Determination Number: AA 119/05
File Number: AEA 1007/01

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Health Waikato, Waikato District Health Board (First Initiating party) **AND** Renee Turner (Second Initiating party) **AND** Health Waikato, Waikato District Health Board (Third Initiating party) **AND** Public Service Association (Fourth Initiating party)
AND	Renee Turner (First Responding party) **AND** Health Waikato, Waikato District Health Board (Second Responding party) **AND** Renee Turner (Third Responding party)
REPRESENTATIVES	Rob Ord, for Ms Turner Phirak Appleton, for the PSA
MEMBER OF AUTHORITY	Marija Urlich
INVESTIGATION MEETING	8 February 2005
FURTHER INFORMATION RECEIVED	22 February 2005
SUBMISSIONS RECEIVED	23 February, 9 and 15 March 2005
DATE OF DETERMINATION	6 April 2005

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

[1] This determination deals with a preliminary question as to whether there are grounds to join the PSA as the second defendant in proceedings Ms Turner has initiated against her former employer Health Waikato Limited. Ms Turner was a member of the PSA throughout her employment with Health Waikato. She says the PSA failed to adequately represent her prior to her dismissal and this failure contributed to her dismissal. The PSA opposes being joined to the substantive application and asks that the Authority decline to investigate Ms Turner's claims against it for lack of merit.

[2] The Authority must determine the following issues:

(i) can Ms Turner bring a personal grievance against the PSA?;
(ii) can the Authority investigate Ms Turner's claim of breach of contract against the PSA?;
(iii) can the Authority investigate Ms Turner's claim in tort against the PSA?; and
(iv) can the Authority investigate Ms Turner's claim the PSA breached the obligation of good faith it owed her?

Issues

(i) Personal Grievance against the PSA?

[3] Section 103(1) of the Employment Relations Act 2000 defines a personal grievance as:

> "For the purposes of this Act, **personal grievance** means any grievance that an employee may have against the employee's employer or former employer because of a claim -
> …"

[4] Ms Turner was not an employee of the PSA at the time of her alleged unjustified dismissal from Health Waikato Limited. It is an essential element of a personal grievance that it is based on an existing or former employee/employer relationship. There is no such relationship between Ms Turner and the PSA. Ms Turner is unable to raise a personal grievance against the PSA.

[5] The Authority declines to investigate Ms Turner's claim that she has a personal grievance against the PSA.

(ii) Breach of contract?

[6] Ms Appleton argues Ms Turner's claim that the PSA breached express obligations owed to her under the applicable collective employment agreement is without merit and the Authority should decline to investigate this claim.

[7] Mr Ord says Ms Turner will argue the PSA owed her obligations under the collective employment agreement which were breached and that she will rely on *De Soysa v Porirua College Board of Trustees* [1996] 1 ERNZ 538 to support a claim for common law damages in relation to those alleged breaches. In *De Soysa* the applicable collective employment agreement contained express provisions delineating how Mr De Soysa's union would participate in reviews of staffing levels. In that case the Court held the union's actions breached those express provisions.

[8] The breaches of contract Ms Turner intends to raise concern the alleged failure of the PSA to raise arguments based on the applicable collective employment agreement. These arguments are based on how Ms Turner says the hours of work, sick leave, management of change and personal grievance clauses in the collective employment agreement should have been applied to her by Health Waikato. These arguments are apparent to Mr Ord and he says they should have been raised on Ms Turner's behalf by the PSA at the time in question. These clauses do not contain positive duties on the PSA comparable to those relied on by the Court in *De Soysa*.

[9] The arguments Ms Turner intends to raise are not based on breaches of the applicable collective employment agreement. They are claims as to the adequacy of representation provided to her by the PSA. There is no basis for a claim of breach of contract based on alleged breaches of the collective employment agreement. Accordingly, I decline to investigate this claim further.

(iii) Breach of tort?

[10] Mr Ord says Ms Turner will argue breach of an unspecified tortuous duty against the PSA.

[11] Section 161(1)(r) of the Act provides:

> "(1) The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including-
> …

(r) any other action (being an action that is not directly within the jurisdiction of the Court) arising from or related to the employment relationship or related to the interpretation of this Act (other than an action founded on tort):
…"

[12] The Authority does not have jurisdiction to deal with actions founded on tort. I am unable to investigate any claim by Ms Turner founded on tort.

(iv) Breach of good faith obligations?

[13] Section 4(1) of the Employment Relations Act provides:

"(1) The parties to an employment relationship specified in subsection (2)-
(a) must deal with each other in good faith; and
(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything-
(i) to mislead or deceive each other; or
(ii) that is likely to mislead or deceive each other.

(2) The employment relationships are those between-
…
(c) a union and a member of a union:
…"

[14] Ms Appleton says Ms Turner's claim that the PSA breached the obligations of good faith owed to her under section 4 of the Act are without merit and the Authority should decline to investigate them further. She says the delay in bringing the claims has prejudiced the PSA as the organisers involved are no longer employed by the PSA.

[15] Mr Ord says Ms Turner intends to argue the PSA failed to pass on information to her in a timely manner at a critical point in her negotiations with Health Waikato, this failure contributed to her dismissal and amounted to a breach of the section 4 good faith obligations.

[16] It is apparent to me from the evidence received that whether or not there has been a breach of the good faith obligations requires the Authority to resolve disputed facts as to the nature of the communications between Ms Turner and the PSA at this critical time. I am not in a position to resolve those disputed facts at this preliminary stage of the investigation. I have received evidence from the organiser involved at the critical time and I do not anticipate any difficulty receiving further evidence from her if it is required.

Mediation

[17] Ms Turner and the PSA have not attended mediation. They are directed to do so within 28 days of the date of this determination and to advise the Authority of the outcome.

Costs

[18] The issue of costs is reserved. I would indicate to the parties that I am inclined to the view that costs should lie where they fall.

Marija Urlich
Member of Employment Relations Authority