

**IN THE EMPLOYMENT COURT
AUCKLAND**

**AC 3/09
ARC 21/08**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	PATRICK JOHN CLARK Plaintiff
AND	THE BOARD OF TRUSTEES, DARGAVILLE HIGH SCHOOL Defendant

Hearing: by written submissions filed on 23 June 2008 and 14 January and 5
February 2009
(Heard at Auckland)

Representation: Plaintiff in Person
Christine Chilwell, Counsel for Defendant

Judgment: 17 February 2009

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] This interlocutory judgment determines the nature and extent of the hearing of Patrick Clark's challenge to the determination of the Employment Relations Authority dismissing his personal grievance. The decision is made pursuant to s182(3) of the Employment Relations Act 2000. The unfortunate delay in issuing this judgment has arisen because of the defendant's wish that the Court take account of the judgment of the District Court, delivered on 19 December 2008 following a hearing between the parties in that jurisdiction on 22 July 2008. I record that Mr Clark consented to the defendant's applications for extension of time for filing its submissions on these grounds.

[2] The Authority's determination dismissing Mr Clark's personal grievance raised questions about whether Mr Clark may not have participated in the Authority's investigation of his personal grievance in a manner that was designed to resolve the issues involved: s181(2). Accordingly, by a minute dated 10 April 2008, I called for a report from the Authority under s181(1) and, in particular, whether Mr Clark had facilitated rather than obstructed the Authority's investigation of his grievance and whether he had acted in good faith towards his former employer during the Authority's investigation.

[3] The Authority's report to the Court is dated 12 May 2008 and was compliant with s181(3) in that, before submitting it to the Court, the Authority had given each party a reasonable opportunity of supplying written comments on its draft.

[4] Each party has now also taken the opportunity offered of making written submissions to the Court on the questions of the nature and extent of the hearing of the challenge that I must decide.

[5] Some background to these issues must be set out.

[6] Mr Clark brought civil proceedings against the Board of Trustees in the District Court at Dargaville. On the application of the Board, these proceedings were stayed, the District Court Judge being of the view that the parties' dispute was within the exclusive jurisdiction of the Employment Relations Authority.

[7] Mr Clark then issued proceedings in the Authority. At about this time, he ceased to be represented by his union, the Post Primary Teachers Association Inc and has since then had no other representative.

[8] There was a lengthy process of preparation for an Authority investigation meeting contributed in part by Mr Clark's absence overseas. Eventually, however, by early 2008 Mr Clark had returned to New Zealand and obtained alternative teaching employment. He asked that the Authority's investigation meeting be conducted during one of the school holiday periods in early or mid-2008. The defendant opposed this course because its principal, who was also a significant

witness, was scheduled to be overseas with student parties during both of these holiday periods. When the Authority indicated that it would not agree to Mr Clark's proposals to hold an investigation meeting in a school holiday period, the plaintiff indicated clearly to the Authority that he would not participate in any investigation meeting scheduled during school term time. In these circumstances the Authority cancelled the scheduled investigation meeting and dismissed Mr Clark's grievance.

[9] The plaintiff has elected to challenge that determination by hearing de novo.

[10] The case is unusual and more difficult because the grounds for dismissing the claim are the principal grounds upon which the Authority has also concluded that Mr Clark obstructed rather than facilitated its investigation and that he did not act in good faith towards his former employer during the investigation.

[11] A litigant in these circumstances cannot be deprived of a right of challenge. Rather, the s181 procedure leads to a determination of the nature and extent of the challenge, usually by narrowing the nature and extent of what would otherwise be a hearing de novo, that is of all matters that were in issue before the Authority including the merits of Mr Clark's personal grievance that have never been examined.

[12] Very fairly in my view, the defendant agrees that Mr Clark's challenge should continue to be by hearing de novo as he has elected. In these circumstances I so direct. This means, in practical terms, that the substance of Mr Clark's justiciable complaints will be heard and determined by the Court rather than the narrower and now academic question of whether the Authority was correct to have dismissed Mr Clark's grievances when he indicated his intention not to participate in an investigation meeting conducted during school term time to suit the convenience of the defendant but not of himself.

[13] I move now to directions to a hearing of Mr Clark's grievances. Literally in the last few days the plaintiff has filed (and I assume served) an amended statement of claim to which the defendant has not yet had an opportunity to plead. It is at least possible that the defendant may contend that some of Mr Clark's new purported

causes of action are not justiciable by this Court. The timetable of the case may need to allow for a preliminary determination of what issues the plaintiff is entitled to put before the Court in his pleadings.

[14] To expedite the matter I will make directions that the defendant may have the period of 21 days following service upon it of the amended statement of claim to either file and serve a statement of defence to this or to make any application affecting any of the plaintiff's new causes of action, in which circumstances the defendant will not be required to plead to the amended statement of claim until such application has been determined.

[15] There should then be a telephone conference call with a Judge at a time to suit both parties, at which time directions for the future conduct of the case will be given.

[16] I reserve questions of costs on the s181/182 report aspect of the case for decision at its conclusion.

GL Colgan
Chief Judge

Judgment signed at 1 pm on Tuesday 17 February 2009