



New Zealand Employment Relations Authority Decisions

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Nair v TN Communications Limited (Auckland) [2017] NZERA 127; [2017] NZERA Auckland 127 (28 April 2017)

Last Updated: 5 May 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2017] NZERA Auckland 127
3003514

BETWEEN VISHNU NAIR Applicant

AND TN COMMUNICATIONS LIMITED

Respondent

Member of Authority: Eleanor Robinson

Representatives: Simon Mitchell, Counsel for Applicant

Claire Bowdler/Greg Bennett, Advocates for Respondent

Investigation Meeting: On the papers

Submissions received: 26 April 2017 from Applicant

None from Respondent

Determination: 28 April 2017

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

Employment Relationship Problem

[1] The Applicant, Mr Vishnu Nair, claims that he was unjustifiably dismissed by the Respondent, TN Communications Limited.

[2] The Respondent denies that Mr Nair was dismissed and claims that he resigned from his employment.

Issues

[3] The issue for determination is whether or not the firm of advocates representing the Respondent, Abbey Employment Law Specialists (AELSL) should be permitted to represent the Respondent in this matter.

Brief Background Facts

[4] The concern which has been raised by the Applicant regarding the representation by AELSL arises from the fact that AELSL previously acted for the Applicant.

[5] Mr Bennett previously acted as Mr Nair's representative during the course of disciplinary meetings held between the Applicant and the Respondent. AELSL, the firm of advocates of which he is a director and shareholder, and of which Ms Bowdler is a staff member, is now acting for the Respondent.

[6] During the case management conference held on 18 April 2017 Mr Mitchell, on behalf of the Applicant, raised his concern that AELSL continuing to act in this matter in light of Mr Bennett's previous involvement as Mr Nair's representative during the disciplinary meetings with the Respondent, and his indication during the case management conference that he intended to give evidence for the Respondent during the investigation.

[7] Mr Bennett stated that Ms Bowdler had been instructed by the Respondent after his involvement had ended and on that basis there was unlikely to be a conflict of interest. However Mr Bennett agreed to seek instructions from his client as to AELSL continuing to act and advise the Authority by 19 April 2017. He failed to do so.

[8] No response from Mr Bennett having been received by midday on Friday 21 April

2017 I requested that submissions on this matter be filed by 26 April 2017. No submissions were received from Mr Bennett.

Submissions from the Applicant

[9] Mr Mitchell submits that whilst accepting the Law Society Rules of Professional Conduct do not apply to Mr Bennett of AELSL, the Applicant and the Authority are entitled to expect the Respondent's advocates to show proper regard to ethical responsibilities.

[10] He points out that the AELSL website¹ refers to "legal representation" and purports to be "an Employment Law and Human Resource Management practice", which refers to "clients" and offers clients to "arrange a confidential, no obligation interview".

[11] It is submitted that the Authority has jurisdiction to decline to have particular practitioners appear before it, submitting that the Courts and Tribunals (such as the Authority)

¹ www.abbeyes.co.nz

have jurisdiction to make the Tribunal work as intended, and to protect parties from abuse of process, unless there is a statutory provision to the contrary.

[12] In support of this submission Mr Mitchell cites *Owen v McAlpine Industries*

*Limited*² in which Judge Shaw cited with approval:

There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction.

...

*A Court must enjoy such powers in order to enforce its rules of practice and to suppress any abuse of its process and to defeat any attempted thwarting of its process.*³

see *Connelly v DPP* [1964] 2 All ER 401 at 409 Lord Morris of

Borth-y-Gest.

[13] Mr Mitchell further cited the case of *Black v Taylor (Black v Taylor)* in which Cooke

P in the Court of Appeal stated:

*The [inherent] jurisdiction [of the High Court] extends to the propriety of a representative appearing in a particular case. It is not then a question of the right of practice generally, which is governed in New Zealand by Statute, but a question concerning what is needed or may be permitted to ensure in a particular case both justice and the appearance of justice.*⁴

[14] Judge Shaw went on to consider the appropriate tests to be applied, setting out a provision from *Black and Taylor* in which Richardson J stated:

*An ethical code of this kind expresses the profession's own collective judgment as to the standards to be expected of practitioners. While it does not impose legal obligations or have the force of laws, it is some indication of the relevant public policy concerns. Of importance in the present case Rule 1.06 reflects two principles accepted by the profession, namely that knowledge of a client may itself disqualify the practitioner from acting against that client and that an appearance of impropriety should be avoided.*⁵

[15] Mr Mitchell submits that this is a clear case of the Respondent intending not only to use the same representative as represented the Applicant during the disciplinary process, but also to rely on their evidence contrary to the interests of the Applicant. He submits that it is

an abuse of the Authority's process for AELSL to continue to act.

² [\[1999\] NZEmpC 139](#); [\[1999\] 1 ERNZ 870](#) at page

³ *Ibid* at page [874]

⁴ [\[1993\] NZCA 266](#); [\[1993\] 3 NZLR 403](#) at page [406]

⁵ *Black and Taylor* at page [409]

Determination

[16] Lawyers are bound by the Lawyers and Conveyancers Act (Lawyers: Conduct and care) Rules which set guidelines by which lawyers must comply. If a lawyer acts in breach of the Rules, Court intervention may ensue. AELSL is not a firm of lawyers and as such is not bound from representing the Respondent in this matter by any professional code of conduct prohibitions.

[17] Advocates and representatives, including those with no legal training or qualifications are not precluding from representing applicants and respondents in the Authority. An applicant or a respondent has the right to choose his or her representative.

[18] However the Authority is a creature of statute. As such it has certain powers and duties associated with its role as an investigative body of resolving employment relationship problems pursuant to [s 157](#) of the [Employment Relations Act 2000](#) (the Act).

[19] The role of the Authority in the course of exercising its investigative role is to pursuant to [s157\(2\)](#) of the Act to:

(a) *comply with the principles of natural justice; and*

(b) *aim to promote good faith behaviour*

[20] Moreover the Authority): “*must act as it thinks fit in equity and good conscience*” (s

157(3) and, pursuant to [s160\(f\)](#) of the Act: “*follow whatever procedure the Authority*

considers appropriate”.

[21] Mr Bennett previously represented the Applicant in the disciplinary meetings which were held with the Respondent. In that capacity he obtained instructions and information from his client for the purpose of carrying out the representative role at that time which I consider Mr Nair was entitled to regard as being of a confidential nature.

[22] The AELSL website refers to ‘clients’ and offers them a ‘confidential’ interview. I consider that such phraseology carries with it an assurance that AELSL will act in a professional and ethical manner.

[23] Irrespective of whether or not Mr Bennett received a payment for the time he spent representing Mr Nair at the disciplinary meetings, I consider that Mr Nair believed such information as he shared with Mr Bennett in a professional context would be confidential.

Had he realised at the time that Mr Bennett’s company AELSL might subsequently be representing the Respondent, he would have been entitled to take that consideration into account in communications with Mr Bennett at that time.

[24] In this context I note the comment by Member Appleton in a case regarding representation of an employee by union, that: “To turn this on its head, if Mr Thomas had said to Mr Stuart, *I’ll represent you but reserve the right to give evidence against you in any proceedings and to disclose to the respondent and the Authority the contents of our private discussions and my private thoughts as a result of them*, it is very likely that Mr Stuart would have declined Mr Thomas’ representation.”⁶

[25] Accordingly I regard the nature of communication between Mr Bennett and his then client, Mr Nair, to have been privileged and akin to that which exists between a lawyer and the client whom he or she is representing.

[26] Mr Bennett during the case management conference at which this issue was raised, stated that Ms Bowdler’s appointment post-dated his involvement and that she would be capable of acting impartially in this matter.

[27] Whilst I make no comment on that assurance, it is nonetheless the perception of the Applicant that he may be placed at a disadvantage in this matter if AELSL were to continue to represent the Respondent, especially given Mr Bennett’s indication that he intends to give evidence for the Respondent during the investigation meeting. I regard that perception as being reasonably held.

[28] Natural justice principles mandate that the parties be permitted a fair hearing which extends not merely to justice, but also to the appearance of justice. It is important that even an appearance of impropriety be avoided.⁷

[29] I believe that to continue to allow AELSL to act as the Respondent's representatives in this matter would be a contravention of natural justice, and to potentially constitute an abuse of the Authority's process and its mandate to act in equity and good conscience.

[30] I am entitled to follow whatever procedure I consider appropriate during an investigation. Accordingly I determine that AELSL is not permitted to continue to represent the Respondent in this case pursuant to [s 160\(f\)](#) of the Act.

Costs

⁶ *Stuart v Downer NZ Limited* [2012] NZERA Christchurch 160

⁷ Black and Taylor at pages [406] and [409]

[31] Mr Mitchell is seeking costs in respect of this preliminary matter. The parties are to make submissions on costs within 14 days of the date of this determination. All submissions must include a breakdown of how and when costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson

Member of the Employment Relations Authority

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