

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 186
5375213

BETWEEN	NEW ZEALAND NURSES ORGANISATION First Applicant
A N D	SERVICE & FOOD WORKERS UNION NGA RINGA TOTA INC Second Applicant
A N D	RADIUS RESIDENTIAL CARE LIMITED Respondent

Member of Authority: James Crichton

Representatives: Jock Lawrie, Counsel for First Applicant
Tim Oldfield, Counsel for Second Applicant
Peter Kiely, Counsel for Respondent

Investigation meeting: On the papers

Date of Determination: 1 June 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] By statement of problem filed in the Authority on 23 March 2012, the first applicant (the Nurses Organisation) and the second applicant (the Union), seek the assistance of the Authority to resolve disputes around the interpretation of a particular provision in the operative collective agreement between those parties and the respondent employer (Radius). In addition, the applicants seek a finding that Radius has breached its good faith obligations.

[2] In an initial case management conference with counsel, it became apparent that Radius intended to call its former human resources manager as a witness in the

proceeding. That individual, Ms Eleanor Robinson, left the service of Radius when appointed a member of the Employment Relations Authority at Auckland and she continues to serve in that capacity.

[3] Given that intelligence, there was a discussion between the Authority and counsel as to whether the fact of Ms Robinson being a witness in the proceeding would create any particular difficulty, either for the parties or for the Authority.

[4] So far as the Authority was concerned, it indicated that if the parties wished it to proceed to investigate the matter, it was perfectly happy to proceed on that footing and that the nature of the issue was not unprecedented.

[5] Notwithstanding that, the Authority readily agreed to adjourn the telephone conference to a later date to enable counsel for the two applicants to discuss that aspect of the proceeding and form a common view. A second telephone conference was convened by the Authority on 31 May 2012 at which the applicant parties indicated to the Authority that while counsel had no difficulty with the Authority proceeding to deal with the matter, they were concerned about the potential attitude of their members and the prospect that some of them might regard the Authority as more disposed to accept the evidence of a colleague than the evidence of other witnesses, if questions of credibility were in play.

[6] That being the position, the Authority undertook to entertain an immediate application for the matter to be removed to the Employment Court and indicated that, in the circumstances, the Authority was prepared to progress the matter without the usual formalities, if the parties agreed. In the result, the applicants were prepared to make such an application during the telephone conference which the Authority undertook to respond to and Radius, for its part, gave the Authority to understand that it would not oppose an application for removal, given the circumstances of the case.

[7] That being the position, the Authority is happy to deal with the matter on this informal basis subject to the payment by the applicant parties of the appropriate fee.

Determination

[8] By way of summary, the Nurses Organisation and the Union have applied for the whole of the matter to be removed to the Employment Court for the Employment

Court to hear and determine the issues identified in the statement of problem, without the Authority investigating the matter. That application is consented to by Radius.

[9] The basis of the application is that a sitting member of Authority is required to give evidence in the matter and that might lead to an appearance of bias. This is particularly possible where, to use the words of Member Cheyne, in *Shearer v. Radius Residential Care Ltd*, 24 June 2010, CA133/10:

There is a substantial risk of the appearance of bias should (the Authority) prefer (Ms Robinson's evidence) over that of other witnesses.

[10] In addition, the Nurses Organisation and the Union also make the point that a very large amount of money is at stake in relation to the issues in dispute between the parties and it follows that whatever the outcome might have been were the Authority to investigate the employment relationship problem, a challenge was likely.

[11] In all the circumstances then, the Authority considers that it should order the removal of the whole matter to the Employment Court so that the Court can hear and determine it without an Authority investigating the employment relationship problem and, in making the decision that it does, the Authority relies on s.178(2)(d) of the Employment Relations Act 2000.

Costs

[12] Costs are reserved.

James Crichton
Member of the Employment Relations Authority