IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2019] NZEmpC 5
EMPC 310/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application as to scope of challenge
BETWEEN	SHANE HATCHER Plaintiff
AND	BURGESS CROWLEY CIVIL LIMITED Defendant

Hearing: On the papers

Appearances: L Hansen, counsel for plaintiff
T Wano, counsel for the defendant

Judgment: 4 February 2019

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL
(Application as to scope of challenge)

Introduction

[1] An issue has arisen as to the scope of the de novo challenge brought by the plaintiff.

[2] The Employment Relations Authority (the Authority) issued a determination concerning alleged unpaid holiday leave entitlements.[1] It found that the plaintiff's leave entitlements had been paid by the defendant.

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1 *Hatcher v Burgess Crowley Civil Ltd* [2018] NZERA Wellington 81.

[3] Subsequently, the plaintiff filed a statement of claim which raised two claims. The first claim relates to the question of whether alleged holiday pay entitlements had been met, this being the topic dealt with by the Authority in its determination. The second claim relates to alleged unpaid public holidays, alternate days and ordinary wages, a topic which was not referred to in the determination.

[4] Mr Wano, counsel for the defendant, says that the second claim was not formally raised either when a personal grievance was instituted on 30 January 2017, or in the statement of problem of 26 May 2017. He accepted that the defendant was provided with a document prepared for the plaintiff by an accountant, which touched on this issue, on 22 September 2017; and that the accountant attended an investigation meeting held on 27 September 2017, although she was not in fact called to give evidence on that occasion. Mr Wano also accepts that an oral application was made at the commencement of a second investigation meeting on 17 May 2018 to include a claim for public holiday entitlements; he confirmed the application was declined by the Member.

[5] In response, an affidavit has been placed before the Court from Ms S Dodunski, the lawyer who represented the plaintiff at all material times when the matter was before the Authority. She provided detailed evidence as to the relevant history.

[6] In summary, she said:

a) A memorandum was filed, and I infer was served on the defendant, on 15 September 2017, attaching the accountant's analysis of wage and time records which included reference, amongst other things, to the fact that on several occasions the plaintiff had worked statutory holidays which had not been paid for in accordance with the legislation; nor had alternate holidays been paid, except for one which was probably recorded as a public holiday. The accountant concluded that payment for eight alternate holidays was owed.

b) Ms Dodunski confirmed Mr Wano asked for the accountant to be present at the upcoming hearing which was scheduled to take place on 27 September 2017, so that she could be questioned.

c) In the following days, there were difficulties as to the provision of wage and time records from the employer.

d) At the investigation meeting held on 27 September 2017, issues relating to the plaintiff's annual leave entitlements were discussed, with counsel agreeing there should be an adjournment of the leave issue which had been raised in the statement of problem, so that the issues could be discussed. Consequently, evidence was not taken from the accountant.

e) There was then a meeting between counsel. The possibility of an independent expert being appointed to analyse the wage and time records was discussed. However, this never occurred.

f) The plaintiff, frustrated with the lack of progress as to an independent review of the outstanding issues or otherwise, instructed Ms Dodunski to request that the outstanding issues be brought on for consideration at an investigation meeting. A second investigation meeting was accordingly scheduled for 17 May 2018.

g) At the commencement of that meeting, Ms Dodunski made an oral application:

> ... for a further wage claim in regards to the non-payment or incorrect payment of public holidays, alternate holidays and general wages.

h) In support of the application she told the Authority it had received information about these issues prior to the first investigation meeting on 27 September 2017, in the form of the accountant's review. The defendant had been given a chance to respond to this information when filing evidence for the second investigation meeting. Ms Dodunski submitted that errors had been identified and the claim quantified. She

apologised to the Authority that the claim had not been raised prior to the hearing, but said there was a legislative regime in place which covered the annual leave issue, as well as the matters she was now raising.

i) The Member held that these issues had not been pleaded in the statement of problem. However, he also noted that there was a limitation period of six years to bring such a claim, and that only 18 months had passed since the ending of the plaintiff's employment. That said, he declined the oral application. No reference to this topic was made in the determination.

Relevant principles

[7] Section 179 of the Employment Relations Act 2000 (the Act) provides the basis in which challenges may be brought to determinations of the Authority. In particular, s 179(1) provides:

> **179 Challenges to determinations of the Authority**
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> (1) A party to a matter before the Authority who is dissatisfied with a written determination of the Authority ... (or any part of that determination) may elect to have the matter heard by the court.
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> ...

[8] It is well established that a broad approach is to be taken to the meaning of the word "matter" in s 179(1).[2]

[9] In *Bourne v Real Journeys Ltd,* Judge Couch held that the Court could hear and decide matters which were not actually determined by the Authority, providing they were a part of the Authority's investigation.[3]

[10] As was observed by (now) Chief Judge Inglis, in *Udovenko v Offshore Marine Services (NZ) Ltd,* an overly technical approach is not to be taken on this issue, as this would enable form to trump substance.[4] The Court referred to dicta of the Court of

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2 For example, *Abernethy v Dynea New Zealand Ltd (No 1)* [2007] ERNZ 271 (EmpC) at [31]-[33].
3 *Bourne v Real Journeys Ltd* [2011] NZEmpC 120, [2011] ERNZ 375 at [13].
4 *Udovenko v Offshore Marine Services (NZ) Ltd* [2013] NZEmpC 174.

Appeal that parties should have every opportunity to ensure that the real controversy goes to trial, enabling the just determination of the proceeding.[5]

[11] In that particular case, the Court was required to consider an application for leave to amend a statement of claim to include a second and alternative cause of action under the Wages Protection Act 1983. The Authority had dealt with a claim for wage arrears, but not an assertion that the employer had made an unlawful deduction, which was the issue raised in the proposed amendment. The Court held that broadly speaking the matter before the Authority was whether the defendant had paid the plaintiff appropriately, and if not, what wages he had owing to him.[6] Leave was accordingly granted.[7]

[12] The cases are clear that a refusal by the Authority to consider a particular aspect of an employment relationship problem does not result in a conclusion that the matter was not before the Authority. So, as recorded in *Abernethy v Dynea New Zealand Ltd (No 1),* the Authority had determined that a personal grievance could not be brought because there was a valid accord and satisfaction.[8] Ultimately, the Court concluded there was no binding resolution of the matter, and that the employee was accordingly free to pursue his personal grievance.[9] In short, the decision not to investigate the personal grievance itself did not preclude that aspect of the employee's problem being regarded as an aspect of the matter which was before the Authority.

Analysis

[13] I accept the accuracy of Ms Dodunski's detailed account of the somewhat convoluted history of this matter, as summarised earlier.

[14] In the context of several wage issues which were being dealt with by the Authority, issues pertaining to public holidays, alternate holidays and general wages were raised. These matters were initially traversed in a document prepared for the plaintiff by his accountant, which was filed in the Authority and provided to the

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5 *Thornton Hall Manufacturing Ltd v Shanton Apparel Ltd* [1989] 3 NZLR 304 (CA) at 309.
6 *Udovenko v Offshore Marine Services (NZ) Ltd*, above n 4, at [12].
7 At [15].
8 *Abernethy v Dynea New Zealand Ltd (No 1)*, above n 2, at [4].
9 *Abernethy v Dynea New Zealand Ltd (No 2)* [2007] ERNZ 462 (EmpC).

defendant. Discussions between counsel then took place, when the possibility of an independent review of the documentation was discussed, however, such a report was not obtained. The issue of payment for public holidays, alternate holidays and a failure to pay ordinary wages was clearly referred to in the evidence before the Authority, and remained in dispute because a formal application was made by Ms Dodunski at the commencement of the second investigation meeting to have it included in the investigation which was to take place that day. Although it was not apparently couched as an application to amend the statement of problem, that was the effect of the application.

[15] It is not necessary for the Court to review the merits of the Member's decision to decline that application. The sole question is whether the issue was a matter before the Authority, albeit one which the Authority declined to consider.

[16] I am satisfied that the issues which have been pleaded as a second claim were part of the plaintiff's claim that he had not been correctly paid by his employer. It was an aspect of the matter before the Authority, albeit one which the Authority declined to investigate at the point of the second investigation meeting.

[17] Accordingly, I rule that the second claim is able to be raised as part of the plaintiff's de novo challenge.

[18] I reserve costs.

[19] I note that the matter is now to proceed to a Judicial Settlement Conference.

B A Corkill
Judge

Judgment signed 11.00 am on 4 February 2019