

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Dr Nigel Perry (Applicant)

AND The Vice Chancellor of the University of Canterbury (Respondent)

REPRESENTATIVES David Beck, counsel for the applicant
Neil McPhail, advocate for the respondent

MEMBER OF AUTHORITY James Crichton

SUBMISSIONS RECEIVED 1 April 2005
1 May 2005
10 May 2005

DATE OF DETERMINATION 16 June 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 21 July 2004, the applicant filed a statement of problem with the Authority alleging that he had been the subject of the series of unjustified actions which caused ongoing disadvantage to him pursuant to s103 (1)(b) of the Employment Relations Act 2000 and that there were also breaches of express and implied terms of the applicant's employment agreement, and in the alternative breaches of various statutory provisions both in the Employment Relations Act and in other statutes.

[2] In its statement in reply filed with the Authority on 3 August 2004, the respondent, the University of Canterbury (the University) denied all those claims and maintained that the applicant's claim should be struck out.

[3] In a telephone conference convened by the Authority on 9 March 2005, the parties agreed that the University's application to have Dr Perry's claims struck in its entirety should be dealt with as a preliminary matter by way of written submissions.

[4] A timetable for submissions was set by the Authority and those submissions have now come to hand. The purpose of this determination is to deal only with the issue of the application to strike out.

Issues

[5] The issues for the Authority to determine are:

- (a) Is this a case where the discretion to strike out ought to be exercised?

- (b) Is this a case where a definite conclusion can be reached without further investigation by the Authority?

Is this a suitable case for the exercise of the Authority's discretion?

[6] It is accepted that the legal principles involved in strike out applications are those stated in the Labour Court decision *New Zealand (with exceptions) Shipwrights etc Union v. New Zealand Amalgamated Engineering etc IUOW* [1989] 3 NZILR 284.

[7] It is worth quoting in full the salient excerpt from that decision:

1. *The question to be assessed is whether it has been demonstrated that the case pleaded is so clearly untenable that it cannot possibly succeed.*
2. *The jurisdiction is to be exercised sparingly and only in a clear case where the Court is satisfied that it can reach a definite and certain conclusion.*
3. *It is not a valid criticism of an application to strike out that extensive and complex argument and even evidence is necessary to demonstrate that the case is clear enough for the Court to exercise its summary powers of striking out.*
4. *The Court will not strike out a proceeding if, on the way to doing so, it has to decide disputed questions of fact.*
5. *Even if jurisdiction exists and the absence of a tenable case is established, the Court has a residual discretion to decline the application if the justice of the case so requires, but that discretion will not often be exercised if the Court has been able to form a clear view of the case.*

The Court went on to say:

The purpose of a striking out application is to save the Court the time and the parties the expense of an inquiry into a case which, from the start, is obviously doomed to failure. It is in the public interest that the Court should not be involved in an exercise in futility and that defendants should not, without good reason, be brought before the Court.

[8] In essence, in order for the Authority in the instant case to be satisfied that it ought to exercise its discretion to strike out Dr Perry's proceedings it would be necessary for the respondent University to satisfy the Authority:

- (a) That Dr Perry's case is so untenable as to make it impossible that he could succeed if the matter went to a substantive hearing;
- (b) That it was clear that the Authority could reach a definitive conclusion on the matter;
- (c) That there were no disputed questions of fact;
- (d) That the justice of the case does not require the matter to proceed; and
- (e) That the applicant's proceedings are so futile that the respondent should not be put to the trouble of defending them.

[9] In this particular matter, Dr Perry argues that, notwithstanding those legal questions I have referred to above, the investigative and relatively informal nature of the Authority's work makes it much less acceptable for the Authority to *wholeheartedly adopt the principles announced in the Shipwrights case*

[10] That argument certainly has its attractions. In essence what it says is that even if, at first blush, the test announced in the *Shipwright's case* is made out, it is still available to the Authority to say that in pursuance of its *equity and good conscience* jurisdiction and the unique nature of its investigative role a striking out of a party's proceedings would in all the circumstances be unjust and inequitable.

[11] Dr Perry adds weight to that point by arguing that, given that this is a continuing employment relationship, he ought to have access to the Authority to achieve some resolution of his employment relationship problem.

[12] The University's argument that Dr Perry's application, as framed, is untenable is based on its analysis of the statement of problem and in particular the allegations set out in para.2.7, 2.10 and 2.11 of the statement of problem which the University says all underpin each and every one of the applicant's claims namely:

- Disadvantage;
- Breach of implied and express terms;
- Breach of trust and confidence and good faith requirements;
- Breach of the Fair Trading Act or the Contractual Remedies Act;
- Unfair bargaining.

[13] It is the University's position that none of the central allegations contained in those three paragraphs (para.2.7, 2.10 and 2.11 of the statement of problem) are capable of being supported by the known facts. Indeed, the University says that the known facts support quite the opposite view from the one advanced by Dr Perry.

[14] The known facts are comprised essentially in a small number of letters and in extensive email traffic between Dr Perry and in particular Dr Bell who was at the relevant time the head of the relevant department at the University that Dr Perry was to work at.

[15] Those emails are all available to the Authority and form part of the Authority's file. The University says that there is no additional evidence that can be brought to bear on the problem which could as it were *overrule* the plain words in the relevant email exchanges.

[16] The University says in effect that all of the exchanges between the parties leading up to Dr Perry's appointment to a role at the University are clearly documented in the email traffic so there is no room for nuance or matters of perception.

[17] For his part, Dr Perry says that perception and the way in which the parties conceptualised their relationship is relevant and that there are relevant issues in terms of the credibility of the witnesses presumably especially the email writers. Dr Perry invites the Authority to take the view that justice and fairness requires the Authority to hear the witnesses, test their evidence by the investigative process and then form a determination as to the meaning of the email traffic which the University says ought to be given its plain ordinary meaning without the necessity of a formal investigation meeting.

[18] The University also alleges that with respect to the personal grievance claim alleging disadvantage, Dr Perry's raising of the grievance was out of time because he was notified that his application for promotion was unsuccessful on 21 November 2002 and yet the grievance was not raised until 15 May 2003. Conversely, Dr Perry says that he was first informed that the *special arrangement* which he claimed was the basis of his employment was denied by the University in a letter from the then acting Vice Chancellor Professor Bob Kirk dated 17 February 2003 and so the 90 days should run from that date and not from the date relied upon by the University of 21 November 2002.

Is this a case where a definite conclusion can be reached without further investigation by the Authority?

[19] The University says that all of the negotiations between the parties leading up to Dr Perry's engagement by the University on certain terms and conditions, were fully and clearly documented. That documentation of course is contained in the extensive email traffic to which I have already referred. It is the University's position that that documentation is both clear and full that is to say the documentation in question forms a complete record of the discussions between the parties which lead up to the confirmation of the relationship.

[20] It follows that the University argues that no good purpose could be served by there being an investigation meeting at which the credibility of witnesses might be in issue. From the University's prospective, the plain words of the email traffic give the lie to Dr Perry's claim.

[21] For his part, Dr Perry maintains that the credibility of the parties and the parties' witnesses needs to be assessed by the Authority and that until that process is undertaken, it would be impossible to reach the point that the case as pleaded is so untenable that it could not possibly succeed.

[22] Further, Dr Perry invites me to reflect on the peculiar investigative powers of the Authority and allow a different result of this strike out application than might have resulted from an application made to strike out in an adversarial forum.

Determination

[23] I have reached the conclusion that the application to strike out ought not to be granted although I must say that I think the matter is very finely balanced.

[24] In reaching that conclusion, I am particularly influenced by the unique nature of the Authority's investigative powers and the different dynamic that exists in an investigative process, and by the conviction that the justice of the case really seems to require the matter to proceed to an investigation.

[25] I am not persuaded that the applicant's claim is so futile that the respondent should not be put to the trouble of defending it. Nor do I accept the University's argument in respect to the personal grievance being time-barred.

[26] Costs are reserved.

James Crichton
Member of Employment Relations Authority