

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2011] NZEmpC 75
ARC 119/10**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN MICHAEL ALEXANDER TALBOT
Plaintiff

AND NEW ZEALAND AIR LINE PILOTS'
ASSOCIATION INDUSTRIAL UNION
OF WORKERS INC
Defendant

Hearing: 23 June 2011
(Heard at Auckland)

Counsel: Plaintiff in person
Richard McCabe, counsel for defendant

Judgment: 29 June 2011

JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] The issue in this challenge from a determination¹ of the Employment Relations Authority is whether the defendant's (the Union's) Rules preclude reconsideration of a dismissed complaint of conduct prejudicial to the Union or any of its members, by one member of the Union against another.

[2] It is important to state clearly the limited nature of the issues on this challenge. There is a plethora of documentary evidence submitted by both parties describing the circumstances in which there was a reconsideration of the complaint. However, this is not a case either about the plaintiff's conduct that was the subject of the complaint or about the correctness of a legal opinion subsequently provided to the Union also about the plaintiff's conduct. These materials are not relevant to the

¹ AA447/10, 18 October 2010.

narrow but important legal issue raised by the case and which must be determined. I will, therefore, not make any reference to those extensive documents except as may be strictly necessary to decide the issues in this case.

No live issue?

[3] The Union says that there is no live issue for consideration by the Court because Michael Talbot was successful in that another union member's complaint against him has not been taken further and he is neither at risk of sanction nor otherwise prejudiced. Whilst that is strictly correct, I do not consider that it would be just to dismiss the challenge out of hand and otherwise than on its merits for the following reasons.

[4] That is a plea that was apparently advanced by the Union before the Employment Relations Authority but was rejected by it, albeit without written reasons. It is not difficult to understand why the Union might be keen to have its Rules interpreted and clarified. That is a valid function of such proceedings in addition, of course, to resolution of a particular individual's case. Employment law is, if not unique, then in a special position that the Authority and the Court can give these or other parties guidance for the future and for the avoidance of future litigation.

[5] The latest word on moot appeals is the judgment of the Supreme Court in *Orlov v ANZA Distributing (NZ) Ltd (in liquidation)*.² In those proceedings a lawyer, Mr Orlov, had costs awarded against him (and his clients on a joint and several basis) by the High Court. Mr Orlov appealed against that order but then all the parties to the litigation (including Mr Orlov) settled it. The parties agreed, however, that Mr Orlov could pursue his appeals against the costs judgment to allow him to challenge the correctness in law of that decision and the facts supporting it. In these circumstances, Mr Orlov's appeal had become moot. Although the Court of Appeal indicated a willingness to hear Mr Orlov's appeal, it required a number of conditions including that Mr Orlov be required to fund a contradictor. He did not do so and his

² [2011] NZSC 28.

appeal was struck out. The Supreme Court's judgment was on Mr Orlov's application for leave to appeal against the striking out by the Court of Appeal.

[6] The Supreme Court referred to, and affirmed its judgment in, *Gordon-Smith v R*.³ In that case, the Supreme Court, following *R v Secretary of State for the Home Department ex Salem*⁴ agreed that "mootness is not a matter that deprives a court of jurisdiction to hear an appeal."⁵ The Supreme Court in *Gordon-Smith* continued at para [16]:

The question of whether this Court should hear an appeal which otherwise qualifies under statutory criteria for a grant of leave but is moot, is rather one of judicial policy. In general, appellate courts do not decide appeals where the decision will have no practical effect on the rights of parties before the Court, in relation to what has been at issue between them in lower courts. This is so even where the issue has become abstract only after leave to appeal has been given. But in circumstances warranting an exception to that policy, provided the Court has jurisdiction, it may exercise its discretion and hear an appeal on a moot question.

[7] The Court of Appeal in *Gordon-Smith* concluded that such exercises of discretion were not confined to cases of public law. Indeed, it cited the judgment of the Court of Appeal in an employment law case, *Attorney-General v David*⁶ as authority for that proposition. This is not a case where the mootness has arisen between the Authority's determination and the hearing of the challenge. Whilst it may have been a stronger case for dismissal for mootness in the Authority, it is less so now and the unique employment law issues and those of union discipline of members have caused me to exercise the discretion not to dismiss the challenge without consideration on its merits.

[8] Had Mr Talbot been successful in the Authority it is very likely that the Union would have challenged that determination and would have resisted any suggestion that there was no live issue for determination on its challenge. Mr Talbot has a determination of the Authority that is adverse to him. The statute allows him a right of challenge. This Court should be very reluctant to bar access to justice for reasons of convenience or changes in circumstances. Mr Talbot is, in my view,

³ [2008] NZSC 56, [2009] 1 NZLR 721.

⁴ [1999] 1 AC 450.

⁵ *Gordon-Smith* at [16].

⁶ [2001] ERNZ 291, [2002] 1 NZLR 501.

entitled, for himself and on behalf of other members of the Union whose conduct may be the subject of complaint, to establish authoritatively the interpretation and application of the Union's Rules governing such serious matters. This is a disciplinary function in which Union members are at risk of penal sanctions.

[9] For the foregoing reasons I consider that the challenge should not be dismissed without a consideration of its merits.

The facts

[10] Mr Talbot is a member of the Union. It received a complaint by another member, Paul Lyons, that Mr Talbot had engaged in conduct prejudicial to the best interests of the Union or any of its members. Such complaints can be made by members against members and the Union's Rules provide both a procedure for dealing with such complaints and, if they are upheld, for sanctions to be imposed including, ultimately and very seriously, cancellation of the affected member's membership of the Union. The Union's Rules govern these matters. This is a disciplinary function in which Union members are at risk of penal sanctions.

[11] Upon receipt of Mr Lyons's complaint under r 13(1)(f), the Union's Board of Management referred this to an investigatory sub-committee under r 13(5). The sub-committee investigated Mr Lyons's complaint and reported back to the Union's Board of Management that "the complaint does not establish a prima facie case to be answered" and gave its reasons for so concluding.

[12] Rules 13(6) and (7) provided:

- (6) The investigatory sub-committee shall consider whether the complaint establishes a prima facie case to be answered and, at the conclusion of those considerations, shall report back to the Board of Management in writing stating either that "The complaint does establish a prima facie case to be answered" or that "The complaint does not establish a prima facie case to be answered" and giving its reasons for its decision. The decision of the majority of the investigatory sub-committee shall be the decision of the investigatory sub-committee.
- (7) Where the investigatory sub-committee reports to the Board of Management that the complaint does not establish a prima facie case to be answered, the Board of Management shall forthwith advise the

complainant in writing, enclosing a copy of the sub-committee's report, that the complaint will not be further pursued.

[13] Although the Union then wrote to Mr Lyons and to Mr Talbot enclosing copies of the sub-committee's report to it, it did not advise that the complaint would not be pursued further.

[14] Instead, the sub-committee's report was sent to the Union's next Board of Management meeting held on 16 December 2009. The minutes of that meeting record that the Board of Management directed the Union's Mark Rammell to write to Mr Lyons to inform him that his complaint would not be pursued. Mr McCabe, counsel for the Union, conceded that this direction had not been complied with despite the requirement of r 13(7) that the Board of Management "... shall forthwith advise the complainant in writing, enclosing a copy of the sub-committee's report, that the complaint will not be further pursued."

[15] More than a month later, Mr Lyons requested the Union to re-investigate his complaint and enclosed for that purpose a legal opinion which Mr Lyons had obtained on the matter of the complaint. Mr Lyons complained that the sub-committee had not had legal advice available to it when it first considered his complaint.

[16] This re-submitted complaint was considered by the Union's Board of Management which resolved "[t]hat the investigatory sub-committee reviews their decision on [Mr Lyons's] prejudicial conduct complaint against Captain Mike Talbot, considering the legal opinion provided to the Board of Management."

[17] The Board of Management then referred the complaint and the legal opinion to the sub-committee. The sub-committee issued a second report to the Board of Management which stated that after reviewing Mr Lyons's complaint and the legal opinion, it considered that the complaint "does not establish a prima facie case to be answered" and gave its reasons for that.

[18] The Board of Management then received the sub-committee's second report and later wrote to Mr Lyons and Mr Talbot advising them that the sub-committee had

reviewed its decision and had reconfirmed its initial view that the complaint did not establish a prima facie to be answered. On this occasion, however, the Board of Management advised the parties expressly that the complaint was not going to be pursued.

[19] Despite his vindication by his peers, Mr Talbot has nevertheless complained that the process to which he was subjected by the Union was unlawful and seeks a declaration accordingly.

The Rules – Scheme and interpretation

[20] Mr McCabe urged the Court to interpret the Union's Rules "sensibly and realistically so as to give the practical workaday effect".⁷ He also submitted that the Rules should be interpreted and applied "flexibly and pragmatically".⁸ Those principles are derived from cases dealing with the interpretation and operation of rules of incorporated societies and I do not disagree with their generality. Unions such as the defendant are also incorporated societies but where the rules to be interpreted and applied are disciplinary and the process governed by them may lead to penal sanctions of substantial severity, I conclude that such particular rules should also be interpreted and applied strictly with the benefit of any doubt or ambiguity going to the member or members at risk of such consequences. That is a consistent approach to interpretation with that applied by courts to penal statutes.

[21] In that connection, also, general powers allowed for in the Rules cannot trump express provisions where the exercise of the general power would be contrary to, or inconsistent with, the specific provision or provisions. That is especially important in the context of disciplinary rules. Put in the terms of this case, where an express rule creates a procedure for dealing with disciplinary matters, the Union is not entitled to subvert, augment, or avoid that express process by invoking a general power of management of the Union's affairs. Members, especially members who are the subject of a complaint, are entitled to expect that the disciplinary exercise invoked against them will adhere to the processes set out in the Rules. The Union

⁷ *Walker v Mt Victoria Residents Assoc Inc* [1991] 2 NZLR 520.

⁸ *Antunovich v Dalmatinsko Kulturno Društvo Incorporated* (Dalmatian Cultural Society) [2001] NZAR 229.

can not adopt an ad hoc procedure for dealing with the complaint that is both inconsistent with the particular provisions of the Rules and is not known in advance of the application of the disciplinary process by those subject to it.

[22] The general scheme of the Union's Rules is to create a collective of employees for their mutual benefit and advancement of their interests in particular in dealings with their employers. Some provisions of the Employment Relations Act 2000 (the Act) apply to the relationship between the Union and its members. They are required to act in good faith towards each other as that term is defined in s 4 of the Act. Turning to r 13 in particular, the Rules acknowledge that at times members may fall out with the Union or between themselves. The Rules are intended to ensure the maintenance of standards of conduct between adversaries in those circumstances and, in particular, by providing for just and democratic sanctions where those standards are contravened. The process is intended to be democratic in the sense that elected union members have decision making roles in such cases. It is intended to be just by the requirement for fair procedures including the application of the rules of natural justice appropriate in such circumstances.

[23] Next, the Rules recognise that some such complaints may be unworthy of more than preliminary investigation and assessment and that a member so complained against should not have to endure either ongoing prosecution of such a complaint or repetition of that complaint. Complaints which survive that preliminary sifting or filtering mechanism are the subject of more prescriptive procedures which are not at issue in this case.

[24] The scheme of the Rules for dealing with complaints by members against others involves a preliminary filtering or sifting process under r 13(6) which requires an investigatory sub-committee to determine whether a prima facie case of breach of the Rules is established by the complainant. The purpose of this is to dispose, at an early stage, of complaints that even on their own and without supplement (including input from the member complained against) will not be upheld. The scheme of the Rules is also that members, whilst they should be able to complain of breaches of the Rules by other members, should not be able to do so repeatedly, interminably, or

without good cause if such complaints have been dismissed on this ‘no prima facie case’ basis.

[25] So it follows that the Rules provide that if an investigatory sub-committee determines that there is not a prima facie case, the Union’s Board of Management must advise the complainant that the complaint will not be pursued further. Not only must that advice be given but it is clearly implicit in that advice also that the complaint will indeed not be pursued further. That precludes the complainant from coming back to try again, with or without additional material. The rule may be seen to place an onus upon a complainant to put forward his or her best case of breach of the Rules to the Union, but that is what its members have determined should happen. Rule 13(7) is one that precludes second or subsequent bites of the cherry.

The Authority’s determination and decision of the challenge to it

[26] As to r 13(7), the Authority concluded at paragraphs [22] and [23] of its determination:

[22] ... Rule 13(6) & (7) does not expressly address the BoM’s ability to refer a complaint back to an investigatory subcommittee after it has received a report on whether or not there is a prima facie case to answer.

[23] I find that omission means the BoM is not on the face of it limited or precluded by rule 13 from referring a matter back to an investigatory subcommittee. ...

[27] That is an unduly narrow and literal interpretation of the rule. It does not take sufficient cognisance of the requirement of the Union to advise a complainant that the complaint will not be further pursued once an investigatory sub-committee has reported that a prima facie case has not been made and given its reasons for that conclusion.

[28] Had the Union complied with the clear and unambiguous requirements of r 13(7), that would have been the end of the complaint. The union should not (and indeed could not) have gone back on its assurance that it was required to give to the complainant, which it would also have had, as a matter of natural justice, to have copied to Mr Talbot, that the complaint would not be pursued further. Mr Lyons’s

re-submission of his complaint was just that. It was supported by a new legal opinion that had not been presented to the investigatory sub-committee earlier but it was still the same complaint. The complainant had his opportunity to include a legal opinion with his earlier complaint but appears not to have taken that opportunity. It was only when the investigatory sub-committee concluded that there was no prima facie case that Mr Lyons sought to bolster his complaint with a new legal opinion. The Union's Rules did not allow this.

[29] The Authority's determination continued:

[23] ... I therefore need to go on to consider whether such action is prohibited by any other rule or is contrary to NZALPA's objects or any other BoM powers.

[24] I have reviewed the Rules and not found any rule which expressly prevents the BoM receiving additional information about a complaint, or once that has occurred, from determining how best to address that. It was open to the union to limit the BoM's powers in this way, so I consider it significant that it has not actually done so.

[30] With respect to the Authority Member's reasoning, that is also not correct. Rule 13(7) contains the barrier to the Union's ability in law to reconsider the complaint having been obliged to advise the complainant (and necessarily, as it did, Mr Talbot also as a matter of natural justice) that it would not pursue the complaint further. It is axiomatic that the Union will be true to its word and would indeed not do so. That is what it ought to have done in response to the re-submission of the complaint pursuant to the express obligation of so advising the complainant which it also breached.

[31] On this point of the Union's compliance with r 13(7), the Authority found at paragraphs [45] and [46] of its determination as follows:

[45] The BoM's letters to L and Mr Talbot on 9 December 2009 did not comply with the rule 13(7) requirement to advise the complainant in writing *that the complaint will not be pursued further*. This form of words was not used at all, in contrast to the BoM's letter to [Mr Lyons] dated 4 June 2010 which stated *the Board of Management will not pursue your complaint under rule 13 any further*.

[46] I therefore find that the requirements of rule 13(7) were not met until 4 June 2010, so the Subcommittee was still in existence, and not functus officio, at the point it received the complainant's legal opinion.

[32] With respect to the Authority's reasoning, this cannot be right. It has ignored the Union's breach of r 13(7) and the requirement for the Board of Management to so advise a complainant. This was not a discretionary step that it was at liberty to waive.

[33] The matter was further dealt with by the Authority as follows:

Did rule 13(7) prohibit the reference back to the Subcommittee?

[47] I do not accept [Mr] Talbot's interpretation of rule 13(7) which would mean that an investigatory subcommittee's report to the BoM is final, and can never be revisited under any circumstances. I accept Mr McCabe's submission that such an analysis is in direct conflict with:

- (a) The *prima facie* nature of the Subcommittee's investigation, and the meaning of *prima facie*;
- (b) The substantial powers conferred on the BoM under Rule 26;
- (c) General legal principles as to how incorporated society rules are to be construed.

[48] To interpret rule 13(7) in the manner advocated by [Mr] Talbot would in my view impose significant restrictions on the union's autonomy to deal with its own internal affairs, in circumstances where it has obviously chosen not to limit itself in that way.

[34] Again, with respect to the Authority Member, that is not correct. The hierarchy of mechanisms for dealing with such complaints makes it clear that if they do not survive investigatory sub-committee scrutiny to a relatively low *prima facie* threshold, such complaints are to go no further. General powers to manage the Union's affairs cannot be invoked to achieve an outcome that is contrary to what the Rules provide specifically. One consequence of this early final disposition of complaints, albeit at a low threshold level, is that complainants (or the Union) are not permitted to bolster their complaints subsequently as Mr Lyons attempted to do in this case by providing a legal opinion. Whether the investigatory sub-committee should have had legal advice in its deliberations is not to the point. It could have called for this itself but did not. Mr Lyons could have provided his legal opinion with his initial complaint but he did not.

Observation

[35] Although not strictly an issue in this case, I consider that the Union's Board of Management was in breach of the rules of natural justice in one other respect. This was its refusal of Mr Talbot's request, once he learnt of the existence of the legal opinion that had been provided to the Board of Management and the investigatory sub-committee, that he be provided with a copy of this. The refusal to do so by the Union was not based on any question of the opinion's privileged nature and indeed could not have been because Mr Lyons had waived privilege in the legal advice he had received by asking the Union to consider it. Although the Union's refusal to provide a copy of the opinion contained in a faxed letter to Mr Talbot on 17 March 2010 was not an absolute refusal, that does not negate the obligation on the Union to have given Mr Talbot a copy of the opinion when he asked for it. The letter of refusal contained the following:

I do not consider it appropriate at this stage to provide you with copies of Captain Lyons' legal opinion and correspondence as requested. Whilst very mindful of the principles of natural justice in this process and of the Association's duty of care to you as a member, Captain Lyons' complaint is still at the investigatory stage [under Rule 13(6)] to determine whether it establishes a *prima facie* case of prejudicial conduct to be answered.

If and when any response or other input from you is required, I assure you that you will be provided with all relevant documentation.

[36] It was not sufficient for the Union to say that it was mindful of its obligations of natural justice towards Mr Talbot or that he might eventually be provided with a copy of the opinion. Actions speak louder than words in such circumstances. In all the circumstances, Mr Talbot was entitled to know what Mr Lyons had alleged against him and, more particularly and immediately, of Mr Lyons's attempts to persuade the Union including to reopen its investigation of his misconduct which, it now transpires, the Union was not entitled to do under its Rules.

[37] Mr Talbot was at risk of an adverse decision by the Union's investigatory sub-committee and should have been afforded an opportunity both to address the Union as to whether the investigatory sub-committee was entitled to reconsider its previous decision, and to know of the basis on which it was being asked to do so.

That was important at least because the opinion tendered by Mr Lyons included not only the opinion writer's views about the substance of the complaint but also about the legal status of the Union's ability in law to undertake a reconsideration: see para [1] ("Introduction") of the opinion.

[38] This observation does not form part of the decision of the challenge. Rather, it is offered in an attempt to assist the Union and its members about how to deal with often difficult legal and procedural matters where complaints may be made by and against Union members, and the Rules do not specify what a member complained against is entitled to receive and when.

Decision - Summary

[39] The union, by its Board of Management, breached r 13(7) by not advising the complainant in writing that his complaint would not be further pursued. It was obliged to so advise Mr Lyons as a consequence of the investigatory sub-committee's report that the complaint had not established a prima facie case to be answered by Mr Talbot. The Union was bound by such advice as it should have given. It cannot be permitted to benefit from its breach of r 13(7) by being permitted to do what the rule required it, to advise what it would and would not do. Whatever powers the Board of Management had, and as the Authority found, it was not empowered to first breach the Rules and then to exercise powers contrary to although purportedly in reliance on that breach.

[40] For the foregoing reasons, Mr Talbot's challenge succeeds and the determination of the Authority is set aside. The plaintiff is entitled to a declaration that the defendant acted unlawfully and in breach of its Rules when it purported to re-consider the complaint by Mr Lyons against Mr Talbot.

Costs

[41] Mr Talbot did not seek costs against the Union and none are awarded.

GL Colgan
Chief Judge

Judgment signed at 8.30 am on Wednesday 29 June 2011