

[3] Because of the early stage this employment relationship problem is currently at, there is no other evidence to either contradict or confirm Ms Athy's. Because it has been given by affidavit her evidence has not yet been tested by questioning from the Authority or the parties. What is deposed to by Ms Athy, particularly about the background, appears to be non-contentious and I rely on it simply on that basis.

[4] Mr Nicholas is employed as Farm Manager of Waitangi Terrace Station, which is located in the Gisborne district. He was appointed to that position near the end of 1991 and a written contract signed by him and Mr Alan Baldwin at that time records the terms and conditions of the employment.

Personal grievance raised

[5] Mr Nicholas has recently raised a personal grievance with his employers the Baldwins. He complains that they have tried to solicit or induce his retirement and that their actions in this regard were taken on account of his age. For now at least, he continues to perform the Farm Manager's work under the terms and conditions of his employment agreement.

[6] A difference has arisen over the means by which Mr Nicholas' grievance is to be resolved. Upon raising it Mr Nicholas proposed seeking resolution by using a mediator of the Department of Labour's Mediation Service. The Baldwins on the other hand want to invoke the Dispute Procedure that was expressly provided in the 1991 employment contract.

[7] The immediate issue referred by the parties to the Authority for it to resolve is the question of whether that contractual Dispute Procedure is permissive or mandatory. For Mr Nicholas, it is argued that he is not required to follow the Procedure but may choose to do so, whereas the Baldwins take the view that the provisions are, in effect, obligatory for the parties to follow once they have been invoked by either employer or employee.

[8] After raising his personal grievance Mr Nicholas initially applied to the Authority for an injunction to restrain the Baldwins from taking any steps under the Dispute Procedure. He also sought from the Authority directions requiring the Baldwins to use mediation, in accordance with the Employment Relations Act 2000 and s 159(1)(b) in particular.

[9] Following a telephone conference with counsel Mr Simperingham and Mr Henderson it was agreed that the Authority should initially resolve the underlying dispute about the interpretation, application or operation of the Dispute Procedure.

[10] It was agreed this could be done 'on the papers' and comprehensive submissions on the points of difference were subsequently provided. They have been considered by the Authority in making this determination.

The employment agreement

[11] The statutory employment law enacted when the agreement was formed near the end of 1991 was the Employment Contracts Act 1991, in force from 15 May 1991. While no statute or statutory provision is expressly referred to in the 1991 employment contract, statutory requirements such as those under the Holidays Act then in force were clearly provided for.

[12] The agreement was varied in October 1994 to provide Mr Nicholas with an increase in remuneration. Other changes made to it at that time are not material to this dispute.

Dispute Procedure

[13] In this regard the following is provided in the 1991 employment contract:

Dispute Procedure

Should any dispute arise as to any personal grievance, as to the terms of the contract or their interpretation, application or operation, as to misconduct, incompetence or negligence of the Manager, or as to any other dispute in relation to the Manager's employment, then that dispute may be resolved by either party initiating the setting up of a Dispute Committee. Such a committee is to be constituted within two weeks of the dispute arising.

The Dispute Committee shall comprise one representative nominated by each party and an independent Chairperson mutually agreed on by those two representatives, or if no agreement, by nomination of the local Provincial President of Federated Farmers.

The Dispute Committee's function is to proceed to hear and determine the dispute. A decision reached by a majority of the Dispute Committee shall be binding on the Owners and Manager. The Committee shall make all endeavours to ensure a speedy resolution to the dispute. Except in relation to questions of law, the decision of the Committee shall be final and not appealable.

Employer's submissions

[14] On behalf of the Baldwins, it is submitted that once the Dispute Procedure has been invoked, the steps to be taken under it are mandatory and lead eventually to a determination of a personal grievance by the Dispute Committee convened under the Procedure.

[15] It is submitted that the use of "*shall*" in the second and third paragraphs of the provision indicates that once a party has exercised the option of invoking the Procedure the provisions of it must thereafter be followed by both. The Baldwins have purported to invoke the Procedure.

[16] While acknowledging that the Employment Contracts Act 1991 ceased to be the applicable statutory employment law upon its repeal by the present legislation, the Employment Relations Act 2000, the Baldwins submit that the Disputes Procedure applies notwithstanding s 102 of the current statute, which provides as follows:

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

[17] Pursuit of any grievance under the current statute allows an employee access to mediation or to an investigation and determination by the Authority if the grievance remains unresolved. For the Baldwins it is noted that the current Act provides little guidance about "*alternative dispute resolution procedures,*" although it does provide that parties can use private mediation or they can submit an employment relationship problem to arbitration.

[18] In conclusion, on behalf of the Baldwins it has been submitted that the Dispute Procedure in the employment agreement is a fair one which should not be set aside and that it is mandatory once either party has exercised the right to invoke it, as the Baldwins have purported to do in the present case.

Employee's submissions

[19] For Mr Nicholas, it is submitted that the provisions of the Dispute Procedure are permissive, in that the procedure is one that the parties can choose to adopt when a grievance has been raised. Reliance is placed on the use of the word "*may*" in the first paragraph of the Dispute Procedure as expressly indicating that the procedure is optional.

[20] It is submitted that the Dispute Procedure does not amount to a binding submission to arbitration under s 155 of the Employment Relations Act 2000 but that even if it could be construed as such, s 155(3) permits Mr Nicholas to use mediation or apply to the Authority for an investigation (or the Employment Court) under Part IV of the Act to have a personal grievance resolved.

[21] It is submitted that s 238 of the Act under which the statute's provisions are to prevail over any provision to the contrary in any contract or agreement, also has the effect of allowing Mr Nicholas to choose mediation and, if necessary, to seek and obtain a direction from the Authority under s 159 requiring the parties to undertake that dispute resolution process.

[22] It is submitted that the provisions of the Dispute Procedure are not sufficiently strong and clear to have the effect of ousting the jurisdiction of the Employment Relations Authority (or the Employment Court) to resolve personal grievances, or to oust the Authority's jurisdiction under s 159 to direct parties to mediation.

[23] It is submitted that the application or operation of the Dispute Procedure must be determined in the context of current legislation, being the Employment Relations Act 2000 rather than the Employment Contracts Act 1991 which, although it was in force at the time the agreement was formed, has subsequently been repealed. It is submitted that the Dispute Procedure did not conform to s 44 of the Employment Contracts Act as providing an effective procedure and one that was also not inconsistent with the requirements of that Act.

Determination

[24] The Baldwins insistence on using the Dispute Procedure in the face of the request of Mr Nicholas for the grievance to be resolved by mediation is difficult to understand in the light of the inexpensive, speedy and effective dispute resolution processes available under the current legislation, the Employment Relations Act 2000.

[25] The object of that legislation, expressed at s 3, includes the promotion of mediation as the "*primary problem-solving mechanism*," although it is to be acknowledged that the protection of the integrity of individual choice is also expressly an object of the Act.

[26] Mediation as provided by the Department of Labour is at no cost to the parties, and the mediators are trained and can be expected to have the necessary skill and experience to perform that role. It is difficult to see any disadvantage to the Baldwins had they acceded to the request of Mr Nicholas to have his grievance resolved, or attempted to be resolved, by mediation in the first instance.

[27] If the Dispute Procedure remained a term or condition of employment between the parties after the Employment Contracts Act was repealed, its existence could not have prevented the Authority from directing the parties to mediation as sought by Mr Nicholas.

[28] Under s 159 of the Employment Relations Act, the Authority has a duty to consider mediation “*where any matter*” comes before it, as is now the case. Section 159 is not circumscribed but is of general application to all matters that may come before the Authority. The Authority must direct that mediation be used before investigating the matter unless it is satisfied that mediation:

1. *Will not contribute constructively to resolving the matter; or*
2. *Will not, in all the circumstances, be in the public interest; or*
3. *Will undermine the urgent or interim nature of the proceedings.*

[29] There is no suggestion of any of those situations being present.

[30] There are also the provisions of s 238 already referred to, under which the provisions of the Act prevail despite any provisions to the contrary in any employment contract or agreement.

[31] Further, there is s 102 of the Act which permits an employee to pursue any personal grievance under the Act. The Authority is given exclusive jurisdiction under s 161 of the Act to make determinations about personal grievances. The Procedure could not have prevented the Authority from investigating and determining the grievance while it remained unresolved for any reason.

[32] Because of those provisions, s 102, s 159, s 161 and s 238, in its discretion the Authority is likely to have declined any application for compliance with the Disputes Procedure if sought against Mr Nicholas because of his opposition to the use of that procedure.

Sections 242 and 245 of the Act

[33] The way this dispute must be resolved is put beyond doubt by the transitional provisions of the Employment Relations Act 2000.

[34] The Dispute Procedure is found in an individual employment contract that was in force immediately before the commencement of the Employment Relations Act. By operation of s 242 of that Act, such an employment contract was to continue in force “*according to its tenor.*”

[35] However, under s 245 of the Act, “*the grievance and disputes procedures*” in any individual employment contract that was continued in force by s 242, became “*of no effect*” from the commencement of the Employment Relations Act.

[36] Section 245 is expressed to be subject to ss 247 and 248, but neither provision has any application in this case.

[37] This dispute could have been avoided if the parties had updated their employment agreement following the law change in 2000.

[38] The operation of the transitional provisions has not left the Baldwins or Mr Nicholas without a disputes and personal grievance procedure, as the procedures under the Act expressly apply pursuant to s 102 of the Act.

[39] In their insistence on using the Dispute Procedure the Baldwins have been flogging a dead horse, as that procedure no longer applies and cannot therefore be invoked by them.

[40] Accordingly, this dispute about the interpretation, application or operation of the employment agreement, and the Dispute Procedure contained in it in particular, must be resolved in favour of Mr Nicholas. He is no longer bound by that procedure which ceased to have effect in October 2000. It is open to him to have his grievance resolved in mediation and he may, if necessary, seek an order from the Authority directing the Baldwins to take part in that process.

[41] The parties should now concentrate on the real issue between them which is the grievance Mr Nicholas has raised about the offer he was made to retire from his employment.

[42] I make no orders or directions as to attendance at mediation at this stage, and neither will I determine any question of costs yet.

[43] Leave is reserved for the parties to apply again to the Authority in this matter for further orders or directions, including in relation to costs, if necessary, after attempts have been made to resolve the grievance.

A Dumbleton

Member of the Employment Relations Authority