IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2010] NZEMPC 35
CRC 18/09

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND	
IN THE MATTER OF	a preliminary question of jurisdiction
BETWEEN	HERITAGE EXPEDITIONS LIMITED Plaintiff
AND	GRAEME JOHN FRASER Defendant

Hearing: On the papers, submissions received 11 December 2009, 29 January and 12 February 2010

Appearances: Linda Ryder, counsel for the plaintiff
Defendant in person

Judgment: 31 March 2010

JUDGMENT OF JUDGE A A COUCH
IN RELATION TO PRELIMINARY ISSUE

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[1] This judgment concerns the jurisdiction of the Employment Relations Authority to reopen an investigation. In particular, the question to be answered is whether the Authority has jurisdiction to reopen an investigation of its own volition.

[2] The background to the matter is detailed in my earlier judgment dealing with an application for an extension of time in which to challenge the Authority's determination[1]. In essence, the Authority originally determined[2] that Mr Fraser had been employed by Heritage Travel Group Limited and had been unjustifiably dismissed by that company. The Authority ordered Heritage Travel Group Limited to pay remedies to Mr Fraser totalling nearly $14,000.

[1] CC 11/09, 26 August 2009

[3] Six months later, on 28 April 2009, solicitors representing Mr Fraser wrote to the Authority suggesting that Heritage Expeditions Limited had been Mr Fraser's employer at the time of his dismissal. On 20 May 2009, the Authority issued a minute to Mr Fraser and to Heritage Travel Group Limited in which it said:

> [1] On 29 October 2008, the Authority issued its determination on this matter.
>
> [2] It has recently been brought to the Authority's attention that, following the applicant's attempts to enforce the determination, the respondent contends Mr Fraser was not employed by the respondent cited in the intituling.
>
> [3] Having considered the correspondence from the applicant's counsel, the Authority is reopening this matter at its own election in order to consider this issue alone.

[4] Having reopened the investigation in this manner, the Authority conducted a further investigation meeting on 4 June 2009. Mr Fraser appeared in person. There was no appearance for Heritage Travel Group Limited. On 3 July 2009, the Authority issued a supplementary determination[3] in which it concluded:

> [12] I find the correct employer of Mr Fraser during the time of his employment was Heritage Expeditions Limited. His employment was never with Heritage Travel Group Limited.
>
> [13] As a result of this finding I order Heritage Expeditions Limited to pay the applicant the sum set out in the original determination, namely
>
> - Lost remuneration in the sum of $6,346.18 gross
> - Compensation in the sum of $7,500 net

[5] In the final paragraph of the determination, the Authority also made an order for costs in favour of Mr Fraser of $2,097.50.

[6] It is this determination citing the plaintiff as a party and making orders against it which is the subject of the challenge. In my earlier judgment, I granted an extension of time within which the plaintiff might file that challenge. The statement of claim was duly filed in time and a statement of defence to it was also filed. I then held a telephone conference with the parties on 9 November 2009.

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[2] CA 159/08, 23 October 2008
[3] CA 93/09

[7] The original statement of claim was filed by Rodney Russ, a director of the plaintiff. It was not in an appropriate form. Before the telephone conference on 9 November 2009, however, the plaintiff had engaged Ms Ryder to represent it and it was she who took part in the conference call. In the course of that call, Ms Ryder outlined the arguments the plaintiff wished to advance in support of its challenge. They included the proposition that the Authority had no jurisdiction to reopen the investigation "at its own motion" and that its subsequent determination was therefore a nullity.

[8] After discussion with Ms Ryder and Mr Fraser, I directed that the jurisdictional issues be heard and decided as preliminary issues. In my minute dated 9 November 2009, I defined those issues as being:

> a) Having given its substantive determination, did the Employment Relations Authority have jurisdiction to reopen its investigation on its own motion?
>
> b) If the answer to a) is "no", do the substantive issues determined by the Authority in its supplementary determination remain before the Court for decision?

[9] Ms Ryder and Mr Fraser agreed that these issues should be the subject of written submissions and dealt with on the papers. I set a timetable for the provision of submissions and concluded my minute by saying:

> [9] If the substantive issue of the identity of Mr Fraser's former employer remains before the Court following decision of the preliminary jurisdictional issues, there will be a further telephone conference to decide how the matter is to proceed. Options at that stage would include further mediation or a judicial settlement conference. …

Parties' submissions

[10] Ms Ryder and Mr Fraser have provided written submissions as agreed but both have dealt with the entire range of issues raised by the pleadings rather than just the jurisdictional issues they were required to address. At this stage of the matter, I have put their submissions relating to other matters to one side and had regard only to their submissions on the jurisdictional issues.

[11] The Employment Relations Act 2000 explicitly gives the Authority jurisdiction to reopen an investigation. Clause 4 of Schedule 2 provides:

> **4 Reopening of investigation**
> (1) The Authority may order an investigation to be reopened upon such terms as it thinks reasonable, and in the meantime to stay the effect of any order previously made.
> (2) The reopened investigation need not be carried out by the same member of the Authority.

[12] The essential issue is whether this clause enables the Authority to reopen an investigation of its own volition or only on the application of a party.

[13] For the plaintiff, Ms Ryder made a series of submissions supporting the proposition that the power conferred by cl 4(1) could only be exercised on the application of a party.

[14] Ms Ryder's first submission was that the power conferred by cl 4(1) was an exception to the principle of functus officio, the effect of which is that, once a judicial decision has been given, the decision-maker cannot alter it. That being so, she submitted that the power could only be exercised in accordance with what she described as "the statutory code" comprising the Employment Relations Act 2000 and the Employment Relations Authority Regulations 2000.

[15] Ms Ryder's second submission relied on reg 10 which provides:

> **10 Application to Authority to reopen investigation**
> Every application under clause 4 of Schedule 2 of the Act to reopen an investigation must—
> (a) be lodged with an officer of the Authority; and
> (b) be in form 4; and
> (c) be accompanied by the prescribed fee.

[16] Ms Ryder submitted that the effect of this regulation was that the scope for exercise of the power conferred on the Authority by cl 4(1) was limited to applications made in accordance with reg 10. She suggested that this would ensure that all parties to the matter in which it was sought to reopen the investigation would have an opportunity to be heard on the question. She submitted that, if the Authority could exercise the power of its own volition, affected parties would not necessarily have an opportunity to be heard and this would risk injustice.

[17] Finally, Ms Ryder pointed to several provisions of the Employment Relations Act 2000 which she said conferred power on the Authority to act on its own volition and contrasted this with the lack of any express power to do so in cl 4. A reading of the provisions, however, shows that only one of those to which she referred confers such a power expressly. That is cl 5 of Schedule 2 which gives the Authority power "on the application of any party to the matter, or of its own volition" to issue witness summons.

[18] In his submissions, Mr Fraser emphasised that the power conferred by cl 4 is not subject to any express constraints and submitted that there was nothing else in the Employment Relations Act 2000 from which a legislative intention to constrain the power could be inferred. He noted that the powers of the Authority in other respects, particularly those in s 160, were wide and that a similarly wide construction of cl 4 would therefore be consistent with the scheme of the statute.

Discussion and decision

[19] As with any exercise in statutory interpretation, the starting point must be s 5 of the Interpretation Act 1999:

> **5 Ascertaining meaning of legislation**
> (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.
> (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.
> (3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

[20] The text of cl 4(1) is straightforward. The plain meaning of the words used is simply that the Authority has power to reopen an investigation. That power is not qualified in any way by the clause itself. It follows that the issue then becomes whether this is inconsistent with the purpose of the legislation or if there is any proper reason to depart from the plain meaning of the words used.

[21] The immediate purpose of having a power to reopen an investigation is to enable the Authority to prevent injustice. To that end, the principle consideration in the exercise of the power must be the justice of the case. This fundamental purpose

can be achieved whether the proposal to reopen an investigation comes from a party or from the Authority itself. Indeed, it might be said that the purpose of cl 4 will be best achieved by a wide interpretation because there may be occasions on which the Authority becomes aware of reasons to reconsider its determination which are not known to the parties.

[22] A useful indication of the intended meaning of cl 4(1) may be found in the history of the provision. Under the Employment Contracts Act 1991, the power of the Employment Tribunal to order a rehearing was conferred by s 91(1)which provided:

> (1) The Tribunal shall in every proceeding, on the application of an original party to the proceeding, have the power to order a rehearing to be had upon such terms as it thinks reasonable, and in the meantime to stay proceedings.

[23] The same power was conferred on the Court by s 125(1), the wording of which was identical to s 91(1).

[24] The wording of s 125(1) of the Employment Contracts Act 1991 has been carried over in cl 5(1) of Schedule 3 of the Employment Relations Act 2000 which now gives the Court power to order a rehearing. It remains explicitly qualified by the words "on the application of an original party to the proceeding". That may be contrasted with cl 4(1) where, in conferring the power on the Authority, those words have been omitted. This is a clear indication that the Authority's power under cl 4(1) was not intended to be constrained in that way.

[25] As with all statutory discretions, however, the power conferred by cl 4(1) must be exercised judicially and in accordance with the statutory role of the Authority. That role is defined in s 157 which provides in ss (2) that the Authority must, in carrying out its role, comply with the principles of natural justice. Section 173(1) is also directly relevant. It provides:

> **173 Procedure**
> (1) The Authority, in exercising its powers and functions, must—
> (a) comply with the principles of natural justice; and
> (b) act in a manner that is reasonable having regard to its investigative role.

[26] Thus, although the power conferred on the Authority by cl 4(1) is wide in its terms, that power may only be properly exercised in accordance with well-established principles. Those principles generally include ensuring that all parties potentially affected by the exercise of the Authority's powers are fully and fairly informed of what is to be considered and have a proper opportunity to be heard.

[27] This is consistent with the Authority's primary role set out in s 157(1) which includes making a determination in each case according to the substantial merits of the case. That can only be achieved if all those potentially affected by any determination the Authority might make are aware of the issues and have a proper opportunity to contribute to the investigation.

[28] By these means, the statute itself ensures that parties to proceedings in which it is sought to reopen an investigation have a proper opportunity to be heard. There is therefore no need for that end to be achieved by constraining the Authority's power under cl 4(1) as Ms Ryder suggested.

[29] Another fundamental difficulty with the argument advanced by Ms Ryder is that it relies on regulations impliedly limiting the scope of a statutory provision. As I observed in *Vice-Chancellor of Lincoln University v Stewart (No 1)*[4]:

> The Employment Court Regulations 2000 are a form of delegated legislation made pursuant to the power conferred by s 237 of the Employment Relations Act 2000. Unless the empowering statute so provides, delegated legislation cannot override or otherwise be inconsistent with a statute, particularly the statute under which it was made.

[30] That principle extends to discretions conferred by statute. The exercise of a statutory discretion cannot be constrained by regulations, rules or other delegated legislation unless the statute provides for that effect.

[31] In conclusion, there is no reason to depart from the plain meaning of the words used in cl 4(1) of Schedule 3 to the Employment Relations Act 2000. It follows that the Authority may exercise the power to reopen an investigation of its own volition.

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[4] [2008] ERNZ 132 at paragraph [11]

Comment

[32] Although I have found as a matter of jurisdiction that the Authority had the power to reopen its investigation in this case, that is not to say that the power was exercised appropriately. That is a separate matter which, had the plaintiff sought judicial review or mounted a non de novo challenge on the point, would have to be decided in light of all the relevant evidence. As the plaintiff has challenged the whole of the Authority's determination and sought a hearing de novo, however, there is no need to embark on that inquiry.

[33] In her submissions, Ms Ryder also suggested that, because the plaintiff had not been a party to the original proceedings before the Authority, it could not have been a party to the reopened investigation. That overlooks s 221 of the Employment Relations Act 2000 which gives the Authority a wide discretion to join or strike out parties. By substituting the plaintiff for Heritage Travel Group Limited, the Authority effectively exercised those powers. Again, the manner in which that power was exercised may well have been open to judicial review or to a non de novo challenge but that is not the form of proceedings the plaintiff has chosen to initiate in the Court.

[34] The substantive issue, being the identity of the defendant's employer at the time his employment ended, is now properly before the Court and needs to be resolved. There will now be a further telephone conference with the parties' representatives to decide how the matter will proceed.

Costs

[35] Costs in relation to this matter to date are reserved.

A A Couch
Judge

Signed at 2.45 pm on 31 March 2010.