

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 175/10
5279934**

BETWEEN PAUL GILBERT
 Applicant

AND VICE-CHANCELLOR OF THE
 UNIVERSITY OF AUCKLAND
 Respondent

Member of Authority: Leon Robinson

Representatives: Peter Cranney, Counsel for Applicant
 David France, Counsel for Respondent

Submissions Received: 15 February 2010

Determination: 16 April 2010

DETERMINATION OF THE AUTHORITY

The application

[1] The applicant Mr Paul Gilbert ("Mr Gilbert") claims he was unjustifiably dismissed by the respondent Vice-Chancellor of the University of Auckland ("the University"). He claims reimbursement and compensation. The University defends the application and says that Mr Gilbert was justifiably dismissed.

[2] Mr Gilbert has lodged in the Authority an "application for removal of question of law to employment court" dated 1 February 2010. There are also "submissions on application to remove important question of law to employment court" in support. The University advises the Authority it does not oppose the application. This determination disposes of that application.

The merits

[3] During the course of the employment relationship between the parties, they attended formal mediation on 3 October 2008 and reached an agreement between

them as to difficulties they were then experiencing. That agreement was formally recorded in a document I shall refer to as "the memorandum of understanding". As part of the present employment relationship problem, Mr Gilbert alleges the University breached terms of the memorandum of understanding. He wishes to produce the memorandum of understanding in the Authority's investigation but the University resists on the grounds that it is confidential and by law cannot be produced to the Authority.

[4] While the Authority awaited the parties' indication of their preference of whether an investigation meeting was required on the issue of admissibility, Mr Gilbert lodged the present "application for removal of question of law to employment court".

[5] The question of law is said to be this:-

Whether the document dated 3 October 2008 entitled "Memorandum of Understanding of Ongoing Employment Relationship" is admissible in evidence in the Authority, having regard to ss148 and 149 of the Employment Relations Act 2000.

[6] The application lodged on 1 February 2010 says this:-

The Applicant now considers the appropriate course is to remove the question to the Court for decision pursuant to s177; and to delay the investigation until it receives the Court's opinion on the matter.

[7] I wish to underscore the particular references to "remove" and "s177" in addition to noting the substance of the contended application relates to a "question of law".

[8] I am specifically directed to section 177 of the Employment Relations Act 2000 ("the Act") for the jurisdiction on which to permit the resolution immediately sought. That section states:-

177 Referral of question of law

- (1) *The Authority may, where a question of law arises during an investigation, -*
- (a) *refer that question of law to the Court for its opinion; and*
 - (b) *delay the investigation until it receives the Court's opinion on that question.*
- (2) *Every reference under subsection (1) must be made in the prescribed manner.*
- (3) *The Court must provide the Authority with its opinion on the question of law and the Authority must then continue its investigation in accordance with that opinion.*
- (4) *Subsection (1) does not apply -*
- (a) *to a question about the procedure that the Authority has followed, is following, or is intending to follow; and*
 - (b) *without limiting paragraph (a), to a question about whether the Authority may follow or adopt a particular procedure.*

[9] The said prescribed manner is according to Regulation 11 of the Authority's regulations:-

11 Referral of question of law to Court

If, under section 177 of the Act, the Authority refers a question of law to the Court for its opinion, the reference must—

- (a) *state fully but concisely the material facts of the problem or matter to which the question of law relates; and*
- (b) *state fully but concisely the question of law; and*
- (c) *be signed by the relevant member of the Authority.*

[10] I consider that it is not correct to say "remove" but rather, the question of law is "referred". I think it right to say that a "referral" will invite the court's "opinion" while a "removal" will bring the court's "determination" (judgment).

[11] I further consider that a "referral" is not a substantive right of the parties made upon an "application" by them. It is my view that the referral of a question of law for the court's "opinion"¹ is entirely a matter of the Authority's discretion. In that regard I note the opening of the section "The Authority may,". The parties may invite the Authority to exercise its discretion to make such a reference.

[12] The Authority may or may not desire the court's opinion on a discrete question of law where there is a question of law. But the section does not prescribe any qualifications as to the nature of any such question so as to inform the parameters of

¹ as distinct from "determination" by removal

the particular discretion². In my view, the Authority's exercise of its discretion is a matter of procedure. Except where the exercise of the discretion affects substantive rights, I do not consider the Authority's exercise or not of its discretion gives a right of challenge.

[13] I have given consideration to the contended question of law as stated. I do not agree that a question of law has been posed for answer. What is alleged is a question of the application of certain facts to established law.

[14] I consider that the uncompromising terms of section 149 of the Act in addition to section 148 put the matter beyond doubt and I am not moved to exercise my discretion to refer the contended question to the court. Having inspected the pleadings, I also conclude that I do not consider the discretion to be conclusively determinative of substantive rights.

The determination

[15] For the reasons stated, **I decline to exercise my discretion to refer a question of law to the Court.**

[16] The matter should continue to be investigated by the Authority, but not by me. It will be assigned to another Member. As this determination disposes only of referral of question of law issue, the question of "admissibility" of evidence remains. The memorandum of understanding is to be re-sealed.

The costs

[17] I reserve costs.

Leon Robinson
Member of Employment Relations Authority

² I note section 178 contains explicit qualifications for the question of law