IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2011] NZERA Christchurch 109
5273865

	BETWEEN	BRIAN GRANT Applicant
	AND	VICE CHANCELLOR UNIVERSITY OF OTAGO Respondent

Member of Authority:	Philip Cheyne
Representatives:	Len Andersen, Counsel for Applicant Barry Dorking, Counsel for Respondent
Investigation Meeting:	26 July 2011 by Phone Conference
Submissions:	20 June 2011 from the Applicant 4 July 2011 from the Respondent
Determination:	27 July 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Grant and the Vice Chancellor agreed pursuant to s.173A of the Employment Relations Act 2000 to confer on the Authority the power to make a written recommendation in relation to the matters in issue and further agreed that the recommendation would become final on the 10th day following the date of the recommendation unless either of them gave notice before then that they did not accept the recommendation.

[2] On 20 April 2011 I released a recommendation. On the day of its release counsel for Mr Grant requested an extension of that time frame because of the impending Easter break and counsel for the Vice Chancellor noted the sense of an extension. The Authority indicated it would not object to an agreed extension and

both parties then confirmed in writing their agreement to extend the time frame for rejecting the recommendation to 9 May 2011.

[3] On 5 May 2011 counsel for the Vice Chancellor gave written notice that the respondent did not accept the recommendation.

[4] During a phone conference to arrange for the continuation of the Authority's investigation counsel for the applicant indicated that Mr Grant did not accept that the date for notification had been validly extended and would instruct other counsel to progress his view that the recommendation must now be treated as the Authority's determination of the matter pursuant to s.173A(5) of the Act.

[5] I have now received submissions on this point from both parties and convened a phone conference with them to hear any further points. This determination resolves the issue about the status of the recommendation dated 20 April 2011.

The argument for Mr Grant

[6] To summarise, Mr Grant's view is that once the parties have fixed the date for an objection to be notified there is no provision in the Act for that time to be extended either by the parties or the Authority. That submission is based on the wording of s.173A of the Act. If there was no legal basis for the extension it follows that there was no objection to the recommendation within time and the recommendation must now be regarded as the determination of the Authority.

The argument for the Vice Chancellor

[7] The Vice Chancellor says that Mr Grant's approach is too narrow. I am referred to the explanatory note that accompanied the amendment Bill to inform the purpose of s.173A. It is said that if the parties can agree in writing on a date for the purposes of s.173A(1)(b) they must also be able to agree to vary that date, as was done in this case. A point is made about the potential for unfairness or absurdity if it was not possible to agree on an amended date in the case of (for example) temporary incapacity. I am referred to objects of the Act such as s.143(d) and (f) that emphasise flexibility and the lack of strict procedural requirements. Finally the point is made

that it would be inconsistent with good faith and equity and good conscience to allow Mr Grant who initiated the extension to benefit by finding that the Vice Chancellor's rejection of the recommendation was out of time.

Reasoning

[8] These circumstances are unfortunate. Original counsel for Mr Grant did no more than try and ensure that her client had sufficient time to consider and get advice about the recommendation. Counsel for the Vice Chancellor acknowledged the sense in that approach. That reflected a co-operative approach. It is common ground that if it could be validly done, there was an agreement in good faith to extend the date for rejection of the recommendation.

[9] The issue is whether s.173A permits parties to agree on a date other than the one they originally agreed to. In the present case the parties purportedly did this after the recommendation was released to them but it could just as easily arise before then.

[10] The starting point for statutory interpretation is the Interpretation Act 1999. S.5 provides that the meaning of an enactment must be ascertained from its text and in light of its purpose. Matters that may be considered in ascertaining the meaning of an enactment include indications provided in the enactment such as explanatory material and the organisation and format of the enactment.

[11] S.173A is within Part 10 of the Employment Relations Act 2000. The object of Part 10 is set out in s.143. It includes establishing procedures and institutions that recognise that the procedures for problem-solving need to be flexible and to recognise that judicial intervention at the lowest level needs to be that of a specialist decision-making body that is not inhibited by strict procedural requirements.

[12] S.173A neither expressly permits nor prohibits a variation to the date agreed pursuant to s.173A(1)(b). However it is implicit in the notion of agreement that the parties to such an agreement may vary it by consensus. That approach is more consistent with the object of Part 10 than to read into s.173A a restriction on the parties' ability to vary the originally agreed date.

[13] S.173A(1)(a) permits the parties by agreement in writing to confer a power on the Authority. The conferment of that power is not affected if the parties are able to vary their agreed date so that is not a reason for a narrow construction of s.173A.

[14] S.173A(2) imposes a duty on the Authority to explain the effects of ss.(4) and (5) and to be satisfied that, knowing the effect of those subsections, the parties affirm their agreement. The operation of s.173(2) is not undermined by reading into s.173A(1)(b) the power for the parties to consensually vary the originally agreed date.

[15] Because I find that it is implicit in the wording of s.173A that the parties may consensually vary the date for rejecting a recommendation, it is not necessary to deal with the submissions about good faith and equity and good conscience. Nor is it necessary to consider the Authority's powers under s.219 and s.221 to validate informal proceedings and extend time, but those powers might have had some application in the present situation.

Conclusion

[16] The recommendation has not become the determination of the Authority in this matter because the Vice Chancellor gave notice within time that he did not accept the recommendation.

Philip Cheyne
Member of the Employment Relations Authority