IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 185/10
5070822

	BETWEEN	MARY O'NEILL Applicant
	A N D	THE VICE CHANCELLOR UNIVERSITY OF OTAGO Respondent

Member of Authority:	James Crichton
Representatives:	Anna Irving, Counsel for Applicant Barry Dorking, Counsel for Respondent
Submissions Received:	13 September 2010 from Applicant 3 September 2010 from Respondent
Determination:	17 September 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In a determination dated 12 May 2010 (CA119/10), the Authority determined the substantive issues between these parties by finding a personal grievance for a disadvantage as a consequence of unjustified actions of the respondent (the University). The present proceedings come before the Authority because of an application by the University to reopen the investigation by the Authority; that application is resisted by Ms O'Neill.

[2] The claim by the University proceeds on three grounds, namely lack of jurisdiction, breach of natural justice and contradictory findings of fact. While resisting all of those grounds, Ms O'Neill also contends that there would be no miscarriage of justice if the original determination were to stand and indeed contends that, for reasons I will enunciate later, if the investigation were to be reopened, that would constitute a miscarriage of justice. Furthermore, Ms O'Neill contends that the

University's application is misconceived and that the proper course if it is dissatisfied with the Authority's decision is to challenge that decision in the Employment Court. Finally, Ms O'Neill contends that as the Authority Member who issued the original determination has now retired from the Authority, of necessity the granting of an application to reopen the investigation would necessitate an effective re-hearing of all the disputed evidence and if that is required, then the proper venue for that to take place is in the Employment Court and not by way of a fresh investigation in the Authority.

The law

[3] It is clear law that the Authority has the statutory power to grant an application to reopen an investigation: clause 4 Second Schedule, Employment Relations Act 2000. The remedy is a discretionary one and as with all discretionary remedies, that discretion must be exercised in accordance with principle. The question, in effect, for the Authority is not whether the Authority could grant a reopening but whether it should.

[4] The principal legal test for determining whether a matter ought to be reopened or not is whether a failure to do so would constitute a miscarriage of justice. Not surprisingly, the parties' positions are diametrically opposed in that the University maintains it would be a miscarriage of justice if the matter were not opened while Ms O'Neill maintains it would be a miscarriage of justice if there were a reopening. The Authority must balance the risk of miscarriage of justice against the countervailing principle that certainty in litigation is important.

The grounds for reopening

[5] The University's first ground for reopening is lack of jurisdiction. It points out (correctly) that the Authority relied on s.122 of the Act to make the decision complained of. Section 122 provides as follows:

> *Nothing in this Part or in any employment agreement prevents a finding that a personal grievance is of a type other than that alleged.*

[6] It is contended that in making the decision that it did, the Authority acted ultra vires because that section only gives the Authority power to, as it were, *change the label* on a grievance but not to import an entirely new grievance which has not been pleaded. The essence then of the University's claim on this ground is that the facts of

the grievance must be before the Authority however the grievance is actually labelled. In the present case, it is contended that the factual matters on which the Authority relied in its substantive determination were not pleaded as part of the grievance and were therefore not before the Authority. It is contended that the Authority, in reliance on s.122, cannot infer a grievance from facts which emerge from the investigation, particularly where it is also contended that the Authority breached natural justice by making such inferences without disclosing that fact to the University and its witnesses.

[7] The University contends that the nature of the personal grievance raised by Ms O'Neill was that set out in a particular letter from Ms O'Neill's then counsel dated 18 October 2006. The thrust of that letter (and indeed of Ms O'Neill's claim in its totality) pertained to her allegation that she had been constructively dismissed. The Authority's investigation did not accept that contention, but the point which the University seeks to emphasise in its present application is that at no stage in the argument for Ms O'Neill's personal grievance was it suggested that the matters on which the Authority subsequently relied to find a different sort of a grievance were part of the factual matrix supporting the original grievance.

[8] The University says that the Authority's determination made its finding of disadvantage *based on the alleged failure* of Ms O'Neill's manager to pass on a medical certificate to the University's human resources manager. But I have a difficulty with this submission because I am not satisfied that that adequately describes the reason the Authority reached the conclusion that it did. On this point, I agree with the submission of Ms Irving, counsel for Ms O'Neill. Ms Irving submits (and I agree) that that was not the basis of the Authority's determination at all. In my judgment, the Authority clearly is indicating that it was satisfied that Professor Fenton (Ms O'Neill's immediate superior) had seen a relevant medical certificate, and that that medical certificate would have told Professor Fenton that Ms O'Neill was suffering from *a workplace induce illness*. In that regard, the relevant sentence from the Authority's determination is as follows:

> *The Professor's perception and consequent inaction in the face of a medical certificate identifying a serious medical condition falls short of what a fair and reasonable employer would have done in the circumstances that prevailed at the time.*

[9] That sentence seems to me to be the ratio of the Authority's decision. It follows that I reject the University's submission that the problem that the Authority was addressing was Professor Fenton's failure to pass the certificate on to the human resources manager. The alleged failure is that, having satisfied itself that Professor Fenton had seen the certificate (and Professor Fenton is quoted in the determination responding to questions about the certificate so the Authority's conclusion that Professor Fenton saw it is unremarkable), and having accepted that Professor Fenton saw the certificate, the Authority was critical of him for failing to take the steps that the Authority considered a fair and reasonable employer would have taken at that time.

[10] That being my conclusion in relation to this ground, I dismiss the application as it relates to this ground and proceed to the next ground.

[11] The second ground identified by the University is the allegation that the Authority breached natural justice in the way in which it conducted the investigation. The University quite properly makes the point that the Authority is required to comply with the principles of natural justice. As well as being a truism, that obligation is mandated by the statute: s.157(2)(a).

[12] The effect of that obligation was to require the Authority to put adverse findings to the relevant party and give them an opportunity to present evidence and/or submissions on the point. The difficulty in assessing this submission is that the parties (based on the submissions before the Authority now) have very different recollections about the way that the investigation meeting proceeded. Ms O'Neill's counsel makes clear submissions to the effect that … *the medical certificate issue was the subject of a detailed examination by the Authority*. Ms Irving then goes on to point out that the issue was referred to in the submissions of the parties subsequently.

[13] The short point is that there is a difference between the parties as to what actually happened at the investigation meeting. Ms Irving points out that, as the Authority member who conducted the investigation meeting has now retired from the Authority and the application to reopen is before me, and there is no written transcript of the investigation available save for the former Member's notes, in order for the Authority to resolve the apparent conflict about whether there was a breach of natural justice or not, the Authority would need to re-hear all of that evidence.

[14] On the balance of probabilities, I conclude that it is more rather than less likely that the University was aware of the prospect that findings adverse to it would be made because of the failure to treat the medical certificate appropriately and I reach that conclusion first because the matter appears to have been referred to in closing submissions but secondly and more importantly, the Authority's substantive determination referred specifically to a question from Ms O'Neill's then counsel to Professor Fenton asking him whether the receipt of the medical certificate referring to Ms O'Neill being medically unfit for work because of a workplace illness did not put Professor Fenton on his guard. His reply is referred to in the determination as well, but my point for present purposes is that Professor Fenton must have been, by that question at least, on notice that the way in which he had dealt with the matter of the medical certificate was problematic. Finally, I note, again from the submissions of Ms Irving, her contention that the Authority Member questioned Professor Fenton extensively about the medical certificate issue. I conclude then that there has been no breach of natural justice.

[15] The final ground on which the University seeks to base its application to reopen the Authority's investigation is the claim that the Authority made contradictory findings of fact. The principal basis for this contention appears to be the University's conclusion that the disadvantage suffered by Ms O'Neill was that her medical certificate was not passed on to the University's human resources manager by Professor Fenton and so Ms O'Neill was denied the opportunity of further support from the University in that regard. I have already made clear that I do not accept the proposition that the ratio of the Authority's decision is about the passing of the medical certificate from Professor Fenton to the human resources manager at the University. Rather, my conclusion is that the Authority's reasoning was based on the fact that Professor Fenton saw the medical certificate but took no steps to ameliorate Ms O'Neill's circumstances. The Authority concluded that that was not the action of a good and fair employer.

[16] It seems to me to matter not at all whether the allegation is that Professor Fenton took no steps or that the human resources department took no steps. The short point is that the obligation is on the employer (the University) and its agents wherever deployed in the organisation to take proper care of Ms O'Neill while she was unwell. I am satisfied that those conclusions reached by the Authority are supported by the

evidence that the Authority found persuasive and that the reasoning that enabled the Authority to reach the conclusion that it did is properly identified in its determination.

Determination

[17] For the reasons that I have set out above, I am not persuaded that the Authority ought to reopen its investigation into this matter. Balancing the need for certainty on the one hand and the appropriate principle that a successful litigant should be allowed to grasp the fruits of their victory against the equally important precept that courts and tribunals must take all reasonable steps to avoid the prospect of a miscarriage of justice, I conclude that in the particular circumstances of this case, reopening this matter would not only be inappropriate but would also be an affront to public policy.

[18] There are particular matters in this case which underpin my decision. While not resiling in any way from the foregoing analysis, my conclusion that no further steps should be taken in the matter is reinforced by two reasonably uncommon factors in the present case. The first is that the Authority Member responsible for the decision which the University seeks to reopen has now retired from the Authority's service. It follows that it is not possible for the Authority to reconsider the matter in the way it would normally do where such an application is filed, save in a most cursory way. Plainly, it is not possible to speak to the former Authority Member about the matter, and the only basis on which the matters now before the Authority again could be tested is by reviewing the former Authority Member's handwritten notes. That is unlikely to provide a reviewer with anything other than a very cursory flavour of the actual proceedings themselves. It seems to follow that, were it to be established that the matter should be reopened, in effect a re-hearing of much of the salient evidence might well be required. That raises the propriety of the use of the application to reopen in the present case. Clearly, the University had open to it the opportunity of a complete re-hearing *de novo* before the Employment Court. The Authority would be loathe to offer what amounted to a partial re-hearing in the present circumstances, where the parties had available to them the thorough and complete attention of an Employment Court Judge, should they wish it.

[19] Finally, the other unusual aspect of the present case is the very significant delay between the date of the investigation meeting and the issue of the determination. That delay appears to have been occasioned by circumstances entirely outside the control of the parties. I accept the submission made on Ms O'Neill's behalf that the

effect of allowing the application to reopen would be to create yet more delay in bringing this matter to a satisfactory conclusion and accordingly I am disposed to the view that, for this reason as well, the proper course of action is for the application to reopen, to be denied.

Costs

[20] Costs are reserved.

James Crichton
Member of the Employment Relations Authority