

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Warwick Pyne (Applicant)
AND ASB Bank Limited (Respondent)
REPRESENTATIVES Simon Mitchell, Counsel for Applicant
Simon Dench, Counsel for Respondent
MEMBER OF AUTHORITY Leon Robinson
INVESTIGATION MEETING 21 March 2005
DATE OF DETERMINATION 22 March 2005

PRELIMINARY DETERMINATION OF THE AUTHORITY

[1] This Preliminary Determination deals with an application by the applicant Mr Warwick Pyne (“Mr Pyne”) to transfer proceedings to the Employment Court. The respondent ASB Bank Limited (“the Bank”) also asks the Authority to make certain orders in relation to documentary evidence.

[2] Mr Pyne asks the Authority to investigate a number of contended personal grievances including unjustifiable disadvantage, discrimination, sexual harassment, unjustifiable dismissal together with certain specified breach of contract claims. The essence of Mr Pyne’s employment relationship problem is an alleged constructive dismissal. In all, Mr Pyne claims compensatory relief in the total sum of \$290,000.00 and exemplary damages in the sum of \$30,000.00. Additionally he claims penalties of \$10,000.00 in respect of each of the alleged breaches of contract.

[3] A claim of constructive dismissal is not a complex proceeding although frequently evidentially complicated. The legal enquiry is not difficult however. In my view, the complexity of these proceedings as may be suggested by the statement of problem is more apparent than real. Constructive dismissal is a routine claim in the Authority though more often than not, unsuccessfully. The factual enquiry required and the relevant legal principles are well settled.

The application for transfer of proceedings

[4] Mr Pyne raises two grounds in seeking transfer of the proceedings. First he says there is an important question of law arising other than incidentally. The question posed is whether the Bank breached or has been a party to breaches of the law involving sections 9 and/or 13 of the Fair Trading Act 1986. Secondly, it is said that the case is of such a nature and such urgency that the public interest indicates it be removed immediately to the Court. That is said because if there is a breach of the Fair Trading Act 1986 any person who has suffered loss or damage may then claim

against the Bank¹. It is further said that there would be a very large number of investors who may have potential claims and there is a time limit for bringing any such claims² and that the public needs to know urgently if unlawful conduct by one of the major trading banks has taken place. It is said too, that there may also be an impact on the Bank's other employee investment advisers.

An important question of law?

[5] Mr Pyne says he was forced to act unlawfully i.e. in breach of sections 9 and/or 13 of the Fair Trading Act 1986 and/or unethically and that he was consequently forced to resign as a result. He alleges the Bank's disclosure statement he provided to his clients did not adequately disclose his commission rates. He alleges that he was required, instructed and directed to perform his work in an unlawful and/or unethical manner. Mr Mitchell urges that that question is a question of law. I am not persuaded that it is.

[6] There is no question of law arising as to whether there has been a breach of sections 9 and/or 13(b) of the Fair Trading Act 1986. The legal application of sections 9 and 13 of the Fair Trading Act 1986 are well settled. Whether the Bank acted in breach of the Fair Trading Act 1986 is a factual enquiry to be decided by the application of facts to the stated law. The matter is one of factual application and not a question of law. The Authority is capable of making that factual assessment in investigating Mr Pyne's employment relationship problem. I conclude therefore there is no question of law. The further question of whether that question of law is an important one does not fall to be decided.

[7] In any event, in my view the answer to the question alleged is incidental to the overall enquiry the Authority conducts. The Authority in investigating the alleged constructive dismissal is concerned with what the Bank required of Mr Pyne and whether those requirements were in breach of the terms of Mr Pyne's employment agreement. Even if the said disclosure statement is contrary to the provisions of the Fair Trading Act 1986, what matters for the Authority's purposes is what the Bank required, instructed and directed Mr Pyne to do and then whether such requirements, instructions or directions were contrary to contractual duties the Bank owed to Mr Pyne. I conclude therefore that the alleged question not being a question of law, will arise only incidentally.

Urgency and the public interest

[8] It is submitted that the case is of such a nature and such urgency that the public interest requires it be removed to the Court.

[9] As concerns public interest, I am aware of the steps Mr Pyne has taken to place the issue relating to the Fair Trading Act 1986 in the public arena. I would expect that persons affected would have taken steps to seek redress as a result of the publicity. I was not advised of any action by regulatory bodies or institutions in relation to the issue.

[10] The Authority's task is to assist the parties to resolve an employment relationship problem. Other interests arising out of breaches of the Fair Trading Act 1986 are properly and legitimately pursued in other forums and legal institutions. The matter is not primarily the focus of the Authority's attention. My investigation of Mr Pyne's employment relationship problem is confined only to the relevant employment issues. It has no other focus. That being so, it cannot be said that there is a public interest in the case.

¹ Section 43(2) Fair Trading Act 1986.

² Section 43(5) Fair Trading Act 1986.

[11] As I understand it, Mr Pyne alleges there is some urgency arising out of a concern for the limitation period for potential litigants – i.e investors who have suffered loss. I was not made aware of any potential litigation arising out of the matter Mr Pyne alleges. I am not persuaded that evidentially there is any public interest in the matter and nor is there any urgency arising out of it.

[12] As for the concerns raised for the Bank's other employee investment advisers, I am advised by Counsel and I accept that the Bank has taken appropriate steps such that those interests are not relevant for present purposes.

Determination

[13] I am not persuaded that the statutory criteria have been met and nor am I of the opinion that in the circumstances the Court should determine the matter. Accordingly **I decline to exercise my discretion to order the removal of the matter to the Employment Court.**

Other Orders

[14] The respondent has sought certain orders in relation to documentary information. The matter was resolved by agreement with the assistance of counsel.

[15] Until further order of the Authority, by consent it is now ordered that:-

- (i) The applicant (by himself or his agents) is restrained from using or disclosing documents the property of the respondent, except in accordance with the following terms:-
 - (a) The applicant is permitted to use and disclose such documents for the sole purpose of briefing his witnesses and presenting his case in the Authority or Court, except that he may disclose the said documents to the regulatory bodies listed in the Notice of Opposition dated 21 February 2005 at paragraph 4.1 - 4.4;
 - (b) The applicant is to provide to the Authority and the respondent a list of the names of the witnesses to whom disclosure is proposed and, in relation to each witness, the document(s) that are to be disclosed and the relevance of the witnesses' evidence to those document(s).
- (ii) Before any witness is shown any document(s) the property of the respondent, or their contents are disclosed:-
 - (a) the witness must first agree in writing not to use or disclose the document(s) or their contents to any person apart from the parties, their representatives, and any member or employee of the Authority; &
 - (b) the Authority had determined that the witnesses' evidence is likely to be relevant and that disclosure to the witness is needed.

Costs

If costs are sought, they are reserved.

L P Robinson
Member of Employment Relations Authority