Determination Number: AA 3/01
File Number: AEA 17/00

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN Michael Stephen Kimber (Applicant)

AND The New Zealand Fire Service (Respondent)

REPRESENTATIVES Mr James Parlane for the applicant
Ms Jo Copeland for the respondent

DATED 11 January 2001

DETERMINATION OF THE AUTHORITY

Confirmation of Verbal Determination.

This Determination confirms and expands upon the verbal Determination conveyed to the representatives of the parties during a telephone conference on Wednesday 20 December 2000.

The Employment Relationship Problem.

In order to understand the nature of the employment relationship problem it is necessary to outline the series of events and the steps taken to firstly define the problem and secondly to define the nature of the remedies sought.

On 23 November 2000 the applicant, who is employed as a field trainer with the New Zealand Fire Service at Te Awamutu, lodged an application with the Authority. This application included the following statement of problem.

[Note: This statement and other correspondence quoted below are reproduced exactly as written]

1. The problem (or matter) that I wish the Authority to resolve is:

The respondent has made allegations against me, It has investigated these and found on the basis of untrue statements, that I have to answer allegations of breaches of a Code of Conduct. It has now required that I attend for a "disciplinary interview" and threatened that I could be dismissed.

I am of the view that the respondent is actively trying to destabilise me in my position, and it is seeking to either have me resign due to pressure, or it is trying to have me dismissed.

2. The facts that had given rise to problem (or matter) are:

As a result of a Course that I was running on behalf of the Respondent. I say that the Respondent has no proper grounds to continue to harass me and that I have not breached the said Code of Conduct.

I am of the view that I have been singled out for undue punishment.

3. I would like the problem (or matter) to be resolved in the following way:

An order requiring the Respondent to refrain from harassing me and for it to allow me to continue doing my job. I also seek to have my employment record cleared of all of these allegations.

I seek an urgent hearing of this matter as soon as possible. If I am dismissed from my position, I will seek removal to the Employment Court and Apply (on an ex parte basis if required) for reinstatement.

Costs and Compensation for Stress, Emotional Harm and Damages for Harassment and damage to my Employment record, reputation and physical damage to my property as a result of Fire Service members.

Attached to Mr Kimber's application was a letter, dated 17 November 2000, from Mr Brent Dooley, General Manager of the New Zealand Fire Service. It is not necessary for me to reproduce this letter in full. However the following extracts are relevant.

Dear Mike [the applicant]

I have received a report prepared by Mr Dennis Thomas detailing an investigation that he has completed as a result of complaints laid by the Chief Fire Officer, Te Awamutu Volunteer Fire Brigade and Mr Rodney Ross, concerning the Basic Fire Fighters course held at Te Awamutu station over the weekend 14 - 15 October 2000. You were the instructor in charge of this course. I understand that you have also received a copy of all the information.

Mr Thomas's report and the supporting documentation indicate that there appears to have been a breach of the Standards of Conduct (copy attached) by you, particularly:

The letter then sets out extracts from the Standards of Conduct and continues…

While I have read the information, I would like to opportunity to meet with you so that you can present your views to me on matters that have been raised as this would seem to be a case serious misconduct on your part. You should be aware that this is a disciplinary interview and an outcome of this process may be to instigate disciplinary action against you, and that could result in a warning being issued, or your dismissal.

I would like to meet with you at 10.00 am on Thursday 23 November 2000 at the Hamilton Fire Station, and I would recommend that you take the opportunity to bring a support person with you to the interview. Mr Leonce Jones, Training Delivery Manager and Mr Dennis Thomas, Training Team Leader will also be present at the interview. If you cannot make this time please let me know.

After you have had the opportunity to present your views, and I am satisfied that I have enough information, I will terminate the meeting and consider all of the information that has been provided before making a final decision on what, if any, action I intend to take.

At the time of filing Mr Kimber's application with the Employment Relations Authority Mr Parlane also wrote to the New Zealand Fire Service. In that letter, dated 21st November 2000, he advised the Fire Service of the application and stated:

I suggest that you do not do anything precipitous in the meantime and I trust that you will abide by the decision of the Authority.

You may wish to put off your interview on Thursday until the ERA has made a decision. Mr Kimber will attend the interview only due to the fact that he is required to do so. He will not be offering any further comment there. Please advise if you want to adjourn the interview in light of this.

I have advised Mr Kimber that if you require him to attend Thursday's interview, he should not say anything further as he is entitled to preserve his position due to the Human Rights Act 1993.

In this case Mr Kimber has had the chance to give his views and the Fire Service has made detailed enquiries.

I suggest that your organisation is now harassing him unduly. We are looking at an application under the Harassment Act 1997 also.

On the 22 November 2000 the Fire Service advised Mr Parlane and Mr Kimber that in light of Mr Parlane's letter of the 21 November 2000 they would adjourn the meeting scheduled for the 23 November 2000. I note for the record that Mr Parlane has on several occasions stated that the decision to adjourn this meeting was made by the Fire Service and was not due to his client's refusal to attend.

On 4 December 2000 the Fire Service lodged a formal statement in reply. This statement canvassed the respondent's view of the events leading up to the current situation and, *inter alia*, made the following comments:

Formal allegations had been made against the applicant which call into question his management of a training course on behalf of the respondent. In accordance with the respondent's policy on managing misconduct, it has conducted an initial investigation into the allegations and has determined that there is substance to the allegations. In accordance with its policy, it has now requested the applicant to attend a formal disciplinary meeting to answer allegations of a breach of the respondent's standards of conduct. As is required by law and by the respondent's internal policy, it has advised the applicant that the outcome of the meeting could result in a warning being issued or in the applicant's dismissal. This is a natural requirement of any disciplinary process.

The respondent is not trying to destabilise the applicant from his position nor is it placing pressure on the applicant in an attempt to force him to resign. It is simply attempting to conduct a disciplinary inquiry as a result of formal complaints laid against the applicant. This cannot and does not in this case amount to harassment of the applicant.

And

The respondent believes that it should be entitled to conduct its investigation and reach a decision in relation to whether or not there has been a breach of the Standards of Conduct requiring disciplinary action.

And

The respondent believes that it is not appropriate to conduct a disciplinary inquiry by way of mediation. The decision in relation to what action will be taken is one that the employer must come

to on its own. It has not been given the opportunity to make the decision in this case as a result of the actions of the applicant.

After some difficulty in arranging a mutually convenient time, I held a telephone conference with Mr Parlane and Ms Copeland on 14 December 2000. During this conference I indicated to the parties that I was particularly interested in hearing their views as to what power, if any, the Authority had to intervene in the way that the applicant had requested. After some discussion it was agreed that the respective representatives would provide me with written submissions on this point by the morning of Wednesday 20 December 2000. I indicated that, once I had received these submissions, I would (a) determine whether or not I had the power to intervene and (b) whether or not I should intervene and how.

Given the delays that have already occurred in this process and the closeness of the Christmas break I advised parties that I would convey my verbal determination during a further telephone conference to take place on 20 December 2000. It was agreed that the disciplinary meeting adjourned from 23 November 2000 should be rescheduled for Thursday 21 December 2000. This was on the understanding that, should my determination be in favour of the applicant (i.e. should I decide to issue an injunction restraining the respondent from continuing the disciplinary process,) this meeting would be cancelled.

On 19 December 2000 the applicant, in addition to his submissions on the powers of the Authority as agreed, submitted a formal application for interim injunction in the following terms:

*That the Applicant herein applies to the Employment relations authority for **an Interim Injunction** restraining the Respondent from proceeding further in disciplinary matters until such time as the Employment Relations Authority considers it appropriate to continue these disciplinary matters (if at all); and*

The Applicant also Applies for Orders from the Employment Relations Authority that;

1 The Respondent Advise the Applicant of it's intentions towards him regarding the disciplinary meeting to be held on 21 December 2000 and provide him with copies of all memoranda in the possession or control of the Respondent not already provided to the Applicant prior to that forthwith.

2 That the meeting of the 21st December be stayed. And the matters that were to be determined at that meeting be dealt with in the Employment Relations Authority forum so that there can be proper control and direction in the situation. This would avoid the possibility of the disciplinary meeting being a "sham" meeting designed to "rubber stamp" the Applicant's dismissal, or to "go through the procedure."

3 That the matters are to be determined either before the Employment Relations Authority or the matter be transferred to the Employment Court either for directions or for consideration.

Discussion of the Authority's jurisdiction

The Applicant's position.

In his submissions on behalf of the applicant Mr Parlane argues that the Authority does have the jurisdiction and should intervene in this case. In summary Mr Parlane's argument is as follows:

[It should be noted that while much of the argument set out below has been taken directly from Mr Parlane's submissions I have not reproduced those submissions word for word. Rather I have attempted to capture the key points.]

1. A key provision and object of the Employment Relations Act 2000 (Section 3) states *inter alia.*

> ***3 Object of this Act***
> *The object of this Act is -*
> *(a) to build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment and of the employment relationship-*
> *(i) by recognising that employment relationships must be built on good faith behaviour;…*
>
> *(v) by promoting mediation as the primary problem-solving mechanism;……*

2. Section 102 of the Act states-

> ***102 Employee may pursue personal grievance under this Act***
> *An employee who believes that he or she has personal grievance may pursue that grievance under this Act.*

The word "believe" implies that the grounds for determining a personal grievance are subjective. An application may be made when an employee suffers detriment in circumstances where other employees doing work of that description are not or would not be dismissed or subject to such detriment.
Detriment includes anything that has a detrimental effect on that employee's employment job performance or job satisfaction. (For this definition of *detriment* Mr Parlane quotes s.104, the section of the Act dealing with *discrimination*.)

3. Sections 160 and 161 of the Act give the Authority the power to intervene, specifically:

> ***160 Powers of Authority***
> *(1) The Authority may, in investigating any matter,-*
> *(a) call for evidence and information from the parties or from any other person:*
> *(b) require the parties or any other person to attend an investigation meeting to give evidence:*
> *(c) ……etc*
>
> *(2) The Authority may take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.*
>
> *(3) 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.*

161 Jurisdiction

(1) The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including-
(a)……etc

(e) personal grievances: ……

(r) any other action (being an action that is not directly within the jurisdiction of Court) arising from or related to the employment relationship or related to the interpretation of this Act (other than action founded on tort): ……..

4. Nothing in the Employment Relations Act 2000 prevents the early intervention of the Authority. It is appropriate for the Authority to manage the process of matters relating to the use of disciplinary procedures where these are being used to bring duress by way of pressure and humiliation on an employee.

It is appropriate for the Authority to be involved as soon as possible in the matters before it and it is not only a remedial organisation for matters that have already progressed past the point of discipline or dismissal. The Authority is able to manage these processes and make decisions on the appropriateness of discipline or dismissal before these events occur.

Disciplinary procedures and investigation of these is not the sole prerogative of the employer and the Authority is entitled to be involved in these if there is an allegation that they were being used inappropriately or as a form of harassment. Due to the subjective test in section 131 of the Act, an employee may seek the assistance of the Authority in matters of personal grievance when he has been placed under duress or unfairly treated.

5. This case involves the use of a disciplinary meeting, probably to punish the applicant due to the recommendations of a report and one of the procedures available (to the employer) is to dismiss him.

The disciplinary meeting was not going to afford the applicant opportunity to put his questions to the respondent's witnesses to gauge their response or so the decision making parties could hear this evidence. This is an affront to natural justice in three respects-

- A person is entitled to have his accusers face him.
- He is entitled to have some faith that those deciding on his plight will do so in an unbiased way.
- He is entitled to have the opportunity to be heard or to elect not to add further to what is being held up against him.

There has been no indication to the applicant that he would not lose his job at this meeting.

6. The Employment Relations Act does not say that an employee must wait until he has been dismissed before he is allowed to raise the duress that he will no doubt suffer in the event of dismissal

The threat of dismissal is only one form of duress. Others include:

- pressure on the applicant to resign.
- threats or comments to him about others wanting his job and are seeking relocation.

- discussion with other personnel regarding his circumstances, the incidents surrounding this matter and discussion with volunteer firemen in the Brigade in which the applicant is a member, resulting in a loss of respect and confidence in the applicant who holds a position of responsibility in that organisation.

The Respondent's position

In her submissions on behalf of the respondent Ms Copeland does not contest that the Authority, under appropriate circumstances, does have the power to issue an injunction stopping the Fire Service from completing a disciplinary process. However she argues that the circumstances surrounding this case make such an injunction inappropriate. In summary Ms Copeland's arguments are as follows: (Once again I have elected to set out only the main points)

1. Injunctive relief is not something that Courts (and therefore the Authority, given s.162 of the Act) have a

> *... despotic power to grant or withhold. An injunction is only available for the protection of a legal right or to prevent the infringement of a legal right.*
>
> *Armourguard v. NZPSA* [1989] 2 NZILR 405, 408 per Chief Judge Goddard.

The applicant has not established and cannot establish that a disciplinary investigation would infringe any of his legal rights. An injunction is therefore not available.

2. In *Russell v. Wanganui City College* [1998] 3 ERNZ 1076,1082 Chief Judge Goddard made the following comments regarding an employers right to undertake an investigation into allegations coming to its attention:

> *(i) In the ordinary course of things an employer is entitled to conduct an investigation into the conduct and performance of an employee that is of concern to it and, indeed, bound to do so in the ordinary course of its business of being an employer.*
> *(ii) It is a grave matter for the Court to interfere with this entitlement by some form of prior restraint and to take such a course requires justification on proper ground.*

3. It is squarely within the power of the respondent's management prerogative to conduct a disciplinary investigation if it considers the facts warrant it. The interference of the Authority in conducting this inquiry would severely curtail that prerogative. This is particularly so given that the applicant has been unable to adduce any evidence to suggest that the respondent has in fact predetermined the outcome of the investigation. The respondent assures the Authority that this is certainly not the case.

Determination.

The Employment Relations Act 2000 gives the Authority wide powers to investigate (s.160), to make Determinations (s.161) and to issue injunctions (s.162). To this extent I agree with Mr

Parlane's submission that the Authority does have the **power** to issue the interim injunction(s) he seeks on behalf of the applicant. However, as set out by Chief Judge Goddard in the *Armourguard* and *Russell* cases as cited by Ms Copeland (above) the issuing of such injunctions is not something to be done lightly. Like every other equitable remedy the issuing of an interim injunction is discretionary. The Authority cannot please itself whether it grants or refuses the remedy. Equitable discretions are to be exercised by taking into account and giving proper weight to all relevant matters which tend towards demonstrating the justice or injustice of granting the remedy and by weighing them against each other in order to decide whether the relief should be granted or refused. The Employment Relations Act 2000 does not change this requirement.

The Employment Court's approach to the issuing of interim injunctions is well known and there is no need for me to set this out again in this Determination. However in *Kumar v. Elizabeth Memorial Home Ltd* [1998] 1 ERNZ 67 Chief Judge Goddard sets out a useful discussion of Quia timet injunctions:

> *(3) Quia timet injunctions*
>
> *I apologise for the use of a Latin phrase in 1998 but unfortunately there is no convenient equally short term in English for what this short phrase conveys. Those who are fond of classifying various proceedings include not only taxonomic botanists but also lawyers. One class of injunctions is the Quia timet injunction and the injunction sought by the plaintiff belongs to this class. The words Quia timet mean no more in Latin than "because she is afraid". This, in turn, means that an injunction of this class is directed not at some invasion of rights that is already in progress, but at something that has been threatened or which there is some good reason to apprehend. It is possible for this purpose to rely, as the plaintiff does, on a defendant's track record. As was said in the English Court of Appeal over 100 years ago by Cotton LJ:*
>
> *"the Court of Chancery said, 'where a man threatens and intends to do an unlawful act,"*
>
> *-in those civilised days only men did unlawful acts and women were too polite to threaten to do them-*
>
> *"we will, before it is done, grant an injunction to prevent his doing it, and we will grant it where the act has been done and is likely to be repeated' - the jurisdiction is simply preventive."*
>
> *(See Proctor v. Bailey (1889) 42 Ch D 390, 398.)*

What the applicant is seeking can be classified as a quia timet injunction. However the action he is seeking to prevent (a disciplinary investigation process) is clearly not illegal. (See *Russell* above.)

I turn now specifically to the remedy sought by the applicant. In this regard I refer to the application for interim injunction lodged by the applicant on 19 December 2000 set out earlier in this Determination.

*(a) That the Applicant herein applies … for **an interim injunction** restraining the Respondent from proceeding further in disciplinary matters until such time as the Employment Relations Authority considers it appropriate to continue these disciplinary matters (if at all);*

To issue such an injunction would, in effect, be to restrain the employer from legitimately carrying out their right to continue and complete an investigation as part of the disciplinary process. I could not issue such an injunction without strong evidence that to do so is necessary to protect the applicant's legal rights. (For example if there was clear evidence that the respondent had already predetermined the outcome of the disciplinary process and the process was merely a subterfuge to legitimise the applicant's dismissal.) In this case the respondent has clearly stated, and I accept, that the proposed meeting forms part of the normal disciplinary process and that they have not prejudged the outcome of that process. After careful consideration of all of the relevant matters I can see no reason to stop this meeting from occurring and therefore **decline** the application in this regard.

(b)That the respondent be ordered to advise the applicant of its intentions toward him regarding the disciplinary meeting to be held on the 21st December…..…

The respondent has formally requested that the applicant attend this meeting. They have outlined the purpose of the meeting and given the applicant a copy of the investigator's report and recommendations that are to be the subject of the meeting. They have also clearly stated that there will be no decision on what, if any, disciplinary action will be taken against the applicant until after the completion of the meeting. To require the respondent to advise the applicant of their intentions prior to the meeting would seem to me to be to request that they prejudge what the applicant might say in his own defence. To make such an order would clearly be against the principles of natural justice and I therefore **decline** to do so.

(c)… and provide (the applicant) with copies of all memoranda in the possession or control of the respondent not already provided to the applicant prior to (the meeting of 21 December 2000) forthwith.

The respondent has agreed to provide all correspondence to the applicant voluntarily. No order is therefore necessary in this regard.

(d)That the meeting of the 21st December 2000 be stayed…

I have dealt with this issue in (a) above.

(e)… and the matters that would be determined at that meeting be dealt with in the Employment Relations Authority forum…

To do as the applicant requests would be tantamount to the Authority taking over the role of the employer. It is not the role of the Authority to make judgments as to whether disciplinary action should or should not be taken. If an employee believes he or she has an employment relationship problem, e.g. a personal grievance, they can apply to the Authority to determine the matter. Until the respondent has completed its investigation and made a decision I cannot see that the Authority has any role to play in this case. The applicant has suggested that there is some form of harassment or plot to dismiss him. If such evidence exists and the applicant is dismissed then he will have a

strong case for establishing that he has a personal grievance on the grounds that he has been unjustifiably dismissed. In this event he will no doubt seek reinstatement and compensation.

(f) That the matters are to be determined either before the Employment Relations Authority or the matter be transferred to the Employment Court either for directions or for consideration.

It will be clear from what I stated above that I am not prepared to order that *the matters* i.e. the investigation and decision of the disciplinary issues, should be determined by the Authority. Neither am I prepared to transfer this matter to the Employment Court. It is of course up to the applicant should he wish to take this matter directly to the Court. In the meantime I can see no barrier to the respondent continuing with the disciplinary meeting planned for 21 December 2000.

Costs.

Both parties had requested that they be awarded costs. Given the tenor of my decision if any costs were to be awarded these could only be to the respondent. While I accept that both parties spent considerable time and effort in preparing submissions for this case such discussions as were necessary took place by way of telephone conferences. Neither party was subjected to costs involved in preparing for and participating in a formal investigation meeting. Given the relatively minor level of direct costs involved I am reluctant to make an award in this regard. However should the respondent wish to pursue a claim for costs they should make a brief written submission to me by 31 January 2001.

James Wilson
Member, Employment Relations Authority.