

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2012] NZEmpC 188  
ARC 62/12**

IN THE MATTER OF an application for leave to file challenge  
out of time

BETWEEN ABC01 LIMITED (FORMERLY  
PRIMARY HEART CARE LIMITED)  
Plaintiff

AND HOWARD DELL  
Defendant

**ARC 65/12**

IN THE MATTER OF an application for compliance order

BETWEEN HOWARD DELL  
Plaintiff

AND ABC01 LIMITED (FORMERLY  
PRIMARY HEART CARE LIMITED)  
Defendant

Hearing: 6 November 2012  
(Heard at Auckland)

Appearances: Tane Rakau, agent for ABC01 Limited  
Howard Dell in person

Judgment: 6 November 2012

---

**JUDGMENT OF CHIEF JUDGE G L COLGAN**

---

[1] There are five interlocutory issues on these associated files to be decided, and logically in the following sequence.

[2] The first matter to be addressed before any other is the plaintiff's challenge to the jurisdiction of the Employment Court to hear and decide this proceeding. That is despite the company itself having invoked the jurisdiction of the Court by seeking leave to challenge out of time against, and (if leave is granted) to challenge, the determination of the Employment Relations Authority in which it was the respondent.<sup>1</sup>

[3] As I understand the submission, the plaintiff as a limited liability company is now afforded the protection of an incorporation known as Ngai Tupango Incorporation (Ngai Tupango) which is empowered to, and is now making directions independently of the Employment Court, about the course of these proceedings pursuant to the provisions of the Te Ture Whenua Maori Act 1993. This is said to be necessarily to the exclusion of the Employment Court. So, again as I understand Mr Rakau's argument, the plaintiff says that the case is in a separate and exclusive legal system that the Employment Court is not empowered to adjudicate in the dispute between Howard Dell, and the company.

[4] The Court is not concerned with what the company may have elected to do as regards their representation in this dispute. ABC01 Limited is entitled to be represented (including in the Employment Court) by Ngai Tupango and its representatives. Nor is the Court concerned with whether there may now be an additional and alternative dispute resolution process that ABC01 Limited seeks to invoke. Rather, the issue for the Court, raised by the company, is whether it is to continue in its appellate role in this dispute pursuant to the Employment Relations Act 2000 (the Act). For reasons which I will give more fully in a further judgment, I do not accept the proposition that the Employment Court is now without jurisdiction or power on grounds of lack of Parliamentary sovereignty to hear and decide the matters now before it.

[5] There is, however, another basis for this submission by the company which must, necessarily, assume that the sovereignty argument fails as it does.

---

<sup>1</sup> [2012] NZERA Auckland 272.

[6] The plaintiff claims that there was no privity of contract between the parties so that Mr Dell was never in the company's employ. It says that he failed to establish this preliminary issue so that the Court has no jurisdiction to deal with the matter now. It would, however and logically, have to go further and say that the Employment Relations Authority likewise had no jurisdiction to enter into its investigation, let alone to make the determination that it did.

[7] There are several difficulties for the plaintiff with this submission at this stage at least. First, if that was the position, it is surprising to say the least that the company did not take steps to bring that to the Authority's attention so that the proceeding could be nipped in the bud at the very earliest stage. Next, the plaintiff does not know what happened at the Authority's investigation meeting because it was absent. I must assume that the experienced Authority Member would have required Mr Dell to satisfy him of the existence of an employment agreement before moving to consider whether it had been breached and then compensation for such breach. I imagine that the Authority would have required Mr Dell to satisfy it of this fundamental jurisdictional prerequisite on oath or affirmation and that he did so satisfy the Authority Member. That is not to say, of course, that if leave is granted, the plaintiff can now establish that this was not so but, until then, it cannot be said without more as the plaintiff claims to do, that there was simply no jurisdiction to get to this point.

[8] Next, the plaintiff relies on copies of two letters from the New Zealand Consul General in Los Angeles, California, addressed to Mr Dell dated 21 July 2010 and 17 January 2011. The effect of these letters was to decline Mr Dell's applications for a work visa. That meant, on its face, that Mr Dell was not permitted to perform work in New Zealand. It did not prevent him from entering New Zealand under other immigration arrangements and, of course, it did not prohibit him from working for the plaintiff but outside New Zealand. Indeed, even if Mr Dell had worked in New Zealand for the company without having a work permit, and although this may have constituted an immigration offence, it would not necessarily have negated any employment contract obligations that the company may have owed to him for work performed for it, even if in breach of immigration law.

[9] These things can only be established after a full hearing of Mr Dell's claims on their merits with active participation of both parties. These assertions by the company are, at best, premature.

[10] I have determined that the challenges to the Court's jurisdiction must fail, so that the Court is competent to now deal with the other matters before it. These include:

- ABC01 Limited's application for leave to challenge out of time the determination of the Employment Relations Authority which found against the company;
- If leave to challenge is granted, whether execution of the Authority's determination should be stayed and, if so, whether on terms;
- Whether Mr Hinchcliff should be joined as another defendant to Mr Dell's application for a compliance order; and
- Whether Mr Dell should be granted a compliance order requiring the company to comply with the Authority's compliance order requiring it to pay Mr Dell compensation for unjustified dismissal

[11] I deal first with ABC01 Limited's application for leave to file its challenge to the Authority's determination out of time. In the Authority, ABC01 Limited was known as Primary Heart Care Limited (PHCL). Howard Dell brought proceedings claiming that he was owed wages for 28 months' work with PHCL. The Authority concluded that although the company had been properly served and that its investigation meeting had been brought to its notice, there was no appearance by the employer and no excuse for this. In these circumstances, the Authority continued with its investigation meeting on 24 July 2012. On 10 August 2012 the Authority released its determination, finding PHCL liable to Mr Dell for the sum of \$186,666.66 for unpaid wages over the 28 months of his work for the company.

[12] Apart from the company's current representative (Ngai Tupango) giving notice to the Authority that it acted for PHCL, neither that corporation nor any other person took the company's part in any way in the proceedings in the Authority and it is recorded in the determination as having failed absolutely to comply with its timetables. The Authority indeed concluded that the company's failure was "wilful rather than inadvertent" and was consistent with Mr Dell's account of his difficulties in dealing with the company during the period of his employment.

[13] The time for challenging the Authority's determination as of right expired on 7 September 2012. On 5 September 2012 Ngai Tupango sent a statement of claim to the Employment Relations Authority challenging its determination. This was the wrong recipient. Ngai Tupango's Tane Rakau says that it supposed that its challenge would be lodged with the body whose decision was challenged. The documents, which I am prepared to assume would have arrived at the Employment Relations Authority by 7 September 2012, eventually found their way to the Employment Court on 11 September 2012, by which time the 28 day period had expired. The documents were returned by the Court to Ngai Tupango on 13 September 2012 with advice that it was entitled to apply for leave to challenge out of time and also advice that a stay of execution of the Authority's orders could be sought from the Authority. This application for leave was filed on 17 September 2012. Mr Rakau's affidavit in support explains the circumstances in which the challenge was filed in the wrong body (an erroneous assumption that an appeal would be lodged with the body appealed from), but does not address any other elements affecting the Court's discretion whether to grant leave.

[14] Mr Dell opposes the application for leave, citing the company's track record of non-involvement in and non-compliance with the Authority. He submits that the sending of the papers, two days before the expiry of the appeal period, to the wrong address "shows a lack of respect for the ERA judicial process" and says (but without more) that the Authority told the applicant how the challenge should be lodged. Mr Dell also asserts that Mr Rakau's account of events is untrue. He says that since the Authority issued its determination, the director of the company (John-William Hinchcliff) has resigned and it has changed its name in what Mr Dell believes to be an attempt to judgment-proof itself. Mr Dell submits that by not granting leave, the

Court “will bring this kind of corporate activity to an immediate end” will give him an opportunity to enforce his determination. Mr Dell asserts, at least by implication, that if leave is granted, he may be prejudiced by the company being wound up or going into liquidation so that he will not be able to recover the fruits of his judgment. Mr Dell’s other grounds for opposing leave being granted are really a reiteration of the foregoing, albeit expressed in passionate language.

[15] There is no affidavit evidence provided by ABC01 Limited setting out what its defence might be to Mr Dell’s claims if leave is granted. Its draft statement of claim asserts that Mr Dell was never employed by it although it acknowledges making him a written offer of employment which included a form of individual employment agreement. The draft statement of claim continues that Mr Dell accepted the offer of employment and signed and returned the written agreement to the company. It claims, however, never to have signed the employment agreement and that it withdrew the offer of employment before there was an agreement reached between the parties.

[16] ABC01 Limited does not explain at all, let alone satisfactorily, why it did not participate in the Authority’s investigation process despite having had a number of opportunities to do so. It is all the more surprising given its adamant assertions now of strong defences to Mr Dell’s claims. For example, the company asserts that not only was Mr Dell never employed by it but that he never undertook work for it and was only rarely in New Zealand during the period for which he has claimed wages, being engaged principally as a professional tennis coach at a club in Newport Beach (USA) and elsewhere around the world.

[17] Despite those failings, ABC01 Limited has, however, explained (albeit barely) the circumstances in which its challenge was not filed in the Court within time. It clearly sought to challenge the Authority’s determination, took timely steps to do so, and only failed because the papers were sent to the wrong body. Ngai Tupango is not an experienced employment advocacy service and its explanation is not so incredible, as Mr Dell invites the Court to find, that it should be rejected. After this error was brought to the plaintiff’s notice, subsequent steps were taken in a timely manner.

[18] Although this material ought to have been contained in an affidavit sworn by a knowledgeable person such as Mr Hinchcliff, I am prepared in the circumstances to have some regard to the contents of the company's draft statement of claim to address the requirement for the provision of information about its defence if leave is granted. This raises a number of potential defences including whether an employment agreement was ever concluded, whether Mr Dell was capable of performance of that agreement, and whether it was performed.

[19] Addressing the factor of prejudice to Mr Dell, I am satisfied that this can be sufficiently neutralised by attaching conditions to the grant of leave to challenge out of time, and this will be done also in the context of the conditional order for stay that I will make subsequently.

[20] Leave to challenge out of time is granted on condition that within 14 days of the date of this judgment, ABC01 Limited either pays to the Registrar of the Employment Court at Auckland the sum of \$186,666.66 to be held by the Registrar on interest bearing deposit and to be disbursed only by order of a Judge or on the written agreement of the parties, or that ABC01 Limited gives other security for that sum to the Registrar's satisfaction. This is the same condition that will attach to the next order staying execution of the Authority's determination. For clarity, I confirm that ABC01 Limited need only pay money in or otherwise give security once to satisfy both conditions attaching to these orders.

[21] I waive the requirement for Mr Dell to file and serve a statement of defence until no more than 30 days after the expiry of that 14 day period, at which latter time the draft statement of claim will become operative. Mr Dell may, of course, elect to file and serve the statement of defence before the expiry of that 30 day period. When the statements of claim and defence have been filed and served, the Registrar will arrange a telephone directions conference to deal with any outstanding interlocutory issues and set the challenge down for hearing.

[22] I now turn to the second issue for decision. As already alluded to, there will be an order staying execution of the Employment Relations Authority's determination but only on condition either that ABC01 Limited pays to the Registrar

of the Employment Court at Auckland, within 14 days of the date of this judgment, the sum of \$186,666.66 to be held by the Registrar on interest bearing deposit and to be disbursed only by order of a Judge or on the written agreement of the parties, or that ABC01 Limited gives other security for that sum to the Registrar's satisfaction.

[23] Although this is a significant sum for which security must be found, the company has been on specific notice of the possibility of this condition attaching to an order for stay since 19 October 2012 so that it has been clear about the consequences of having to give this security. If that security is not given, upon expiry of that period of 14 days from today, Mr Dell will be free to pursue his recovery of that sum against the company and the conditional leave for the company to challenge out of time will lapse.

[24] Next, I deal with Mr Dell's application to join Mr Hinchcliff as a party to his application for a compliance order. This is made under s 221 of the Act which provides materially that, in order to enable the Court to more effectually dispose of the matter before it (the application for a compliance order) according to the substantial merits and equities of the case, it may direct a party to be joined.

[25] Mr Dell says that Mr Hinchcliff is and has been the sole owner of the company now known as ABC01 Limited, but which was previously PHCL. Mr Dell claims that Mr Hinchcliff has recently resigned as a director and, on 24 August 2012, changed the name of the company from PHCL to ABC01 Limited. Mr Dell assumes that Mr Hinchcliff has done so to try to keep the company's assets from attack by Mr Dell seeking to satisfy the Authority's determination. Mr Dell says that he wishes to join Mr Hinchcliff "so that his personal property can be sequestered to pay the outstanding \$186,666.66." Mr Dell fears that Mr Hinchcliff will attempt to claim that the company has no money or move its assets "into the company trust".

[26] To join Mr Hinchcliff as a party to Mr Dell's application for a compliance order so that Mr Hinchcliff's own assets (as distinct from the company's) can be used in satisfaction of the judgment, will not meet the s 221 test of enabling the Court more effectually to dispose of that application according to its substantial merits and equities. There is no suggestion by Mr Dell that his employer was other



than the company. That is a separate legal entity from the human personality that is Mr Hinchcliff, even if he may control the company, or at least have done so when he was a director.

[27] There is, however, a legitimate purpose for joining Mr Hinchcliff as a party but this will also need to be on clear conditions. Mr Hinchcliff is in a position to influence the company to meet its legal obligations including, if security is not given or the company's challenge is unsuccessful, paying its debt to Mr Dell. That is a legitimate circumstance in which an individual corporate office holder may be joined to a compliance order application: see, for example, *Northern Clerical IUOW v Lawrence Publishing Co of New Zealand Ltd.*<sup>2</sup>

[28] So, for the purpose of enforcing any compliance order against ABC01 Limited that the Court might make (but not for the purpose of enabling Mr Dell to enforce his debt against Mr Hinchcliff's personal assets), I make an order joining John William Hinchcliff as second defendant to Mr Dell's application for compliance order under ARC 65/12.

[29] Finally, I turn to Mr Dell's application for a compliance order. Given the grant of leave for the company to challenge the Authority's determination out of time, the requirement that it provide security for the sum at issue in the proceeding within 14 days, and the need for Mr Hinchcliff who (although he has not been in court but has been represented) has just been joined as a party to that application to consider his position, I adjourn Mr Dell's application for a compliance order until 10 am on Monday 26 November 2012, that is little less than three weeks hence. If the amount in issue has been secured satisfactorily in terms of the conditions attaching to the grant of leave to challenge out of time and the application for stay, the application for compliance order will not be granted. If, however, the company fails to adhere to that condition, then it can expect that a compliance order will be made on that date and, if that is not complied with, subsequent enforcement orders may follow.

---

<sup>2</sup> (1990) ERNZ Sel Cas 667 at 672

[30] Finally I deal with the matter of costs. Although clearly notified, both at the telephone directions conference and subsequently in a Minute issued by the Court, of the date and time of hearing, there was no appearance for the company at the scheduled 9.30 am start time today. Mr Dell was, however, present via video conference call which was costing him a not insignificant amount of money. The Registrar's telephone inquiries of Ngai Tupango revealed that Mr Rakau would be able to attend on the company's behalf in about an hour and, in those circumstances and despite opposition from Mr Dell, I adjourned the hearing for that period. I accept that this resulted in wasted costs for Mr Dell in relation to the video conference call for which he should be reimbursed by the company and irrespective of the outcome of any of the other matters dealt with in this judgment. The company is required to pay separately, through the Registrar, for Mr Dell's benefit, the sum of \$400 to compensate him for the wasted video conference costs. The continued participation in this case as a party by the company is dependent upon the payment of these costs within the period of 14 days from today. If the company does not pay them, it will not be entitled to the benefits of the conditional orders that have been made in its favour today.

GL Colgan  
Chief Judge

Judgment signed at 5.15 pm on Tuesday 6 November 2012