IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2011] NZERA Wellington 203
5310462

	BETWEEN	RICHARD RANKIN Applicant
	AND	SWIRE PACIFIC OFFSHORE NZ LIMITED Respondent

Member of Authority:	G J Wood
Representatives:	Peter Cranney for the Applicant Megan Gundesen for the Respondent
Investigation Meeting:	By way of submissions received by 16 November 2011
Determination:	19 December 2011

DETERMINATION OF THE AUTHORITY

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[1] This was an unusual employment relationship problem. Mr Rankin was a seafarer employed on various vessels under a collective employment agreement, including some operated by the respondent (Swire Pacific). Mr Rankin became aware, through his union, that the hiring agent for a number of vessels had indicated that Mr Rankin was no longer to be employed, because of various incidents on vessels that he had previously been employed on. The union understood that Swire Pacific had indicated he would not be welcome back on any of its vessels.

[2] Mr Rankin therefore brought claims of unjustified dismissal, unjustified action, breach of an employment agreement and breach of good faith, against Swire Pacific. Swire Pacific declined to file a statement in reply until after a conference call with the Authority. Its statement in reply repeated its previous objections to the claim being out of time, lacking details to support a claim of unjustified dismissal (given that Swire Pacific considered there was no dismissal because of the expiration of a fixed term agreement), that it was not responsible for the actions of what the union

described as a hiring agent but it described as a representative of another employer party to the collective agreement, and noted that it had not pursued any disciplinary procedures against Mr Rankin.

[3] After some delay of many months, and two deferrals due to Mr Cranney's late unavailability, the parties attended mediation, which was unsuccessful. Following a further conference call it was made clear by Mr Cranney on Mr Rankin's behalf that the nub of his claim was that during his employment Swire Pacific had disciplinary and performance concerns with him to the extent that it would no longer re-engage him, but it did not raise these matters during the course of his fixed term agreement. This was said to constitute an unjustified disadvantage and a breach of good faith.

[4] After another conference call, Ms Gundesen sought to have applications heard that the matter be struck out as either out of time, or frivolous or vexatious, or brought against the wrong employer. I concluded that instead the best way forward was to have the matter dealt with in one short investigation meeting, but that Mr Rankin should be on notice of the potential for increased costs should he be unsuccessful. This was for the reason that his appeared to be a novel claim, with a number of hurdles to overcome before it could be successful. I indicated that those interlocutory applications could be dealt with at the investigation meeting. However, I also directed Swire Pacific to provide Mr Rankin with a copy of his personal file and any documentation relating to communications between it and NZ Offshore Services (another employer party) concerning him.

[5] Mr Cranney was almost two weeks late in providing Mr Rankin's written statements. However this did not prejudice the investigation meeting set down for 6 September.

[6] On 26 August, the relevant Swire Pacific manager provided his evidence. That evidence helpfully provided for the first time that there had only ever been one minor matter of concern to Swire Pacific about Ms Rankin's performance, which was dealt with quickly and resolved. No doubt as a result of that evidence, Mr Rankin withdrew his claim.

[7] Ms Gundesen then filed for indemnity costs of $13,565, plus GST. This was, it was submitted, because of the lack of merit of Mr Rankin's case and its late discontinuance, despite warnings to Mr Rankin about the costs' implications of

pursuing the matter. It was claimed that Mr Rankin had not given any specifics, had misrepresented the collective agreement and was relying on third party statements that could not have been linked to Swire Pacific. It was also noted that it was only two working days before the investigation meeting when the matter was discontinued. These costs included mediation because it was directed by the Authority.

[8] In response, Mr Cranney noted that the Act provides obligations on employers, who have performance concerns with employees, to raise them with the employee and it was not until the evidence was in that Swire Pacific finally denied that there were any concerns about Mr Rankin's conduct. He also noted that it was Swire Pacific that had to be directed to attend mediation and that there was good cause for the two occasions on which he had not been able to attend mediation.

[9] In essence, Mr Cranney blamed any problems on Swire Pacific's failure to provide, either in the statement in reply or prior to the formal tendering of evidence, the denial that proved to be conclusive in the case. He therefore submitted that any costs award should be moderate and commensurate with a very small scale and uncomplicated case in which a hearing was not necessary.

[10] Good faith relationships under the Act are extremely broad. Employees are entitled to challenge what they consider may be actions in breach of these obligations by employers, just as employers are entitled to do so against employees. While Mr Rankin's statement of problem might have better focused on that aspect, the fact was there was such a focus well in advance of the investigation meeting, and in any event the Authority has a broad brief to investigate employment relationship problems, however they may be described by the parties.

[11] Given that the simple declaration in evidence that there were no performance concerns with Mr Rankin was sufficient to resolve the employment relationship problem, it seems unfair to blame Mr Rankin for all the procedural machinations that the case took. I therefore do not accept that the claim was frivolous or vexatious, or that it could not succeed for other reasons. Rather, like most matters, it fell to be decided on the evidence. Once the evidence was in, the applicant, as was his right, withdrew his claim. However, because of delays, in the main on Mr Rankin's part, discontinuance did not take place until very shortly before the Authority investigation.

[12] I consider, therefore, that Mr Rankin should be required to make the usual contribution to Swire Pacific's costs in this situation. I accept Mr Cranney's assurances as an officer of the Court that mediation was twice deferred for good reason, and therefore take no account of the mediation deferrals. I have no reason to know, and nor can I be told without both parties' agreement, why the matter was not resolved at mediation. I therefore decline to make any award over costs associated with mediation.

[13] If the matter had gone ahead, Mr Rankin could have expected to pay $2,000 or $3,000 in costs, if he was unsuccessful, unless the circumstances dictated a higher award. However, the matter was not fully investigated by way of an investigation meeting. In all the circumstances I consider that an appropriate contribution to Swire Pacific's costs is $1,000.

[14] I therefore order the applicant, Mr Richard Rankin, to pay to the respondent, Swire Pacific Offshore NZ Limited, the sum of $1,000 in costs.

G J Wood
Member of the Employment Relations Authority