

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Dean Smith (applicant)
AND	the Attorney-General for the Commissioner of Police (respondent)
REPRESENTATIVES	Noel Sainsbury for the applicant Joanna Holden for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
SUBMISSIONS RECEIVED	24 April & 22 June 2006
DATE OF DETERMINATION	7 July 2006

**DETERMINATION OF AUTHORITY: Application for Removal to the Employment
Court**

Employment Relationship Problem

1. Mr Smith says his employment was affected to his disadvantage by some unjustifiable action of his employer and that he was unjustifiably dismissed – amended statement of problem received on 26 April 2005. He seeks reinstatement, the reimbursement of wages, etc lost by him as a result of the grievance, unspecified compensation for humiliation and for loss of any benefit and costs.

2. On the same date, and by way of a separate application, Mr Smith asked that his proceedings be removed to the Employment Court.
3. The Commissioner says amongst other things that Mr Smith failed to raise his unjustified dismissal grievance within 90-days and is therefore out of time. The Commissioner also denies Mr Smith's allegations – statement in reply to the amended statement of problem received on 22 June.
4. In a memorandum of the same date the Commissioner supports Mr Smith's removal application.
5. The parties have undertaken mediation.

Background

6. Mr Smith's grievance has been the subject of a number of earlier Authority and Employment Court decisions: refer to my determination WA 30/04, dated 11 March 2004, declining an earlier application by Mr Smith for removal to the Employment Court; to my determination WA 30A/04, dated 1 April 2004, in favour of the Commissioner's application for a stay of proceedings (so that the respondent was free to conclude his disciplinary process) and a decision by the Employment Court, [2005] 1 ERNZ 699, in favour of the Commissioner's application to strike out Mr Smith's application for review.

Parties' Positions

Applicant's Position

7. The grounds of Mr Smith's present application for removal are that the case has been to mediation and its nature will not be resolved through mediation. The factual issues are largely or entirely apparent on the face of available written material and can therefore be presented by affidavit. It is anticipated little or no *viva voce* evidence will need to be called.

8. The primary issues to be determined are legal issues as to the obligations of the Commissioner and whether the investigation, the New Zealand Police Disciplinary Tribunal hearing and dismissal hearings in respect of Mr Smith were carried out in a fair and proper manner.
9. The case involves consideration of the recently enacted s. 194A of the Act, including the live issue as to whether the legal tests and principles applicable to judicial review should be applied in part, in full or at all.
10. The case therefore raises novel issues of law that make it appropriate to place before the Employment Court.

Respondent's Position

11. While agreeing with the application for removal, the respondent does so for different reasons. In particular, the Commissioner believes that the issues of law posed by the applicant do not justify removal but other, more important questions, do.
12. The important questions of law that the respondent believes may arise more than incidentally (s. 178(2)(a) of the Act) are:

Whether the employment institutions have any jurisdiction to inquire into the process and the decision of the Police Disciplinary Tribunal and if so to what extent?

To what extent might a failure to provide complete information to an employee in relation to disciplinary action previously taken by the employer in respect of other employees render a subsequent dismissal unjustifiable?

13. The recent decision of *Creedy v Commissioner of Police*, unreported, Colgan CJ, 23 May 2006, AC 29/06, addressed only incidentally the first question set out above, whereas in this case the issue will go to the heart of the substantive claim.
14. The Commissioner also believes it is appropriate in all the circumstances (s. 178(2)(d) of the Act) for the Authority to refer this matter to the Employment Court because of the proceeding's long history and it has already been before the Authority

and the Court in respect of interim proceedings. Also, a challenge is likely to be mounted regardless of the outcome in the Authority.

15. The Commissioner is of the view that there are no factors in this case that would otherwise make removal inappropriate (*Auckland District Health Board v X*, unreported, Colgan C J, 29 June 2005, AC 33/05).

Discussion and Findings

16. I accept the parties' request to refer this matter to the Employment Court for the following reasons. Proceedings between the parties (this matter was first filed in the Authority on 22 December 2003) have been, and show every likelihood of continuing to be, protracted. They have already made several appearances before the Authority, one before the Court. Ongoing challenges to Authority decisions appear inevitable.
17. The fact that two experienced employment law practitioners are seeking removal because of what they see as important questions of law, albeit for different reasons, should also be taken account of: s. 178(2)(d) of the Act applied.

Determination

18. For the reasons set out above I find in favour of the parties' application for removal to the Employment Court.
19. Costs are also reserved.

Denis Asher
Member of Employment Relations Authority