

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 143/10
5298820

BETWEEN STUART LEWIS CHAMBERS
Applicant

AND ERS NEW ZEALAND
LIMITED TRADING AS
TRANSPACIFIC
INDUSTRIAL SOLUTIONS
Respondent

Member of Authority: P R Stapp

Representatives: Michael Smith, Counsel for the Applicant
Daniel Erickson, Counsel for the Respondent

Investigation Meeting: By telephone conference 8 September 2010

Determination: 9 September 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] There was an incident in the work place resulting in an investigation and disciplinary action. The applicant was dismissed from his employment. The respondent laid a complaint against the applicant with the Police in regard to an alleged assault and the Police subsequently charged the applicant.

[2] Mr Chambers has claimed his dismissal was unjustified. The criminal case was heard in the District Court at New Plymouth and Mr Chambers was found guilty. The sentencing date is 26 October 2010. An appeal on the conviction is likely.

[3] Mr Chambers has briefed a barrister to take the matter on appeal, but an appeal cannot be filed until the sentence is brought down. Apparently any appeal is not likely to be heard until early next year.

[4] The Authority has been attempting to set this matter down for an investigation. This includes following up obtaining an amended statement of problem that Mr Smith signalled would be filed.

[5] Mr Chambers is seeking to have the proceedings before the Employment Relations Authority stayed, pending determination of the criminal matters. The respondent has opposed the application for a stay and has requested a timetable for an amended statement of problem and statement of reply.

The issues

[6] The issues in this application are:

- a. Is the correct name of the employer cited in the application?
- b. Should a stay of the Authority's investigation be granted?

The parties' positions on the application for a stay

[7] The Authority requested Mr Smith to provide details as to the relevance and impact (if any) of the criminal matter on the employment relationship problem. A timetable was put in place for this and the respondent given an opportunity to reply.

[8] By memorandum filed on 26 August 2010 Mr Smith provided the details for the applicant's request for a stay of the investigation meeting.

[9] Mr Chambers has denied that he assaulted a foreman and contends that a scuffle that occurred was initiated by the foreman.

[10] The grounds relied upon by Mr Smith involve:

- (a) Whether it is just and equitable that the other party's ordinary rights should be interfered with?
- (b) The balancing of the justice between the parties must take account of all the relevant factors;
- (c) The public interest;
- (d) The possibility of a miscarriage of justice.

[11] Mr Smith has relied on the Authority having to decide the same matters that were before the District Court as to whether or not the applicant assaulted the foreman. He accepted that the proof differs in each forum and that the test the Authority will need to apply is proof on the balance of probabilities. He has submitted that it would be likely that the evidence of the conviction in the District Court would be tendered in evidence before the Authority.

[12] He submitted that if the Authority ruled on relying on the District Court judgment and the Court's factual conclusion that this would be adverse to the applicant's interests. This he says would have an impact on the applicant's right in respect of his grievance before the Authority and that the Authority would be *functus officio* and an issue of estoppel would bar any further action for the applicant. Such an outcome would be contrary to the public interest and conflict between the two jurisdictions. He says there would be a real risk that a miscarriage of justice would eventuate.

[13] He says that any prejudice that the respondent may suffer caused by delay in determination of the grievance would be outweighed first by the prejudice suffered by the applicant should the investigation proceed and he was subsequently to prevail in the criminal appeal, and second the public interest in maintaining confidence in the processes of adjudicative bodies.

[14] The respondent has opposed the application for stay of an investigation meeting on the grounds that:

- (i) The onus is on the applicant for a stay to establish that it is just and convenient to interfere with the other party's right to a timely determination; and
- (ii) The granting of a stay is at the discretion of the Authority and to be exercised in accordance with its equity and good conscious jurisdiction and the balancing of the justice between the parties.

[15] The respondent submitted that the criminal proceedings do not now involve the invocation of *the right to silence* where criminal proceedings have been pending and where evidence had yet to be given in such proceedings. In this case evidence has already been given in the criminal proceedings. It was submitted that any issues arising out of *the right to silence* are of no direct relevance. I agree.

[16] It was also submitted that the fact a conviction had been entered against the applicant is not relevant to the assessment of justification due to the fact that the conviction occurred after the dismissal. Section 103A of the Employment Relations Act 2000 provides:

For the purposes of s.103 (1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[17] It was drawn to my attention that the circumstances involving Mr Chambers are not dissimilar to those in *Tauhore v. Farmers Trading Company Ltd* (unreported) 25 February 2008, Shaw J, WC 3/08. In that case the employee was dismissed following an investigation into an alleged assault against a colleague. In a subsequent criminal trial the employee was found not guilty of assault. Judge Shaw held at paragraph [49]:

...[T]hat result can have no bearing on the decision by Farmers to dismiss her. In the first place, the dismissal occurred before the hearing of the criminal charge and, secondly, the standard of proof in the criminal case is completely different from that which an employer must meet when disciplining an employee. The actions of Farmers are to be judged on the circumstances at the time of the dismissal.

[18] In that case the decision to dismiss was justified on the basis of the *fair and reasonable employer* test, notwithstanding the acquittal on the assault charge. In Mr Chambers' case his conviction was entered after the respondent had made the decision to dismiss him. The respondent was not relying on the conviction to base any decision to dismiss Mr Chambers on.

[19] Therefore, it was not a factor that impacted on the respondent's decision to dismiss Mr Chambers.

[20] It was submitted that the conviction should not be taken into account by the Authority (pursuant to s.103A of the Act) in assessing the employer's justification for the dismissal. The fact is the Authority will be required to consider the investigation undertaken by the respondent and the decision it made following that investigation. It is not necessary for the Authority to determine whether the alleged assault took place

in scrutinising the employer's process and decision. That is correct in as much as the assessment of the decision to dismiss is made.

[21] However, I invited any comment on the Authority's consideration of any remedies and contribution may need to be determined and whether the applicant assaulted the foreman in the workplace and what was involved in the scuffle. Mr Erickson suggested that the first part of the investigation could take place on the justification of the dismissal and that any remedies could be reserved. I agreed that this seemed a sensible approach.

[22] The respondent relied on the differing tests in the two jurisdictions and that the applicant's appeal against the criminal conviction, if successful, would not be determinative of his personal grievance. It was submitted that a refusal of a stay would not unduly prejudice the applicant. However, if it was granted it would interfere with the respondent's right to a timely adjudication of the claim made against it. It was submitted that the balancing of justice between the two parties would favour the refusal of the application for a stay.

The position on the correct name of the respondent

[23] There is a preliminary issue in regard to the identity of the correct respondent. The company described as the applicant's employer in his employment agreement is Transpacific Industrial Solutions New Zealand. The company described by counsel for the applicant in one of the memoranda before the Authority is Transpacific Industries Group (NZ) Ltd. There is a company called Transpacific Industrial Solutions (NZ) Ltd but that is a name protection company only (within the New Zealand base business of Transpacific Industries Group (NZ) Ltd). It was submitted that company has never traded therefore the description in the employment agreement is somewhat erroneous as it states the business unit in which the applicant worked rather than the actual employing entity.

[24] It was submitted that the proper employing entity is ERS New Zealand Ltd trading as Transpacific Industrial Solutions. This is a wholly owned subsidiary of the named respondent. Thus the proper employing entity is in fact ERS New Zealand Ltd trading as Transpacific Industrial Solutions which is a subsidiary of the named respondent. The applicant's representative accepted that the applicant's application needed a legal entity to be cited and both parties agreed for me to correct the citation

of the respondent. Mr Erickson confirmed that he was authorised to accept service and was being instructed by ERS New Zealand Limited. Pursuant to s 221 of the Act ERS New Zealand Limited is the correct name of the respondent. It is left for Mr Smith to ensure the correct legal entity of the respondent is made in an amended statement of problem.

Determination

[25] I accept the principles that apply to an application for a stay, except that this application relates the Authority's investigation and investigation meeting. It seems an unusual way to request the Authority to delay and postpone its investigation process and investigation meeting. However the application does provide a useful way to exercise equity and good conscience (s 157 (3) of the Act) on what to do in a principled way. For that reason I cover off the parties' submissions on the principles used for a stay application. There is no direct provision for a stay of an investigation except that the Authority has the power to make directions that are necessary or expedient in the circumstances of the case under regulation 4 (2) of the Employment Relations Authority Regulations. There is a broad discretion on the timing of the Authority's procedure subject to compliance with natural justice and acting in a manner that is reasonable (s 173 of the Act).

[26] I agree with the respondent's counsel's submissions. However, there is a problem that could arise in regard to an assessment of any remedies because those will inevitably involve, if the applicant is successful in bringing a personal grievance, an assessment of what did happen for the purposes of contribution (if any). This is covered by the suggestion to split the hearing and reserve any determination on remedies until later.

[27] I have rejected Mr Smith's submission that there would be any issue that the District Court decision and its factual conclusions would be relied upon by the Authority and would be determinative of the applicant's grievance. The tests in the District Court and the Authority are completely different and the applicant could not possibly lose his right of action in respect of the personal grievance. The Authority's investigation is an entirely separate matter. Witnesses will be required to give evidence and the applicant's rights to challenge the admissibility of any prejudicial evidence can be dealt with during the investigation.

[28] Therefore, the Authority would not be *functus officio* and an issue of estoppel could not arise to bar any further action. It must therefore follow that there would not be an outcome contrary to the public interest casting the adjudicative bodies in a bad light and undermining confidence in the adjudication process.

[29] The personal grievance claim has nothing to do with the criminal matter. The employer was not relying on the complaint to the Police and any conviction that would prejudice the applicant. There is no intention of the respondent to call evidence relating to that trial and or use the District Court's decision in its justification of the dismissal. In this case evidence has already been given in the criminal proceedings. It was submitted that any issues arising out of *the right to silence* are of no direct relevance. I agree. There is no detriment to the applicant where the right to silence does not apply.

[30] I accept the submission that as a conviction has been entered against the applicant, it is not relevant to the assessment of justification due to the fact that the conviction occurred after the dismissal. The respondent is entitled to have a speedy determination of the employment relationship problem at least on the substantive issues relating to justification where the onus to justify its action rests on the employer, and the Authority applying s 103 A of the Act. It is a sensible suggestion that if there needs to be any remedies they can be reserved until after any appeal of the District Court's decision, if the applicant is in any way prejudiced. In any case there has been no appeal yet and sentencing is not until 26 October. The date proposed for the Authority's investigation meeting will be after this date.

[31] I conclude that the applicant's grounds do not support that it is just and convenient to interfere with the other party's right to a timely determination. Also, I am satisfied that there is no detriment to the applicant in proceeding with the investigation. Balancing the convenience and overall justice by taking into account all the factors I find favours the respondent

[32] It is my decision not to grant a stay of the application. In other words I am not prepared to adjourn indefinitely the Authority's investigation. Under regulation 4 (1) (c) of the Employment Relations Authority Regulations and s 173 of the Act I intend to proceed with an investigation to determine the substantive merits of the claim and to do so speedily, which involves a planned course of action that has involved both

parties' representatives. Any issues on any remedies (if applicable) will be reserved unless there is a change in circumstances.

[33] In the meantime the suggestion that the applicant provide an amended statement of claim, now that he is represented, should occur. This is to ensure that the respondent is put on notice of the details and proper claims to resolve a personal grievance. The respondent will have the right to reply. This needs a timetable to progress an investigation, and that has been dealt with separately in a memorandum with the representatives' consent.

[34] Pursuant to section 221 of the Act I have corrected and joined ERS New Zealand Limited as the respondent and service has been accepted. Both representatives consented to the correction and joining ERS New Zealand Limited to the application.

[35] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority