New Zealand Employment Relations Authority Decisions

Q v W (Auckland) [2008] NZERA 115 (30 June 2008)

Last Updated: 31 July 2013

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 223/08

5096586

BETWEEN Q

Applicant

AND W

Respondent

Member of Authority: James Wilson

Representatives: Aaron Crabb for the applicant and Ms Q in person

David France for the respondent

Investigation Meeting: Determined on the papers

Submissions received: 18 April & 17 June 2008 from the applicant

3 June 2008 from the respondent

Determination: 30 June 2008

DETERMINATION OF THE AUTHORITY OF APPLICATION TO REOPEN INVESTIGATION

Application to reopen

[1] The applicant, Q , has requested that her unsuccessful application, to have matters removed to the Employment Court, be reopened. This determination deals only with that request and does not address the question of whether or not the matters should be removed to the Court should the file be reopened.

History

[2] The matters that gave rise to the present application have a long history. Ms Q's first statement of problem was filed with the Authority in July 2002. This statement raised a number of alleged problems including unpaid overtime, incorrect annual leave and, as described in the Authority's original Determination (AA 179/04 of 21 May 2004) *numerous unidentified discrepancies resulting in personal grievances and acts of discrimination against the applicant.*

[3] In this first determination, the Authority determined that:

I will hear and determine the following matters:

1. Wages owed.

2. Sick and annual leave discrepancies.

3. The formation of the contract.

4. The bonus issue.

5. Penalty

I will not hear the following matters:

1. The personal grievances – discrimination, constructive dismissal. These were not notified within the requisite time period

2. Failure to provide a safe workplace ... (because these were matters which were the subject of an ACC claim scheduled to be heard by the High Court)

[4] On 13 September 2004 the Authority issued a second determination (AA

179A/04) which determined *Ms Q has been paid correctly and is not owed any monies*. As previously indicated in its original determination, the Authority did not address Ms Q's personal grievance claims.

[5] In October 2004 Ms Q filed a statement of claim in the Employment Court challenging the Authorities determination(s). This statement of claim raised a number of causes of action including:

- claims of unjustifiable constructive dismissal and failure to adequately provide a healthy work environment

• that the Authority incorrectly determined that she had not raised her personal grievances within the required 90 day period and, in the alternative

• if the Employment Court determined that Ms Q had not raised the personal grievance or employment relationship problem within the required 90 days then Ms Q sought leave of the Court to raise the personal grievance out of time. Ms Q said that the Authority had not been asked nor had it considered such an application.

[6] Following a call over meeting on 10 December 2004, Judge Travis in the

Employment Court issued a minute in the following terms:

1.....

2. One of the matters before the Court is whether or not the grievance was raised within the 90 day time limit. [W] was successful before the Authority in obtaining a ruling that it was not.

3. That has been challenged and will need evidence in support and in opposition.

4. However the plaintiff has also indicated she is now wishing to seek leave if it is determined that the grievance was not raised within the 90 day limit. Counsel and the Court are in agreement that it is unlikely that the Court has originating jurisdiction on that matter as it was not previously raised before the Authority.

5. Counsel are to consider their respective positions but the likely indication is that the plaintiff will be applying in the Authority for leave and seeking to have the matter transferred to the Court so that all matters may be heard together. It is likely that there will be, if that course is successful, a hearing to deal with all matters regarding the limitation period, which at the same time could also accommodate those matters contained in the challenge in relation to the arrears claims.

6. If the plaintiff is successful then the grievance itself may have to be dealt with by the Employment Relations Authority which has never determined the grievance because of the rulings it made on the limitation period. That is a matter that can await further consideration.

[7] On 4 July 2006 Ms Q filed a new application in the Authority seeking a determination from the Authority that:

- *(Ms Q) had raised personal grievances within the 90 day time limit or, alternatively*

• seeking leave to have the matters heard out of time.

And seeking to have *all the remaining matters* removed to the Court.

[8] Having received submissions from the parties on this matter the Authority issued a third Determination (AA 311/06, 3 October 2006) saying:

The respondent initially did not oppose the removal application. This was based on a minute of Travis J. dated 10 December 2004

in which Travis J. made reference to the likelihood of an application for removal being made.

Since then, however, the applicant has apparently not progressed her de novo challenge to my determination regarding the 90 day issue and on 10 August

2006 the Duty Judge noted the Court had received no response regarding progressing the proceedings and that the proceedings were to be treated as withdrawn.

I checked with the Employment Court in case there had been any variation to this and was informed that the matter (ARC 47/04) was administratively withdrawn.

The respondent submits that there are no grounds now for removal of either issue. The exceptional circumstances issue is one which should be determined by the Authority at first instance and the second is a de novo challenge. Given that the de novo application has been withdrawn there are now no proceedings in the Employment Court. There are no other grounds for removal and I decline the removal application.

[9] On 21 November 2006 Mr Crabb, on behalf of Ms Q , filed a memorandum with the Authority advising that the Employment Court had reinstated Ms Q 's challenges and requesting that the Authority *revisit the application (for removal) and makes a substantive decision based on the submissions supporting it.*

[10] In February 2007 the Authority held a conference call with Mr Crabb and Mr France. As a result of that conference call there is a note on the Authority's file indicating that the Authority would *wait for an application from Mr Crabb.*

[11] In December 2007 Ms Q filed an application with the Authority for its investigation to be reopened. This application canvassed a number of issues including those which were the subject of the Authorities determinations in 2004.

[12] Following the exchange of various correspondence and submissions I convened a conference call with the parties on the 20 May 2008. In that conference call I advised the parties that it was my intention, in the first instance, to consider whether or not the application for removal (declined in determination AA 311/06) should be reopened. The parties were also advised that it was my intention to deal with this matter on the papers, but reserved the right to convene an investigation meeting should any evidential issues arise. Submissions having been received from Ms Q /Mr Crabb in respect to the application to reopen, the respondent was requested to file and serve submissions on this matter by 3 June 2008. The respondent's submissions were duly filed and Ms Q , on 17 June 2008, filed submissions in reply.

Legal considerations

[13] Mr France has drawn my attention to the Employment Court decision in *Shore v Aqua-Cool ltd* 5/12/05 Colgan J AC 73/05. In that judgement the Court said:

[14] The Employment Relations Authority Regulations 2000 contain a form of "Application for investigation to be reopened", Form 4, relating to Schedule 2 clause 4 of the Employment Relations Act 2000. The form specifies under the heading "GROUNDS":

This application is made on the following grounds: [State fully but concisely the grounds on which this application is made.]

[15] The form does not require or even refer to the tests that the Authority adopted from rehearing cases in courts and applied in this case. Nor does the substantive legislation relating to the reopening of investigations so specify. This is dealt with in clause 4 of Schedule 2 to the Employment Relations Act

2000 and provides:

4 Reopening of investigation

(1) The Authority may order an investigation to be reopened upon such terms as it thinks reasonable, and in the meantime to stay the effect of any order previously made.

(2) The reopened investigation need not be carried out by the same member of the Authority.

[16] The conditions upon which the Authority may reopen an investigation would include that an applicant should meet the wasted costs of the

respondent. All decisions made by the Employment Relations Authority are, of course, subject to the overriding requirement that it ***"must act as it thinks fit***

in equity and good conscience, ...": s157(3). (emphasis added)

Discussion

[14] In his submissions Mr France argues that, in applying its equity and good conscience objectives, the Authority should

consider as the main criteria whether *there has been a miscarriage of justice which can only be remedied by the reopening of an investigation.* He continues that in this instance there has been no miscarriage of justice. Mr France correctly points out that the effect of granting the application to reopen means that the Authority will need to reinvestigate the application resulting in its determination declining to remove the matter to the Court.

[15] Despite Mr France's persuasive arguments I believe that in this instance it is appropriate that the Authority use its discretion to reopen the narrow question of whether or not Ms Q 's applications in respect to the 90 day should be removed to the Employment Court. It is clear from the Authority's determination of 3 October

2006 that the Authority declined the application because the Court did not *already have before it proceedings which are between the same parties and which involve the same or similar or related issues* - section 178(2) of the Employment Relations Act.

Since that determination was issued the Court have reinstated Ms Q 's challenges. It may be that now that the Court once again has proceedings before it an application for removal would succeed. There is no statutory limit to the number of times a party can apply to have a case reopened and it would of course be open to Ms Q to file a new application for removal. However to require her to do so would seem both unduly pedantic and add yet further cost and delay to what has already been a torturous and no doubt expensive case for both parties.

Determination

[16] **In terms of Clause 4 of the Second Schedule to the Employment Relations Act the Authority's investigation into Ms Q 's application for removal (as previously decided in determination AA 311/06; 3 October 2006) is reopened on the terms set out below.**

[17] The Authority has previously received extensive submissions from the parties regarding the application for removal and these will be taken into account in reconsidering this application. However should the parties wish to make further submissions regarding the application for removal these are to be filed and served within 14 days of the date of this determination. Should such submissions be filed the parties will have seven days in which to file submissions in response.

[18] Following receipt of any further submissions and submissions in reply the

Authority will determine whether or not Ms Q 's application in respect to the

90 day issue (as set out in her application for removal received on 4 July 2006) should be removed to the Employment Court.

[19] It is my inclination to determine the question of removal on the papers. However should either party believe that an investigation meeting would be beneficial they should advise the Authority forthwith and I will convene a telephone conference to discuss whether or not a meeting is necessary and if so to make the necessary arrangements.

Concluding comments

[20] As I have already noted this matter has had a long and tortured history. I urge the parties if at all possible to comply with the timetable set out above. If they are unable to do so they should immediately contact the Authority to seek a variation to that timetable.

James Wilson

Member of the Employment Relations Authority
