IN THE EMPLOYMENT COURT
CHRISTCHURCH

CC 6/09
CRC 30/08

IN THE MATTER OF	a de novo challenge to a determination of the Employment Relations Authority
BETWEEN	JENNIE GAMBLE Plaintiff
AND	AGRESEARCH LTD Defendant

Hearing: 29 June 2009
(Heard at Christchurch)

Appearances: F J Wall, advocate for plaintiff
Philip Skelton, counsel for defendant

Judgment: 29 June 2009

ORAL JUDGMENT OF JUDGE A A COUCH

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[1] Mrs Gamble is an experienced laboratory technician. Beginning in 1972 she worked for Canesis Network Limited at its laboratory in Lincoln.

[2] In mid 2006, Canesis entered into discussions with the defendant in this matter, AgResearch Limited, which is a large Crown Research Institute also based in Lincoln. Those discussions led to an agreement in principle that AgResearch would purchase all of the business assets of Canesis. On 28 October 2006 that proposed sale was announced to the staff of Canesis.

[3] In the course of the negotiations, AgResearch assessed the number of additional positions it would need to create to carry out its work after the business acquired from Canesis had been integrated into its existing business. AgResearch determined

that it would need 100 additional staff and proposed offering that number of positions to staff from Canesis. At that time Canesis had 116 permanent and fixed term employees. The net result of this situation was that there were 16 existing employees of Canesis who would not be offered employment by AgResearch. Mrs Gamble was one of those 16.

[4] On 14 November 2006 the sale and purchase agreement between Canesis and AgResearch was concluded. That day Canesis wrote to Mrs Gamble advising of the sale which was then expected to settle on 1 January 2007. Canesis told Mrs Gamble that AgResearch was not proposing to offer her employment and invited submissions from her regarding the future of her position. It was indicated clearly that, with the sale of the business assets, her position was likely to be redundant but she was nonetheless invited to make submissions which Canesis said would also be passed on to AgResearch. Mrs Gamble made such submissions, supported by the two supervisors of her work at Canesis.

[5] Those submissions appear to have been considered by both Canesis and AgResearch but neither company altered its position after seeing them. Mrs Gamble's position with Canesis was redundant and she was not offered employment by AgResearch. That situation was finally confirmed to her in a letter on 8 December 2006. In that letter she was asked to work out part of a period of notice until 22 December 2006. Otherwise, she was to be paid 3 months' salary in lieu of notice and 44 weeks' salary by way of redundancy compensation. It was clear from the letter that the reason for Mrs Gamble's dismissal by Canesis was redundancy and redundancy alone.

[6] In February and March 2007, AgResearch advertised positions for research technicians at its Lincoln laboratory. Mrs Gamble saw those advertisements and believed them to be for positions similar to that she had previously held at Canesis. Notwithstanding that she did not apply for those positions.

[7] It is common ground that, throughout this sequence of events, AgResearch never offered employment to Mrs Gamble.

[8] In March 2007, Mrs Gamble raised a personal grievance with AgResearch alleging unjustifiable dismissal. In October 2007, the matter was lodged with the Employment Relations Authority. The Authority identified a preliminary issue which was whether Mrs Gamble had standing to pursue a personal grievance against AgResearch. That was dealt with by the Authority by way of written submissions which were provided in May and June 2008, with the Authority's determination being given on 18 September 2008 (CA 139/08). The Authority determined that as Mrs Gamble had never been an employee of AgResearch, she had no standing to pursue her personal grievance.

[9] Mrs Gamble challenges that determination and the matter proceeded before the Court by way of a hearing de novo of the preliminary issue of standing. In addition to the question of standing to pursue a personal grievance which was before the Authority, Mrs Gamble also now seeks the imposition of a penalty pursuant to s134 of the Employment Relations Act 2000 and there is also a question of her standing to do that.

[10] The original statement of claim filed on behalf of Mrs Gamble was very wide-ranging and discursive. It was, however, replaced with an amended statement of claim in December 2008. Even then the nature of the plaintiff's case was not entirely certain and was the subject of a discussion I held with the parties' representatives in a telephone conference on 16 March 2009. One of the areas of uncertainty was whether Mrs Gamble was seeking to pursue a claim in tort but that was expressly abandoned by Mr Wall on her behalf. It was then agreed that the issue for the Court was:

> *Whether the plaintiff was an employee of the defendant for the purposes of the Employment Relations Act 2000 or otherwise has standing to pursue her claims under the Employment Relations Act 2000 against the defendant.*

[11] That issue is clearly one of mixed fact and law. As to the issues of fact, I have approached this matter on a basis similar to that appropriate to an application to strike out proceedings. I have assumed that allegations of fact made in the statement of claim are susceptible of proof and I have also had regard to the evidence

contained in affidavits which were filed. There were two such affidavits: one by Mrs Gamble herself, the other by Ms Dunster on behalf of AgResearch. Neither deponent was cross-examined which was understandable as there were essentially no conflicts between what was said in the two affidavits.

[12] As to the legal issues, it was agreed that counsel and advocate would provide written synopses of argument in advance of the hearing. They have both done so and it has been of very great assistance to me because it has enabled me to consider carefully the nature of each party's case and, where appropriate, to review the materials and authorities referred to in the synopses.

[13] On behalf of Mrs Gamble, Mr Wall filed a very detailed and extensive synopsis running to some 37 pages of close typed text. Much of these submissions related to the history of various legal propositions relied on by Mr Wall in his submissions. While I have considered those submissions, the essence of the case for the plaintiff lies in the latter part of the synopsis.

[14] What Mrs Gamble seeks to do in this case is to exercise a statutory process for the purpose of obtaining statutory remedies. The statute in question is the Employment Relations Act 2000. The question of her standing must therefore be primarily determined by reference to the provisions of that enactment.

[15] A personal grievance is defined in s103 of the Act as *"... any grievance that an employee may have against the employee's employer or former employer...*" because of one of the claims set out in 6 subsequent paragraphs.

[16] It is essential to the right to pursue a personal grievance that the person seeking to do so is or was an employee for the purposes of the Act of the party against whom the claim is made.

[17] The key concepts therefore, are those of employee and employer. The meaning of the term employee is set out in s6 of the Act:

> ***6 Meaning of employee***
>
> *(1) In this Act, unless the context otherwise requires,* ***employee*** *–*

> (a) *means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and*
>
> (b) *includes-*
>
> > (i) *a homeworker; or*
> >
> > (ii) *a person intending to work; but*
>
> (c) *excludes a volunteer who-*
>
> > (i) *does not expect to be rewarded for work to be performed as a volunteer; and*
> >
> > (ii) *receives no reward for work performed as a volunteer.*

[18] The essence of the argument advanced on behalf of Mrs Gamble by Mr Wall was that she was "*a person intending to work*" within the scope of this definition. The term "*person intending to work*" is itself defined in section 5:

> ***person intending to work** means a person who has been offered, and accepted, work as an employee; and **intended work** has a corresponding meaning*

[19] As I have said earlier, it was common ground that Mrs Gamble was never offered work by AgResearch Ltd. In order to persuade me that she nonetheless fell within the definition of a person intending to work in s5, Mr Wall submitted that that definition "*works both ways*". By this he meant that, just as a person who has been offered and accepted work as an employee is a person intending to work for the purposes of the Act, so in his submission a person intending to work must be deemed to have been offered and accepted work as an employee.

[20] That submission was at the heart of the plaintiff's case. It is a submission I cannot and do not accept. Statutory definitions essentially work one way. The word or words which are reproduced in bold type in the statute are to be interpreted according to the text which follows and not the other way around. A unilateral subjective intention cannot create an employment relationship for the purposes of the Act – see *Tucker Wool Processors Ltd v Harrison* [1999] 1 ERNZ 894 (CA) at paragraph [39].

[21] In support of his submission, Mr Wall placed emphasis on the use in the latter part of the definition of the word "*corresponding*". He invited me to conclude that

the use of that word evidenced an intention that the definition should work both ways. Again, I cannot and do not accept that submission. The purpose of the word "*corresponding*" is plain from the definition. The term *"intended work*" is to have a meaning corresponding to the expression "*person intending to work*" so that intended work is the work which a person has been offered and accepted to do as an employee.

[22] It is clear on the evidence, and indeed on the pleadings, that Mrs Gamble was not a person intending to work as that term is defined in s5 of the Act. She had been made no offer of employment and therefore had not accepted any offer of employment by AgResearch.

[23] By way of subsidiary submissions, Mr Wall also urged several other propositions on me. The first was based on the historic concept that an employment relationship could be created by proximity. Mr Wall submitted that, by expressing a wish to be employed by AgResearch, Mrs Gamble had become sufficiently proximate to AgResearch that an employment relationship was established. I do not accept that submission. As I have said earlier, an employment relationship for the purposes of the Employment Relations Act 2000 cannot be created in such a unilateral manner.

[24] Secondly, Mr Wall sought to rely on Part 6A of the Act. In particular, he relied on the heading of that part which is "***Continuity of employment if employees' work affected by restructuring***". He submitted that this imported into the Act a broad concept of continuity of employment in all cases of the transfer of an undertaking. In support of this, he referred me to various publications of other jurisdictions but he accepted that those had no application in New Zealand.

[25] While this may be the heading of Part 6A, any specifics rights conferred by the Act can only be those set out in the subsequent sections contained within Part 6A. That part is divided into several subparts. It is clear that, by the nature of her work, Mrs Gamble did not fall within Subpart 1, but rather within Subpart 3. That does not confer on affected employees any general right of employment by the transferee of an undertaking. It therefore does not assist Mrs Gamble's case.

[26] A third proposition Mr Wall advanced was that, as a general principle, the transfer of assets from one entity to another necessarily involves the transfer of associated liabilities. In making this submission, Mr Wall said that he saw no distinction between the take-over of a company and the purchase of its assets. That is a fundamental error. As Mr Skelton quite properly observed, there is a very important distinction between a company and its assets. It is common commercial practice to sell the assets of a business entirely distinct from the liabilities so that the purchaser need not be concerned to know what those liabilities are or the extent of them. It is clear in this case that what was purchased by AgResearch was the assets of Canesis and not the company itself. It follows that AgResearch did not take over the liabilities of Canesis including any possible liability that company may have had towards Mrs Gamble.

[27] I conclude that Mrs Gamble was not an *"employee"* of AgResearch for the purposes of the Employment Relations Act and that, accordingly, she has no standing to pursue a personal grievance against AgResearch.

[28] The claim for penalty was based on s134 of the Act which provides:

> ***134 Penalties for breach of employment agreement***
>
> *(1) Every party to an employment agreement who breaches that agreement is liable to a penalty under this Act.*
>
> *(2) Every person who incites, instigates, aids, or abets any breach of an employment agreement is liable to a penalty imposed by the Authority.*

[29] As Mr Wall properly accepted in the course of argument, to succeed in a claim for penalty against a person who is not party to the employment agreement it must be established that there was a breach of an employment agreement. In this case the only employment agreement in question was that between Mrs Gamble and Canesis.

[30] There is no allegation in the statement of claim of a breach of that employment agreement, nor is there any evidence to suggest that such a breach may have occurred. It follows that Mrs Gamble has no standing to pursue such a penalty.

Conclusion

[31] In conclusion I find that Mrs Gamble has no standing to pursue either the personal grievance she has lodged against AgResearch or a claim for penalty against that company. The challenge is dismissed.

Costs

[32] The defendant seeks costs. In light of the conclusion I have reached, it is appropriate that an order for costs be made. If the parties are unable to agree on costs, memoranda should be filed. Mr Skelton is to have 14 days from today's date to file and serve his memorandum. Mr Wall is then to have a further 14 days in which to file and serve any memorandum in response.

A A Couch
Judge

Judgment signed at 9.30am on 30 June 2009