IN THE EMPLOYMENT COURT
AUCKLAND

[2017] NZEmpC 35
EMPC 331/2016
EMPC 12/2017

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	NEELAM AHUJA, CHIRAG AHUJA AND RHYTHM AHUJA (RE KHOOBSURAT LIMITED) (IN LIQUIDATION) Plaintiffs
AND	NAARI COLLECTION LIMITED (IN LIQUIDATION) AND NEELAM AHUJA AND CHIRAG AHUJA Second Plaintiffs
AND	KHOOBSURAT COLLECTIONS LIMITED (IN LIQUIDATION) AND NEELAM AHUJA AND CHIRAG AHUJA Third Plaintiffs
AND	A LABOUR INSPECTOR, MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Defendant

Hearing:	On written submissions filed on 15 and 21 March 2017
Appearances:	G Bennett and C Bowdler, advocates for plaintiffs M Urlich, counsel for defendant P Gunn and G Taylor, counsel for Employment Relations Authority (appearing by leave)
Judgment:	30 March 2017

INTERLOCUTORY JUDGMENT (NO 2) OF CHIEF JUDGE G L COLGAN

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[1] This preliminary judgment deals with the nature of the hearing of a challenge by hearing de novo to a determination of the Employment Relations Authority.[1] The particular issue dealt with arises because it was the Authority, of its own motion and independently of the proceedings between the parties, which investigated and determined to penalise the first plaintiffs for obstructing its investigation of the associated case between the parties.

[2] When the case first came before me for preliminary directions, I considered that the preferable way for the challenge to proceed, in light of this background, was for the impugned findings of obstruction of the Authority and the challenge to the significant monetary penalties imposed therefor, to be proved afresh. This seemed to me then to best meet the spirit of statutory intention entitling parties dissatisfied with an Authority's determination to a challenge by hearing de novo. Most and perhaps, until now, all such challenges have been able to be prosecuted and defended by the original parties in the Authority, albeit now in different roles of plaintiff or defendant. The difference in this case is that, after concluding its inter partes investigation and determination of the Labour Inspector's claims, the Authority then set out to itself conduct an investigation into a new, albeit associated, issue. This had significant ramifications for the respondents to that new investigation, now the first plaintiffs. They have been penalised monetarily by the Authority for their obstructive conduct during the Authority's first investigation.

[3] In these circumstances, I directed that the challenge should be dealt with by a re-proving of those allegations of obstructive conduct by the first plaintiffs. I then considered that the most just way of achieving this was for the Court to appoint independent counsel to prosecute those issues which the Authority had investigated of its own motion and subsequently decided. The Authority is not a party to the first plaintiffs' challenge and I concluded that it would not be proper for it, even through counsel, to appear and prosecute those applications for penalties which the first plaintiffs have challenged.

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1 *Labour Inspector of Ministry of Business, Innovation and Employment v Ahuja* [2016] NZERA Auckland 420.

[4] In a Minute (dated 25 January 2017) which included these directions, I raised the question of payment of the costs of independent prosecution of these matters, including for consideration by the Authority itself. It had, after all, instigated of its own motion the penalty proceeding which is now the subject of challenge. This, in turn and unsurprisingly, excited the interest of the Authority which sought the assistance of the Crown Law Office in the person of experienced Crown counsel, Mr Gunn.

[5] In the foregoing circumstances, I have been invited by counsel for the Labour Inspector and by Mr Gunn to reconsider those directions made initially, particularly in light of the fact that the Labour Inspector is now prepared to undertake the role of supporting the Authority's penalties determination which is now the subject of the challenge. In short, Mr Gunn's submissions, which are supported by counsel for the Labour Inspector, say that such cases should fall to the other party in the Authority to defend on a challenge in the Employment Court as the Labour Inspector now says he/she will do in this case.

[6] In re-examining those directions, I am conscious that although there is a statutory Labour Inspector able and willing to perform that role of respondent in this case, there may be other cases that arise out of similar circumstances in which a respondent to a challenge will have no interest in being involved to defend a challenge against an order which provides for penalties to be paid to the Crown. A principled methodology needs to be established for the generality of cases and not just the first such case that appears to have arisen in this instance.

[7] I address first the submissions made to the Court by Crown counsel, Mr Gunn, which are substantially supported by the Labour Inspector. I will then deal with the written submissions made by the advocates for the first plaintiffs.

Submissions for Employment Relations Authority

[8] Counsel for the Authority makes the preliminary point, which I accept and indeed is uncontroversial, that the Authority is empowered, of its own motion, under s 134A(2)(a) of the Employment Relations Act 2000 (the Act), to do what it did in this

case: that is to initiate, investigate and determine the question whether the (now) first plaintiffs obstructed it in its investigation of the proceedings brought by the Labour Inspector. The entitlement of the Authority to do as it did in this case is, as Mr Gunn points out, reinforced by ss 160 and 161 of the Act.

[9] Mr Gunn submits that it is significant that the trigger for the Authority's commencement of its investigation of alleged obstruction was the raising by the Labour Inspector of such allegations shortly before its investigation meeting in those separate substantive proceedings. Further, counsel points out that in its investigation to determine penalties, several months later, the Authority Member took evidence from several of the Labour Inspector's witnesses in the earlier proceeding.

[10] Next, counsel submits that, notwithstanding the commencement, conduct and conclusion of the Authority's own inquiry, the parties to the subsequent challenge by hearing de novo are the parties cited in the Authority's original substantive determination as a result of the application of s 179(2) of the Act and regs 7 and 12 of the Employment Court Regulations 2000.

[11] Mr Gunn submits that it would be inappropriate for the Authority to be represented at the hearing of the challenge or for such a penalty action to be undertaken on its behalf. Being represented as if it were a party would, counsel submits, be inconsistent with principle and law. In this regard, counsel relies on the judgment of the Court of Appeal in *Secretary for Internal Affairs v Pub Charity.*[2]

[12] In *Pub Charity*, the Court of Appeal said the following in relation to the participation in a subsequent appeal or judicial review hearing of the decision-maker:

> [27] It is a well-established principle that decision-makers should not become protagonists in appeals from their own decisions. The proper course is to abide the decision of the court and not enter the fray. The decision should speak for itself. Exceptionally, the court may allow a decision-maker to appear where the court considers it may benefit from the decision-maker's assistance, for example in matters relating to the administration of the legislation at issue. A court will also sometimes hear from a decision-maker on questions of jurisdiction. The present case did involve a question of jurisdiction. However, the submissions filed by the Commission went beyond that. Further, this was not a situation where the Court did not have the benefit of full argument on

[2] *Secretary for Internal Affairs v Pub Charity* [2013] NZCA 627, [2014] NZAR 177.

> each key issue from the competing parties. Both the Secretary and Pub Charity filed comprehensive submissions.
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> (footnote omitted)

[13] I accept Mr Gunn's submission, both in principle and in practice, but it does not address adequately the essential issue in this case. Here the Authority is not a party to, and will not otherwise be a participant in, the challenge and indeed my original directions sought to ensure that outcome. This is not a case about the active participation, as a party or litigant, of the Authority. Rather, the original direction sought to remove, from the Authority to independent counsel appointed by the Court, the obligations of proving the allegedly unlawful obstruction of the Authority, at the same time as ensuring that the plaintiffs did not bear an onus of establishing their innocence as plaintiffs who, in most appeals, will bear an onus of establishing error by the decision-maker.

[14] Counsel concedes that in some cases a cited defendant, such as the Labour Inspector in this case, may not be in a position to defend an Authority-initiated penalty determination or may decide (whether for reasons of costs or otherwise) not to do so. In such cases counsel for the Authority accepts that the Court might determine that it needs to appoint an amicus. Mr Gunn submits, however, that an appropriately cited defendant such as he says the Labour Inspector is in this case, may determine whether and how the defendant wishes to respond to the challenge, and this is a decision for the defendant to make. Further, counsel submits that a Labour Inspector, in addition to assisting the Authority with the provision of witnesses to the assertions of intimidation, has particular statutory powers in relation to the recovery of penalties under employment legislation.[3] Although acknowledging that it is ultimately for the Court to determine whether it will be assisted by the appointment of independent counsel, because of the Labour Inspector's intention to participate actively in this challenge to support the Authority's determination, appointment of external counsel is not required.

[15] As to the costs of counsel who may be appointed by the Court, Mr Gunn submits that such are generally met out of public funds and should not be by way of

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[3] See Employment Relations Act 2000, s 229(7).

formal partial contribution from the Authority itself. Were that to happen, counsel submits that there may be a misunderstanding that the Authority undertakes a prosecutorial role, which it does not, and which would, in any case, be inconsistent with principle.[4]

[16] Without meaning any disrespect to counsel for the Labour Inspector, her submissions essentially reiterate those of counsel for the Authority and confirm that the Inspector will "play an active role in defending the challenge".

First plaintiffs' submissions

[17] The first is that the Authority is the 'actual' defendant in this proceeding rather than the Labour Inspector who is the cited party. The first plaintiffs say that the Labour Inspector was not a party to the Authority's investigation of what were, in effect, its own investigations into a suggestion that had been made to it that the first plaintiffs had obstructed its investigation of the Labour Inspector's claims. They say that the Authority, of its own motion, decided to investigate and therefore became a party to this proceeding, but not the Labour Inspector. They submit that if the Labour Inspector is, in effect, to be the actual and only defendant to this challenge, the Inspector is unable to put forward to the Court why the Authority, of its own motion, commenced an investigation and how this was undertaken, including what information it had or did not have at relevant stages of its investigation. The first plaintiffs say it is not proper for the Labour Inspector to step into the shoes of the Authority in a case such as this.

[18] Next, although not in logical sequence, the first plaintiffs say that the Authority acted beyond its jurisdiction to investigate whether there should be penalties for obstruction or delay, because there was no identifiable employment relationship problem in s 4(2) of the Act, the existence of which would only have provided a jurisdictional foundation for the Authority's investigation and decision. Rather, and in reality, the first plaintiffs say that the allegation or suggestion investigated by the Authority was of intimidation which is a statutory crime under the Crimes Act 1961

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[4] See *Pub Charity*, above n 2. As to the funding of counsel assisting higher or now senior courts, see Senior Courts Act 2016, s 178 which was previously found in the Judicature Act 1908, s 99A.

and not an employment problem or otherwise within the jurisdiction of the Authority to investigate.

[19] The advocates say that although the Labour Inspector participated in the Authority's investigation by producing witnesses, he or she (the Inspector) did not "[prosecute] the breach". The first plaintiffs' remaining submissions address the merits of the claims for penalties against them which are not currently before the Court, and pose a rhetorical question whether they may be able to seek damages from the Authority if it acted without jurisdiction. That, too, is not a matter currently before the Court and on which I express no view.

Decision

[20] The usual position in inter partes litigation, including in challenges from determinations of the Authority, is that it is for the respondent to the challenge to support the Authority's determination or otherwise to oppose the challenge. The legislative provisions empowering the Authority to undertake investigations of its own motion and to sanction parties, including by penalising them financially as a result of such self-initiated and self-determined investigations, provide an unusual, if not unique, challenge as to how the Court deals most justly with a case such as this.

[21] Although not a direct analogy, some assistance can be obtained from the manner in which judicial review cases against courts or other judicial bodies are conducted. In such cases, however, the Court or other judicial body is a cited party to the proceedings for judicial review although so, too, are or should be other original parties to the associated proceedings in which it is alleged that the Court acted unlawfully. In almost all such cases the Court will abide the judgment of the reviewing superior court, although will provide such appropriate assistance as transcripts of hearings, exhibits and the like if called upon to do so. In such cases, however, there is an expectation that the other original party or parties will participate in the judicial review and support the actions of the respondent court. The situation here is not completely analogous. In this case the respondent party (the Inspector) did not initiate the proceeding. Rather, it was the Authority itself which did so and then heard and decided it.

[22] Where, as in this case, there is a statutory officer (a Labour Inspector) who is both a party to the challenge and is willing to participate fully in it to support the Authority's determination, the Court will allow (as I do in this case) that course to be followed. The Court will not require the appointment of independent counsel to participate in this case. To that extent I vary the directions given in my original Minute.

[23] However, I do not change (nor have I been invited to) the directions about the manner in which the challenge will be heard. These are, in this case, that the Labour Inspector will bear the onus of persuading the Court, on evidence called and submissions made, that the first plaintiffs obstructed the Authority's investigation contrary to law and that statutory penalties are warranted for such obstruction if it is proven. The first plaintiffs will not bear any onus to establish error on the part of the Authority and in a sense the hearing of the challenge will be truly one de novo.

[24] Parties and the Authority itself may need, however, to be prepared for other directions to be made in the future where there is not, as in this case, a competent and willing person such as the Labour Inspector to defend a challenge by hearing de novo from a self-initiated Authority investigation and determination, and in the same manner as has been directed for the hearing of the challenge in this case.

[25] Although it has not arisen for decision in this case, the question of who is to meet the costs of independent prosecuting counsel in similar cases in the future where a Labour Inspector may not be involved or prepared to do so, will arise again. The Ministry of Business, Innovation and Employment and the Ministry of Justice**,** which administer and fund the Employment Relations Authority and the Employment Court respectively, may wish to consider how these funding questions are to be dealt with. Although it is open to the Court to direct that the costs of independent counsel be met by a party or by parties, what might be called front-end certainty about the payment of independent counsel would seem to be desirable.

[26] In the circumstances, there will be no orders for costs between the parties and preparation for a hearing of the first plaintiffs' challenge may resume.

GL Colgan
Chief Judge

Judgment signed at 12.30 pm on 30 March 2017