IN THE EMPLOYMENT COURT
CHRISTCHURCH

CC 12/06
CRC 23/05

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	BAYLISS SHARR & HANSEN Plaintiff
AND	TERESA MCDONALD Defendant

Hearing: 19 May 2006
(Heard at Christchurch)

Appearances: K Owen, Advocate for the Plaintiff
T J Twomey, Counsel for the Defendant

Judgment: 7 December 2006

JUDGMENT OF JUDGE A A COUCH

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[1] As a matter of public policy, communications between parties to a dispute which are exchanged in an effort to resolve that dispute are privileged and the courts will generally not hear evidence about them. An important issue in this case is whether that privilege ought to have applied to evidence which the Authority heard and relied upon to find in the defendant's favour.

[2] A second significant issue is the extent of the Authority's obligation under the Employment Relations Act 2000 to consider issues of contribution and to record its conclusions in its determination.

Nature of the proceedings

[3] This matter came before the Court as a challenge to a determination of the Employment Relations Authority dated 19 July 2005 (Determination no. CA 98/05). In the original statement of claim, the plaintiff alleged that the Authority made

several errors in its determination. Some were said to be errors of fact, some to be errors of law and others, by their nature, were matters of mixed fact and law. In respect of all of these issues, however, the plaintiff sought a non de novo hearing.

[4] Based on an assurance by counsel for both parties that the matter could be dealt with by way of submission only and that there was no need to call evidence, the matter was set down for hearing on 17 March 2006. The parties were also directed to file an agreed bundle of documents by 10 March 2006. Difficulties arose when the parties could not agree about the content of the bundle of documents to be made available to the Court. This was the subject of a memorandum from Mr Twomey on 10 March 2006.

[5] This memorandum raised for the first time a fundamental problem inherent in the form of the proceedings. The plaintiff sought to challenge findings of fact made by the Authority and have them set aside in a non de novo hearing in which no evidence was to be called. That was something which the Court was not properly able to do. Accordingly, I called a telephone conference with counsel on 15 March 2006 and, in my subsequent minute to the parties, I said:

> *Findings of fact must be based on a consideration of all the evidence. While the Authority generally requires parties to an investigation to provide written briefs of evidence for witnesses, no record is made of evidence given orally to the Authority at an investigation meeting or otherwise. It follows that, unless evidence is heard, there is no basis on which the Court can properly review findings of fact made by the Authority.*

[6] Following discussion with counsel and advocate, I suggested to Mr Owen that if the plaintiff wished to pursue all of the issues set out in the statement of claim it could only do so by way of a hearing de novo. Alternatively, if the plaintiff wished to proceed with a non de novo hearing, the issues would need to be limited to questions of law decided on the basis of the findings of fact made by the Authority and set out in its determination.

[7] On behalf of the plaintiff, Mr Owen initially said that the plaintiff would elect the first option and seek a hearing de novo. On that basis, the fixture allocated for 17 March 2006 was vacated. At a further telephone conference conducted on 17 March 2006, however, Mr Owen said that the plaintiff no longer wished to take the option of a hearing de novo. Rather, he said, the plaintiff preferred to abandon its challenge to any of the findings of fact made by the Authority and to proceed with a non de

novo challenge confined to questions of law. The plaintiff was then directed to file an amended statement of claim consistent with electing this option. That was provided on 31 March 2006 and I will refer to its content later in this judgment.

[8] The parties were also given an opportunity to decide whether there were any documents they wished to put before the Court. They elected not to do so. The matter therefore proceeded solely on the basis of the findings of fact made by the Authority and recorded in its determination.

The facts

[9] Ms McDonald is a young woman who was employed by the firm of Bayliss Sharr & Hansen ("BSH") as an office junior. This was her first job and it was arranged as part of her course of study at the Christchurch Polytechnic. Each week, she worked for BSH for 4 days and then attended classes at the Polytechnic on the fifth day.

[10] There were difficulties in the employment relationship between the parties. These came to a head in July 2004 when BSH decided to have a disciplinary meeting with Ms McDonald. That took place on 20 July 2004.

[11] Both parties were represented at this meeting. BSH was represented by Mr Owen; Ms McDonald was represented by Mr Davidson. Shortly after the meeting began, Mr Owen suggested to Mr Davidson that they have a private discussion "*off the record*". Mr Davidson agreed and the two men then went outside to conduct that discussion.

[12] The Authority heard conflicting evidence about what was said in the course of this discussion. It was common ground, however, that Mr Owen put forward a proposal that BSH would pay Ms McDonald a sum of money in consideration of her resigning her employment. It was also common ground that Ms McDonald was receptive to such a proposal and that Mr Owen and Mr Davidson then effectively negotiated what the terms of such an agreement might be.

[13] Following this negotiation, the parties went their separate ways. The original disciplinary meeting called by BSH did not proceed further and there is no suggestion that any conclusions were reached. Unfortunately, the parties went away with differing understandings of the outcome of the negotiations.

[14] Mr Hansen, a partner in BSH, gave evidence at the Employment Relations Authority investigation that he was never told that agreement had been reached. He said that his understanding was that Ms McDonald was going away to think about an offer made by BSH and to discuss it with her father.

[15] Mr Davidson gave evidence that final agreement was reached that day, one of the terms being that the agreement would be recorded by the mediation service of the Department of Labour.

[16] Rather than resolve this conflict of evidence, the Authority declined to make a finding of fact about whether or not a binding agreement between the parties was reached on 20 July 2004. The Authority did, however, say:

> *[44] The short point is that at the end of the day on 20 July it seems that Ms McDonald believed that she was leaving the workplace at the behest of her employer. Ms McDonald's own evidence was that she was told by her then representative, Mr Davidson, that BSH did not want her to continue with her employment. In her evidence she said* "I was quite depressed at hearing this news although I had already gained the impression that I was not wanted."
>
> *[45] Based on this intelligence, Ms McDonald decided it was best to go. No doubt she relied on Mr Davidson's advice in that regard but the fact was that certainly, on her evidence which was not challenged by BSH, Ms McDonald got a very clear message that she was not wanted by the employer.*

[17] In terms of the agreement Ms McDonald thought had been concluded with BSH, she was to finish work immediately. With that understanding, she collected her personal effects from the workplace and regarded her employment as at an end.

[18] Over the 2 days following the meeting on 20 July 2004, it progressively became apparent to Mr Owen and Mr Davidson that they and their clients had differing views about the outcome of the meeting on 20 July 2004. BSH was willing to sign an agreement on certain terms but those were not the terms that Ms McDonald understood had been agreed in the discussion between the two representatives. Both parties held their ground. BSH then asked Ms McDonald to return to work. She refused.

The determination of the Authority

[19] Before the Authority, Ms McDonald's case was put forward on two alternative grounds. The first was that a binding agreement between the parties had been reached on 20 July 2004. She sought a declaration to that effect and an order

that BSH pay her money in accordance with it. In the alternative, she alleged that termination of her employment was an unjustifiable constructive dismissal.

[20] As I have noted earlier, the Authority declined to resolve the conflict of evidence about the negotiation between the parties on 20 July 2004. In this regard, the Authority said:

> *[38] The differences are so stark and the matters in dispute so important that I find it quite impossible to make any judgment about whether there was an agreement or not at that meeting or meetings between the representatives on 20 July 2004. Not only is it not clear what the offer was, it is also not clear whether that offer (whatever it was) was accepted. In those circumstances, any determination of the question whether there was a concluded agreement can be no more than an inspired guess and that is not good enough.*

[21] Having effectively put Ms McDonald's primary cause of action to one side, the Authority went on to consider whether there had been a constructive dismissal. Somewhat surprisingly, the Authority did not refer in its determination to any of the decided cases in which the concept of constructive dismissal has been discussed and explained. Neither did the Authority state the principles it applied in deciding this issue. Rather, after making the findings of fact in paragraphs [44] and [45] of the determination which I have set out earlier, the Authority said:

> *[48] In those circumstances, I frankly think it inconceivable that an inexperienced young woman in her first job having been subjected to a disciplinary process (whether justified or not) and then having gone through what appeared to be an employer-initiated exit strategy which subsequently fell apart, should then be expected to take a deep breath and return to the workplace as if nothing had happened.*
>
> *[49] In my opinion, the employment relationship had irretrievably broken down by this stage and it is quite unreasonable to have expected Ms McDonald to put that all behind her and return to the workplace.*
>
> *[50] The question I must decide however is whether that factual matrix constitutes the elements of a constructive dismissal. I have reached the conclusion that it does.*
>
> *[51] In my view, Ms McDonald's resignation or perhaps more accurately her refusal to return to the workplace was a reasonably foreseeable consequence of the course of conduct which the employer initiated by its promoting of an exit strategy for Ms McDonald in the context of a major disciplinary meeting.*
>
> *[52] In effect, it is my considered view that the employment relationship was effectively brought to an end by the employer's inducement of her departing with the promise of some compensation. When that compensation*

> *was not forthcoming, it seems to me the spell was broken and the relationship effectively at an end.*

[22] The key principles to be applied in determining whether a termination of employment such as this should be regarded as a constructive dismissal are those enunciated by the Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168 where, at page 172, the Court said:

> *In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.*

[23] It seems to me from the language used by the Authority in reaching its conclusion that Ms McDonald had been constructively dismissed that the Authority was applying these principles. Specifically, the Authority appears to have found as a fact that Ms McDonald's refusal to return to work on or about 22 July 2004 was caused by BSH initiating an "*exit strategy*" on 20 July 2004. Equally, the Authority has found as a fact that, BSH having initiated that strategy, it was reasonably foreseeable that Ms McDonald would not be prepared to continue working for the firm any more.

[24] Although the Authority did, in this way, explain its conclusion that Ms McDonald had been constructively dismissed, the determination contains no discussion about whether that constructive dismissal was justifiable or not. In a summary of its conclusions at the end of the determination, the Authority simply said "*I am persuaded that Ms McDonald has been unjustifiably constructively dismissed*".

[25] The Authority awarded Ms McDonald $4,000 compensation under s123(1)(c)(i) of the Employment Relations Act 2000 together with "L*ost wages attributable to the dismissal in the sum of $4,387.50*." The determination contains no explanation of how that sum awarded by way of reimbursement of lost wages was calculated. Equally, the Authority did not say in its determination if it had

considered whether the actions of Ms McDonald contributed in any way towards the situation that gave rise to her personal grievance or make any findings of fact relevant to that issue.

The plaintiff's case

[26] In the amended statement of claim, the plaintiff alleged that the Authority had made three errors of law in its determination:

(a) by having regard to evidence of "without prejudice" discussions between the representatives of the parties; and

(b) by concluding on the facts as found that Ms McDonald had been constructively dismissed; and

(c) by failing to consider whether there had been contributory conduct by Ms McDonald.

[27] The allegation that the Authority made an error of law in finding that Ms McDonald had been constructively dismissed was advanced on two grounds. The first was an extension of the plaintiff's general objection to the Authority having regard to what was said in "without prejudice" discussions. It was submitted that, had the Authority not done so, it could not have found that there had been a constructive dismissal.

[28] The second ground on which this part of the plaintiff's case was advanced was that, as a matter of law, it was not open to the Authority to find that Ms McDonald had been constructively dismissed after she had refused BSH's request that she return to work on or about 22 July 2004.

"Without prejudice" communications

[29] A significant amount of the evidence tendered to the Authority in its investigation related to the "*off the record*" discussion between Mr Owen and Mr Davidson on 20 July 2004 and the subsequent correspondence between them arising out of that discussion. The Authority had regard to that evidence for two purposes. The first was to decide whether the parties had reached a binding agreement about the termination of Ms McDonald's employment and payment to her of compensation

and other money by BSH. As noted earlier, the Authority declined to make a decision about that issue.

[30] Secondly, the Authority referred to and relied on evidence of those "*off the record*" communications to reach its conclusion that Ms McDonald had been constructively dismissed. In particular, the Authority relied on evidence of those discussions to conclude that BSH had initiated "*an exit strategy for Ms McDonald in the context of a major disciplinary meeting*." That finding of fact was then the foundation on which the Authority reached the conclusion that BSH's actions effectively brought the employment relationship to an end and that it was reasonably foreseeable as a result that Ms McDonald would not be prepared to return to work.

[31] Mr Owen submitted that the Authority erred in law by having regard to this evidence for any purpose. In support of this submission, he relied heavily on the decision of this Court in *Jackson v Enterprise Motor Group (North Shore) Ltd* [2004] 2 ERNZ 424 where Colgan J said:

> *[17] I consider that what was probably meant by the parties in this case was, as the Authority expressed it, an intention that the meeting and its subject matter be "in confidence" or, colloquially, "off the record". That is a long-standing and frequent feature of attempting to resolve employment relationship disputes. Parties, and especially their representatives, hold such meetings and discussions daily and much litigation or potential litigation is resolved or narrowed in scope by frank exchanges that are "off the record". It is in the public interest that such practices be allowed to continue in the safe knowledge that the fact of them and particularly their contents will not be disclosed to the Authority or to the Court or any other person subsequently. Such procedures lubricate the machinery of employment dispute resolution. Indeed, the emphasis in the problem resolution provisions in the Employment Relations Act 2000 is supportive of this approach. Despite the importance of the privilege attaching to the content of such a meeting it does not mean that, even immediately after the end of an "off the record" meeting, one or other party cannot then make its position clear on the record by, for example, making a Calderbank offer and/or amending pleadings as occurred in this case.*

[32] The "*privilege*" referred to by Colgan J in that passage was what is commonly referred to as "without prejudice" privilege. The classic description of that privilege, or what is alternatively known as the effect of the "without prejudice" rule, is set out in Phipson on Evidence, (16th edition) at paragraph 24-14:

> *Written or oral communications which are made for the purpose of a genuine attempt to compromise a dispute between the parties may generally not be admitted in evidence.*

[33] The authors of Phipson record that the policy behind the rule is summarised in the following statement from the judgment of Oliver LJ in *Cutts v Head* [1984] Ch. 290, 306 as follows:

> *It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should … be encouraged fully and frankly to put their cards on the table … The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability*.

[34] Before discussing the particular application of the "without prejudice" rule to the facts of this case, a necessary preliminary consideration must be whether the rule applies at all. The classic statement of the scope of the rule was given in *Re Daintrey ex p Holt* [1893] 2 QB 116, which is still frequently referred to in decisions and texts relating to the "without prejudice" rule. At page 119 of the report, Vaughan Williams J said:

> *In my opinion, the rule which excludes documents marked "without prejudice" has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation…*

[35] The word "*dispute*" in this context was long taken to mean that the parties must be engaged in litigation or litigation must have been threatened before the "without prejudice" rule would apply. This is apparent from the decision of Barker J in *Butler v Countrywide Finance Ltd* (1992) 5 PRNZ 447 who also dealt with the meaning of "*negotiation*" in this context. He said:

> *I have looked at the documents as suggested in the* Daintrey *case. Whilst not strictly in dispute because there were no Court proceedings either pending or threatened, the parties were in negotiation; therefore the documents should be protected from disclosure under the "without prejudice" rule.*

[36] In that case, it was common ground that the parties had been in a commercial dispute for some time and had been conducting a lengthy negotiation in an effort to

resolve that dispute. The obvious inference to be drawn from this is that, in relying on the parties being in *"negotiation"*, Barker J meant negotiation relating to an existing dispute.

[37] In *City Realties (Rural) Ltd v Wilson Neill Ltd* (1996) 9 PRNZ 164, Master Thomson rejected that view and seemed to suggest that the "without prejudice" rule could apply in the absence of any dispute provided the parties were "in negotiation" for any purpose. In support of this proposition, Master Thomson advanced a policy argument that a successful conclusion to negotiations could mean the avoidance of possible litigation.

[38] In my view, that argument is inherently flawed. Litigation would only be a likely outcome of negotiations if those negotiations related to an existing dispute. Put another way, a failure to reach agreement in negotiations unrelated to an underlying dispute would not give rise to a cause of action.

[39] Master Thomson's conclusion in the *City Realties* case is inconsistent with the decision of the Court of Appeal in *D F Hammond Land Holdings Ltd v Elders Pastoral Ltd* (1989) 2 PRNZ 232 where, at page 236, Hardie Boys J said:

> *The privilege attached to "without prejudice" communications is based to a large degree on considerations of public policy. It is intended to encourage and facilitate the negotiation and settlement of disputes, by preventing any possible admission of liability being raised against the party making it.*

As I read this dictum, it clearly speaks of "negotiation" as meaning "negotiation of disputes".

[40] The proposition that the "without prejudice" rule may apply in the absence of an existing dispute is also inconsistent with the views expressed by the authors of authoritative texts.

[41] In Halsbury's Laws of England (4th edition) Vol 17(1) at paragraph 887, the authors explain the "without prejudice" rule as follows:

> *Letters written and oral communications made during a dispute between the parties, which are written or made for the purpose of settling the dispute, and which are expressed or otherwise proved to*

have been made 'without prejudice', cannot generally be admitted in evidence.

[42] In The Law and Practice of Compromise (5th edition) by Foskett, the author says at paragraph 27-09:

> *As is plain from the foregoing discussion, communications (including specific offers) in negotiations genuinely aimed at settlement are generally protected from revelation at any subsequent trial of the action in the event that the negotiations do not produce a resolution. … It is, perhaps, axiomatic that discussions cannot be treated as being "aimed at settlement" if at the time they take place there is no dispute (or no extant dispute) to settle.*

[43] In The Modern Law of Evidence (6th edition) by Keane, the author says at page 664:

> *The essential pre-condition for a claim to without prejudice privilege is the existence of a dispute. The privilege, therefore, will not protect correspondence designed to prevent a dispute arising.*

[44] In support of this last statement, the author cites the decision in *The Prudential Assurance Company Ltd v The Prudential Insurance Company of America* [2002] EWHC 2809 (Ch) where the Vice-Chancellor Justice Strand decided that "without prejudice" privilege did not apply to correspondence which was created to prevent a dispute arising rather than to compromise an existing dispute. He then said at paragraph 20:

> *It does not appear to me that the considerations of public policy described by Oliver LJ in* Cutts v Head *and referred to with approval by Lord Griffiths in* Rush & Tompkins *[1989] 1 AC 1280, 1299 have any application to these communications. Nothing had been said or done by either party which was likely to give rise to any litigation the outcome of which might be affected by any admission made in the course of these negotiations. And if the protection of the 'without prejudice' rule is extended to communications of this nature the effect will be to withhold from the court evidence which may be material in many diverse contexts without good reason.*

[45] I adopt the view expressed in these texts and decided cases that the "without prejudice" rule cannot apply in the absence of an existing dispute between the parties to the communication in question.

[46] As to the meaning of the term "dispute" in this context, it is clear that in recent years the application of the "without prejudice" rule has been extended by a broader construction of the word which does not limit it to situations in which

litigation has either been commenced or threatened. On any view of the matter, however, for a dispute to exist there must be a significant difference between the expressed views of the parties about a matter concerning them both.

[47] Adopting that broad approach and having regard to the findings of fact made by the Authority, there is nothing in this case to suggest that there was an actual dispute between the parties at the time Mr Owen invited Mr Davidson to speak privately with him. The Authority found as a fact that BSH was dissatisfied with the performance of Ms McDonald. It also found that BSH initiated a disciplinary meeting on 20 July 2004 to discuss that dissatisfaction with her. The Authority did not, however, make any findings of fact about what occurred at that meeting other than to say "*This meeting took the usual course for meetings of this kind…*". Critically, there was no finding of fact that Ms McDonald disagreed with the views of her employer about her performance or that those views were even explained to her.

[48] On this basis, I am unable to infer that there was a dispute between the parties on 20 July 2004 when the discussions between Mr Owen and Mr Davidson took place. Accordingly, I find that the "without prejudice" rule cannot apply to what they said to each other that day or to their subsequent correspondence as being for the purpose of compromising a dispute.

[49] I record that I would also have reached the same conclusion even if I had found there was a dispute in existence prior to Mr Owen approaching Mr Davidson on 20 July 2004. As Colgan J said in paragraph [19] of his decision in the *Enterprise Motor Group* case, there remains a residual jurisdiction to consider evidence of "without prejudice" communications where the effect of excluding it will be more prejudicial than admitting it. Exercising that jurisdiction, I would adopt the proposition advanced by the authors of Cross on Evidence at paragraph 10.48:

> *If the making of a statement itself constitutes a cause of action, or is an ingredient of one, it is submitted that the statement is not privileged because it cannot be regarded as incidental to "without prejudice" discussions aimed at settling a pre-existing litigation or dispute.*

[50] In this case, the Authority found that the initiation by BSH of an "*exit strategy*" in the course of a disciplinary inquiry was destructive of its employment

relationship with Ms McDonald and was implicitly a significant breach of its duty to her as an employee. It was therefore a key ingredient of her claim to have been unjustifiably constructively dismissed and ought not to be protected by "without prejudice" privilege.

[51] For these reasons, I do not accept Mr Owen's first submission and find that the Authority did not err in law in having regard to evidence about the communication between Mr Owen and Mr Davidson.

Constructive dismissal?

[52] I have concluded earlier in my discussion of the Authority's determination that, in reaching the conclusion that Ms McDonald was constructively dismissed, the Authority seemed to apply the principles enunciated by the Court of Appeal in the *Auckland Electric Power Board* case. In doing so, the Authority properly instructed itself and did not err in law.

[53] In taking that approach, the Authority made several findings of fact. Mr Owen's primary submission was that those findings of fact were not open to the Authority because they relied on evidence of what was said in the "off the record" discussions he had with Mr Davidson. In light of the conclusion I have reached that evidence of those discussions was not subject to privilege, that submission must fail.

[54] In the amended statement of claim, the plaintiff also advanced the proposition that the Authority erred in law in finding that Ms McDonald "*could refuse to return to work and resign in these circumstances.*" I understood this to be an allegation that, as a matter of law, the resignation of an employee who refused to work when called upon to do so by his or her employee could not be regarded as a constructive dismissal. In his submissions, Mr Owen did not pursue this allegation but, to ensure the issue is disposed of, I record that I do not accept the proposition. The fact that the employer may not wish the employee to leave does not preclude the employee's leaving being regarded as a constructive dismissal – see *Review Publishing Company Ltd v Walker* [1996] 2 ERNZ 407.

Contribution

[55] The third proposition on which the plaintiff's challenge was based was that the Authority erred in law in finding that Ms McDonald had been unjustifiably

dismissed "*and in then not considering whether there had been any contributory conduct*" by her. This was a reference to s124 of the Employment Relations Act 2000 which provides:

> ***124 Remedy reduced if contributing behaviour by employee***
> *Where the Authority or the Court determines that an employee has a personal grievance, the Authority or the Court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance,—*
> *(a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and*
> *(b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.*

[56] As Mr Owen correctly submitted, the provisions of s124 are mandatory once the Authority has found that the employee has a personal grievance.

[57] Mr Owen submitted that it was apparent from the determination that the Authority had failed to consider contribution as required by s124. Firstly, he noted that, in its determination, the Authority did not refer to the issue of contribution or make any findings of fact in relation to possible contribution by Ms McDonald.

[58] Secondly, Mr Owen referred me to s174 of the Employment Relations Act 2000 which provides:

> ***174 Determinations***
> *In recording its determination on any matter before it, the Authority, for the purpose of delivering speedy, informal, and practical justice to the parties,—*
> *(a) must—*
> *(i) state relevant findings of fact; and*
> *(ii) state and explain its findings on relevant issues of law; and*
> *(iii) express its conclusions on the matters or issues it considers require determination in order to dispose of the matter; and*
> *(iv) specify what orders (if any) it is making; but*
> *(b) need not—*
> *(i) set out a record of all or any of the evidence heard or received; or*
> *(ii) record or summarise any submissions made by the parties; or*
> *(iii) indicate why it made, or did not make, specific findings as to the credibility of any evidence or person; or*
> *(iv) record the process followed in investigating and determining the matter.*

[59] Mr Owen then submitted that, presuming the Authority complied fully with its duty under s174, it cannot have considered the issue of contribution because it stated no findings of fact relating to the issue of contribution. In this regard, Mr Owen relied particularly on s174(a)(i).

[60] There is logical force in Mr Owen's submissions on this point but Mr Twomey did not directly answer them in response. Rather, Mr Twomey sought to persuade me that, in any event, there could have been no proper finding that Ms McDonald had contributed to the situation that gave rise to her personal grievance. Relying on *Paykel Ltd v Ahlfeld* [1993] 1 ERNZ 334 and *Beazley v Department of Justice* [1995] 2 ERNZ 465, Mr Twomey submitted that there must be a causal connection between the employee's conduct and the employer's conduct giving rise to the personal grievance before a finding of contribution can be made. He then submitted that, on the findings of facts recorded by the Authority in its determination, it was not possible to find such a connection and that this sufficiently explained the Authority's failure to advert to the issue of contribution in its determination.

[61] I cannot accept that submission. The most recent statements of the law regarding contribution are those of the Court of Appeal in *Waitakere City Council v Ioane* [2004] 2 ERNZ 194 and [2005] 1 ERNZ 1043. While those decisions were made in the context of ss 40 and 41 of the Employment Contracts Act 1991, the principles enunciated and applied by the Court of Appeal are equally applicable to the analogous provisions in s124 of the Employment Relations Act 2000. At paragraph [30] of the later decision, the Court said:

> *[30] These sections refer to "the situation that gave rise to the personal grievance". This language must be considered broadly and, in the present context, extend to the entire history of the dispute between Mr Ioane and his superiors. In other words, the assessment required by ss 40(2) and 41(3) is not confined to considering whether the actions of Mr Ioane were causally linked to the procedural infelicities that resulted in the decision that his dismissal was procedurally unjustified, see* Ark Aviation Ltd v Newton *[2001] 1 ERNZ 133 (CA) at para 42.*

[62] Applying those principles, the facts as found by the Authority do not preclude a conclusion that the conduct of Ms McDonald which gave rise to BSH's concerns about her performance prompted BSH's decision to initiate an exit strategy and thereby contributed to the situation that gave rise to her personal grievance.

[63] In any event, having found that Ms McDonald had a valid personal grievance, the Authority was bound by s124 to consider whether, as a matter of fact, there was contribution by Ms McDonald. Equally, s174 imposed a duty on the Authority to record the findings of fact it made on that issue. Even if the Authority found as a fact that there was no contributory conduct by Ms McDonald, it was obliged by s174 to record that finding of fact. These obligations apply to both the Court and the Authority in every case in which an employee is found to have a valid personal grievance and remedies have to be considered.

[64] The Authority's silence on the issue of contribution in this case can only mean that it has either failed to consider contribution and make the necessary findings of fact or that it has failed in its duty under s174 to record the findings of fact it did make. In either event, the Authority has erred in law in the sense that it has not discharged its statutory duty.

Disposition of the challenge

[65] The conclusions I have reached on the three aspects of the challenge are:

a) The "without prejudice" rule did not apply to the discussion which took place between Mr Owen and Mr Davidson on 20 July 2004 and the subsequent communications between the parties which arose out of it. Accordingly, the Authority was entitled to hear evidence of those communications and to take that evidence into account.

b) The Authority applied an appropriate test to determine whether Ms McDonald had been constructively dismissed and made findings of fact on the basis of evidence it was entitled to have regard to.

c) The Authority was required to consider whether Ms McDonald contributed to the situation giving rise to her personal grievance and to record in its determination the findings of fact it made in that regard. In failing to mention the issue of contribution at all in its determination, the Authority was in breach of either s124 or s174 of the Employment Relations Act 2000.

[66] Having concluded that the Authority erred in failing to mention the issue of contribution in its determination, there is nothing further I can do given the nature of this particular challenge. The form of the challenge was a matter for the plaintiff.

Although it had the alternative of a de novo hearing of the whole matter, the plaintiff elected a non de novo hearing based on the facts as found by the Authority. I have heard no evidence and the Authority made no findings of fact which would enable me to reach a conclusion about the extent, if any, to which Ms McDonald may have contributed to the situation giving rise to her unjustifiable constructive dismissal. I therefore reach no conclusion about whether there was any contribution. If the plaintiff wishes to pursue the matter further, it may apply to the Authority to reopen its investigation but, in that case, it will be a matter for the Authority whether to grant such an application.

Comment

[67] The result of this case was very largely dependent on the findings of fact made by the Authority. In particular, the conclusion that there was no dispute between the parties at the time negotiations commenced and the consequent finding that the "without prejudice" rule did not apply to those negotiations was the result of the limited nature of the findings of fact made by the Authority. Such an outcome will be unusual.

Costs

[68] Costs are reserved. Although the plaintiff has succeeded on one aspect of the challenge, the remedies awarded by the Authority remain unaffected by my decision. The plaintiff's victory is small at best and may in fact be pyrrhic. My initial inclination is that costs should lie where they fall but, if either party wishes to persuade me that I should make an award of costs, counsel should file and serve a memorandum by 31 January 2007. In that event, counsel for the other party will have a further 14 days to file and serve a memorandum in reply.

A A Couch
Judge

Judgment signed at 11.00am on 7 December 2006

Representatives: Advocacy Assistance Ltd, Christchurch, for the Plaintiff
Purnell Creighton, Christchurch, for the Defendant