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**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 188/09
5085018

BETWEEN MUSTAFA KANAR
 Applicant

AND EROL GURLEYEN AND
 SULTAN'S HAREM LIMITED
 Respondents

Member of Authority: P R Stapp

Representatives: Paul McBride for Mr Kanar
 Mark Beech for Mr Gurleyen
 Alyn Higgins for Sultan's Harem Limited

Investigation Meeting: On the papers and by Telephone conferences by 23
 November 2009

Determination: 1 December 2009

**DETERMINATION OF THE AUTHORITY: APPLICATION FOR
INDEFINITE STAY**

Employment Relationship Problem

[1] Mr Kanar's employment relationship problem will depend on identifying who his employer was between Mr Gurleyen and Sultan's Harem Limited. The original statement of problem was lodged in the Employment Relations Authority on 18 April 2007. There were difficulties in getting any reply from Mr Gurleyen and the matter was first set down for an investigation meeting scheduled for 2 August 2007. In the meantime the parties were directed to mediation services to be provided by the Department of Labour. A new statement of problem was lodged on 12 June 2007 citing Sultan's Harem Limited as an additional party. Difficulties then occurred with

service of the notice of investigation meeting and the statements of problem on the respondents. Service was left to the applicant's representative. The dates for the investigation meeting had to be vacated because the applicant was unavailable due to an accident. The file was put on hold waiting on the applicant's intentions.

[2] The matter was resurrected by the Authority in May of 2009 when there had been no progress. The Authority instructed that the matter be set down for an investigation meeting, which was scheduled for 11 August 2009 and suggestions were given on the service required. Mr Kanar provided an affidavit for me to use because he was in Australia and there was no certainty that there would be any appearance by either of the respondents at an investigation meeting. This approach was also to try and save any more costs for the applicant.

[3] However, the Authority then received a reply from Mr Gurleyen's lawyers raising a number of issues. Details were provided in a statement in reply that was lodged on 17 June. There was an application to remove Mr Gurleyen from the employment relationship problem and there was a request for a delay in the investigation meeting scheduled for 11 August 2009. The Authority was required to make various directions and orders to progress the employment relationship problem application. Mr Gurleyen was not struck out. A request was made for documents. The investigation meeting was confirmed to continue on 11 August.

[4] In the meantime service was also achieved on Sultan's Harem Limited, and instructions were given by the Authority on the procedure to be followed to investigate its involvement in the employment relationship problem. Its representative lodged a statement in reply on 2 and 6 July 2009.

[5] An unsworn written response from Mr Gurleyen and a Gwen Sander (allegedly Mr Gurleyen's partner) was then received in the Authority on 6 July 2009 from Mr Gurleyen's lawyer deposing replies to Mr Kanar's affidavit. A signed version was lodged in the Authority on 19 August 2009.

[6] A bundle of documents was lodged in the Authority on 30 July from Mr Kanar's representative, to be used at the investigation meeting.

[7] Next Mr Gurleyen's lawyers requested again that the investigation meeting be postponed because Mr Gurleyen was unwell. A medical certificate was provided to support the application to postpone the investigation meeting.

[8] The 11 August 2009 investigation meeting was vacated and a determination released on costs dated 18 August 2009 (WA 113/90). The 4th of November 2009 was set down as an alternative to start the investigation meeting.

[9] On 12 October Mr Beech requested that the employment relationship problem be stayed indefinitely due to Mr Gurleyen's ill health. Mr Gurleyen's evidence would be crucial as he was directly involved in the allegations made by Mr Kanar. He would need to be involved. His health was such that he could not give instructions for and during the investigation. It was further submitted that it was a matter of natural justice that the Authority stay the hearing indefinitely. Details of Mr Gurleyen's ill health have been provided in a letter from his doctor. There has been a request from Mr Beech to suppress the detail from anybody other than counsel. A separate application has been made for suppression of the medical details.

[10] Mr McBride has expressed the willingness of his client to co-operate but Mr Kanar does want his employment relationship problem to be dealt with. Mr McBride has an issue about further costs, and whether there is jurisdiction for the Authority to preclude parties to proceedings from having access to material that the Authority has.

[11] There is no objection from Sultan's Harem Limited for the suppression of the detail in the meantime as it relates to this application. Mr Higgins says that the directors of Sultan's Harem Limited will abide by any direction and orders from the Authority.

Issues

[12] Does the Authority have jurisdiction to stay proceedings indefinitely and or adjourn sine die? What is to happen to progress the employment relationship problem? What is to happen to the medical details that have been provided?

Determination

[13] This matter has clearly had delays, and as such delays ordinarily would be unacceptable, except that in the current circumstances Mr Gurleyen is pleading being unwell to the extent that his lawyers say he will not be capable of giving instructions for and during an investigation meeting.

[14] I have no intention of staying the matter indefinitely. The applicant has applied for an employment relationship problem to be heard. There is a presumption that upon such an application being made that it should be investigated. I am not yet satisfied that the medical details are such that Mr Gurleyen is so ill that he will not be able to give evidence sometime in the future. Indeed the Employment Relations Act envisages that the application will be dealt with. There are no express powers to adjourn indefinitely and or adjourn sine die, except that any orders made by the Authority would have to be made applying principles, including natural justice, and as a matter of discretion. At this time alternatives to indefinitely staying the application still exist. I must act, however, in accordance with natural justice and in conducting an investigation apply those principles. Whether I am able to proceed to investigate the matter in light of the circumstances being put forward about Mr Gurleyen's health is an entirely separate matter. That requires a principled assessment. I have not reached the point of making that assessment yet on the information available.

[15] Mr Gurleyen relies on two medical reports. One dates from several years ago (26 May 2006). The other (9 October 2009) makes assertions and has opinions about Mr Gurleyen, albeit that it is from a doctor, and that information will require further proof given it involves assertions and opinions from one person, and upon which Mr Gurleyen's counsel have acted. Further proof and any updated information may help, and which may need to include an agreed independent assessment of Mr Gurleyen's health. Such information will need to be in a proper evidentiary form. Thus, there is no need to stay the proceedings indefinitely and I will not grant an adjournment sine die as requested.

[16] I conclude that the circumstances do not preclude me from setting down an investigation meeting and revisiting Mr Gurleyen's ability to participate that may include using any further evidence produced.

[17] I had informed the parties' representatives of the availability of dates in February for this matter. However, I have decided to allocate a date in April and I am satisfied that this will not be prejudicial because documents have been filed, there are affidavits on the file, there is an issue about Mr Gurleyen's current health, and there has been an issue about the applicant's health and ability to actually attend earlier hearings too. This gives time for the parties to make the necessary arrangements for their witnesses to be available, any further written statements to be provided. At the investigation meeting I will be able to investigate Mr Gurleyen's role and the part he has played in the matter and whether or not there will be any prejudice if he is not able to participate, but after exploring any alternatives if they are needed to interview him.

[18] I propose that an investigation meeting be scheduled for 7 April 2010 with back up dates in the same week if needed. I will also assess arrangements on conducting the investigation that may include any such arrangements to involve Mr Gurleyen as may be appropriate. A case management conference can be held if the support officer is faced with any difficulties about the availability of counsel. If nothing is heard from counsel this matter is to be set down for 7 April 2010 with back up dates in the same week.

[19] I now turn to the suppression issue. The details were lodged in the Authority, and it is a matter of fairness and natural justice that the applicant is entitled to see the material on the file that Mr Gurleyen wants a decision based on. Since it was lodged with the purpose of an application for an indefinite stay and or an adjournment sine die the applicant is entitled to see it and to be informed to give Mr McBride instructions on any future action.

[20] Mr Higgins, for Sultan's Harem Limited, has accepted that he does not need to see the medical details for the current considerations, but reserves his client's position on it in the next stage.

[21] Mr McBride has raised an issue about the right of the parties to see material that the Authority has seen. He is entirely correct that I must let the other side see any documents put in front of me. In this case Mr McBride is aware of the detail. I accept

that he has been left in a difficult position about that material and his obligations to Mr Kanar. Therefore releasing the information to Mr Kanar will then give Mr Kanar the ability to consider it and to consider what he wants to do. I am clear that at this stage the applicant wants his employment relationship problem heard and Mr Gurleyen's unavailability for health reasons has not changed that view given the representations that have been made. I note that Mr Gurleyen's representative has not given any reasons of any personal nature between the parties to suppress the information. I presume the request only relates to keeping confidential Mr Gurleyen's personal information from anyone except the Authority and counsel. Mr Gurleyen's health circumstances are being relied on to vacate an employment relationship problem investigation. Of course the applicant is entitled to scrutinise the reasons as the indulgence to vacate an investigation has been requested for Mr Gurleyen. In the circumstances Mr McBride is entitled to pass the information to his client. However there is good reason for the information not to be more widely distributed in public at this stage. I prohibit, on an interim arrangement, the publication of the details in public because the detail only relates to the application for stay at this time and relates to the case management arrangements and there has been no public hearing yet.

[22] In the meantime Mr Kanar's employment relationship problem remains active and will be set down for an investigation meeting on 7 April 2010.

[23] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority