

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 199
5464971

BETWEEN SELWYN CASSIDY
Applicant

A N D VULCAN STEEL LIMITED
Respondent

Member of Authority: David Appleton

Representatives: Phil Yarrall, Advocate for Applicant
Chris Patterson, Counsel for Respondent

Investigation Meeting: Determined on the papers by consent of the parties

Submissions Received: 18 November 2014 from Respondent
21 November 2014 from Applicant

Date of Determination: 2 December 2014

DETERMINATION OF THE AUTHORITY

- A. I decline to order removal of this matter to the Employment Court.**
- B. Costs are reserved.**

Employment relationship problem

[1] Mr Cassidy claims that he was unjustifiably disadvantaged in his employment by reason of not having been paid a bonus for the 2013/2014 financial year. He also claims that the respondent has breached the terms of a mediated settlement.

[2] The respondent denies that it has breached any of its obligations to Mr Cassidy, that he has been unjustified disadvantaged in his employment or that the respondent has breached the terms of the mediated settlement.

[3] This determination deals solely with an application from the respondent for the matter to be removed to the Employment Court pursuant to s.178 of the Employment Relations Act 2000 (the Act). Ms Cassidy opposes removal of the matter to the Employment Court.

Background

[4] The respondent designs and manufactures steel building systems for the construction industry. Mr Cassidy works as a storeman – operator in the coil store of one of the respondent’s Christchurch sites. He is also the site shop steward.

[5] Mr Cassidy claims that he has been treated differently from other employees of the respondent by not having been paid a bonus of \$4,000 in respect of the 2013/2014 financial year. It is understood that this bonus relates to a profit share that was paid out to most employees in or around July 2014.

[6] Mr Cassidy claims that he was told that his attitude and attendance record prevented him from receiving the profit share/bonus, although he has received the full bonus payment every previous year. It is Mr Cassidy’s case that he has not been paid a profit share/bonus on this occasion because of his involvement as a union shop steward in supporting another employee, Errol Walker, in Mr Walker’s personal grievance that was brought to the Authority and investigated by it on 21 September 2014.

[7] Section 178 of the Act provides as follows:

178 Removal to court

(1) The Authority may, on its own motion or on the application of a party to a matter, order the removal of the matter, or any part of it, to the court to hear and determine the matter without the Authority investigating it.

(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 on application under subsection (1), 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.

[8] The respondent applies for removal of this matter to the Employment Court on the grounds that the Employment Court already has before it proceedings which are between similar parties and which will involve similar and inter-related issues. The related issue is the investigation by the Authority of the personal grievance raised by Mr Walker against the respondent, investigated on 23 September 2014 and the subject of a determination dated 15 October 2014.¹

[9] In its determination the Authority found that Mr Walker has suffered unjustified disadvantage in his employment and discrimination by reason directly of his involvement in the activities of a union. He was awarded remedies in relation to those findings.

[10] The respondent has since filed a *de novo* challenge in the Employment Court in relation to the Authority's determination in respect of Mr Walker. It is this that the respondent relies upon in arguing that there is a related matter before the Court.

[11] Mr Walker has also lodged a new matter in the Authority in relation to non-payment to him of a profit share/bonus for the 2013/2014 financial year. The Authority has, upon the application of the respondent, ordered the removal to the Employment Court of that matter lodged by Mr Walker for the Court to hear and determine that matter without the Authority investigating it.² It did this on the basis that Mr Walker's disadvantage grievance in respect of the non-payment of the \$4,000

¹ [2014] NZERA Christchurch 160

² [2014] NZERA Christchurch 200 dated 2 December 2014

profit share/bonus forms an integral part of the matters to be heard and determined by the Employment Court in respect of file number EmpC 296/2014.

[12] The respondent argues that Mr Walker's second claim (subsequent removed to the Employment Court) is almost identical to the claim by Mr Cassidy. The respondent also says that it is concerned that if the Employment Court hears Mr Walker's second claim, and the Authority hears Mr Cassidy's claim in this matter, there is a real risk that the Employment Court and the Authority will come up with inconsistent decisions. A removal of Mr Cassidy's matter to the Employment Court would avoid this risk it says. The respondent says that it relies on ss.178(2)(c) and (d) of the Act in support of this application.

Determination

[13] It is true that the text of the statement of problem lodged by Mr Yarrall on behalf of Mr Cassidy is written in very similar terms to the text of the statement of problem lodged by Mr Yarrall on behalf of Mr Walker. However, whilst it was appropriate to remove Mr Walker's matter to the Employment Court I do not accept that it is appropriate to do so in relation to Mr Cassidy's matter.

[14] I make this finding on the basis that Mr Cassidy would have had a right to be considered for the payment of the profit share/bonus which was quite separate and distinct from Mr Cassidy's right. Although the same criteria would (presumably) have been brought to bear, the relevant factual matters taken into account by the respondent in deciding not to grant Mr Cassidy a bonus/profit share should have been distinct from the factual matters taken into account by the respondent in deciding not to grant Mr Walker a bonus/profit share, as they are two different employees with different work histories and performance. Indeed, if the respective factual considerations that were taken into account for Mr Cassidy were seen by the respondent to be interrelated to those for Mr Walker, that may tend to prove Mr Cassidy's allegation.

[15] Furthermore, even if the respondent succeeds with its challenge to the Authority's determination and finds that the issuing of a final written warning to Mr Walker was not an unjustified action, and that he was not discriminated against by reason directly of his involvement in the activities of a union, such a finding would not materially affect the investigation that would need to be carried out in relation to

Mr Cassidy's application, because the allegation is that it was Mr Cassidy's involvement in Mr Walker's case that led to the disadvantage. It is irrelevant whether Mr Walker was unjustifiably disadvantaged or not.

[16] Therefore, I do not accept that there is any material risk that the Employment Court and the Authority will come up with inconsistent decisions as the two bodies will be examining different questions.

Determination

[17] For the reasons given above, I decline to remove Mr Cassidy's matter to the Employment Court pursuant to s.178 of the Act.

Directions

[18] A telephone conference shall be arranged between the parties to set down a date for the Authority to investigate Mr Cassidy's personal grievance claim. During this case management telephone conference, the parties shall be asked to explain their respective positions on attending mediation in an attempt to resolve the matter.

Costs

[19] Costs are reserved. The costs of this application should be considered at the conclusion of the substantive investigation into Mr Cassidy's claim.

David Appleton
Member of the Employment Relations Authority