Determination Number: AA 308/06
File Number: 5032377

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND OFFICE

BETWEEN	Association of University Staff Inc
AND	Vice-Chancellor of the University of Auckland
REPRESENTATIVES	Peter Cranney, Counsel for Applicant Phillipa Muir and Rochelle Price, Counsel for Respondent
MEMBER OF AUTHORITY	Dzintra King
INVESTIGATION MEETING	On the papers Applicant 12 April, 21 and 28 August 2006 Respondent 27 April, 17 August, 22 September 2006
DATE OF DETERMINATION	3 October 2006

DETERMINATION OF THE AUTHORITY

The applicant, the Association of University Staff Inc, has filed a removal application. The application is contested by the respondent, the Vice Chancellor of the University of Auckland. The proceedings relate to communications to non-union members and good faith obligations.

In 2005 the union, together with other unions, gave notice under ss42 and 45 to the respondent and other universities for collective bargaining. The respondent declined to enter into a MECA and made offers to non-union staff who were on individual employment agreements. The union maintained that the non-union staff communications undermined its bargaining authority and breached the Employment Relations Act. A Full Bench of the Employment Court heard and determined the issues: Association of University Staff Inc v Vice-Chancellor of the University of Auckland [2005] 1 ERNZ 224.

The union now says that other communications to non-union staff constitute a breach of s 32 (1) (d) (iii) Employment Relations Act, that they are in breach of the principles set down by the Full Court and constitute a breach of the duty of good faith and an undermining of the employment relationship. The respondent says that these issues have already been determined in the 2005 Full Court decision.

The statutory provisions state:

> *1) Where a matter comes before the Authority, any party may apply to the Authority to have the matter, or part of it, removed to the Court for the Court to hear and determine it without the Authority investigating the matter.*

2) The Authority may order the removal of the matter, or any part of it, to the Court if—

(a) an important question of law is likely to arise in the matter other than incidentally; or

(b) the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Court; or

(c) the Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or

(d)
the Authority is of the opinion that in all the circumstances the Court should determine the matter.

The applicant says that the respondent has repeated conduct in 2006 which was held to be illegal in 2005. It also says that there has been a breach of certain terms of an agreement entered into by the parties on 1 September 2005 (after the Full Court decision which was issued on 4 May 2005) and there have been breaches of the good faith provisions. The applicant states that all three causes of action rely in part on the 2004 Court decision.

The respondent has asked that the first cause of action be struck out and also to strike out certain allegations on the basis of res judicata and estoppel arguments. The respondent says that none of the statutory criteria for removal are met.

Important Issues of Law

The applicant says that there are important issues of law. These are:

- Whether an employer who makes unilateral communications to non-members prior to a bargaining process agreement being reached is in breach of s 32 (1) (d) (iii)
- Whether such communications are in breach of the 2005 Full Court decision
- Whether when the Full Court has declared the law in relation to particular parties and there is a breach a permanent injunction should issue
- Whether the communications were in all the circumstances a breach of good faith and an undermining of the employment relationship

Mr Cranney submitted that the matter of communication of offers to non-members and the timing and obligations relating to such offers is a matter of general importance; the issue of the nature and scope of such obligations imposed by the Full Court's decision is an important matter of law affecting unions and employers generally; the questions of law raised would be decisive of the case; and the questions of law could or would affect a significant number of employers and employees.

The respondent says none of the questions of law are such as to render them "important" for the purposes of the Act. Specifically:

- The issue of unilateral communications to non-members is a matter of limited statutory interpretation
- The Authority has previously determined issues regarding good faith obligations and good faith obligations in relation to bargaining
- The issue has already been determined by the Full Court

- The issue of whether a permanent injunction is an appropriate remedy is also within the Authority's jurisdiction and the Authority had previously decided this in relation to an alleged breach of good faith
- Whether or not the respondent's communications were a breach of good faith have been determined by the Court in a number of decisions
- Whether the specific communications constitute such an alleged breach is a matter to be determined on the facts of the specific case
- The resolution of the matter will not affect large numbers of employers or employees because it will specific to this case

Removal in the Public Interest

Mr Cranney maintained that both the nature and urgency of the case meant it was in the public interest that the matter be removed. It was in the public interest that the issue of whether there had been an undermining of bargaining should be determined and that the statutory provisions were still relatively new and the applications of the Full Court case to the current facts was in dispute. He also argued that because the respondent was a major New Zealand employer and a public servant that it was in the public interest that the matter be removed. Also relevant to the removal issue was the fact that the current proceeding was a continuation or repeat of the matter previously before the Full Court.

The respondent denies that the current proceedings are a continuation or repeat of the previous proceedings and asserts that the issues relate to matters between the parties, not matters of public interest. The nature and identity of the employer is not in itself sufficient reason to allow the Authority to be by passed: Sprott v Centre for Advances Medicine Ltd, unrep, 25 February 2005.

Ms Muir noted that s178 (2) (b) required a combination of both the particular nature of the case and urgency, which made it in the public interest for the matter to be removed. Here there had been no claim regarding urgency and the applicant had not moved the matter expeditiously. The Statement of Problem was filed on 28 February and no other action had been taken. The respondent's actions took place in February 2006. It had made its 2006 pay increase offer to non-union members and there was no imminent risk of its making any further disputed unilateral offers as pay increase offers were made annually. There was, therefore, no urgent need to have the matter determined to prevent imminent unlawful actions.

Removal appropriate in all the circumstances

The respondent had raised defences of res judicata and estoppel and applied for part of the proceedings to be struck out. These defences were likely to complicate the litigation process resulting in appeals and challenges to interlocutory decisions and it was therefore more appropriate that one forum should hear the entire matter especially as the issue would relate to an interpretation by the Court of its own recent decision.

The respondent says the Authority has the jurisdiction and expertise to hear and determine issues of res judicata and estoppel and strike out applications and has done so.

Decision

Important Question of Law

The statute provides that the Authority is to determine matters at first instance and should generally do so unless it is satisfied that one of the removal criteria is met and that it is appropriate given the Authority's residual discretion for it to remove the matter.

The questions of law identified by the applicant are questions that need to be resolved in order for a decision to be made. That, however, is not sufficient in itself to render them "important questions" for the purposes of s 178 (2) (a). In Hanlon v International Educational Foundation (NZ) Inc [1995] 1 ERNZ 1, 7 Goddard CJ held:

> *It goes without saying that every question of law that needs to be resolved in the course of deciding a case is important in the sense that the fate of the case may depend upon the way in which the question of law is resolved. That is not enough by itself to render the question of law an important one for the purposes of [s 178].*

The issue of the nature and scope of the obligations imposed by the Full Court decision is appropriately a matter that needs to be determined by considering and analysing the particular circumstances of this case. I agree that what is required to determine the issues is a matter of statutory interpretation and an interpretation and application of the Full Court decision. I do not think they are novel or new questions, and, even if they were, that in itself would not meet the statutory test. In NZ Amalgamated Engineering, Printing and Manufacturing Union Inc v Carter Holt Harvey Ltd, [2002] ERNZ 71 the Court held at para 30:

> *The statutory test is not whether there is an unsettled, controversial or novel point of law. Rather, an important question of law must be shown to be likely to arise in the proceeding other than incidentally.*

The issues here relate to the particular circumstances of this case and the Authority provides the ideal forum for this determination.

An important question of law is not likely to arise other than incidentally.

Public Interest

Section 178 (2) (b) requires that the case must be "of such a nature **and** such urgency" that it should be removed in the public interest. There has been no claim by the applicant that it is urgent and I accept the respondent's submissions as to why it is not. This requirement is not met.

Same proceedings

This does not apply. Whether or not the current proceedings are similar to the proceedings dealt with by the Full Court in 2005 and while proceedings may be filed in the Employment Court regarding the injunction jurisdiction there are at this stage no current proceedings before the Court.

Consideration of all the circumstances

The fact that there are strike out applications and that res judicata and estoppel have been pleaded as defences does not in itself constitute circumstances in which removal should be ordered. The Authority often deals with cases where there are interlocutory proceedings.

One of the remedies sought was a permanent injunction. At the time I was about to issue my determination the Employment Court issued Axiom Rolle PRP Valuations Services Ltd v Kapadia, unrep, AC 43/06, 4 August 2006, Colgan CJ, Travis & Shaw JJ which dealt with the Authority's jurisdiction to issue injunctions. I asked the parties whether they wanted to make additional submissions on the effect of the Court's decision.

The respondent says that Axiom has no effect on the removal application because it is only in circumstances of "great urgency" that the Authority's processes may not be swift enough to restrain what would otherwise be "irreparable harm". It is only in cases where urgent injunctive relief is sought and appropriate that it may be necessary for a party to bring the matter to the Employment Court (para 70). However, the applicant says that para 70 makes it clear that the Authority has no power to grant an injunction, that power being reserved to the Court. Mr Cranney asked that I remove "that portion of the proceedings which survives Axiom to the Court so that the applicant could have the entire matter resolved in the Court.

The respondent argues that if the submission that the Authority did not have jurisdiction to grant a permanent injunction were correct the effect would be that a party could seek an injunction in relation to any employment relationship problem simply in order to bypass the Authority. That cannot have been the Court's intention in Axiom, given that it is the Authority that has been given the jurisdiction to adjudicate employment relationship problems at first instance. As the applicant is not seeking urgent remedies or interim injunctive relief the Authority has jurisdiction to grant a permanent injunction.

> *Where urgent injunctive relief is appropriate in the employment field, it is the Court that is empowered, not the Authority.*

I accept the respondent's submission that the Authority retains the jurisdiction to make permanent injunctions although that does not include Mareva injunctions and Anton Piller orders.

Furthermore, s178 (2) (c) requires that there the Court must already have proceedings before it which are between the same parties and which involve the same or similar issues. That is not the case here.

None of the grounds for removal have been satisfied.

Costs

If the parties are unable to resolve the issue of costs the respondent should file a memorandum within 28 days of the date of this determination. The applicant should then file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King
Member of Employment Relations Authority