IN THE EMPLOYMENT COURT
AUCKLAND

[2014] NZEmpC 170
ARC 59/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	HAGFISH NZ LIMITED Plaintiff
AND	DAE HYUNG CHOI Defendant

Hearing:	By memoranda of submissions filed on 25 August and 8 September 2014
Appearances:	P Coleman, agent for plaintiff T Sung, counsel for defendant
Judgment:	11 September 2014

JUDGMENT OF CHIEF JUDGE G L COLGAN

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[1] This interlocutory judgment determines the outcome of a "good faith" report called for by the Court under s 181 of the Employment Relations Act 2000 (the Act). Section 182 ("Hearings") is also engaged because, if the Court is satisfied on the basis of a s 181(1) report, and having regard to comments submitted under s 181(5), that the plaintiff did not participate in the Employment Relations Authority's investigation of the matter in a manner that was designed to resolve the issues involved, "the Court must direct, in relation to those issues, the nature and extent of the hearing."

[2] Dae Hyung Choi took proceedings in the Authority which were investigated by it on 3 June 2014.[1] Hagfish NZ Limited (Hagfish) did not appear at, or otherwise participate in, the Authority's investigation meeting. The Authority determined that

[1] *Choi v Hagfish NZ Limited* [2014] NZERA 212.

Mr Choi was employed by Hagfish and that he was owed arrears of wages by that company. It determined that the amount owed was $23,098.80 and required Hagfish to pay this sum to Mr Choi within 14 days after 4 June 2014. Hagfish was also required to reimburse Mr Choi for the Authority filing fee of $71.56.

[3] The Authority's determination records that Hagfish failed to file a statement in reply to Mr Choi's statement of problem and failed to attend the Authority's investigation meeting. The Authority said that Hagfish had been properly served with the requisite documents.

[4] On 2 July 2014 Hagfish filed a statement of claim challenging the Authority's determination. It elected to challenge by hearing de novo. The Authority's determination triggered s 181 of the Act and, by Minute dated 3 July 2014, the Court called for a good faith report from the Authority.

[5] This was furnished to the Court on 1 August 2014 and the parties have subsequently accepted the Court's invitation to make submissions on that report on the date set out in the entituling to this judgment.

[6] The Court must decide, first, whether Hagfish did not participate in the Authority's investigation of the matter in a manner that was designed to resolve the issues involved.

[7] The Authority reported that Hagfish did not facilitate its investigation. It said that despite reminders from the Authority and being requested specifically by an Authority Member to do so, Hagfish failed to file a statement in reply to Mr Choi's statement of problem. The Authority said that although Mr Coleman had previously communicated with it using an email address which was the same address to which the notice of the investigation meeting was sent, he claimed not to have received the Authority's 9 May 2014 email attaching that notice of investigation meeting.

[8] The Authority reported also that during a telephone conference call with an Authority Member on 8 April 2014, for the purpose of preparing for the investigation meeting, Mr Coleman, on behalf of Hagfish, acknowledged that it owed money to

Mr Choi but disputed the amount. Mr Coleman also asserted that Mr Choi was not an employee although the Authority reports that no substantive supporting evidence in documentary form or otherwise was put forward by Hagfish either before or at the investigation meeting.

[9] The Authority's report also records that Mr Coleman was sent an email on 9 May 2014 attaching a notice of the Authority's investigation meeting to be held on 3 June 2014. The email was not rejected electronically; yet there was no representation on behalf of Hagfish at the investigation meeting on 3 June 2014.

[10] Mr Coleman, in his submissions to this Court, said that in addition to the submissions that he made to the Authority for the preparation of its good faith report, it (the Authority) did not serve the required notice of investigation meeting in accordance with the Employment Relations Authority Regulations 2000 (the ERA Regulations). That notice of investigation meeting was sent by email to Mr Coleman. It is significant that the defendant's failure to file and serve a statement in reply meant that neither the Authority nor Mr Choi had an address for service for Hagfish.

[11] Regulation 16(3)(a)(i) of the ERA Regulations provides that in these circumstances:

- a document is to be served by leaving the notice, order, or document with the person to be served; or if that person does not accept it, by putting it down in that person's presence and bringing it to that person's notice; or

- pursuant to reg 16(3)(a)(ii), by sending a notice, order, or document by registered post at the last known residence or place of business of the person to be served; or

- pursuant to reg 16(3)(a)(iii) in the case of a company, by sending the notice, order or document by registered post to its registered office or to any postal box held in New Zealand by the company; or finally

- pursuant to reg 16(3)(a)(iv), "in such other manner as the Authority or an officer of the Authority directs".

[12] Regulation 8(3) of the ERA Regulations provides that if a party fails to lodge a statement in reply in the time specified, that party is entitled to reply or respond to the application only with the leave of the Authority. It seems clear from the Authority's report, and Mr Coleman does not contest this, that the plaintiff failed to file and serve a statement in reply. Therefore it was not strictly entitled to receive notice of the investigation meeting, although I infer that the Authority did provide that notice to Mr Coleman as a matter of courtesy.

[13] So, although in one sense Mr Coleman is right that the notice of the investigation meeting was not served in accordance with the ERA Regulations, the Authority was not obliged to do so because of Hagfish's failure to file a statement in reply including an address for service. It should not be allowed to take advantage of its default in the way it seeks to do. In these circumstances, the plaintiff's submission fails.

[14] The Court is satisfied that the Authority is correct that Hagfish did not participate in the Authority's investigation in a manner that was designed to resolve the issues involved. In these circumstances, the Court is empowered to give directions in relation to the nature and extent of the hearing.

[15] Counsel for the defendant has made submissions on what such directions should be. The plaintiff's agent has not done so, relying instead on seeking to persuade the Court (unsuccessfully) that there should be no such directions given.

[16] I direct that the only issue for judgment by the Court on the challenge will be whether Mr Choi was, at all relevant times, an employee of Hagfish. If the Court finds that Mr Choi was an employee, then the findings of the Authority that Mr Choi was owed arrears of wages, the amount of those arrears, and other ancillary orders made by the Authority, will not be the subject of the plaintiff's challenge and, subject to any adjustments for interest, the Authority's conclusions on remedies will form part of the Court's judgment.

[17] In any event, these are the issues identified by the plaintiff's statement of claim filed on 2 July 2014, to which the defendant now has the period of 30 days to plead by statement of defence. Following the filing and service of that statement of defence, the Registrar will arrange a telephone directions conference with a Judge to timetable the case to a hearing.

[18] I reserve costs on the good faith report aspect of the challenge to this point.

GL Colgan
Chief Judge

Judgment signed at 4.30 pm on Thursday 11 September 2014