

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 191
5556333

BETWEEN	DEREK GILBERT Applicant
A N D	NEW ZEALAND AMALGAMATED ENGINEERING PRINTING & MANUFACTURING UNION INC Respondent

Member of Authority: James Crichton

Representatives: Applicant in person
Gregory Lloyd, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 31 August 2015 and 24 September 2015 on behalf of the
Applicant
17 September 2015 on behalf of the Respondent

Date of Determination: 8 December 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Gilbert) alleges that he has a personal grievance with the respondent, his former union (the Union) together with a dispute with that union and he seeks damages for the alleged wrongs done to him.

[2] In particular, Mr Gilbert says that the Union breached its statutory duty of good faith to him and in addition, breached the Fair Trading Act 1986 in respect of its treatment of him.

[3] The Union denies all of Mr Gilbert's allegations.

[4] The parties were referred to mediation by consent and an unsuccessful mediation took place on 28 July 2015.

[5] Then by memorandum dated 4 August 2015, Mr Gilbert gave notice of his intention to proceed with a hearing in the Authority and his wish to summons the then National Secretary of the Union, Mr Andrew Little, now the leader of the Parliamentary Labour Party, as a witness in the proceeding.

[6] Then in anticipation of a telephone conference with me, counsel for the Union indicated its intention to ask the Authority to deal with the strike-out application as a preliminary matter.

[7] An application from Mr Gilbert dated 7 August 2015 sought removal of the matter to the Employment Court on the basis that an important question of law was raised by the proceedings, other than incidentally.

[8] At the telephone conference which I convened on 17 August 2015, the parties agreed that I would determine the application for removal to the Employment Court on the papers and the helpful submissions that have now been filed by both parties enable me to do that.

The issues

[9] The only issue that falls for determination in the present proceeding is whether the particular question Mr Gilbert poses ought to be removed to the Court for disposition there. However that question is framed (and there are two versions of it proffered by Mr Gilbert, one in his application for removal dated 7 August 2015 and another in his first set of submissions on the matter dated 31 August 2015), there are other issues in dispute between the parties.

[10] Even were the Authority minded to refer the question identified to the Court, which broadly raises the issue whether the Union had a duty to represent Mr Gilbert, or not, there would remain other issues of disputation between the parties that would require to be investigated in the Authority or be otherwise disposed of.

[11] This point is particularly illustrated by the exchange between the parties concerning the quantification of the costs which Mr Gilbert seeks to claim from the Union. This matter is referred to by both parties in the submissions filed but both

parties accept that the quantification of costs is not a matter that needs to be dealt with now.

Ought Mr Gilbert's question be removed to the Court for disposition?

[12] The law on this question is well established. Section 178(2)(a) of the Employment Relations Act 2000 (the Act) establishes a basis on which questions may be removed from the Employment Relations Authority to the Employment Court where the application in question involves an important question of law that is likely to arise, other than incidentally.

[13] So the test for me to apply must include a consideration of whether there is any important question of law involved that is new or novel in such a way as to be "*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*": *Hanlon v. International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1 per Chief Judge Goddard.

[14] Put shortly, I do not consider that any formulation of Mr Gilbert's questions raises an important question of law.

[15] The fundamental question which really underpins Mr Gilbert's position is whether a union owes a duty of good faith to a member and, as a subset of that, whether the union is required to comply with its own rules in dealing with its members. The answer to both those questions is in the affirmative and if there were any doubt as to that answer, the question was firmly disposed of by the present Chief Judge in *McCartney v. Atlas Concrete Ltd and First Union Inc* [2014] NZEmpC 85.

[16] The question whether the Union failed to meet its statutory and rule-based obligations to Mr Gilbert or not is a question of fact and not a question of law and so matters under this head do not take Mr Gilbert's argument any further. The Authority is perfectly able to investigate the factual matrix on which Mr Gilbert relies and can then consider whether the evidence discloses any failing, or not.

[17] I express no view at all about the further submissions made for the Union concerning whatever remedies might be available to be awarded; unless and until some breach or breaches have been identified, there can be no question of any inquiry as to remedy.

Determination

[18] I have not been persuaded that there is any basis on which this matter ought to be removed to the Court. This is because I consider no important question of law arises, whether incidentally or otherwise. It seems to me that the questions of law that are involved have been already disposed of by a proper construction of the statute and by decision of the Employment Court and the contentions that Mr Gilbert advances about the alleged inadequacies of the service provided to him by the Union cannot be taken any further unless and until the Authority's investigation discloses that there has indeed been some deficit in that regard.

[19] It is not enough for Mr Gilbert to assert that he has had bad service from the Union and that bad service breaches the Union's obligations to him; that allegation has to be proved and that is something which the Authority is well able to do, assuming that is necessary.

[20] I note in that regard that the Union has already foreshadowed its intention of pursuing a strike-out application in respect of the totality of Mr Gilbert's proceedings and I discern that the next task for the Authority, after the challenge period for this determination has elapsed, will be to engage with the parties to consider whether the Union's application to strike-out Mr Gilbert's proceedings in their entirety, ought to be dealt with next.

Costs

[21] Costs are reserved.

James Crichton
Chief of the Employment Relations Authority