IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2019] NZEmpC 166
EMPC 195/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	GEA PROCESS ENGINEERING LIMITED Plaintiff
AND	TONY SCHICKER Defendant

Hearing:	15 April 2019 (Heard at Auckland)
Appearances:	S Langton, counsel, and L Briffett, advocate for plaintiff No appearance for defendant (the defendant abiding the decision of the Court)
Judgment:	18 November 2019

JUDGMENT OF JUDGE M E PERKINS

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[1] This judgment deals with a non-de novo challenge to the Court against determinations of the Employment Relations Authority (the Authority), first, refusing to reopen and continue with its investigation[1] and, second, refusing to direct that a different Member of the Authority consider the matter.[2] Those determinations followed an earlier determination in which the Authority dismissed the substantive proceedings before it mainly on the ground that the plaintiff had failed to prosecute its claims.[3] These proceedings, therefore, have a considerable history before both the Authority and the Court.

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1 *GEA Process Engineering Ltd v Schicker* [2018] NZERA Auckland 185.
2 *GEA Process Engineering Ltd v Schicker* [2017] NZERA Auckland 380.
3 *GEA Process Engineering Ltd v Schicker* [2017] NZERA Auckland 183.

[2] The history and sequence of these proceedings has been set out in an interlocutory judgment dated 2 October 2018, which dealt with a good faith report received from the Authority.[4] For the purposes of this judgment, which now deals with substantive challenges, it is necessary to set out that history and sequence again. This judgment, for present purposes, finally deals with matters before the Court. Out of an abundance of caution, however, and if the Court declined the plaintiff's application to return the proceedings to the Authority, a de novo challenge against the first determination dismissing the proceeding was filed with the Court. The challenge, nevertheless, related to the substantive employment relationship issues between the parties. This was done to ensure that time limits were complied with and that no limitation issues could be raised as an impediment to hearing the substantive issues if that is required.

[3] It has been necessary to refer to the challenge to the first determination in this judgment insofar as it related to the dismissal of the proceedings before the Authority. That challenge, as far as it relates to the employment relationship problem between the parties, will probably become otiose, but, in the meantime, it will be allowed to remain on the Court file so that it can be revived if that proves necessary.

Factual background

[4] The defendant, Tony Schicker, was previously a long-term employee for the plaintiff, GEA Process Engineering Ltd (GEA). He worked as a component sales manager from 7 December 2006 until 30 January 2015. After his employment with GEA ended, Mr Schicker commenced employment with Dynaflow Process Services Limited (Dynaflow). Dynaflow was a customer of GEA. The two companies also shared some customers in common. During Mr Schicker's employment with GEA, he had made various business-related contacts with Dynaflow. The directors of Dynaflow and associated companies are Kieron and Scott Clarke. They became embroiled in collateral proceedings with GEA as will be described shortly.

[5] Following Mr Schicker taking up his new employment with Dynaflow, GEA alleged that, while Mr Schicker was still its employee, he had revealed to Dynaflow

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4 *GEA Process Engineering Ltd v Schicker* [2018] NZEmpC 117.

plans GEA had for developing a valve servicing business. It was also alleged that Mr Schicker took some of GEA's confidential information for use in his new job with Dynaflow. GEA commenced proceedings in the Authority on 15 June 2015 for orders requiring Mr Schicker to comply with his confidentiality obligations under his former employment with GEA and not to assist Dynaflow's own valve servicing business. A penalty was sought against Mr Schicker by GEA, and the Authority was asked to carry out an investigation into damages caused by the alleged breaches by Mr Schicker of his contractual obligations. Mr Schicker denies he breached duties owed to GEA both before and after termination of his employment with GEA or in his new role with Dynaflow.

[6] The employment relationship problem between GEA and Mr Schicker was referred to mediation. Mediation, however, did not resolve the matter. In the Authority proceedings, Mr Schicker also sought, but was denied, leave to raise out of time a personal grievance against GEA. The denial was the subject of a final determination of the Authority and has not been challenged.[5]

[7] As a result of the way the proceedings in the Authority between GEA and Mr Schicker progressed, they became bogged down in procedural matters. The events which are now the subject of the proceedings occurred some years ago. The proceedings in the Court to which this judgment relates arise from the procedural mire which faced the Authority and upon which the determinations of the Authority subject to this challenge and the earlier challenge arose. Mr Schicker has not participated in this challenge. Through his legal counsel, he has indicated to the Court that, at this stage, he is prepared to simply abide the decisions of the Court. He wishes to conserve his finances to enable him to participate when, and if, the substantive proceedings against him are progressed.

[8] The main issue which the Court now needs to determine is whether the substantive proceedings continue as an investigation in the Authority or proceed in the Court. If the latter, then the challenge which I have already earlier indicated is to be

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5 *Schicker v GEA Process Engineering Ltd* [2015] NZERA Auckland 384.

held in abeyance may be revived. If the former, then the matter will simply be referred to the Authority for it to continue with its investigation.

The issue of disclosure of documents by Dynaflow as a non-party

[9] The process of disclosure and exchange of documents in the Authority proceedings resulted in GEA providing its relevant documents to Mr Schicker on 12 April 2016. Mr Schicker had stated in an affidavit dated 4 November 2015 that he did not have any documents relevant to the claim.

[10] The plaintiff also sought documents from Dynaflow which were relevant to the claim. The method by which this was to be achieved was originally proposed by the plaintiff and encompassed the serving of witness summonses on Kieron and Scott Clarke, requiring them to attend the investigation meeting and to bring with them and produce listed relevant documents.

[11] It appears that some difficulties were seen to be associated with this process. On 8 December 2015, the Authority, in consultation with the parties, released the Clarkes from their witness summonses and directed them to instead provide affidavits listing which documents requested by the plaintiff they had within their control. They were to categorise them as "in scope", "privileged", "confidential, or "out of scope". This process was analogous to the process for non-party disclosure contained in the High Court Rules 2016.

[12] This process of disclosure also proved to be complicated and unfortunately resulted in the collateral proceedings referred to earlier in this judgment. Between 22 February 2016 and 6 May 2016, the Clarkes served four iterations of their affidavits listing documents. On 14 March 2016, the Authority directed Dynaflow to provide documents on a counsel-only basis and for the plaintiff's counsel to provide undertakings that they would only access the "out of scope" and "confidential" documents which had been disclosed in order to determine if they were relevant to the plaintiff's claim and that these documents would not be shared with the plaintiff.

[13] As an indication of the extent of the disclosure process which Dynaflow undertook, on 23 May 2016, its counsel sent to plaintiff's counsel 2,513 documents for counsel to review. On 1 September 2016, plaintiff's counsel informed Dynaflow's counsel that it considered 39 of those documents in the "out of scope" and "confidential" categories were relevant to the plaintiff's claim, and it explained the reasons for this. A change of solicitors by Dynaflow in September 2016 resulted in further delays occurring. Its new solicitors responded to counsel for the plaintiff on 12 December 2016, refusing its consent to the relatively small number of documents in the "out of scope" and "confidential" categories being used in the claim.

[14] As can be imagined, the Authority would have been becoming concerned and frustrated by the delay which was occurring in preventing it from commencing its investigation. On 26 August 2016, the Authority had requested the parties to update it on what steps were necessary to progress the claim. Counsel for the plaintiff informed the Authority that it was seeking agreement on the use of certain documents with Dynaflow and would update the Authority once it had a response from Dynaflow's solicitors. This was at a time prior to Dynaflow changing its solicitors.

[15] On 9 February 2017, when no further progress had been reported to the Authority, it asked the parties if the file should be closed. Counsel for the plaintiff in these circumstances naturally responded that the file should not be closed, as it was still working through the issue of documents with Dynaflow to ascertain what documents could be used in the claim.

[16] While the process of working through the issue of documents was taking place, on 6 March 2017, counsel for Dynaflow submitted a memorandum to the Authority regarding delays to concluding the non-party disclosure process and applying for costs. On 10 March 2017, counsel for the plaintiff put forward a proposal to counsel for Dynaflow, suggesting how each of the disputed documents could be used in the proceeding without unduly prejudicing Dynaflow.

[17] When the Authority received the memorandum on costs from Dynaflow's counsel, the Authority proposed a case management conference and offered some dates. The Authority's first two suggested dates were deferred because, by that time,

Dynaflow's counsel had received the proposal from counsel for the plaintiff and needed more time to review that latest proposal on the documents. The following dates offered by the Authority could not be made by counsel because of scheduling difficulties. A final date of 12 May 2017 was accepted, and a conference was held on that date.

[18] It was assumed that the conference would deal with the proposals on documents and the request on costs. The Authority Member, however, issued a minute dated 24 April 2017 outlining a preliminary view that the plaintiff's claims should be dismissed for want of progress. The conference was instead to be used to hear counsel for the parties and Dynaflow regarding the proposal to dismiss the claim and Dynaflow's application for costs. The conference took place on this basis.

[19] On 27 June 2017, the Authority issued its determination that GEA's proceedings against Mr Schicker were dismissed without further investigation, and the issue of costs made by the Clarkes arising out of the non-party disclosure process was removed to the Court to hear and determine.

Applications to re-open the investigation and for recusal

[20] As indicated, a challenge has been filed with the Court against this determination, and that is the challenge which is presently being held in abeyance. It challenges both the dismissal of the proceedings and refusal to investigate the substantive claims. If it, nevertheless, proceeds in the Court, a de novo hearing of the substantive claims against Mr Schicker is sought. GEA subsequently made an application to the Authority to reconsider its decision and continue with the investigation. It also made the application for recusal. Both applications were then decided in the subsequent determinations of the Authority, and the challenges against those later determinations are the subject of this judgment.

[21] The collateral proceedings removed to the Court to deal with the Clarke's application for costs have now been discontinued. A judgment dealing with costs on the discontinuance was issued on 12 April 2019.[6]

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6 *Clarke v GEA Process Engineering Ltd* [2019] NZEmpC 44.

[22] Concentration has been on the third determination that declined the application to reinstate and continue the investigation. That determination, however, relied upon basically the same grounds as had been used to dismiss the claim in the first determination. While the third determination provides a basis for challenge, it is necessary as part of the consideration of that challenge to consider the first determination where the grounds for dismissal of the claim and refusal to continue the investigation were first set out.

[23] The second determination, and that part of the third determination dealing with a recusal, is a separate issue, and, because of the findings in this judgment, that issue is now moot.

[24] The grounds enunciated by the Authority for dismissal contained in the first and third determinations can be summarised as:

(a) The failure of GEA to keep the Authority informed of events taking place over disclosure.

(b) The effect on Mr Schicker of the delays.

(c) The perception that the proceedings were being used for reasons other than those related to or necessary for the Authority's investigation.

(d) The prejudice to Mr Schicker by the continued delay outweighed any prejudice which would be suffered by GEA from dismissal – GEA retaining the right to refer the matter to the Court which the Authority considered was the more appropriate place for the claim to be heard.

(e) The Authority was exercising powers to act reasonably and in equity and good conscience in dismissing the proceedings.

[25] While the issue relating to the non-parties' costs which was removed to the Court is now resolved, I am not sure that removal was based on grounds available to the Authority. It may have been better for the Authority to refer a question of law under s 177 of the Employment Relations Act 2000 (the Act), but probably the matter

was obscured by the Authority deciding to conclude its investigation. Nevertheless, this issue is no longer before the Court.

[26] The third determination concentrated on principles the Authority would rely upon in deciding whether to re-open an investigation. An analogy was made to applications for re-hearing. These were applied with the over-riding consideration of the interests of justice being balanced against factors such as the importance of finality in litigation. The Authority placed weight upon the fact that GEA would not be deprived of a remedy by the dismissal, as it still had recourse to the Court. Ultimately, the Authority rejected the application to re-open the investigation, as the real ground perceived for the application was that it was merely an attempt by GEA to have the first determination re-visited to persuade the Authority to change its mind. The grounds which would traditionally apply if a re-hearing was to be granted, it held, were not established by GEA.

Legal issues arising

[27] While considerable discussion of principles to be applied in an application for re-hearing is contained in the determination dealing with the refusal to re-open the investigation, I consider that it is a wrong approach in this case. The question which really arises is whether the Authority was correct in the first place to place the parties in the position of justifying the continuation of the proceedings, decline to continue its investigation and then dismiss the proceedings.

[28] Mr Langton, counsel for GEA, has, in his submissions, comprehensively dealt with a range of issues arising in this case, including the issue of recusal. He has adopted the approach, correctly in my view, of raising a primary argument against the original decision to dismiss, which is contained in the first determination and then confirmed by the Authority in the third determination when the application was made asking the Authority to reconsider.

[29] Mr Langton submitted that the Authority made an error of law regarding its powers when it dismissed the claim on the grounds of the plaintiff's unreasonable

delays in pursuing it. It was submitted that the Authority is a statutory body, whose jurisdiction, powers and duties are limited by the Act.

[30] Insight is given into this issue in the following part of the Explanatory Note to the Employment Relations Bill 2000 about the Authority's intended function and purpose:

> The Bill also establishes a separate specialist lower level investigatory body, known as the Employment Relations Authority (ERA), to investigate employment problems in a speedy and non-adversarial way. Members of the Authority will have the power to gather information, call evidence and investigate matters as they see fit, in order to understand the key issues in dispute, and make pragmatic determinations about them. It is intended that the Authority will make practical decisions quickly, with a minimum of detail, focusing on key issues and how to resolve them. Informality will be emphasised in the ERA, and efforts to achieve prior settlement encouraged by enabling the Authority to order the parties to try to resolve their differences through mediation before it proceeds to deal with any matter, where this is appropriate in the circumstances.

[31] In line with this statement from the Explanatory Note, Mr Langton submitted that the relevant objects contained in s 143 of the Act relating to Part 10 are relevant. The relevant portions of that section read as follows:

> **143 Object of this Part**
>
> The object of this Part is to establish procedures and institutions that—
>
> ...
>
> (f) recognise that judicial intervention at the lowest level needs to be that of a specialist decision-making body that is not inhibited by strict procedural requirements; and
>
> (fa) ensure that investigations by the specialist decision-making body are, generally, concluded before any higher court exercises its jurisdiction in relation to the investigations; and
>
> (g) recognise that difficult issues of law will need to be determined by higher courts.

[32] Mr Langton also referred to ss 157, 160 and 173 of the Act as being consistent with the requirement for access to the Authority's investigative process, at first instance, being a primary premise of the Act. I set out those portions of ss 157, 160 and 173 as are relevant.

[33] The Authority's role is prescribed in s 157 of the Act:

> **157 Role of Authority**
>
> (1) The Authority is an investigative body that has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities.
>
> (2) The Authority must, in carrying out its role,—
>
> (a) comply with the principles of natural justice; and
>
> (b) aim to promote good faith behaviour; and
>
> (c) support successful employment relationships; and
>
> (d) generally further the object of this Act.
>
> ...
>
> (3) The Authority must act as it thinks fit in equity and good conscience, but may not do anything that is inconsistent with—
>
> (a) this Act; or
>
> (b) any regulations made under this Act; or
>
> (c) the relevant employment agreement.

[34] Section 160 the Act provides:

> **160 Powers of Authority**
>
> (1) The Authority may, in investigating any matter,—
>
> (f) follow whatever procedure the Authority considers appropriate.
>
> (2) The Authority may take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.

[35] Section 173 of the Act provides:

> **173 Procedure**
>
> (1) The Authority, in exercising its powers and performing its 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.

[36] Mr Langton cited the decision of *Ryan Security & Consulting (Otago Ltd v Bolton*[7] and, in particular, at [46] of the judgment, which reads:

> [46] Mr Anderson relied heavily on the observation made by the full Court in *Credit Consultants Debt Services NZ Ltd v Wilson (No 2)* that Parliament intended the Authority to be a *"one stop shop"*. That was shorthand for the proposition that different elements of a case should not have to be commenced in different courts or tribunals. While that is desirable and is reflected in the scheme of the Employment Relations Act 2000, it is not the same as saying that all decisions made in the course of litigation should be made by the same body. Obvious examples of different judicial bodies necessarily being involved in the same litigation include challenges, appeals and judicial review. In any event, while a scheme underlying legislation may assist in interpreting the provisions of the statute, that scheme cannot prevail over the express provisions of the enactment. *Although Parliament intended that a party should be able to bring all aspects of an employment relationship problem to the Authority in the first instance and have the Authority deal with it according to the substantive merits, rights of challenge and judicial review must be exercised in the Court.* The same applies to enforcement of the Authority's orders. Some of these are enforceable at first instance in the Authority itself by compliance order but any further steps must be taken in the Employment Court or the District Court.

[37] When dealing with statutory provisions, Mr Langton also referred to sch 2, cl 12A of the Act:

> **12A Power to dismiss frivolous or vexatious proceedings**
>
> (1) The Authority may, at any time in any proceedings before it, dismiss a matter or defence that the Authority considers to be frivolous or vexatious.
>
> (2) In any such case, the order of the Authority may include an order for payment of costs and expenses against the party bringing the matter or defence.

[38] In the same context, he also referred to ss 134A, 174D and 221, which deal with the Authority's powers to penalise a party for obstructing or delaying an Authority investigation without sufficient cause, the power to determine a matter without an investigation meeting and the power to strike out a party to more effectually dispose of a matter before it, according to the substantial merits and equities of the case.

[39] None of these provisions referred to provide the Authority with powers to dismiss a claim without carrying out an investigation in circumstances such as prevailed in this case. The limited power of the Authority in this respect was discussed

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7 *Ryan Security & Consulting (Otago) Ltd v Bolton* [2008] ERNZ 428 (EmpC) (emphasis added).

by Judge Inglis (as she then was) in *Lumsden v Sky City Management*[8], where she stated:

> [38] Relevantly, Parliament has chosen to limit the circumstances in which the Authority may dismiss a proceeding without investigating it under cl 12A, to matters which are either frivolous or vexatious. There is, for example, no reference to dismissal of a matter which discloses no reasonably arguable cause of action or defence. While the dismissal of cases with little or no merit appears to have been contemplated at a relatively early stage of the legislative process, the wording did not find its way into the section or clauses as enacted. The rationale for limiting the scope for dismissal may well reflect the special characteristics of this jurisdiction and the underlying policy thrust of the Act, empowering employees to pursue claims and have them determined on their substantive merits, without undue regard to legalities, and in an efficient, non-technical manner. Dismissing claims without full investigation on broad grounds relating to an assessment of legal merits does not sit comfortably with this.
>
> [39] I conclude that the Authority's power to dismiss is limited. The threshold is high. Dismissing a claim is a serious step, and not one to be taken lightly. It cuts a claim off at the knees and, because of its draconian effects and having regard to the scheme and purpose of the legislation, is to be reserved for clear cut cases. This is not one of them.

[40] Further statements on this issue are also contained in the earlier decision of the Court of Appeal in *Employment Relations Authority v Rawlings*.[9] This case involved a situation where the Authority had issued directions in an effort to have the matter proceed. They were not complied with. The Authority issued a direction that the statement of problem was deemed to have been withdrawn. Mr Rawlings tried to challenge the direction but was wrongly advised by the Court Registrar that a challenge was not available to him. He applied to the Court to judicially review the Authority's decision. The Authority then, being a party, applied unsuccessfully to the Court to strike out the proceedings and then appealed that judgment to the Court of Appeal. On the point concerning whether the Authority had power to treat a claim as being dismissed, the Court made obiter remarks as follows:

> [17] Although the deemed withdrawal was probably of limited intended effect, it is doubtful whether it was within the powers of the Authority.
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> ...
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> [21] It is thus arguable that it was the duty of the Authority to resolve the problem, not to refuse to hear the dispute. Sections 160(1)(f) and 173(1)(b)

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8 *Lumsden v SkyCity Management Ltd* [2015] NZEmpC 225, [2015] ERNZ 389 (footnotes omitted).
9 *Employment Relations Authority v Rawlings* [2008] NZCA 15, [2008] ERNZ 26.

> arguably do not provide a statutory basis for declining to exercise the relevant statutory jurisdiction in this case. Further, the concept of a deemed withdrawal may be inconsistent with cl 14 of the Second Schedule. As well, cl 13 suggests that the sort of defects which the statement of problem exhibits did not warrant the proceedings being held to be bad for want of form.
>
> [22] All in all there is scope for much argument about the appropriateness of the unless direction. Given that the unless direction provided the basis upon which the claim was deemed to have been withdrawn, that deemed withdrawal may well also be challengeable. But as Gabbett Machinery is not a party to the appeal, it would be inappropriate to go any further.

Were the proceedings validly dismissed? – Conclusions

[41] While in the third determination, the Authority Member adopted considerations which might apply where an application for a rehearing was being made, the original determination effectively dismissed the plaintiff's proceedings for want of prosecution. The reasoning applied by the Authority Member in the first determination related specifically to considerations which would be considered where a dismissal for want of prosecution was being made. The High Court Rules 2016, r 15.2, providing for dismissal for want of prosecution can, by analogy, be applied in this case. The rule reads as follows:

> **15.2 Dismissal for want of prosecution**
>
> Any opposite party may apply to have all or part of a proceeding or counterclaim dismissed or stayed, and the court may make such order as it thinks just, if—
>
> (a) the plaintiff fails to prosecute all or part of the plaintiff's proceeding to trial and judgment; or
>
> (b) the defendant fails to prosecute all or part of the defendant's counterclaim to trial and judgment.

[42] In *Lovie v Medical Assurance Society New Zealand Ltd*,[10] Eichelbaum CJ, in dealing with the application of the rule, stated:

> ... the applicant must show that the plaintiff has been guilty of inordinate delay, that such delay is inexcusable, and that it has seriously prejudiced the defendant. Although these considerations are not necessarily exclusive, and at the end one must always stand back and have regard to the interests of justice, in this country, ever since [*New Zealand Industrial Gases Ltd*] *v Andersons Ltd* [1970] NZLR 58 it has been accepted that if the application is

[10] *Lovie v Medical Assurance Society New Zealand Ltd* [1992] 2 NZLR 244 (HC) at 248.

> to be successful, the applicant must commence by proving the three factors listed.

[43] In *Commerce Commission v Giltrap City Ltd*,[11] the Court of Appeal also addressed the need to stand back by considering whether the overall interests of justice would allow the case to proceed.

[44] It has been held that whether there is inordinate delay and whether it is inexcusable depend upon the circumstances of a particular case. As far as serious prejudice is concerned, the most important factor is whether justice can still be done between the parties if the proceeding goes to trial.

[45] Even if the Authority had jurisdiction to dismiss the case, the factors set out in *Lovie* were not established by the Authority Member in dismissing the proceedings. In the overall circumstances, while the delay in the proceedings was frustrating and perhaps aggravating, there were reasons which could not be attributable only to the plaintiff for the delay occurring. The delay could not be described as inordinate. Certainly, the Authority Member could not have held as established that Mr Schicker was seriously prejudiced. Indeed, he confirmed that fact by indicating in the determination that the proceedings could still continue in the Court after the dismissal had taken place. So, there could be no suggestion that the matter had reached the point where the interests of justice could not be met if the case was allowed to proceed.

[46] Dynaflow and the Clarkes, in presenting the Authority with their claim for reimbursement of costs, appear to have supported Mr Schicker's application to have the proceedings dismissed. The Authority Member in both the first and third determinations makes mention of this fact, which appears to have weighed in his reasoning in granting the dismissal and refusing the later application to re-open and continue his investigation. Any delay in the proceedings was, of course, no business of the Clarkes or Dynaflow, even though they clearly identified with Mr Schicker's position in the proceedings. They were not, however, parties to the proceedings. Their obligation was merely to meet the requirements for disclosure as non-parties. They could have sought clarification in respect of the extent of their disclosure obligations

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[11] *Commerce Commission v Giltrap City Ltd* (1997) 11 PRNZ 573 (CA).

and did seek reimbursement of costs, but any delay on GEA's part in advancing the proceedings was not their concern.

[47] In considering whether the proceedings were validly dismissed, it is clear, therefore, that the Authority had no statutory power to do so. The Authority had the parties in contact and knew the proceedings were still active. It was unfair to GEA for the Authority to dismiss the proceedings when the delays were also occasioned by the disclosure process which the Authority itself had approved. It then appears to have endorsed the stand taken by the Clarkes and their new solicitors. There was in the decision to dismiss too much emphasis on GEA's actions alone when it was clear that the non-parties contributed to the delay by raising issues on disclosure which needed resolution. This is not to say, however, that there should not have been more regular contact between counsel and the Authority.

[48] As indicated, it was not appropriate to say that GEA was not deprived of remedies as it could have recourse to the Court. I find this was in effect using an alternative method of removal when the Authority could no longer adopt this course having commenced its investigation. There are also conceptual difficulties with what the Authority was proposing. The determination seems to suggest that GEA could somehow restart the proceedings in the Court. There could be no challenge, as the Authority had not completed its investigation on the substantive issues between the parties. The Court has no jurisdiction to accept originating proceedings in these circumstances. In any event, it was a dangerous proposition the Authority was making, as serious limitation issues could arise. In such a situation, the remedy for the Authority was to simply continue the investigation by taking control of the proceedings and forcing them on. If a recalcitrant applicant does not then co-operate, the hearing takes place with the risk that the applicant's case will be inevitably declined. GEA is entitled in this case to have its problem investigated by the Authority and to preserve its appeal rights. The problem facing the Authority was a common one facing the Courts. Some of the considerations, which arose in this case can be resolved by the judicial officer taking control of the proceedings. Sentiments along these lines were expressed by the Court in *Matsuoka v LSG Sky Chefs NZ Ltd*.[12]

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12 *Matsuoka v LSG Sky Chefs NZ Ltd* [2018] NZEmpC 34.

[49] It is clear that this case started off on the wrong foot in attempting to resolve GEA's issues with documents. The Authority could have simply continued with the process of a witness summons, which would then require the witnesses to bring documents to the investigation meeting.

[50] The Authority Member was clearly frustrated by the delay, and this could have perhaps been avoided by more constant contact with the Authority by counsel. However, in dismissing the claim, the consequences to GEA are that it has lost its statutory right to have its claim investigated and, as is often submitted in cases such as this, where removal to the Court is being contemplated, the step in the appeal process from the hearing at first instance is lost. There is a benefit to a party in being able to participate in the inquisitorial process in the Authority as opposed to a strict adversarial process in the Court. Equally, the entitlement of a party to retain a step in the appeal process is not to be dispensed with lightly. Even if a challenge against an Authority's determination may appear inevitable, there are substantial advantages in the parties having gone through an investigative process in the Authority, such as having heard each side's case, narrowing of issues and the potential for settlement even after the Authority's determination.

[51] Simply dismissing the proceedings was not the answer in this case and outside the powers of the Authority and the statutory obligations placed upon it.

The recusal applications

[52] In dealing with the challenge against the determination refusing to grant the application that the Authority Member recuse himself, I have already indicated that this is now largely moot. This includes the refusal in the third determination of the Authority Member to recuse himself when again requested to do so. In this case, there is, in the argument, confusion between circumstances where recusal is sought on the grounds of alleged bias or partiality and where it is being suggested that a rehearing application should be dealt with by another Member in view of the existing finding.[13]

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[13] The Court considered the former and reviewed the relevant authorities in *P v A (No 2)* [2017] NZEmpC 149.

[53] It is usual in a rehearing application for that application to be heard by the same judicial officer who made the earlier decision upon which a rehearing is sought. There may be circumstances where that is not appropriate, which I do not perceive to exist in the present case. In any event, this issue is now resolved by the decisions reached in this judgment and no declaration is needed. To do so, would, in any event, come perilously close, having regard to the facts of this case, to the Court interfering in the procedures the Authority is adopting, contrary to s 179(5) of the Act.

Disposition

[54] For the reasons discussed, GEA's challenges to the determinations of the Authority involving dismissal of the proceedings are allowed. The matter is referred to the Authority for the continuation of its investigation. The proceedings are now in a position where no further delays are necessary. It is for the Authority to decide how to force the matter on if there is any further tardiness.

[55] Insofar as the challenge against the second determination dealing with recusal and the refusal of the Authority Member to recuse himself in the third determination are concerned, GEA has sought a declaration only. That issue is now moot, but, in any event, I consider that, on these particular facts, the Court should not interfere in the decisions of the Authority.

Costs

[56] Even though GEA has been successful in its challenges which proceeded by way of a formal proof hearing, Mr Schicker from the outset indicated that he would abide the decision of the Court. The procedural difficulties which have given rise to these challenges were not of his making, and it would be inappropriate to make any award of costs against him.

M E Perkins
Judge

Judgment signed at 4.55 pm on 18 November 2019