

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA344/07
5047426

BETWEEN PATRICK JOHN CLARK
Applicant

AND DARGAVILLE HIGH
SCHOOL BOARD OF
TRUSTEES
Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
Christine Chilwell for Respondent

Submissions received: 2 July and 3 August 2007 from Applicant
17 July and 6 August 2007 from Respondent

Determination: 31 October 2007

DETERMINATION OF THE AUTHORITY

[1] This determination concerns preliminary issues of whether the Authority has jurisdiction to consider all of the Applicant's claims and whether this matter should be removed to the Employment Court.

[2] The application for removal to the Employment Court was initiated by the Applicant. The Respondent, in reply, supported removal of the matter to the Court but for reasons different to the Applicant. The Applicant now says the matter need not be removed but wants a ruling from the Authority on whether it has jurisdiction to hear one part of his claim. What has effectively become the Respondent's application for removal still needs to be determined.

[3] Neither party objects to the Authority determining the removal and jurisdictional issues “on the papers”. Both have lodged memoranda regarding the issues, discussed below.

The facts

[4] The Applicant gained Provisional Registration with the Teachers Council in December 2003. He began work as a teacher for the Respondent in January 2004 and was employed under the terms of the Secondary Teachers Collective Employment Agreement.

[5] In January 2006 he resigned, effective 20 February, alleging he suffered acute anxiety and stress due to unfair and unreasonable treatment over his registration.

[6] In May 2006 the Post Primary Teachers Association (PPTA) raised the Applicant’s personal grievance on the grounds of his “forced resignation”. Following an unsuccessful mediation in October 2006 the Applicant dispensed with the services of PPTA and now represents himself.

[7] After another mediation in November 2006, the Applicant commenced proceedings in the District Court. His claim alleged the Respondent was negligent by failing in its duty of care to provide a safe workplace, breached contractual obligations to approve a salary increment, defamed him through comments recorded in his personnel file and failed in its obligation to support him to full registration as a teacher.

[8] The Respondent applied for those proceedings to be struck out or stayed on the grounds that the Applicant’s claims were really employment relationship problems within the exclusive jurisdiction of the Employment Relations Authority under s161(1) of the Employment Relationships Act 2000 (“the Act”).

[9] On 17 May 2006 the District Court (CIV 2006-011-000118, Judge Wade) stayed the Applicant’s proceedings in that court. His honour stated that he had “*no doubt that the Employment Relations Authority is the more suitable tribunal to*

determine the issues raised by the plaintiff and that the [A]uthority certainly has exclusive jurisdiction in a number of the aspects of the plaintiff's claim".

[10] However the judge reserved leave for the Applicant to seek to remove the stay if he could show the Authority was "*unable to remedy a legitimate grievance that the plaintiff has*". The judge was concerned that the Applicant not "*suffer an injustice*" if the Authority lacked adequate powers to remedy one or more legitimate grievances it might find the Applicant had suffered.

[11] I take this to be a reference to whether the Applicant could, if successful in the Authority, be awarded the remedy sought in respect of one of his claims – that is an injunction requiring the Respondent to remove some documents from his personal file. The Applicant alleges that documents recording observations and assessments of his teaching were placed on his personal file without following a proper process of consulting and warning him about possible effects on his progress to full registration. The remedy sought was seen as difficult, at the time of the District Court's decision, because, as the judge records in his decision, both parties "*agreed ... that the Employment Relations Authority has no ability to grant injunctive relief*".

Jurisdictional issue

[12] The jurisdictional issue is whether the Authority is able to investigate all the Applicant's claims and, if he is found to have been treated unfairly or unreasonably, provide remedies. I have no hesitation in saying the answer to this question is 'yes'. That includes the matter of whether injunctive relief can be granted.

[13] Injunctive relief to enforce contractual obligations is open to the Authority as a remedy. That has been made clear by the decision of the full bench of the Employment Court in *Credit Consultants Debt Services NZ Limited v David Wilson* (WC12A/07, 5 April 2007). That was not the position at the time of the District Court's decision in May 2006 because of doubts expressed by the Employment Court in that same month regarding the Authority's jurisdiction to order injunctive relief: *Greenlea Premier Meats Ltd v NZ Meat and Related Trade Union* (AC 27/06, 8 May 2006) and again in August 2006 in *Axiom Rolle PRP Valuations Services Ltd v Kapadia* [2006] 1 ERNZ 639 at [70].

[14] That jurisdictional ‘wrinkle’ has since been smoothed by the full Court’s decision in the *Credit Consultants* case. The Court, in a detailed analysis of the construction of s162 of the Act found, at [47], that “*the Authority is empowered to grant injunctions under both rules of law relating to contracts and under enactments*”. This refers to the wording of that section authorising the Authority to make any order that the High Court or a District Court may make under any enactment or rule of law relating to contracts.

[15] For that reason I am satisfied that if any of the Applicant’s claims are established and injunctive relief is the appropriate remedy, the Authority will – in the words of Judge Wade – have adequate powers to remedy any legitimate grievance that the Applicant has.

[16] The question now turns to whether all of the Applicant’s claims, as expressed in both his Statement of Claim in the District Court and in his Statement of Problem in this Authority, fall within the Authority’s jurisdiction.

[17] The Applicant seeks findings that:

- (i) The Respondent failed to support and guide him to full registration with the Teachers Council; and
- (ii) Documents on the Applicant’s personal file at the Respondent, and said to have been provided to the Teachers Council, are defamatory and were prepared without the proper process under his employment agreement; and
- (iii) In breach of his employment agreement, the Respondent failed to provide the Applicant with salary scale increments; and
- (iv) The Respondent, through its Principal, failed to respond appropriately to a memorandum from that Applicant that he was suffering stress, resulting in his subsequent collapse and diagnosis of psychological trauma; and
- (v) The Respondent’s actions were “a wilful effort” to deprive the Applicant of attestation, registration and an on-going teaching position at the High School.

[18] If such findings were made, the Applicant says the following remedies would be warranted:

- (i) an order for withdrawal of the documents held on the Applicant's personal file and by the Teachers Council; and
- (ii) compensation for loss of the value of full teachers registration for five years; and
- (iii) compensation for loss of the value of salary steps under his employment agreement; and
- (iv) compensation for one year's loss of income; and
- (v) compensation for hurt and humiliation; and
- (vi) reimbursement of counselling costs; and
- (vii) exemplary damages.

[19] The Applicant is self-represented. Part of his claim is pleaded in the 'language' of negligence and defamation. These are torts and are outside the jurisdiction of the Authority (s161(1)(r) of the Act). However s160(3) states that the Authority is not bound to treat a matter as being a matter of the type described by the parties, and may, in investigating the matter, concentrate on resolving the employment relationship problem, however described. The Authority's role is to resolve such problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities (s157).

[20] The Respondent's statement in reply makes this observation of the Applicant's claims, with which I concur:

... the essential character of all the [A]pplicant's claims is to be found entirely within the employment relationship. They are more properly pleaded as claims for unjustified disadvantage, constructive dismissal and/or breach of the employment agreement.

[21] The factual basis of the Applicant's claim – at least as alleged by him – clearly give rise to employment relationship problems of the type defined in s161 of the Act. The alleged actions of the Respondent and its agents would, if proven on the balance of probabilities, amount to breaches of the express or implied terms of the Applicant's employment agreement and personal grievances for unjustified disadvantage, and in respect of the circumstances of his resignation, unjustified dismissal. This litigation began with the Applicant raising a personal grievance in May 2006. In essence, his

case throughout has been that the Respondent did not treat him as a fair and reasonable employer would have. All issues arise out of the employment relationship and the terms, express and implied, of his employment agreement. For this reason I am satisfied that the matter is within the exclusive jurisdiction of the Authority.

[22] Of the remedies sought, there is one – exemplary damages – that is now said not to be available in cases of breach of contract (including employment agreements).¹ While such damages have been considered open in employment cases – see *French v Chief Executive of Dept of Corrections* [2002] 1 ERNZ 325 (EC) at [122]-[124] and [128] and *A-G v Gilbert* [2002] 1 ERNZ 31 (EC) at [116] – the current position is that exemplary damages are not available in a breach of contract claim following the Court of Appeal’s decision in *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188 at [165] and following. While such a remedy is open in tort claims, I do not consider this would support any argument that, because of the absence of an exemplary damages remedy in the employment jurisdiction, the Applicant might have outstanding claims which need to be heard in the civil courts. The reason for this lies in the observation of the Court of Appeal at [182] of the *Paper Reclaim* case:

There is certainly no need for exemplary damages to fill any hole in the range of compensatory damages in the contract field. Contractual remedies now available in appropriate cases include expectation damages, reliance damages, and damages for non-pecuniary loss, mental distress, disappointment and loss of amenity. It has even been suggested that a Court could order an account of profits as a contractual remedy (Attorney-General v Blake [2001] 1 AC 268). In addition, in appropriate cases, indemnity costs may be available for improper conduct in the course of litigation. And, of course, also within the Court’s armoury are the non-monetary remedies of injunction and specific performance. There is no reason in principle to add yet another remedy to the above list that would give a contracting party a windfall profit over and above that which it had bargained for.

[23] The Court’s statement on the range of remedies is important because, firstly, s162 of the Act provides that the Authority may make any order relating to contracts that the High or District Courts can make, and, secondly, it confirms that an adequate range of remedies is available.

¹ See commentary of the learned authors of Brooker’s *Employment Law* (Wellington, 2000) at ER162.07 (10 and (11).

[24] There is one remedial issue which might prove difficult. That is whether the Authority could order the Teachers Council to return or remove documents from any file it may hold on the Applicant. There is no employment relationship – or to my knowledge, any other contractual basis – between the Applicant and the Council and on which such injunctive relief could be based. However that question is premature as it would only arise if the Respondent were found to have breached an implied contractual term of fair dealing to the Applicant in respect of preparing and forwarding any such documents to the Council. There are also alternative remedies to ordering return of documents, which in this case could include compensation for any losses caused as the Applicant has claimed, so there cannot be said to be a lack of remedy if any rights are found to have been breached.

Removal to the Court

[25] The Applicant now accepts that this matter “*no longer needs to be removed to the Employment Court*” and I need not deal with the reasons he advanced for his original application.

[26] The Respondent raises two grounds for removal.

[27] Firstly, it says the Applicant is likely to challenge any adverse determination of the Authority and it is more cost effective, therefore, to have the matter heard at first instance in the Court, thereby saving both parties the cost of an Authority determination. It points to litigation by the Applicant against a former employer in 1999 – heard in the Employment Tribunal and then on appeal in the Employment Court – as an indicator of the likelihood of that.

[28] Secondly, it notes that the Applicant presently lives in Thailand. He has stated that he intends returning to New Zealand for any investigation meeting or hearing. The Respondent expresses concern at the Applicant’s ability to pay costs if he is unsuccessful and its own prospects of enforcing any cost award if he remains resident in Thailand. For those reasons the Respondent wants to seek security for costs, an order that it says is not available in the Authority but may be made by the Court.

[29] Neither ground advanced triggers any of the specific criteria set by s178(2)(a)-(c) of the Act as reasons for removal. Neither, I find, are they sufficiently strong to warrant exercise of the general discretion to order removal under s178(2)(d) where the Authority is of the opinion that “in all the circumstances” the Court should determine the matter. My reasons follow.

[30] The Applicant’s involvement in previous litigation and the prospect that he might challenge an unfavourable Authority determination are simply exercises of civil and statutory rights. Even if the litigation against the previous employer, eight years ago, was unmeritorious, it is not a sufficient predictor of what might happen in the present case. I note too, from a brief review of the Employment Court’s decision in the previous case, that the Applicant was successful in some of his claims and that costs lay where they fell as both parties had some success and some failure: *Clark v Northland Polytechnic* (EC Auckland, AC 15A/99, 19 October 1999, Travis J).

[31] Although the specific reasons are not directly applicable to the present case, I take account too of the general caution expressed by Judge Couch in *Kostic v Dodd & Milligan* (EC Christchurch, CC14/07, 11 July 2007) about what conclusions may be drawn about a litigant from the evidence and decision in a previous matter to which she or he was a party.

[32] No factual foundation is offered for the suggestion that security for costs is required in this matter or that the Applicant would be unlikely to meet an award of costs if one were made against him.

[33] If the Authority is not able to order security for costs, that cannot, on its own, be a reason for removing a matter to the Court. Rather such orders are unnecessary in light of the modest level of costs usually awarded to the successful party in the Authority as a result of the investigative adjudicative model which Parliament has put in place.

[34] The application for removal is declined.

[35] Costs in respect of the matters determined here are reserved.

Next steps

[36] This matter may now be scheduled for investigation. A Support Officer of the Authority is to shortly contact the parties about arrangements for a directions conference to set a timetable for the lodging of witness statements and any additional necessary documents and schedule an investigation meeting date.

Robin Arthur
Member of the Employment Relations Authority