Sutherland v Auck Hospital Bd 1.12.88

20/12 WGL SET 3

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP.2759/88

NOT RECOMMENDED

IN THE MATTER of Part I of the Judicature Amendment Act 1972

BETWEEN A.H.G.T. SUTHERLAND & OTHERS

First Plaintiffs

AND P.H. HEPPOLITE & OTHERS

Second Plaintiffs

AND T.M. PURU & ANOTHER

Third Plaintiffs

AND AUCKLAND HOSPITAL BOARD

First Defendant

AND W. McKEAN

Second Defendant

Hearing: 1 December 1988

Counsel: Mr C. R. Pidgeon, Q.C. and Mr S. D. Cummings for Plaintiffs
Mr D. C. S. Morris for Defendants

Judgment: 1 December 1988

ORAL JUDGMENT OF WYLIE, J.

I begin this judgment by saying first, that it is a matter of some regret to me that more time has not been available to give consideration to many aspects of it that I would like to have done, but the urgency of letting the parties know where

they stand has precluded that. Second, and very importantly, I make this comment that the disputes between the plaintiffs or some of them and the defendants have in one form or another been very public for a long time, that is a matter for regret, but it is a fact which cannot be escaped. The respective arguments of the parties to that dispute have been widely publicised. I, in this application, am in no way concerned with the merits of that dispute. I do not know anything about it in detail and nothing that I say in the course of this judgment is to be taken as indicating any view on the merits of that dispute. Nor is anything that I say in the course of this judgment to be taken as either a victory or a defeat for any of the parties to these proceedings because as you will well know this is only the very earliest stage of the proceedings. I am concerned purely with legal considerations and not with the merits which will be, one expects, fought out in full at a later stage in this Court.

I am dealing only with an application for interim orders brought under s.8 of the Judicature Amendment Act 1972. The orders sought are ones prohibiting the first defendant, the Auckland Hospital Board and Mr McKean, who is I think the general manager of the Board or their successors in title, from taking any action in closing the Whare Paia, Whare Hui or the Kohanga Reo units at Carrington Hospital until further order of the Court; secondly, an order preventing the carrying out of decisions to terminate the employment of the plaintiffs in each case until further order of the Court.

Before I come to deal with the brief facts it is as well that I mention that the proceedings are brought, as it happens, at a curious time in the life of the Hospital Board, if indeed it still exists, in that as from this very day as I understand it, it either has been already or is about to be, replaced by an Area Hospital Board under the Act of that name of 1983 as amended earlier this year. Indeed I was told from the bar that the inaugural meeting of the Area Hospital Board, which I understand would have consisted of the same personnel who were formerly the Auckland Hospital Board was to be held earlier this afternoon. It does seem that any procedural problems that might have arisen because of that transition are overcome by s.7 of the Area Health Boards Act and by the various transitional provisions in the amending legislation this year. Counsel did indicate the possibility that an order substituting the Area Health Board might be desirable. It does not at the moment seem necessary, but if any such order is necessary I should certainly be prepared to make it immediately on application.

The application now before me arises as a result of the Hospital Board having passed a resolution on 17 October 1988 in this form, and I shall read it in full:

> "(a) That the Regional Managers, Mental Health Services, be directed to effect the closure of the Whare Paia and the Whare Hui Units at Carrington Hospital and to take whatever other associated action is necessary in related areas to ensure the effective care of patients and the fair treatment of staff.

(b) That the Board re-affirm its support for Maori health initiatives.

(c) That the Board state that the closing of the Whare Paia and the Whare Hui was not a rejection of opportunities for the practice of Maori values and methods at Carrington Hospital.

(d) That the Board undertake to immediately find ways of retaining and adding to the fundamental concepts of the Maori Health Units at Carrington Hospital."

In effect then, there was a resolution to close the Whare Paia and Whare Hui units. A consequence of that was that the Board gave notice of dismissal to the nursing staff and other health workers at those two units. The closure and the dismissal are to take effect from Monday next, 5 December.

It is against those decisions that the present proceedings have been brought by way of judicial review under the Judicature Amendment Act 1972. In order to be made the subject of such an application for review it is necessary that the decision challenged should be, relevantly for present purposes, the exercise of a statutory power of decision and counsel for the plaintiff submits that the resolution I have referred to and the acts of dismissal are indeed decisions carried out pursuant to statutory powers, specifically the powers of management of the hospital conferred by the Hospitals Act, s.7.

Counsel for the defendants submits, however, that this was not the exercise of a statutory power of decision and that it was no more than the exercise of a function of the Hospital

Board in carrying out its statutory powers. Counsel referred me to Van Duyn v Helensville Borough Council (1984) 5 NZAR 55 where Barker, J. observed that:

> "Parliament could never have intended that a municipal corporation should have its day to day decisions - even contentious ones - subject to constant judicial review."

I refer also to the decision of the Court of Appeal in New Zealand Stock Exchange v Listed Companies Association Inc. [1984] 1NZLR 699 where the same thought was expressed in reference to the Stock Exchange in that case, the Court saying that Parliament could never have intended that any corporate body could have all its commercial operations subject to constant judicial review.

The matter may not be entirely free from doubt and it may be a matter that will be argued on the substantive hearing of this action. In my view, however, and for present purposes, I am prepared so to treat the decision of the Board, namely that this was the exercise of a statutory power of decision. I note the provision of s.55 of the Hospitals Act as amended in the Hospitals Amendment Act (No.3) 1988. This replaced an earlier section under which, if a Board wished to close any institution or restrict the forms of care in any institution or cease to provide a particular service such things could only be done with the consent of the Minister. Under the 1988 amendment the consent of the Minister is no longer required although he may give a direction. The very fact, however,

that decisions such as restricting the forms of care, treatment or relief granted in or from any institution or service under its control are included in that section, for which specific power is given to a Board by way of limitation of its general functions of providing health services, leads me to think that a decision to exercise such a right is indeed the exercise of a statutory power of decision. Nor do I think that in the circumstances of this case the decision to close two units specialising in particular psychiatric care and assessment at the Carrington Hospital, a matter or matters which have been so prominantly and widely aired over a period of years, units which were instituted as a result of a Commission of Inquiry, I think in 1983, which have been the subject of various reports and other inquiries and committee investigations, could in any way be regarded as part of the daily function of the Hospital Board or is any part of the day to day operations which it carries on. So for present purposes I consider that the Board was exercising a statutory power of decision and is subject to review.

The power to grant interim orders under s.8 arises only if it is, in the opinion of the Court, necessary to do so for preserving the position of the applicants. In exercising the Court's discretion under that section to make interim orders it is generally accepted that although by no means exhaustive, the same kinds of tests that are considered in applications for interim injunctions, are relevant and that the Court should take into account matters of that kind, and should

exercise its discretion having regard to the strength of an applicant's case, the necessity to preserve the position and the implications of such an order in the wider sphere.

I first, then consider whether there is on the face of the papers presently before me, a case on which the plaintiffs might and I emphasise might, succeed. I do not attempt to resolve the question of whether the appropriate test in a case of this sort should be merely to show that a serious issue arises or whether it should be the higher standard of showing a prima facie case or indeed whether a more general approach should be taken as was indicated in Carlton & United Breweries Ltd v Minister of Customs [1986] 1 NZLR 423. I think it is sufficient if I say this, that on one or more of the several matters I am about to mention I would be satisfied under any one of those tests and at the end of the day standing back and looking where the overall justice of the situation lies at this preliminary stage.

Looking now at the aspects of the Hospital Board's decision which are subject to attack, I think it is not disputed that the decision of the Board was made without giving the present applicants any opportunity to see or answer reports on which the Board's decision was based. It seems to be conceded that the Board's resolution was reached as a result of a report obtained by it from a Mr Tauroa principally, and I think, on other reports also. The applicants say they did not have the opportunity of seeing

those reports and making submissions on them and that is not disputed. Also it does not seem to be disputed that the notices of dismissal to staff were sent after decision taken without any of the defendants or any representative of the defendants being given the opportunity of being heard in their defence. Now, although the relationship of the applicants as employees of the Board is one of contract, that does not disentitle them to the rights which natural justice would confer upon them That is clear from Malloch v Aberdeen Corporation [1971] 2 All ER 1278 a decision of the House of Lords. The fact that statutory authorities even though exercising contractual powers and rights are nevertheless subject to the principles of administrative law and natural justice is clear from two decisions of the Court of Appeal under the name Webster v Auckland Harbour Board, to be found in [1983] NZLR 646 and [1987] 2 NZLR 129. That is not to say that if only one of the plaintiffs or two or three of the plaintiffs for reasons relating individually to them were to be dismissed, that I would necessarily conclude that they would be entitled individually to the protection of the rules of natural justice, they may well be, but that is not this case. There was, as counsel for the plaintiffs has described it, a wholesale sacking of all the employees of these units. In the narrow sense I am concerned here with the rights of the plaintiffs individually and in that respect, in terms of s.8, with the necessity to preserve the plaintiffs' position, and it could be argued and indeed has been, that I look only at the personal position of each of the plaintiffs. I think,

however, that in the context of this case I am entitled to, and indeed bound to look at the matter in a rather wider way. Counsel for the defendants, on the question of exercise of discretion, submitted that there would be alternative remedies for the plaintiffs for wrongful dismissal, if that was held ultimately to be the case, namely for damages and so on. He also pointed to the evidence of Mr Stacey, the newly appointed regional manager for the Area Health Board which shows that the plaintiffs have been invited to apply for re-employment, in some categories in a similar position to that which they have hitherto occupied, in others in some related kind of employment. That too, said counsel for the defendants, was a matter for me to take into account in the exercise of my discretion as being a remedy available to the plaintiffs which rendered it unnecessary to preserve their present position.

In the context of this case I think that is too narrow a view to take. Rightly or wrongly, and I express no view on that, these plaintiffs have been associated for some time with a specialised form of assessment and treatment unique to this hospital, established for particular reasons, which were voiced by the Gallen Report. Their position as plaintiffs as I see it, is not simply as individual employees, but rather as members of a specialised service which they run in a particular way and which is not easily replaced or reconstituted merely by an offer to re-employ them in a somewhat different capacity even in the same place, and certainly not compensated by a simple monetary award in due

course, if entitlement can be proved, of damages for wrongful dismissal. That concept of looking at the plaintiffs in a way representative of the service they have been providing in these two units also has relevance to the complaint that the decision to close those units was taken without the opportunity for them to make submissions in opposition. Whether in the long term when this case comes to a substantive hearing those propositions which I have just advanced are found to be justified on a full scale hearing, remains to be seen. But in my view on the evidence as it is presently before me the concept is at the least arguable there is a serious issue to be argued coming to the level at the moment as matters are before me, to, I think, a prima facie case. In any event looking at the matter in the round, and not constrained necessarily by the principles applicable to applications for interim injunctions, there is I think a situation which is open to judicial review. So in that sense I think the plaintiffs pass the hurdle of showing that their case is open to judicial review.

In the course of those remarks I have really dealt also with the issue of whether interim relief is necessary to preserve the position of the plaintiffs. The position of the plaintiffs at the moment, of course, is that they are not yet out of their employment. They have received notice of dismissal, but they are not in fact dismissed. The position to be preserved for them is their continued employment in the units and having regard to those considerations I discussed a

few moments ago in my view interim relief is necessary to preserve that position.

There are some other aspects of the plaintiffs' case which I think too raise serious issues which may well attract judicial review. There may be some doubt, and it is a matter for argument, as to whether the Hospital Board, knowing that it was to pass out of existence today, should have reached decisions as to closure and as to dismissal of a large number of staff which would take effect after the Board ceased to be responsible for those aspects of its services and for those members of its staff. That may well be a matter that goes to the legality or the reasonableness of the Boards actions. There may also be a question of the legality of the dismissals of those of the applicants who were employed under contract. The nature of the contract is such that in my view there is an arguable case that at least by implication the contract was initially for a one year term subject to termination for disciplinary matters. The contract is by no means clear in its wording. In paragraph 7 it is provided that the appointment may be terminated by two weeks' notice, but later there is reference to automatic renewal on the completion of one year's satisfactory service. Read together, there may well be an argument that the notices of dismissal were contrary to the terms either expressed or implied of that contract. So those too are matters which would raise issues justifying these proceedings being brought and, for the reasons I have earlier mentioned, interim relief being granted.

There was criticism in the plaintiffs' case that the Board failed to take into account considerations of Maori health aspects, Maori aspirations, Maori requirements. I would not at this stage be prepared to hold that there was any prima facie or arguable case presently apparent in that respect having regard to the express provisions of paragraphs (b), (c) and (d) of the resolution which I have read. Clearly the Board was conscious of those Maori values and health initiatives and there is nothing sufficient in my view before me at the moment to suggest that the Board did not take sufficient account of those matters, although, of course, such evidence may well be produced at a later stage.

It may appear a significant matter that the Board is apparently intending to resume a treatment centre in the same premises on 6 December under a different name with different staff. It has not yet determined finally what will replace the assessment function of the Whare Hui unit, but initially at any rate those functions are to be undertaken at various community mental health centres. The Kohanga Reo unit which was basically a family care adjunct to the other two units was not specifically referred to in the Board's resolution, but it is apparent that it too is to be closed on 5 December and there does not seem to be any immediate proposal for the replacement of that. Nevertheless the indications given by Mr Stacey in his affidavit are that in one way or the other the Board does intend to replace perhaps in a different form, the

units which it closes and the staff which it has dismissed. Taking into account the overall implications of the order that I intend to make it does not seem to me that at least in the short term there will be any insuperable obstacle in the status quo continuing. That may mean that there will be a continuation of the disputes and arguments that have occurred in the past, I do not know, but the very fact that the Board intends to replace the services which it would otherwise get rid of on 5 December strongly suggests to me that one of the objects of its resolution was to have a clean sweep, to start again, with different staff. The offer to employ existing staff is not absolute. In the sense that the invitation is only to apply, (and my questioning counsel for the defendants it was made quite clear) the Board was inviting application only, but reserving the right to reject applications. It seems to me that there is an inference to be drawn that one of the objects of this exercise was to, as I say, have a clean sweep, to get rid of a problem both in the nature of the treatment being given and in the personalities of those involved. I carefully refrain from commenting on whether such action is justified or not. As I said at the outset, neither the Board nor the plaintiffs should regard the result I am about to announce as being a victory or a defeat. Bit if indeed that was a motive of the Board in the action that it has taken then all the more reason why on the information presently before me it should have observed the rules of natural justice. Whether that finally proves to be the case is not for determination at this point.

As will be apparent from all that I have said I think this is a proper case for interim relief to be granted. The second defendant, the manager of the Board, is joined because in relation to staff matters he has some specific statutory functions. For that reason the orders I am about to make will apply against both the defendants and they will be orders as follows:

1. An order prohibiting the first and/or second defendant and its or his successor in title from taking any action to close the Whare Paia and/or Whare Hui and/or Kohanga Reo units until further order of the Court.

2. There will be a further order staying or prohibiting the enforcement of the decisions to terminate the employment of the first and/or second and/or third plaintiffs at the said institutions until further order of the Court.

3. Costs will be reserved.

It is my view that the substantive hearing of this matter should be brought on at the earliest possible opportunity so that a final solution may be reached. I direct that a judicial conference be held at a date to be fixed and notified to counsel so that the future course of the proceedings can be decided upon and appropriate timetable orders fixed.

Solicitors: Sturt and Partners, Auckland for Plaintiffs
Meredith Connell & Co., Auckland for Defendants

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