin (Applicant)

AND The Attorney-General in respect of the State Service
Commissioner (respondent)

REPRESENTATIVES Michael Quigg for the applicant
Ellen France for the respondent

INVESTIGATION MEETING 11 April 2001

DATE OF DETERMINATION 17 April 2001

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

1. In her Statement of Problem filed with the Authority during the afternoon of 10 April 2001 Ms Rankin brings various breaches of contract claims against the respondent ("the Commissioner"). These claims arise out of, and include matters leading up to, the latter's decision not to re-appoint her to her present position when her contract expires on 5 July 2001. Ms Rankin alleges the Commissioner has breached his contractual obligations to her, both express and implied. She also says that he has failed to meet his statutory obligations to act independently. Ms Rankin claims the Commissioner's decision was predetermined and influenced by political and other irrelevant considerations. The applicant says the respondent has not acted in good

faith. Ms Rankin seeks over \$818,000 damages. She also seeks various orders – including one requiring the Commissioner to consider her for re-appointment – and declarations. By way of an alternative claim, Ms Rankin seeks a finding that her employment agreement is of open tenure. The applicant seeks costs.

2. Ms Rankin's also asks that her application, in its entirety, be removed by the Authority to the Employment Court. The application is made in terms of s. 178(2) of the Act. Ms Rankin seeks urgency. The following determination is in respect of only this matter.

Investigation

3. Because of the application for urgency I convened a preliminary telephone directions conference on Wednesday 11 April at 2.15 pm. The outcome was as follows:
 - a. I raised with the parties' representatives my concern as to their clients' failure to undertake mediation. The parties agreed on the general desirability of mediation but held the common view that, in this instance, it was unlikely to contribute constructively to resolving the matters between Ms Rankin and the Commissioner. The respondent also holds the view that, for jurisdictional reasons, the Authority does not possess the ability to direct the parties to mediation in this instance. I understood this view to rest on the respondent's opinion that the Act does not extend to chief executive officers employed in the Public Service.
 - b. The parties expressed their common view that there are important, non-incident questions of law arising out of the application that justify transferring it wholly to the Employment Court. As indicated already, one of these is the respondent's view that the Authority and the Court lack jurisdiction to hear Ms Rankin's application. At my request the parties undertook to set out their common position as to what these questions were.
 - c. Counsel for the applicant reiterated Ms Rankin's wish for urgency. He said his client's request was lent greater urgency by the Government's advice,

that day, of its intention to merge the department she currently heads into a new Ministry of Social Development. Counsel for the respondent advised it was willing to assist in moving the matter along.

- d. The respondent preferred not to submit a Statement in Reply to the Authority but instead to participate in an urgent conference with the Court during which it intended raising certain procedural matters. Counsel for the applicant advised his client was not seeking a Statement in Reply, that there had been already an exchange of views between the parties and that a Statement of Defence in due course would suffice.
- e. The parties confirmed they were seeking a determination from the Authority as soon as possible in respect of the Application for Removal to the Court.

5. I am therefore required by the parties to make a determination on the Application for Removal to the Court. Of necessity my investigation has been limited. I have had regard to Ms Rankin's application (which has no attachments other than a copy of a brief letter by the respondent to her dated 22 February). I have also considered the matters put by counsel during the telephone directions conference held on 11 April. Finally, I have taken account of the statements by the parties setting out the important questions etc, which are the basis for seeking a removal.

Findings of Law

6. Section 178 of the Act permits the Authority to remove matters to the Court. Removal is discretionary (s. 178(2)). Exercise of this discretion is, *inter alia*, dependent on several factors. First, there must be an important question of law. Or, second, the matter is of such a nature and urgency that it is in the public interest that it be removed immediately. Or, third, if the Court has before it proceedings between the same parties and which entail the same or similar issues. Or, four, if the Authority is of the opinion that in all the circumstances it should be determined by the Court. Where the Authority declines to remove any matter the party applying may seek the special leave of the Court for the matter to be removed (s. 178(3)).

7. In considering this application I have had regard to various factors including the Authority's role. It is clearly set out in the Act at s. 157. The Authority is also required to:

- “(a) support successful employment relationships and the good faith obligations that underpin them; and*
- (b) to determine the substantive merits of any case, without regard to technicalities; and*
- (c) to deliver speedy, informal and practical justice to the parties to any matter before it.”*

(reg. 4(1) of the Act)

8. Applications such as this were regularly put to the Employment Tribunal. The criteria under which removal applications were considered are similar to those applying to the Authority but not entirely the same. The Authority can now have regard to *“all the circumstances”* in determining such applications (s. 178(2)(d)). Ms Rankin occupies a prominent public service position. She has attracted considerable media attention. These facts are not of themselves determinative of whether her application can succeed. This is not an exercise in which the Authority is to count how many viewers are attracted to *Coronation Street* or the like. Instead, the issue is one of whether the matters commonly raised by the parties are important questions of law, or of such a nature and of such urgency etc.

The Parties' Submissions

9. As indicated above, the parties agree that there are important questions of law relied upon in support of the application for removal of the matter to the Court. As it happened, and apparently because of the limited time available, it was not possible for the parties to provide a joint memorandum. The respondent's views are set out in a brief submission faxed to the Authority on 12 April. They include:
- a. Whether the applicant has any enforceable right to reappointment at the end of the current term of her contract; and

- b. The nature and scope of the Commissioner's powers, duties and functions under the State Sector Act 1988 in relation to chief executives upon the expiry of their term of contract; and
 - c. Whether the Authority and the Court have jurisdiction to hear and determine these proceedings.
10. Counsel for the respondent also recorded her support for the applicant's submission, in the application for removal.
11. The applicant's submissions are a little more extensive. Essentially they record the same as those matters put forward by the respondent. They also say there is no precedent case law to guide the Authority in relation to Ms Rankin's allegations about the application of various provisions of the State Sector Act 1988 and the Employment Relations Act 2000. Her application raises issues as to how fixed term contracts are to be treated under the new legislation. The Court in *Baguley v Coutts Cars Ltd* unreported, 3 April 2001, AC25/01, has foreshadowed a different approach. Public interest arises from the public's legitimate interest in the operation of government departments that are administered by chief executives such as the applicant who are employed by the Commissioner. The public has a legitimate interest in the operation of a government department affected by political interference. The matter is urgent because Ms Rankin's employment is set to terminate on 5 July and the government has announced its intention to establish a new ministry. The applicant will seek urgency if the matter is removed to the Court.

Conclusions

12. I am satisfied that this is an appropriate instance for the Authority to exercise its discretion in favour of the application and refer the application to the Court, in its entirety. I arrive at this conclusion for several reasons:
- a. First, I concur with the parties' statements setting out what they see as the important questions of law. I accept there are at least four important questions. Three involve untested matters, the first relating to the Commissioner's obligation to act independently and in good faith, and the

third to whether Ms Rankin's contract is of a fixed term in terms of s. 66 of the Act. The third is the issue of whether the Court has jurisdiction.

- b. I am satisfied that these questions mean the case is sufficiently of such a nature and of such urgency that it is in the public interest to remove it immediately to the Court. I reach this conclusion by having regard to the importance of the public having proper confidence in the Public Service and the serious allegation of political interference. I am mindful of the public's legitimate expectation that the Commissioner will make chief executive officer and other appointments objectively and free of political interference, consistent with the provisions of the State Sector Act 1988.
- c. At this early stage of the operation of the new Act it would also be doing the parties and others a service to place the issue of fixed term contracts and s. 66 before the Court.
- d. Finally, and consistent with s. 178(2)(d) of the Act, I am of the opinion that even if the other criteria were not clearly met then this is one of what I anticipate will be rare applications which, in the circumstances, should be determined by the Court anyway. I reach this conclusion after having, as required, regard to the application 'in the round' and because the parties are represented by experienced counsel. They have articulated a common view on the efficacy of the Court addressing all of their concerns, including the issue of jurisdiction: *Cocks v Foote, Cone & Belding Ltd* [1994] 1 ERNZ 180.

13. I therefore determine that Ms Rankin's application in its entirety be removed to the Court.

Orders

14. Pursuant to s. 178 of the Act I order that this matter be removed in its entirety to the Court.

15. Costs are reserved. I recommend that the parties address and attempt to reach agreement on the question of costs in the context of the substantive proceedings.

16. The delay between the investigative meeting held on 11 April and the issuing of this determination today, 17 April has been caused by the Easter holiday period.

Denis Asher

Member of Employment Relations Authority