

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Gustav Allen (applicant)
AND	The Congregational Christian Church of American Samoa in New Zealand (Porirua) Trust Board (respondent)
REPRESENTATIVES	Stephen Brown for the applicant Graeme Ogilvie for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Wellington, 21 January 2005
DATE OF DETERMINATION	25 January 2005

DETERMINATION OF AUTHORITY: Interim Injunction Application

Employment Relationship Problem

1. In an urgent amended statement of claim received on 26 November 2004 the applicant, the Reverend Gustav Allen, said amongst other things that he had been unjustifiably dismissed by the respondent (the Board). He sought immediate interim reinstatement and other remedies including costs.

2. The Board says it does not have an employment relationship with the applicant – amended statement in reply received on 28 November.
3. The parties underwent mediation but their employment relationship problem remained.

Investigation

4. During a telephone conference held on 29 November 2004 the parties agreed to a one-day investigation in Wellington on Friday 21 January 2005. The parties also agreed that, in the event the Reverend Allen was successful with his interim application, a substantive investigation would follow on 2 February. In advance of the interim proceedings, the parties usefully provided witness statements and outlines of their legal positions.

Background

5. Key background details can be summarised as follows.
6. The Congregational Christian Church of American Samoa in New Zealand (the Church) began its Ministry in Porirua in 1985.
7. On 30 August 1991 the Church was incorporated as a Society, called the Congregational Christian Church of American Samoa in New Zealand (Porirua) Incorporated. As required, a set of rules was registered.
8. In July 1992 the Church purchased a Church house property. Title was taken in the name of the Society.
9. In or about the latter part of 1994 the Church built a double-sized garage next to the Church house, to accommodate activities such as services, meetings, choir practices and social gatherings.
10. The applicant has been the Church's Minister since December 1992 following a traditional ceremony of welcome and a special service. He came to Porirua from

American Samoa, where he was born and ordained, following an approach from the Church's congregation. From the outset the Reverend Allen lived in the Church's house with his family.

11. The Church was incorporated on 22 December 1994 under the Charitable Trusts Act 1957 as the Congregational Christian Church of American Samoa in New Zealand (Porirua) Trust Board (the Board).
12. On its incorporation the Board registered a set of rules/constitution (the constitution). The Church house property was subsequently transferred to the Board.
13. Around March 1999 some members of the Church first expressed their dissatisfaction with the Reverend Allen and their wish that he leave. On Sunday 29 August 1999, and with considerable (and ongoing) bitterness, the Church split into two congregations.
14. Following 29 August 1999 the Reverend Allen and his supporters effectively occupied and used the Church house and adjoining building while those who were dissatisfied with him worshipped elsewhere. That situation has largely remained unchanged up to the present time.
15. Along with the occupation of the Church house, the Reverend Allen and his supporters also enjoyed effective control of the Board.
16. Some effort was made by the 'mother' church in Samoa to mediate a resolution; that effort was unsuccessful.
17. Legal proceedings commenced between the two congregations. A decision was issued by the High Court on 16 September 2004, (*Tikinene Apineru v The Board of Trustees of the Congregational Christian Church of American Samoa in New Zealand (Porirua) Trust*, unreported, CIV 2003 485 713, Wild J). It identified the lawfully appointed members of the Board. The Reverend Allen is one of those members. The judgement also found (at par 62),

That such persons are lawfully entitled to control the funds and property of the (Board) in accordance with (its) Constitution.

18. The effect of that decision was to hand control of the Board to those who were dissatisfied with the Reverend Allen and who wanted him to leave.
19. Proceedings are currently underway, initiated by Reverend Allen, to have the Board wound up. A hearing is set down for 31 January 2005.
20. In an application filed in the Employment Authority on 29 October 2004 the Reverend Allen alleged the Board had failed to pay him any personal income since 16 September of that year and that it had failed to pay his contracted income since August 1999.
21. He also alleged the Board had indicated it did not intend to pay the rates due of the Church house, that it intended to sell the house and other property used by him, that it had failed to pay the electricity bill (payable as part of his employment package) which was then due with disconnection of supply threatened and that a "*disciplinary meeting*" had been scheduled for 3 November 2004 with the threat of dismissal without any particulars of any alleged breaches of employment obligations having been provided by the respondent.
22. The parties agreed, during a telephone conference convened by the Authority on 3 November 2004, to undertake mediation. The parties also agreed that the Authority would take no other steps pending the outcome of that mediation.
23. In its statement in reply filed on 9 November the Board denied there was an employment relationship between the parties. In the meantime it had undertaken to pay the electricity account on an asap basis and also to postpone the meeting scheduled for 3 November.
24. On 16 November 2004 the Board purported to terminate the applicant's employment.

25. The Reverend Allen then filed an amended statement of problem in the Authority on 26 November in respect of the purported termination, which this interim determination now addresses.

Parties' Submissions

Applicant's Position

26. The applicant says he is entitled to seek interim relief because his relationship with the respondent was that of an employee and because he has been unjustifiably dismissed. The Reverend Allen says his terms and conditions of agreement were agreed to between himself and members of the Porirua congregation, on or around December 1992.
27. The applicant is asking that, on an interim basis, he be reinstated to his position as Minister, that payment of his agreed wages of \$600 per fortnight be resumed, that the Board resume meeting the costs of his personal outgoings including rates, electricity and telephone and that he be able to continue to use the two Church vehicles currently in his possession. He also asks that he be granted continued occupancy of the Church house (he and his family are presently under notice to vacate the house by 18 February of this year).
28. The applicant's claim of an employment relationship relies on a number of points including a provision in the Board's constitution (refer to the attachment to Tikinene Apineru's affidavit to the High Court dated 29 September 2000) at sub-clause 3.(g), that the Church shall have the power

To appoint, remove or suspend any employees of the Church and direct and control them and fix their remuneration;

29. The Reverend Allen also relies on frequent reference by members of the Board in their affidavits to the High Court and other references to the applicant's "*appointment*" and to his "*employment relationship*" with the Board.

30. Counsel for the Reverend Allen, Mr Stephen Brown, argues that there is no general rule in relation to clergymen but rather the result depends on the individual facts of the case. In this case it is clear that members of the Church considered they were the employer of the Reverend Allen and they were.

Respondent's Position

31. The Board argues that the Authority only has jurisdiction in this matter if there is a contract of service. In this case the Authority has to decide whether there is any contract at all.
32. In *Mabon v The Conference of the Methodist Church of NZ* [1997] ERNZ 690, and as upheld by the Court of Appeal, the Employment Court held there was no intention by the parties to create a contractual relationship. That decision follow a line of English authorities which have identified that ministers of religion are not engaged as employees but instead are called by God to take up a divinely inspired vocation inconsistent with any intention to seek legally binding contractual terms. An exception to this rule is found in *Gray v Nelson Methodist Presbyterian Hospital Chaplaincy Committee* [1995] 1 ERNZ 672; a decision not overturned by the subsequent ruling of the Court of Appeal (*Conference of the Methodist Church of NZ v Gray* [1996] 1 ERNZ 48); but, Gray was not employed by a church rather by an ancillary body.
33. In this case there is no documentation in support of the claimed employment contract. There was instead agreement that the Reverend Allen would be provided with a house and that the Church would pay the rates, phone and power bills, etc. This arrangement is confirmed in the applicant's affidavit of 1 September 2004, in particular par 45, in which the Reverend Allen describes his salary or stipend as a "Love Offering (Alofa)". All of the evidence points to the Porirua congregation accepting the responsibility of the applicant and his family's wellbeing, but not of employing him.
34. For 12 years the Reverend Allen has never sought the wages he now claims he is entitled to of \$600 per fortnight.

35. There was never a job description or list of duties expected of the Reverend Allen.
36. It is accepted provisions in the constitution enable the Board to engage employees but it has never done so as it has never had the need or the resources to take on staff; the Church has never had more than 40-50 adult members. It is also accepted that the Board has used terms like 'employment' in relation to the applicant but only in the most general sense rather than that of defining a legal relationship.

Discussion and Findings

37. The Authority's approach to applications for interim injunctive relief is well-established and well known. A principled approach to the Authority's use of its discretionary power is required. Accordingly, and as is made clear in *Baker v Armourguard Security Ltd* [1998] 1 ERNZ 424, the standard questions to be asked are:

Does the plaintiff have an arguable case of unjustifiable dismissal?

If so, does the balance of convenience favour the grant of interim relief?

Nevertheless, are there alternative remedies available to the plaintiff?

Where does the overall justice of the case lie?

(at 435, above)

38. There can be no doubt that the modest test required of whether the Reverend Allen has an arguable case of unjustified dismissal has been met. The relationship between the parties has come to an end as a result of an initiative by the Board. Before the question of whether or not the termination was unjustified can be answered another question must first be addressed: was the relationship that of a contract of service? I am satisfied that a substantive investigation is required before that question can be properly answered. Consistent with the evidence before me, it is therefore appropriate to provide the Reverend Allen with the benefit of the doubt, i.e. to accept that he has an arguable case.

39. In reaching this conclusion I do so with some hesitation and notwithstanding the absence of any written agreement between the parties as to the nature of their relationship, the initial lack of clarity as to who the parties were to the claimed employment relationship, the apparent considerable difficulties faced by the applicant in respect of well-established case law, his oral evidence to the Authority that his appointment as Minister was for an initial period of 6-years at the end of which either party could bring it to a close and the Reverend Allen's own description (at par 10 of his affidavit of 1 September 2004) of his relationship with the Church, that:

Testimonies were exchanged between me and ... the lay preacher who to that time was the voice of the Church, by which we accepted each other as one. We made a commitment to unity in God's name.

40. I do not accept, however, that the balance of convenience or overall justice lies with the applicant. I reach this conclusion for the following reasons:
41. As already agreed with the parties, the Authority can undertake a substantive investigation as soon as Wednesday 2 February, i.e. in 8-days time (or, should they wish more time, any day during the week commencing 14 February which has just become available). The impact of his termination on the applicant is therefore limited.
42. It is also mitigated by the fact that the Reverend Allen and his family continue to enjoy occupancy of the Church house, as notice of vacation is effective only from 18 February.
43. The applicant also enjoys continued use of the Church's vehicles. The Board undertook as well, during the interim investigation on 21 January, to promptly reimburse the Reverend Allen for the monies spent by him to have the electricity reconnected to the Church house, and in respect of an unpaid account, and to ensure that rates also were paid on the property. According to the Board's advocate, Mr Graeme Ogilvie, it was surprised to hear of the disconnection as it had recently paid an account so as to forestall the threatened disconnection. In a number of important respects the applicant's practical and immediate needs are being met.

44. It is also apparent from the documentary record and the applicant's own account that the remuneration paid to him since 1992 has varied markedly. The Reverend Allen says the original agreement was that he would receive \$600 per fortnight, that it was increased to \$800 in 1994 and later the same year to \$1,000. However, his own bank records provide a snapshot of the period February/March 1999 when automatic payments of Board funds of only \$250 per fortnight were going into his account, whereas previously he says payments were made in cash.
45. I note here that this variability has apparently been of no concern to the Reverend Allen until after the rupture within the Church, in 1999, and in particular following the High Court's decision that returned effective control to those who oppose the applicant.
46. At par 45 of his affidavit, the applicant says he discovered at some point that rather than coming from love offerings or alofa, his "salary" was paid from Housie takings; he pointed out the irregularity of this practice but was told it was the decision of the Church.
47. Neither the balance of convenience or overall justice would be met by directing the Reverend Allen's interim reinstatement to either a salary system based on an irregularity or to one dependent on alofa from a small and bitterly divided congregation, of which the dissident group comprises the greater number (par 42 of the Reverend Allen's affidavit).
48. It would be unrealistic and impractical to do so, particularly as the relations between the Reverend Allen and those members of the Church who are opposed to him are likely to worsen as an inevitable consequence of these proceedings and the applicant's current initiative in the High Court to wind up the Board.
49. I am therefore satisfied that the overall justice of this application is to decline the application for interim reinstatement and instead to proceed to a substantive investigation, as is already agreed with the parties, on 2 February 2005.

Determination

50. For the reasons set out above the application for interim reinstatement by the Reverend Gustav Allen in respect of the respondent, The Congregational Christian Church of American Samoa in New Zealand (Porirua) Trust Board, is declined.

51. Costs are reserved.

Denis Asher

Member of Employment Relations Authority