

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 512
3218519

BETWEEN JENNIFER-LEE HARLEY
Applicant

AND CHIEF OF NEW ZEALAND
DEFENCE FORCE
Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Applicant in person
Channy Mao, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: Up to and including 4 July 2023

Date of Determination: 8 September 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Jennifer-Lee Harley claims she was medically released from the New Zealand Defence Force (NZDF) after sustaining an injury on the job in April 2021. Her final release date was set at 17 February 2023. Ms Harley claims that she was unfairly treated in her final months of employment and also takes issue with her dismissal. She claims she had suffered significantly financially, physically and mentally.

[2] NZDF says that Ms Harley was a regular and full-time serving member of the Royal New Zealand Airforce. It says the applicant was not an employee and accordingly does not have the

ability to commence proceedings in the Authority. It takes a position that the Employment Relations Act 2000 does not apply to the Armed Forces.

[3] The parties have asked that the Authority as a preliminary matter, and before investigating Ms Harley's claims, assess whether it is barred from determining the claims by virtue of s 45(5) of the Defence Act 1990, and if the Authority is not barred, whether the Authority has exclusive jurisdiction to investigate the claims which fall within the definition of an employment relationship; and if so; whether issues arose during the course of an employment relationship and in the work context.

[4] NZDF has made its position clear, namely that Ms Harley's claims cannot proceed as her complaints relate to the conditions of members of the Armed Forces and are not employment relationship problems. It submits that there are no facts that create ambiguity as to the true nature of the relationship between NZDF and Ms Harley.

[5] Ms Harley for her part, has advised she does not wish to make submission on the jurisdictional aspects but wants the Authority to rule on her employment status.

Analysis

[6] Ms Harley does not dispute that she was a regular and full-time serving member of the New Zealand Airforce. She also accepts she filed her Statement of Problem in relation to events which occurred during her engagement as a serving member of the Armed Forces. She filed her Statement of Problem because she believed that the Employment Relations Authority was the body which had the jurisdiction to hear her claims.

[7] As a preliminary matter, the Authority is required to assess whether or not it has jurisdiction to determine Ms Harley's claims or whether s 45(5) of the Defence Act means it is barred from doing so.

[8] Section 45 of the Defence Act 1990 provides:

45 Conditions of service in Armed Forces

- (1) Except as otherwise provided in this section, the conditions of service of members of the Armed Forces shall be prescribed by the Chief of Defence Force.
- (2) In prescribing conditions of service under subsection (1), the Chief of Defence Force shall have regard to the following criteria:

- (a) the need to achieve and maintain fair relativity with the levels of remuneration received elsewhere; and
 - (b) the need to be fair both—
 - (i) to the persons or group of persons whose remuneration is being determined; and
 - (ii) to the taxpayer; and
 - (c) the need to recruit and retain competent persons.
- (3) The Chief of Defence Force shall consult with the Public Service Commission when prescribing conditions of service of members of the Armed Forces under this section. The Public Service Commission may at any time, either before or during the prescribing of such conditions of service, indicate to the Chief of Defence Force that it wishes to participate with the Chief of Defence Force in prescribing those conditions of service, and the Chief of Defence Force shall allow the Public Service Commission to participate accordingly.
- (4) The remuneration of members holding the positions of—
- (a) Chief of Defence Force; or
 - (b) the Chief of Navy; or
 - (c) the Chief of Army; or
 - (d) the Chief of Air Force,—
- shall be determined from time to time by the Remuneration Authority.
- (5) Nothing in the Employment Relations Act 2000 applies to the conditions of service of members of the Armed Forces.
- (5A) Nothing in the Fair Pay Agreements Act 2022 applies to members of the Armed Forces.
- (6) Nothing in this section affects any conditions of service in force in respect of members of the Armed Forces immediately before 1 April 1988.

[9] I note that subsection 5 sits with s 45 which itself is located immediately under the heading “Pay and allowances etc”. Other than subsection 5 and subsection 5A, the rest of s 45 seems weighted towards matters to do with remuneration.

[10] However, s 49 of the Defence Act provides

Redress of complaints

- (1) Except in respect of a matter that would properly be the subject of an appeal under the Court Martial Appeals Act 1953 or the Armed Forces Discipline Act 1971, any member of the Armed Forces who considers that he or she has been wronged in any matter may make a complaint as of right to such Service authority and in such manner as may be prescribed in Defence Force Orders.
- (2) If the complainant is not satisfied with the decision of the authority to whom the complaint was made, and that authority refuses or fails, when requested to do so, to forward the complaint to the next superior authority, the complainant shall be entitled to make a complaint direct to the next

superior authority, and, in the case of any further refusal or failure, to the next superior authority, and so on as prescribed.

- (3) It is the duty of any authority receiving a complaint under this section to investigate it or have it investigated as soon as practicable and to take such steps for redressing the complaint as appear to that authority to be necessary.

[11] Section 49 of the Defence Act makes no reference to whether the Employment Relations Act 2000 applies to any complaint.

Analysis

[12] As submitted by NZDF, the Armed Forces has a unique constitutional position and a member of the Armed Forces is in a relationship of service to the Crown, given effect to by the taking of an oath of allegiance to the sovereign. Section 45(5) of the Defence Act as set out above, specifically provides “nothing in the Employment Relations Act 2000 applies to the conditions of service of members of the Armed Forces.”

[13] The immediate observation is that in terms of Ms Harley’s relationship with NZDF, if the Authority has no jurisdiction regarding her conditions, is there anything left? If the answer is no, then clearly the Authority would have no jurisdiction.

[14] As can be seen above, the Defence Act also provides for the redress of complaints and sets out a process. If the Authority had jurisdiction, it would not make sense to include s 49 of the Defence Act, as it would in essence be a duplication. This lends to the conclusion that the Authority has no jurisdiction in this matter and is a further indication that Parliament intentionally created a different set of rules for members of the Armed Forces.

[15] In *Mishele Radford v Chief of Defence Force* the full Court noted “the terms and conditions of service for personnel in the Armed Forces is in Pt 4”.¹ Under s 45(5) nothing in the Employment Relations Act applies to members of the Armed Forces. Whilst the section itself says that nothing in the Employment Relations Act applies to the conditions of service of members of the Armed Forces, it is clear the Employment Court took the view that this section meant it had no jurisdiction.

[16] Indeed, the Authority itself in *Moncrieff v Her Majesty the Queen in right of her Government in New Zealand acting by and through the Chief of Defence Force* also concluded

¹ [2021] NZEmpC 35 at paragraph 67.

that s 45(5) of the Defence Act meant that a member of the Armed Forces could not pursue a claim before the Authority.²

[17] I also note that Ms Harley can pursue her claims in other forums under the Defence Act.

Conclusion

[18] Ms Harley's claims fall outside the Authority's jurisdiction and accordingly it cannot investigate them.

Costs

[19] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[20] If they are not able to do so and an Authority determination of costs is needed, any party seeking costs may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum, the other party will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[21] The parties could expect the Authority to determine costs and ask to do so on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.³

Geoff O'Sullivan
Member of the Employment Relations Authority

² AA 337/05, 31 August 2005.

³ See www.era.govt.nz/determinations/awarding-costs-remedies.