

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number: WA 88/07

File Number: 5034828

BETWEEN John Christopher Johns Applicant

AND Shell New Zealand Limited
Respondent

Member of Authority: P R Stapp

Representatives: No appearance or representation for Applicant
Megan Richards and Lucy Inglis for Respondent

Investigation Meeting: Wellington 29 May 2007

Submissions received: 22 May 2007 (from the Applicant's representative Seah
Balan Ravi & Co in Malaysia)
24 May 2007 (from the Respondent's representative
Minter Ellison Rudd Watts)
28 & 29 May 2007 (Mr Johns)

Determination: 30 May 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Johns claimed that Shell New Zealand unjustifiably dismissed him on the grounds of redundancy on 30 April 2003. He alleges the cause for this involved his dismissal from an assignment with Shell Malaysia where he had undertaken a number of investigations into Shell Aviation on the basis of his belief that there was fraud and corruption among senior managers. He claimed that Shell New Zealand's decision to make him redundant at the end of that assignment in Malaysia was procedurally flawed and substantively unfair. He also alleges that Shell New Zealand colluded with other Shell companies to stop the investigations he had begun, and was denied access to Shell's web site to obtain alternative employment. The respondent denied the claims. It submitted it justifiably terminated the applicant's employment for redundancy following a repatriation offer made to the applicant, the subsequent unavailability of a suitable position in Shell New Zealand and that the applicant did not secure an alternate position within the company.

[2] On 13 April 2007 Mr Johns requested an adjournment of the 29 and 30 May 2007 investigation meeting to get legal representation. That request was declined. On 22 May 2007 Mr Johns requested another adjournment of the investigation meeting through new lawyers he instructed in Malaysia. He followed their request up with a lengthy email and fax on 29 May. He has requested a three month adjournment without any commitment to further dates. He was previously granted an earlier adjournment for 13 and 14 February 2007 and accepted the above dates. Throughout the respondent has opposed the adjournment requests from Mr Johns. It is continuing its opposition to an adjournment.

[3] Mr Johns did not appear at the investigation meeting and was not represented.

[4] Mr Johns' employment relationship problem was filed in the Authority almost three years after the personal grievance was raised. He has not complied with the directions of the Authority to go to mediation, nor even to provide a written statement of his evidence outlining in detail his allegations, as was requested by the Authority. His latest 28 and 29 May emails raised new claims, seeks interim orders and covers substantive issues.

The Issues

[5] The first issue to determine is whether or not the investigation should be adjourned? Secondly, if the adjournment is not granted is there good cause for Mr Johns' failure to appear or be represented at the investigation meeting? If the investigation meeting continues then it is a matter to determine the employment relationship problem.

The investigation process in the Employment Relations Authority

[6] The Authority's investigation process involved a timetable being put in place to gather relevant information including documents and written statements of evidence. That is a standard process and is flexible. Mr Johns has not provided any written statements as requested. The Authority's investigation would usually culminate in an investigation meeting with all the parties present once the information has been provided. That was expected in this matter and the statement of problem indicated nothing unusual in regard to the range of issues for that not to happen.

[7] Mr Johns is now raising new matters seeking interim relief and disclosure of documents. If he genuinely wanted to pursue these properly then he should have followed a proper process on notice and not left it until the last minute before an investigation meeting. I do not intend to deal with them when they should have been put in proper applications, and on notice, much sooner. On the matter of prior disclosure I have no jurisdiction, except to call for any relevant evidence that could assist me. If Mr Johns had properly filed a witness statement I could have taken some action much earlier to call for relevant evidence, such as documents. It was entirely reasonable to expect those matters to be raised in the time that Mr Johns had available to file his written statement of evidence in reply to the respondent. His action leaves me with the impression that he is he is acting deliberately to delay matters because of the late filing of his email and fax.

[8] There will be circumstances where matters before the Authority would be dealt with on the papers by consent. This is not one of them. The nature of Mr Johns' alleged employment relationship problem required Mr Johns to personally appear as he would be a key witness.

[9] Because of the lateness of the request from Mr Johns for an adjournment I decided to deal with it at the scheduled investigation meeting. Time beforehand did not permit me to consider it earlier. The situation has been reached whereby I am concerned about Mr Johns' availability for any investigation. I am becoming increasingly doubtful about how genuine he is in having the matter dealt with promptly and speedily, despite what appear to his genuine feelings about Shell. The manner in which documents have been provided to the Authority has been less than helpful, including one written in Malaysian requiring translation. In his latest email Mr Johns has been critical of the attempt by Shell to get a translation of the document. If he wanted to rely on the document he should have arranged a translation. Mr Johns has made no attempt to put in place alternate arrangements that the Authority would ordinarily expect to be raised by the parties, if any difficulties existed for the attendance of witnesses, such as video etc. It would have been reasonable to expect Mr Johns' representatives to raise such alternatives.

Reasons for the request for an adjournment

[10] The essence of the latest request related to Mr Johns' alleged inability to leave Malaysia due to tax problems there that he associates with behaviour involving Shell Malaysia (Shell Malaysia) and the respondent (Shell New Zealand).

[11] Mr Johns claimed that Shell is secretly plotting and colluding to keep him in Malaysia to prevent him being able to present himself at the Authority. He says Shell has not properly assisted his repatriation to New Zealand and paid his taxes in Malaysia.

Decision not to grant the adjournment

[12] I have decided not to grant the adjournment as requested by Mr Johns. My reasons are:

- Mr Johns has not satisfied me that he would be prevented from leaving Malaysia or that he has been prevented from arranging representation to be present at the Authority's investigation meeting on his behalf. He led me to believe he was going to be represented and I accept that the nature of the employment relationship problem meant that he would be represented.
- He has not complied with the Authority's timetable to provide a written statement of evidence. This could have been reasonably expected even if he was not available. It would have been a constructive indication that he was genuinely pursuing his employment relationship problem.
- Mr Johns has not provided any proper detail and corroborating information to support his request and that he made any attempts to be present or arrange representation.
- He has changed his reasons for the adjournment. First the application was made on the grounds that he needed to get legal representation in Wellington. He did not do that. Secondly he now is submitting that he is unable to leave Malaysia, without producing any independent verification and evidence of what it is preventing him leaving.
- He committed to the dates set down for the investigation meeting when an earlier application was granted.
- He has not met the conditions of the earlier adjournment and never followed up any inability to prepare for the investigation in a timely manner, until a week before the investigation meeting. Indeed he led the Authority to believe he was instructing lawyers that would be assisting him to prepare and be organised for an investigation meeting, but instead was pursuing requesting an adjournment again.
- An indication that Mr Johns probably would not be present occurred when the Authority received the application from his Malaysian lawyer and if it was not

absolutely clear then it certainly became more certain from 28 May that he would not be appearing.

- He has made a number of new allegations against Shell Malaysia, which is not a party to these proceedings. This is prejudicial to Shell New Zealand in regard to costs and time.
- Mr John's information has been contradicted by David McGuire, employed by Shell in the role of Senior Legal Counsel, who swore an affidavit in the Authority. He deposed evidence generally about the background in the matter and that he has been told Mr Johns has been paid all outstanding amounts including taxes regarding his employment. Mr Johns' entitlement to repatriation remains and that he will be paid when he repatriates. This contradicted what Mr Johns said.
- No detail has been previously provided by Mr Johns and his New Zealand lawyers acting at the time, about the extent of the difficulties Mr Johns has now raised. These issues were never put forward in the statement of problem.

[13] Furthermore, I have concluded that Mr Johns has no intention of making himself available for an investigation on his employment relationship problem speedily and promptly to bring closure to the matter having regard to the entire time it has taken for him to get to this position (applying clause 4 (1) (c) of the Employment Relations Authority Regulations 2000). My reason for this conclusion is that he has not provided me with any certainty that he will be available in three months' time. What seems to be happening is an attempt by him to adjourn the proceedings "*until further notice*", i e indefinitely, an application I have declined earlier. He has left me with the impression that he is acting deliberately to delay matters because he left producing that email and fax until 28 and 29 May when he could have reasonably provided it much earlier. He has not been open about his situation on engaging lawyers. He failed to reasonably provide a written witness statement when he had been given plenty of time to do so and reply to the respondent's evidence. Although I have not been satisfied that Shell New Zealand will be prejudiced, as opposed to being put to costs and inconvenience, it is entitled to have certainty and closure too. Therefore, considering all the above reasons, the request for adjournment has been declined.

No good cause for Mr Johns failure to attend or be represented

[14] There has been no appearance by Mr Johns and he was not represented at the investigation meeting. It was anticipated that Mr Johns would not be present and would not be represented because of his application for an adjournment. This does not amount to good cause in the current

circumstances since the adjournment was applied for late. Mr Johns is in Malaysia. He has engaged Malaysian lawyers. He has provided no good cause why he could not have been represented in New Zealand. He has not satisfied me that he could not have made arrangements to be present or be represented in New Zealand. I conclude that his absence is not with good cause when his latest reason for an adjournment has been challenged and contradicted, and given the time that has elapsed in the matter and the earlier adjournment. I have decided to proceed and act fully in the matter as if he was present or represented (Clause 12 Schedule 2 of the Employment Relations Act 2000).

Determination

[15] I have decided to continue on the basis of the documents placed before me and filed earlier by the parties, including the statement in reply from the respondent and the statement of problem filed by Mr Johns' lawyers acting for him at the time.

[16] Mr Johns has not provided sufficient prove or any independent evidence in support of his claims and statement of problem. He has not been able to prove his allegations about any ulterior motive for dismissal and that the Respondent could not justify its actions in his employment with Shell New Zealand, especially given the evidence that relates to repatriation. He has not been able to establish the grounds for the remedies his lawyers at the time sought on his employment relationship problem.

[17] The respondent has provided evidence that contradicted Mr Johns' information and set out the background to the events and payments Mr Johns referred to in his statement of problem. I am therefore satisfied that the respondent acted genuinely and is able to justify the decision for redundancy and that it acted fairly. It is not liable for the claims made by Mr Johns. Therefore I am unable to resolve the employment relationship problem in the ways suggested in the statement of problem. Mr Johns' claims are dismissed.

Costs

[18] I have reserved costs and will deal with this issue shortly.

Orders

[19] Mr Johns' claims are dismissed.

P R Stapp
Member of the Authority