IN THE EMPLOYMENT COURT
CHRISTCHURCH

CC 5C/08
CRC 2/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	VICE-CHANCELLOR OF LINCOLN UNIVERSITY Plaintiff
AND	GLENN STEWART Defendant

Hearing: 24 April 2008
(Heard at Christchurch)

Appearances: Glenn Jones and Amy Shakespeare, Counsel for Plaintiff
Peter Cranney, Counsel for Defendant

Judgment: 2 May 2008

Reasons: 17 June 2008

JUDGMENT OF JUDGE A A COUCH

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[1] This judgment deals with the process for challenging a determination of the Authority ordering the removal of a matter into the Court. This appears to be a novel issue.

[2] In an interlocutory judgment given on 2 May 2008 (CC 5A/08), I gave my decision that the Authority was wrong to have removed this matter to the Court but that, in the exercise of my discretion, the Authority should not be ordered to investigate the matter. In this judgment, I record the reasons for those decisions.

[3] The defendant was dismissed from his employment by the plaintiff. He commenced proceedings in the Employment Relations Authority alleging that his dismissal was unjustifiable and seeking remedies including reinstatement.

[4] Shortly before the Authority's investigation meeting was to take place, the defendant applied to have the whole of the proceedings removed into the Court. In a determination dated 21 December 2007 (CA 160/07), the Authority granted that application.

[5] The plaintiff sought to challenge that determination and to have a hearing de novo of the application for removal.

Jurisdiction

[6] Removal of matters before the Authority to the Court for hearing in the first instance is governed by s178 of the Employment Relations Act 2000. It provides:

> ***178 Removal to Court***
>
> *(1) Where a matter comes before the Authority, any party may apply to the Authority to have the matter, or part of it, removed to the Court for the Court to hear and determine it without the Authority investigating the matter.*
>
> *(2) The Authority may order the removal of the matter, or any part of it, to the Court if—*
>
> *(a) an important question of law is likely to arise in the matter other than incidentally; or*
>
> *(b) the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Court; or*
>
> *(c) the Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or*
>
> *(d) the Authority is of the opinion that in all the circumstances the Court should determine the matter.*
>
> *(3) Where the Authority declines to remove any matter, or a part of it, to the Court, the party applying for the removal may seek the special leave of the Court for an order of the Court that the matter or part be removed to the Court, and in any such case the Court must apply the criteria set out in paragraphs (a) to (c) of subsection (2).*
>
> *(4) An order for removal to the Court under this section may be made subject to such conditions as the Authority or the Court, as the case may be, thinks fit.*

> *(5) Where the Authority, acting under subsection (2), orders the removal of any matter, or a part of it, to the Court, the Court may, if it considers that the matter or part was not properly so removed, order that the Authority investigate the matter.*
>
> *(6) This section does not apply—*
>
> > *(a) to a matter, or part of a matter, about the procedure that the Authority has followed, is following, or is intending to follow; and*
> >
> > *(b) without limiting paragraph (a), to a matter, or part of a matter, about whether the Authority may follow or adopt a particular procedure.*

[7] The scheme of this section in isolation is clear. Any application to transfer a matter must first be addressed to the Authority. Where the Authority decides that a matter ought not to be removed, an applicant who is dissatisfied with that decision may have the issue reconsidered by the Court under the special leave process provided for in subs (3). Where the Authority orders that a matter be removed, the Court is authorised by subs (5) to reconsider the issue and return the matter to the Authority if it thinks the Authority was wrong to make the order.

[8] In this case, the plaintiff has sought to bring the matter before the Court by way of a challenge under s179 of the Act. This raises the question whether such a process is available as an alternative to that provided for in s178.

[9] Section 179(1) provides for a general right to challenge any determination of the Authority. The term "*determination*" is not defined in the Act. I adopt for the purposes of this case the view I took in *Rawlings v Employment Relations Authority* [2006] ERNZ 729 at paragraph [86] that it should be given a wide meaning encompassing any exercise by the Authority of a power of decision affecting proceedings before it. On that basis, a decision by the Authority to order removal of a matter before it to the Court or to refuse to make such an order would clearly be a determination for the purposes of s179(1) and apparently give rise to a right of challenge under s179.

[10] It might be suggested that jurisdiction under s179 was precluded by s179(5) which provides that the right of challenge under s179(1) does not apply to determinations about the "*procedure*" of the Authority. Essentially the same issue

was considered by Chief Judge Colgan in *Clerk of the House of Representatives v Witcombe* [2006] ERNZ 196 where it was submitted that s178(6) operated as a bar to the operation of s178(3). Section 178(6) is in nearly identical terms to s179(5) and was inserted into the Act by the same amendment in 2004. For the reasons given by the Chief Judge in paragraphs [19] to [31] of his decision in *Witcombe* regarding s178(6), I find that s179(5) does not preclude a challenge under s179(1) to a determination of the Authority on an application for removal.

[11] It follows that, viewing ss178 and 179 separately, each appears to give jurisdiction for the Court to reconsider issues of removal previously determined by the Authority.

[12] The possibility of alternative processes for invoking the Court's jurisdiction to consider questions of removal was noted in the first decision of the Court under s178 – see *NZ Amalgamated Engineering, Printing & Manufacturing Union Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 74 at paragraph [12]. In that case, and in several other subsequent cases in which the same possibility has been noted, there has been no need to decide the issue and the Court has refrained from doing so. As close as the Court seems to have come to expressing a view is an obiter remark in paragraph [2] of the decision in *Witcombe* where Chief Judge Colgan described the proceedings as being an application for special leave under s178(3) *"… as the statute permits in addition to an appeal …"*.

[13] As a matter of principle, it is unsatisfactory for there to be two alternative processes available in the Court to address the same issue. Such a situation is even more unsatisfactory where those two processes involve the application of different criteria.

[14] That is clearly the case where the Authority has declined to order removal. If a dissatisfied applicant seeks special leave pursuant to s178(3), the Court must consider the merits of removal according to the criteria set out in s178(2)(a) to (c) but not s178(2)(d). If that same party pursued a challenge and the issue came before the Court by way of a hearing de novo, the Court would be required to exercise the jurisdiction of the Authority which would extend to all four criteria under s178(2).

[15] Another difference between the two processes is that, while s179(2) requires that a challenge be made within 28 days after the date of the determination in question, s178(3) imposes no time limit within which an application for special leave must be made. Having said that, the Court would undoubtedly have regard to the extent and consequences of any delay in making such an application in the exercise of its residual discretion under s178(3).

[16] Section 178(5) has received very little judicial attention. At best, it has only been mentioned in passing and does not ever appear to have been invoked. Its meaning, however, is clear. Where the Court concludes that the matter was "*not properly*" removed, the Court has a general discretion to refer the matter back to the Authority for investigation. To be satisfied that the matter was "*not properly*" removed can only mean that the Court must be satisfied that the Authority was wrong in its decision to order removal.

[17] This may be compared with the criteria applicable to a challenge to the Authority's determination under s179(1) by way of hearing de novo. In that context, the decision of the Authority is effectively put to one side and the Court makes its own decision according to the criteria set out in s178(2).

[18] Like s178(3), there is no time limit within which the jurisdiction under s178(5) may be exercised whereas a challenge must be made within the 28-day time limit prescribed by s179(2).

[19] In my view, it is clearly preferable that a party dissatisfied with the Authority's determination of an application for removal should proceed under the particular provisions in s178(3) and s178(5) rather than the general right of challenge under s179. Given the clear words of s179, however, it would be wrong to construe them as excluding a challenge to such a determination. I adopt in this context the view of the full Court in *NZ Baking Trades Union (Inc) v Foodtown Supermarkets Ltd* [1992] 3 ERNZ 305 at 307, where, dealing with an analogous situation under the Employment Contracts Act 1991, they said:

> *We should not be taken as having decided that an appeal does not lie from such a decision, but only that despite the fact that the right of appeal to this*

> *Court is expressed generally to encompass any decision of the Tribunal, some very good reason would need to be advanced for not following the procedure provided for by s 94, which has been expressly enacted with this kind of situation in mind …*

[20] Adapting that dictum to the circumstances of the Employment Relations Act 2000, some very good reason would need to be advanced for proceeding by way of challenge under s179 rather than by way of application under s178(3) or s178(5).

Was the matter properly removed?

[21] After discussing these issues with counsel, the plaintiff's challenge to the Authority's determination removing the matter to the Court was treated as if it were an application under s178(5) and was argued on that basis. The issue therefore was whether the matter was properly removed into the Court.

[22] The Authority's reasons for ordering removal were summarised in paragraph [14] of its determination:

> *[14] In consideration of the now extended pleadings of the applicant and in particular the legal issue of the standard of proof where serious fraud allegations are involved, the expanded time scale and the public interest in this case, I order the whole matter removed to the Employment Court.*

[23] This suggested that the Authority relied on paragraphs (a) and (b) of s178(2) in deciding to make the order for removal, that is:

a) that an important question of law was likely to arise other than incidentally; and

b) that the case was of such a nature and of such urgency that it was in the public interest that it be removed.

[24] The primary ground relied on by the Authority was that an important question of law was likely to arise other than incidentally. In reaching that conclusion, the Authority was influenced principally by the changes made in the amended statement of problem filed by Mr Cranney on 29 November 2007. They were said to have included 5 additional causes of action involving:

a) breach of the New Zealand Bill of Rights Act 1990

b) contractual breach of the applicable collective agreement

c) breach of the duty of good faith imposed by s4 of the Employment Relations Act 2000

d) an allegation that the dismissal was *ultra vires* the powers of the plaintiff

e) a claim for recommendations under s123(1)(ca) of the Employment Relations Act 2000

[25] On analysis, these additions to the defendant's claim made little if any difference in substance to the defendant's original claim that he had been unjustifiably dismissed. As they were no more than an adjunct to the primary cause of action, which is the defendant's personal grievance, it inevitably followed that any question of law they might raise was no more than incidental to the proceedings as a whole.

[26] The provision of the New Zealand Bill of Rights Act 1990 relied on was s27. As that is only expressed to apply to any *"tribunal"* or *"other public authority"*, it is difficult to see how it could apply to decisions made by the plaintiff. In any event, the allegation was that the plaintiff had failed to observe the principles of natural justice in dismissing the defendant. As Mr Cranney accepted in the course of argument, observing the principles of natural justice is part of what a fair and reasonable employer would do. Thus, it falls within the scope of the personal grievance and the essential test of justifiability in s103A of the Employment Relations Act 2000.

[27] The allegation that the plaintiff breached the terms of the applicable collective agreement in the course of dismissing the defendant was in a similar position. It was entirely overlapped by the personal grievance alleging unjustified dismissal.

[28] The same can be said of the allegation of breach of the statutory duty of good faith. While s4(1A)(a) declares that the statutory duty of good faith *"is wider in scope than the implied mutual obligations of trust and confidence"*, it is axiomatic that a fair and reasonable employer would observe that duty. Applying the test in s103A, therefore, it will be very difficult if not impossible to say that a dismissal effected in breach of the duty of good faith is justifiable.

[29] The allegation that the dismissal was *ultra vires* could only be pursued as a separate cause of action if it was the subject of an application for judicial review. As the dismissal gave rise to an employment relationship problem, any application for judicial review was precluded by s194A.

[30] The request that the Authority make recommendations pursuant to s123(1)(ca) was incorrectly described as a cause of action. It could only have been a claim for an additional remedy arising out of the personal grievance.

[31] The other proposition apparently relied on by the Authority was that the reasons for the defendant's dismissal included allegations of serious criminal behaviour and that the law was uncertain as to the standard of proof required to establish such allegations.

[32] There were two difficulties with that proposition. Firstly, it emerged that the basis on which it was said that allegations of serious criminal conduct had been made was that a passage in a report to the plaintiff described the defendant's actions as *"fraudulent"* and suggested that he had *"committed fraud"* and *"harassed"* a colleague. The actions of the defendant described in this way comprised his having nominated himself for an award using the name of a colleague without her permission and his part in subsequent bitter correspondence with her about what he had done. That did not impress me as conduct capable of being regarded as criminal and, when I invited Mr Cranney to tell me in the course of submissions what particular crime he suggested the defendant was being accused of, he was unable to do so. Subsequently, Mr Cranney accepted that the allegations made against the defendant were ones of dishonesty and deception in an interpersonal sense rather than allegations of criminal conduct.

[33] The second difficulty with the proposition is that the law relating to the standard of proof applicable to allegations of misconduct in an employment context is not uncertain or, if it is, removing the matter to the Employment Court would not resolve any uncertainty. The question was clearly and succinctly dealt with by the Court of Appeal in *Whanganui College Board of Trustees v Lewis* [2000] 1 ERNZ 397 at paragraphs [19] and [20]. Mr Cranney submitted that what the Court of Appeal said in that case was inconsistent with what it had said in previous decisions. If that is so, and it appears the Court of Appeal itself recognised the possibility of this in paragraph [21] of the decision in *Lewis*, that would create a conflict between decisions of the Court of Appeal. That is a situation the Employment Court cannot resolve and there was no suggestion of the Court being asked to state a case for the Court of Appeal under s211. Given that *Lewis* was decided in the knowledge of what had been said in the earlier cases, the appropriate course for the Authority and the Court would be to apply *Lewis* as the most recent decision.

[34] To the extent that the Authority relied on s178(2)(b), relating to the public interest, it did so in error. In paragraph [13] of the determination, the Authority said:

> *The other matter that I have considered in this application is the high profile enjoyed by both the applicant and the respondent. There has already been some preliminary publicity on this matter in the local media and I am of the view that the public interest in the matter is high.*

[35] It is clear from this passage that the *"public interest"* taken into account by the Authority was the curiosity of the public. That is not the *"public interest"* referred to in s178(2)(b), which is the welfare of the public.

[36] In defending the Authority's determination, Mr Cranney did not attempt to rely on this ground and there is no basis for it on the facts of this case.

[37] I conclude that the matter was not properly removed to the Court.

Residual discretion

[38] Having reached that decision, there remains a residual discretion under s178(5) whether or not to order the Authority to investigate the matter.

[39] In supporting the proposition that the matter should remain in the Court notwithstanding it having been improperly removed, Mr Cranney made three additional submissions. The first was that, because the matter involved serious allegations and both parties had signficant status, it was more appropriate that the Court hear the matter. I do not accept that submission. Authority members regularly deal with allegations of the most serious nature and do so competently. Equally, the Authority's investigation process and its powers to make orders about the process in particular cases have proved effective in the resolution of matters in which allegations of truly criminal and morally reprehensible conduct have been involved. In most cases, a party's standing in the community is irrelevant to the essential issues involved in resolving an employment relationship problem. In the rare cases where it is relevant, it does not seem to me that the Court is any better suited to dealing with such issues than the Authority.

[40] Mr Cranney's second submission was that a challenge to any determination the Authority might give was virtually inevitable and that, as a matter of economy, the matter should remain in the Court. In most cases, I would treat such a submission with considerable caution. An investigation by the Authority may give the parties insights they did not have prior to that process or lead to a compromise they did not anticipate. In this case, however, Mr Jones very candidly informed me on behalf of the plaintiff that, if the Authority ordered reinstatement, the plaintiff would challenge the determination. In a similar vein, Mr Cranney informed me of his instructions that, if reinstatement was not ordered, the defendant would pursue a challenge. These positions understandably arose from the nature of the position held by the defendant. If he is not reinstated, his prospects of obtaining a comparable appointment would be very limited and his academic career could well be at an end. From the plaintiff's point of view, his decision to dismiss the defendant was a grave one and to successfully reintegrate the defendant into the university staff would be difficult.

[41] Mr Cranney's third submission was that, because reinstatement was in issue, a measure of urgency was required and that a final outcome would be unnecessarily delayed by having two hearings, one in the Authority and another in the Court. This submission relied upon the proposition that a challenge to any determination the

Authority might give would be inevitable and was therefore largely an extension of Mr Cranney's second submission.

[42] In response, Ms Shakespeare very properly made the point that, had the defendant not applied to have the matter removed to the Court, the Authority's investigation would almost certainly have been completed some time ago and its determination given. To the extent that the defendant was disadvantaged by delay, Ms Shakespeare submitted that he was the author of his own misfortune and no weight ought to be placed on this factor. While that submission is soundly based in logic, the reality is that the matter is now before the Court and the delay which has occurred cannot be undone. What I must decide is the best way forward rather than what might have been a better course to take in the past. I take into account also that the defendant's claim for reinstatement must have created a measure of uncertainty within the University and that other staff must have an interest in the outcome.

[43] The scheme of the Employment Relations Act 2000 is clear. Personal grievances are to be dealt with by the Authority in the first instance in all but the very few cases in which one or more of the criteria set out in s178(2) are established. In this case, none of those criteria was established. The matter is before the Court as a result of error by the Authority. As a result, there was ample foundation for Mr Jones' submission that the matter should be returned to the Authority. In exercising my discretion, however, I must give effect to what I perceive to be the interests of justice in this particular case.

[44] In all the circumstances, I find that the interests of justice would be best served by the earliest possible resolution of the dispute between the parties. I accept that, in the unusual circumstances of this case, it is almost inevitable that any determination the Authority might give would be challenged. It follows that a hearing in the first instance by the Court is likely to produce an earlier conclusion then a direction that the Authority investigate the matter.

[45] I record that I have reached this conclusion by a narrow margin and that the particular facts of this case have been an important factor in my doing so. This decision should not be taken as an indication of the conclusion which might be

reached in other cases. Indeed, given that the starting point for the exercise of the discretion under s178(5) is that the matter ought not to have been removed into the Court by the Authority, the discretion is more likely than not to be exercised in favour of a direction that the Authority investigate the matter.

Comment

[46] In this decision, I have found that subsections (3) and (5) of s178 of the Employment Relations Act 2000 confer complementary jurisdiction on the Court to review decisions of the Authority to grant or refuse an order for removal. Those two provisions are, however, worded quite differently. Subsection (3) expressly provides for the matter to come before the Court by way of an application by a party. Subsection (5) simply confers jurisdiction without providing for any particular procedure.

[47] On reflection, that makes sense. Where the Authority has refused to remove a matter, it is not before the Court. It must be properly brought before the Court by some means before the Court can exercise its jurisdiction. Subsection (3) of s178 specifically provides that the appropriate means is by application for special leave by the party whose application to the Authority was declined. Unless and until such an application is made, the Court cannot exercise jurisdiction over the matter.

[48] Where the Authority has ordered removal, the matter comes before the Court as a result of that order. It is then open to any party to invite the Court to exercise its jurisdiction under s178(5) by an interlocutory application in the normal form. Equally, the Court may exercise that jurisdiction of its volition.

Costs

[49] The effect of this judgment is that the proceeding removed into the Court (CRC 1/08) remains before the Court for hearing and decision. This proceeding, which was solely concerned with deciding whether or not the Authority would investigate the matter, is at an end. It is therefore appropriate that any issue of costs in this proceeding now be resolved.

[50] This is a case where costs should not necessarily follow the event. Although the plaintiff has been unsuccessful in having the effect of the Authority's order for removal reversed, my conclusion that the order was improperly made must represent a measure of success for the plaintiff. My initial inclination is that costs associated with this aspect of the matter should lie where they fall but I am open to persuasion otherwise. If either party wishes to seek an order for costs, a memorandum should be filed and served within 21 days after the date of these reasons. In that case, the other party shall then have a further 21 days to file a memorandum in response.

A A Couch
Judge

Judgment signed at 3.00pm on 17 June 2008