IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 111
ARC 77/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	PAUL YOUNG Plaintiff
AND	BOARD OF TRUSTEES OF AORERE COLLEGE Defendant

Hearing:	18 June 2013 (Heard at Auckland)
Appearances:	Mr Gregory Bennett, advocate for plaintiff Mr Richard Harrison and Ms Emily McWatt, counsel for defendant
Judgment:	18 June 2013

ORAL JUDGMENT OF JUDGE CHRISTINA INGLIS

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[1] The plaintiff is challenging a determination of the Employment Relations Authority, declining to re-open a matter investigated and determined by it.[1] The challenge was pursued on a de novo basis. The defendant opposes the challenge.

Background

[2] In order to put the challenge into context it is necessary to understand the background to this proceeding. The plaintiff was employed by Aorere College as a teacher and was subsequently dismissed from that position in December 2005. He brought a personal grievance claiming that his dismissal was unjustified. The Authority concluded that Mr Young had been justifiably dismissed and that he had

[1] [2012] NZERA Auckland 366.

not been unjustifiably disadvantaged.[2] Mr Young then filed a challenge against the Authority's determination.

[3] Before the challenge was heard the parties entered into a settlement agreement. The agreement included a term that no complaint would be made in respect of any matter related to the plaintiff's employment. Clause 4 of the agreement provided that:

> All parties accept that all outstanding issues between them have been resolved.

[4] A mediator signed the settlement agreement in accordance with s 149 of the Employment Relations Act 2000 (the Act), confirming that before signing the agreed terms of settlement, she had explained to the parties the effect of ss 149(1) and (3) of the Act. She also confirmed that she was satisfied the parties understood the effect of these provisions.

[5] While Mr Bennett, advocate for the plaintiff, informed me after the closing of submissions that he had just received instructions that Mr Young had no recollection of these matters, I must proceed on the basis of the evidence before the Court and contained in the affidavit filed on behalf of the defendant. Annexed to that affidavit is the documentation confirming the steps that the mediator took.

[6] Despite having signed the settlement agreement in the above terms, Mr Young subsequently applied to the Authority to re-open the matter. That application was declined. It is against that background that the current challenge arises.

Legal framework

[7] Because of the nature of the challenge, the Court is required to consider the application to re-open the matter afresh, having regard to the statutory powers conferred on the Employment Relations Authority (the Authority). In this regard, cl 4 of Sch 2 of the Act provides that:

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[2] AA 267/06, 18 August 2006.

> The Authority may order an investigation to be reopened upon such terms as it thinks reasonable...

[8] While the Authority's discretion is broad it must be exercised according to principle.

[9] In *Shore v Aqua-Cool Ltd*[3] the Court cast doubts on the relevance of the jurisprudence relating to the Court's power to order a re-hearing in considering an application to re-open in the Authority. However, in my view those cases provide a useful framework that can readily be applied by way of analogy. And at the end of the day the overriding consideration must be the interests of justice, having regard to the likelihood of a miscarriage of justice balanced against other relevant factors such as the importance of finality in litigation. In *Ports of Auckland Limited v NZ Waterfront Workers Union*,[4] a full Court of the Employment Court put it this way:[5]

> ... in general the Court must look toward the possibility of a miscarriage of justice, but should not look for proof of that possibility to a high standard. For balance, it must give equal weight to the importance of certainty in litigation and the right normally enjoyed by a successful litigant, ... to enjoy the fruits of a judgment in its favour.

[10] A mere possibility that a miscarriage of justice has occurred does not suffice.

The plaintiff's case

[11] While the challenge was pursued on a de novo basis many of the points raised on the plaintiff's behalf were directed at errors that the Authority member was said to have made in determining the re-opening application itself. In this regard Mr Bennett submitted that the Authority took into account incorrect information in determining the application and this "error" amounted to a miscarriage of justice.

[12] As I understood it, the plaintiff is concerned that two affidavits were filed with the Authority for the purposes of the re-opening application, although the Authority member only referred to "an affidavit", and the Authority member was

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[3] AC 73/05, 5 December 2005 at [22]. The Court was concerned with an application for rehearing pursued under s 125 of the Employment Contracts Act 1991.

[4] [1994] 1 ERNZ 604. The Court of Appeal dismissed an appeal against the judgment of the Employment Court, see [1995] 2 ERNZ 85 (CA).

[5] At 607. In relation to an application for re-hearing.

mistaken as to the amount of time that the original investigation occupied. This, it is said, led the Authority member to misdirect himself as to what occurred during the course of the original investigation, creating a miscarriage of justice and Mr Bennett referred to *Dotcom v Attorney-General*[6] in support of that submission.

[13] The material that the plaintiff is concerned the Authority did not have regard to is a statutory declaration of a former pupil (Mr Khan) dated 11 May 2012. The statutory declaration states that the plaintiff did not provide answers during any exams. While the declaration had not been provided to the Court in compliance with earlier timetabling orders and prior to hearing, Mr Harrison consented to it being admitted in fairness to Mr Young. He submitted that while it may be relevant to an issue originally before the Authority, in determining the justification or otherwise of the plaintiff's dismissal, it is plain that broader issues were at stake (such as an alleged failure to keep adequate records, the way in which marks were allocated and supervision). And Mr Bennett accepted that even if the declaration had been before the Authority, it was "borderline" as to whether it would have ultimately made a difference, and secondly that Mr Young could have accessed the information at the time.

[14] It is also submitted on behalf of the plaintiff that the settlement that was entered into was based on what was known by the plaintiff at the time he agreed to it and it is possible for a settlement to be re-opened if new information subsequently comes to hand. Mr Bennett referred to a judgment of Chief Judge Goddard's in *Marlow v Yorkshire New Zealand Limited*[7] in support of this submission.

[15] Mr Harrison submits that many of the points raised on behalf of the plaintiff are irrelevant to a determination of his challenge and that, taken individually or collectively, they fall short of justifying an order that the Authority's original investigation be re-opened.

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[6] [2013] NZHC 1269.
[7] [2000] 1 ERNZ 206.

Discussion

[16] There are a number of difficulties with the plaintiff's challenge. The key focus for the Court must be on whether there are grounds to re-open the Authority's original investigation, rather than what occurred in the context of the plaintiff's subsequent application to re-open. Many of the complaints that are said to found the basis for the application relate to the Authority's determination of 15 October 2012, and the way in which the Authority approached its discretionary task. They are not relevant to a de novo consideration of the plaintiff's application. Rather, the Court is obliged to approach the application to re-open afresh.

[17] There is no suggestion, as I understand it, that the original determination contained an error of fact or law. Even if it did that, of itself, would not automatically lead to the grant of leave to re-open the investigation.

[18] Nor do I accept that Mr Khan's statutory declaration amounts to new evidence that would support the application. It does not establish a serious concern that the grounds for the dismissal were not properly considered or that, had the Authority been seized of the material, it would likely have reached a different conclusion. And Mr Khan's declaration is dated a number of years after the events complained of occurred.

[19] The plaintiff's decision to enter into a full and final settlement agreement with the defendant represents an additional hurdle for him. Mr Bennett submitted that he was attempting to weave a "fine line" around s 149 but I consider that it presents an insurmountable hurdle for the plaintiff in the circumstances of this case. The agreement represented a full and final settlement of the plaintiff's personal grievance according to its terms. Not only was it expressed to be on a full and final basis but the agreement was also signed off by a Department of Labour mediator pursuant to s 149 of the Act. As Mr Harrison points out, s 149(1) requires a mediator to explain the effects of such an agreement to the parties, before they commit to it, as set out in s 149(3), including that:

- That the terms of the settlement are final and binding on and enforceable by the parties;

- The terms may not be cancelled under s 7 of the Contractual Remedies Act 1979;

- Except for enforcement purposes, no party may seek to bring these terms before the Authority or the Court, whether by action, appeal, application for review, or otherwise.

[20] The combined effect of these provisions is that a settlement agreement which has passed through the s 149 process cannot be challenged or set aside, except with the possible exception of duress on public policy grounds.[8] There is no suggestion, as Mr Bennett accepted, of duress in this case.

[21] I have already referred to the difficulties relating to the belated reliance on Mr Khan's statutory declaration to support a re-opening application. They apply equally to any attempt to unravel the settlement agreement.

[22] Concerns about the adequacy of the plaintiff's representation before the Authority and prior to settlement which are touched on in the written submissions filed on behalf of the plaintiff, are not supported by evidence. In any event they fall well short in terms of establishing good grounds to re-open the Authority's investigation, and (in the process) to undo what would otherwise be a binding settlement agreement. Such a step would, in my view, significantly dilute the intended purpose of s 149, which is to reinforce the finality of settlements.

[23] The plaintiff's grievance has been settled. Nothing remains now for the Authority to investigate, even if its investigation was re-opened. It would, in my view, be an exercise in futility, and one that the Authority should not be required to embark upon.

[24] There was a lengthy delay between the Authority's original determination and the application for re-hearing. As Mr Harrison points out, the delay would likely give rise to prejudice to the defendant having particular regard to the ability of witnesses to recall events which took place now over eight years ago. The period is unexplained, and would weigh against an exercise of the Court's discretion, even in the event that I had otherwise been drawn to the plaintiff's application.

[8] *Tinkler v Fugro PMS Pty Ltd and Pavement Management Services Ltd* [2012] NZEmpC 102.

Conclusion

[25] The plaintiff's challenge is dismissed.

[26] Counsel for the defendant has asked me to reserve the issues of costs which I will do. It may be that they can be agreed between the parties, but if they cannot and they otherwise remain in issue they can be the subject of an exchange of memoranda with the defendant to file and serve any memoranda and material in support within 30 days of the date of this judgment and the plaintiff doing likewise within a further 20 days.

Christina Inglis
Judge

Oral judgment delivered at 11.14 am on 18 June 2013