

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 174
5556333

BETWEEN DEREK WAYNE GILBERT
Applicant

A N D E TU INCORPORATED
(FORMERLY CALLED NZ
AMALGAMATED
ENGINEERING PRINTING &
MANUFACTURING UNION
INC)
Respondent

Member of Authority: Peter van Keulen

Representatives: Applicant in person
Anne-Marie McNally, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 13 September 2016, from the Applicant
16 September 2016, from the Respondent

Date of Determination: 27 September 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Gilbert, has made an application to remove important questions of law to the Employment Court.

[2] The important questions of law relate to a preliminary matter. That preliminary matter is an application made by Mr Gilbert for the Authority to issue a summons to a potential witness in this matter.

[3] The questions posed by Mr Gilbert are:

- (a) Does the Employment Relations Authority have the right to refuse the request for a witness summons sought by the applicant; and
- (b) If so, on what grounds?

Background

[4] Mr Gilbert claims that the respondent, Etū, his former Union, breached the duty of good faith that it owed to him under s 4 of the Employment Relations Act 2000 (the Act). Mr Gilbert says that this breach of good faith arises in connection with decisions that Etū made when his then employer, Transfield Services New Zealand Limited (Transfield), restructured his role and terminated his employment.

[5] Mr Gilbert raised a personal grievance against Transfield and progressed that through the Employment Relations Authority and the Employment Court.

[6] Mr Gilbert says that Etū failed to act for him appropriately during the course of the restructure and initially in raising the personal grievance and then by deciding not to continue to represent him with his personal grievance. For this reason, he had to obtain other representation and incurred fees. Ultimately, Mr Gilbert was successful in the Employment Court. Mr Gilbert says Etū should have represented him throughout his grievance process and its decision not to is a breach of the membership rules because it did not meet the duty of good faith when making that decision. Mr Gilbert's claimed loss is the fees that he incurred in progressing his claim, less any contribution made by Transfield for that representation.

[7] Mr Gilbert's claim encompasses three sets of events. These events are:

- a. An allegation that the Union failed to act appropriately during the course of the restructure and in particular failed to seek an injunction despite requests from its members to do so;
- b. The Union failed to apply for an interim reinstatement order on his request when his role was disestablished as a result of the restructure and his employment was terminated;

- c. Etū made a decision to not represent him further in his personal grievance action culminating in him progressing the matter himself through other representation in the Employment Relations Authority and the Employment Court;

[8] Etū opposes this claim on the basis that it says it has not breached the duty of good faith and therefore not breached any contractual obligation that it owed to Mr Gilbert.

[9] Mr Gilbert alleges that the decisions made, regarding his representation during the restructure and the subsequent personal grievances, were in part made by the National Secretary, Mr Andrew Little. Etū says Mr Little was not involved in these decisions and in fact Mr Ged O'Connor made those decisions on behalf of Etū.

[10] Mr Gilbert made an application for the Authority to summons Mr Little to attend the investigation meeting so that he can give evidence about his role in the relevant decision-making process.

[11] Mr Gilbert applied for a summons for Mr Little on 11 April 2016. We discussed the summons in a case management conference on 14 April 2016. Because of that discussion, I decided that I would reserve my decision on issuing the summons until the parties had lodged and served all the evidence for the investigation meeting. This was so I could take a view as to whether Mr Little's potential evidence would be relevant to the issues I am required to investigate and determine.

[12] Subsequently, on 25 August 2016, after the evidence had been lodged and served, Mr Gilbert filed a memo with the Authority setting out the basis for his application for a summons to be issued for Mr Little. We discussed the summons again in a case management conference on 25 August 2016. Because of that discussion, I decided that I would continue to reserve my decision on issuing a summons to Mr Little until I had further information from Etū. I then posed a set of questions for Etū to answer on 9 September 2016. Etū answered those questions on 16 September 2016.

[13] The evidence so far (based on the witness evidence lodged and the answers to my questions) indicates that:

- a. Mr Little was the National Secretary but had no direct involvement in any of the three sets of events outlined above. He did answer one email directly to Mr Gilbert in relation to the restructure but I cannot ascertain from this email that he was materially involved in the decision about the consultation or action that Etū should take in respect of the restructure;
- b. The two material decisions that inform Mr Gilbert's claim for breach of contract (arising out of the failure to meet the duty of good faith) were not made by Mr Little but rather by Mr O'Connell. I note that this is not a finding of fact and it remains to be determined in the investigation meeting. All that I establish at this stage is that this is what the evidence suggests and in fact is what the affidavit of Mr O'Connell sets out.

[14] On this basis, it is difficult to see that Mr Little could provide evidence that would aid my investigation and therefore I have refused Mr Gilbert's request that the Authority issue a summons for Mr Little to attend the investigation meeting.

Application for removal

[15] Mr Gilbert says that the question of whether I can refuse to issue a summons and if so, on what basis, is a new or novel question, which is not defined in law. Therefore, it is an important question of law and the Employment Court should consider it.

[16] Mr Gilbert also relies on s 160(2A) of the Act which sets out that the Authority must allow cross-examination of a party or a person to the extent that it is consistent with subsection (2). Subsection (2) of the Act provides that I may take into account such evidence and information in equity and good conscience that I think fit, whether strictly legal evidence or not.

[17] Mr Gilbert appears to be saying that he has a right to cross-examine a witness, which I accept, but that he also has a right to cross-examine any person whose evidence and information is, in equity and good conscience, fit to be heard by me.

[18] I do not accept that this means that Mr Gilbert can decide what evidence is appropriate for me to consider. He can of course lodge and serve evidence as he sees

fit, but it may be, in the course of conducting the investigation meeting, that I do not consider a particular witness or any evidence relevant or pertinent to the issues and may therefore choose not to hear from a witness or consider any part of the evidence.

[19] In any event, it is for me to determine at this stage whether the question of whether I have the right to refuse the request for a witness statement, and if so on what grounds, should be transferred to the Employment Court.

[20] The question of whether a matter or part of a matter should be transferred to the Employment Court is governed by s 178 of the Act. Section 178(2) of the Act sets out the grounds on which I can order removal of a matter. The only relevant ground in respect of this matter is that there is an important question of law likely to arise in the matter other than incidentally.

[21] I am not satisfied that the question of whether I have the right to refuse the request of a witness statement and if so on what grounds is an important question of law that justifies the removal of this matter to the Employment Court.

[22] The question of whether I have the right to refuse a witness summons or not is straightforward. Clause 5(1) of schedule 2 of the Act provides:

5 Witness Summons

- (1) For the purposes of any matter before the Authority, the Authority may, on the application of any party to the matter, or of its own volition, issue a summons to any person requiring that person to attend before the Authority and give evidence.

[23] The wording is the Authority *may* issue a summons, not *must*. The question is answered in the clause giving the power. It is not a difficult question, nor is it novel or new. It is simply not an important question, which the Employment Court needs to consider.

[24] The further question of, on what grounds I can refuse to issue a summons, is equally straightforward. Again, the answer lies in the Act. Section 160(2) of the Act provides:

The Authority may take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.

[25] I do not have to consider any evidence – there is no prescriptive requirement of *must* when it comes to evidence. I *may* consider evidence that in equity and good conscience I think fit.

[26] So, it must be that the converse applies, if in equity and good conscience I do not consider evidence to be fit I can refuse to consider it.

[27] I do not consider this to be a difficult, novel or new question and it is not a question of law that the Employment Court needs to consider.

[28] Further, I am not satisfied that the question is one of law but rather, it is one of process. The simple point is I can investigate a matter following whatever procedure I consider appropriate¹. This includes calling for evidence and information from the parties, requiring any party or other person to attend the investigation meeting, interviewing any party or person at any time during or after the investigation meeting and as Mr Gilbert has referred, taking into account such evidence and information that in equity and good conscience I think is fit. This is a matter of process as it relates to how I will conduct my investigation. And, the Act is clear on this; I can follow whatever procedure I consider appropriate.

Determination

[29] I am not satisfied this is a matter which should be removed to the Court and I decline Mr Gilbert's application.

Costs

[30] Costs are reserved.

Peter van Keulen
Member of the Employment Relations Authority

¹ Section 160 of the Act