

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 149
5322204
5332511

BETWEEN	LEITH HAYLLAR Applicant (5332511)
A N D	ANDRE MATENE Applicant (5322204)
AND	THE GOOD TIME FOOD COMPANY LIMITED Respondent

Member of Authority: G J Wood

Representatives: Alan Cressey for the Applicants
Gary Taylor for the Respondent

Investigation Meeting: By way of telephone conference

Submissions Received: 22 September 2011

Determination: 23 September 2011

REASONS FOR DETERMINATION OF THE AUTHORITY

[1] The applicants, Messrs Hayllar and Matene, seek the removal of the employment relationship problems between them and the respondent (Good Time Foods) to the Employment Court because there are important questions of law likely to arise other than incidentally, and because the cases are of such a nature and of such urgency that it is in the public interest that they be removed immediately to the Court.

[2] Good Time Foods, whilst acknowledging that there may be a question of law, does not accept that any such question is important, nor that there are any public interest issues of any urgency. Good Time Foods is particularly concerned at the lateness of this application, coming less than one week before the Authority was due to investigate the matters and that it is unable to be properly reimbursed in costs because the applicants are legally aided.

[3] I granted the application orally yesterday. My reasons for so doing follow.

[4] The applicants were employed by Good Time Foods, a pie making business, as bakers. They were both dismissed for breaching Good Time Foods' use of drugs policy, and have raised personal grievances to challenge those decisions. The fairness of the drugs policy itself, as well as the way it was implemented, are key issues for determination. Both matters have been to mediation but unfortunately have not been able to be resolved.

[5] Mr Cressey's application on behalf of the applicants identified no less than 17 alleged questions of law, or factors that might give rise to removal under the public interest and urgency grounds. However, there were no submissions made that the matter was urgent and, given that the applicants were dismissed last year and do not seek reinstatement, there can be no claim for urgency. Therefore the application on the public interest and urgency grounds must be dismissed.

[6] The leading case on what constitutes an important question of law is *Hanlon v. International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1. It was held at p.7:

First it is necessary to identify a question of law arising in the case other than incidentally; and secondly to measure the importance of that question ...

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.94. On the other hand, a question of law will obviously be important if its resolution can affect large numbers of employers or employees or both, or if the consequences of the answer to the question are of major significance to employment law generally. Most questions of law that could be described as important will be far less momentous ... It has to be not any question of law, but an important question of law. Importance, at any rate of a question of law, cannot exist in isolation. Questions of law cannot always be categorised into important and unimportant ones. The importance of a question of law is a relative matter. Its importance has to be measured in relation to the case in which it arises. A question of law arising in a matter will be important if it is decisive of the case or some important aspect of it or strongly influential in bringing about a decision of it or a material part of it.

[7] While there are constraints on challenges to the process the Authority may choose to undertake when investigating a matter, such as evidence it chooses to hear, jurisdictional decisions, albeit about the Authority's procedure, may give rise to

important questions of law (see, for example, *Ravnjak v. Wellington International Airport Ltd* [2011] NZERA Wellington 46.

[8] Mr Cressey relies on what he describes as *obiter* comments in *Parker v. Silver Farm Ferns Ltd (No 1)* [2009] ERNZ 301, a case involving drug testing policies. It was held:

[26] *My assessment at this point is that Mr Parker's challenge has merit. Whether he was dismissed justifiably will turn on whether the employer's condition for him to return to work, that is to undergo a drugs test, was a lawful and reasonable instruction. It will not be, as the Authority appears to have found in its determination, whether the Authority considered it was fair and reasonable for the employer to demand a negative drugs test as a condition of a return to work. Employee drug testing regimes impinge significantly upon individual rights and freedoms. Not only must policies and their application meet the legal test of being lawful and reasonable directions to employees, but, where these are contained in policies promulgated by the employer, these should be interpreted and applied strictly. A fair and reasonable employer in all the circumstances of a case is unlikely to have insisted justifiably on compliance with an unlawful and/or unreasonable direction to an employee.*

[27] *Mr Parker has a substantial arguable case that the employer's policy, incorporated as part of the collective agreement to which he was subject, did not permit the employer to demand lawfully that he undergo a drug test as a condition of returning to work.*

[9] Mr Cressey also noted that in *NZEPMU v. Air New Zealand Ltd* [2004] 614, the Employment Court did not focus on how a drug testing policy should be properly implemented, and that the findings in that case were specific to the particular circumstances of Air New Zealand and its workforce, including the methodology of testing.

[10] I agree with Mr Cressey that there are important questions of law here because the Court will be able to provide guidance to employers and employees about how drug testing policies should be implemented. In particular, it is an important issue as whether or not an employer such as Good Time Foods must prove, by calling direct evidence, that all aspects of the drugs policy, including all employee safeguards, were complied with and whether, if an employer fails to provide proper and adequate training and education as specified by its policies, the policies remain valid and enforceable. Of lesser significance, but also a potentially important question of law, is whether, if an employee is requested to undergo a drugs test, the employer is

required to disclose the basis for that request (including any evidence on which it is based) and provide the employee with an opportunity to comment before any such request is made. All are central issues in the determination of these cases.

[11] The Authority still has a residual discretion whether or not to remove a case, even where important questions of law do exist other than incidentally. Here I was very concerned about the fact that this application was not made until less than a week before the investigation meeting and that, with the removal, the investigation meeting set down for next week will not go ahead. This has costs implications for Good Time Foods. This is particularly so because the applicants are legally aided and therefore it will be difficult for Good Time Foods to be properly reimbursed in costs. However, the respondent is still entitled to make a claim for costs under the exceptional circumstances criteria, and/or for the Authority to make an award that it would have made in the absence of legal aid.

[12] I am, however, clear that the questions of law identified above are very important in terms of the operation of drug and alcohol policies, particularly given the Court's judgment in *Silver Fern Farms*. This may impact on many, many employers and workers, especially given the growth in recent years of such policies. That, together with the strong likelihood of challenge by either party, was sufficient for me to conclude that removal is in the interests of justice.

[13] I therefore ordered the removal of the employment relationships between Leith Hayllar (5332511) and Andre Matene (5322204) and The Good Time Food Company Limited be removed in their entirety to the Employment Court for the Employment Court to hear and determine the matters without the Authority investigating them.

Costs

[14] Costs are reserved.

G J Wood
Member of the Employment Relations Authority