

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 157/07
5095843

BETWEEN TANIA KA'AI
 Applicant

AND VICE CHANCELLOR,
 UNIVERSITY OF OTAGO
 Respondent

Member of Authority: James Crichton

Representatives: Mary-Jane Thomas, Counsel for Applicant
 Barry Dorking, Counsel for Respondent

Investigation Meeting: On the papers

Submissions received: 12 October 2007 and 2 November 2007

Determination: 19 December 2007

INTERIM DETERMINATION OF THE AUTHORITY

Nature of issue

[1] The applicant (Ms Ka'ai) filed a statement of problem in the Authority on 3 August 2007 in which she alleges that she was unjustifiably disadvantaged and subsequently constructively dismissed by her employer the Vice Chancellor of the University of Otago (Otago University).

[2] That matter, together with similar matters raised by colleagues of Ms Ka'ai, has been set down for an investigation meeting in the Authority in the New Year.

[3] The purpose of this determination, however, is to deal with a proposal that the Authority hear evidence relating to *post termination of employment conduct* of the employer. Ms Ka'ai seeks to introduce such evidence as testimony for her view that Otago University acted in *bad faith* and that bad faith, it is alleged, can be demonstrated, at least in part, by post termination behaviour.

[4] It follows that the application by Ms Ka'ai proceeds not so much on the footing that it is sought to demonstrate that evidence of post termination conduct is relevant to Ms Ka'ai's grievance per se, but on the wider ground that, by dint of its behaviour in post termination matters, Otago University breached its obligations in good faith to Ms Ka'ai.

[5] For Otago University, it is argued, simply speaking, that the law precludes the Authority considering evidence pertaining to post termination matters.

The submissions

[6] The parties have filed helpful submissions with the Authority. Those submissions usefully traverse the issues from each party's perspective.

[7] Ms Ka'ai notes in her submissions, through counsel, that a consequence of decisions taken by Otago University post termination was to deprive her of an opportunity to be heard in respect to the bullying allegations which were made against her and which Otago University decided to investigate. This was because once the employment relationship between Ms Ka'ai and Otago University had been terminated, Otago University made the decision not to proceed further with the investigation into the bullying allegations. Ms Ka'ai wants me to hear evidence on that matter and she has referred to that issue specifically in her statement of problem.

[8] The second fundamental issue that Ms Ka'ai alludes to in her submissions on this preliminary point is a meeting held on 20 July 2007 (almost two months after the termination of Ms Ka'ai's employment) at which it is alleged that a representative of Otago University spoke disrespectfully about Ms Ka'ai thus potentially damaging her reputation.

[9] Ms Ka'ai invites me to hear evidence on those matters particularly on the basis that they demonstrate the bad faith of Otago University and that is relevant to the employment relationship problem which, it is common ground, the Authority has the statutory obligation to deal with.

[10] Otago University's submissions on this preliminary issue commence with a helpful summary of the factual matrix and then proceeds to an analysis of the relevant law.

[11] The first, and perhaps most fundamental, of the submissions of Otago University in relation to the legal position is the question of whether there exists an employment relationship or not at the relevant time. Plainly there was an employment relationship up to the point at which that relationship was brought to an end. However, Ms Ka'ai seeks to have the Authority hear evidence about conduct of Otago University which significantly post dates the termination of the employment relationship.

[12] Otago University say that the Authority's jurisdiction, deriving as it does from statute, is limited to resolving employment relationship problems and that in order for an employment relationship problem to exist, there must be an actual employment relationship at the time the problem arises.

[13] Then I am referred to the actual words of s.103A of the Employment Relations Act 2000 which refers to the test of justification as having to be applied *at the time the dismissal or action occurred*. I am also referred to relevant decisions of the Employment Court which all emphasise the long standing principle that the employer's action has to be judged at the time the action was taken.

[14] In relation to the contention made by Ms Ka'ai that her reputation has been damaged by the post termination behaviour of Otago University at the meeting on 22 July 2007, Otago University say that the employment jurisdiction is not the appropriate forum to deal with matters of reputation; the role complained of is, it is submitted, the tort of defamation and that is a matter that needs to be progressed in the Courts of general jurisdiction.

Determination

[15] I am satisfied on the balance of probabilities that the correct approach in this matter is to exclude the evidence of the post termination conduct of Otago University. I am not persuaded that that conduct is relevant to the complaints of Ms Ka'ai and, I am absolutely persuaded by Otago University's argument that, relevant or not, there is no jurisdiction for the Authority to consider such material.

[16] I am particularly drawn to this conclusion by the submissions of Otago University in respect to the requirement that there must be employer and employee for there to be an employment relationship problem. I accept that submission and applying that view of the law to Ms Ka'ai's argument about bad faith I must reach the

conclusion that there cannot be any contemplation whether bad faith might exist or not in circumstances where there is no employment relationship extant.

[17] I also accept the submission of Otago University in relation to the date at which the justification for the employer's action must be viewed. Otago University's submission in that regard is that the employer's action must be judged at the time the action was taken and not subsequently, and I accept that that is an accurate statement of the law. I think though that that submission is less on point than the Otago University's submission in relation to the requirement for an employment relationship problem to have an extant employment relationship. This is because Ms Ka'ai has argued bad faith rather than argued that Otago University's subsequent behaviour impacts directly on matters of justification with respect to the alleged dismissal and the alleged unjustified action.

[18] For the sake of completeness, I mention also that I accept Otago University's submission relating to the alleged damage to Ms Ka'ai's reputation; plainly that is not a matter for the employment institutions.

[19] It follows that post termination conduct of Otago University is not to be considered in the forthcoming substantive hearing of the issues between the parties. The Authority will not entertain evidence about matters since the termination of employment. The statement of problem filed in this matter must be read so as to exclude reference to those post termination matters.

James Crichton
Member of the Employment Relations Authority