IN THE EMPLOYMENT COURT
AUCKLAND

AC 70/06
ARC 40/05
ARC 81/05
ARC 104/05
ARC 110/05

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	JOANNE LOUISE SKINNER WARREN GREGORY TOBIN Plaintiffs
AND	STAYINFRONT INC Defendants

Hearing: Written submissions dated 1 and 3 August and 5 and 11 September 2006

Judgment: 8 December 2006

JUDGMENT OF JUDGE C M SHAW

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[1] The parties have requested a ruling on a preliminary question concerning the scope of a challenge brought by the plaintiffs against a preliminary determination of the Employment Relations Authority concerning two personal grievances. The question is whether the plaintiffs' challenges are limited to the Authority's determination on the preliminary matter or, does the filing of the challenge on the preliminary issue open up the entire matter of the personal grievance for decision by the Court.

Proceedings in the Employment Relations Authority

[2] In their statements of problem in the Authority each plaintiff alleged unfair constructive dismissal. In Mr Tobin's case he said that he had been induced to enter

a comprehensive settlement of his employment claim under duress and Ms Skinner alleged unfair constructive dismissal and sexual harassment.

[3] In reply the defendant says that all matters relating to the termination of the plaintiffs' employment were resolved by agreement between the parties. The defendant applied to the Employment Relations Authority to have the plaintiffs' claim struck out. The Authority took the view that it was preferable to hear and determine as a preliminary matter whether there was a binding agreement between the parties which meant that the grievances could not proceed.

The Authority's determination

[4] Before the Authority held its investigation meeting into the claims of the plaintiffs, there was at least one conference call and memoranda filed by counsel to establish the extent of the investigation meeting.

[5] In a minute dated 17 December 2004, the Authority member stated that notwithstanding points made by the plaintiffs' advocate, the investigation meeting was to address the preliminary issue of whether there had been a final and binding settlement.

[6] The member expected evidence relevant to that issue to be led at the investigation meeting and stated that she was not persuaded that the arrangements should be changed to embark into a full investigation into the substantive aspects of the employment relationship problems. A date was set for an investigation meeting but by agreement the preliminary matter was determined on the papers.

[7] In her determination, the Authority member said:

> *I took the view that it was preferable to hear and determine as a preliminary matter whether there was a binding agreement between the parties, the effect of which was that the grievance could not proceed. I discussed that view with the parties at a conference call in November 2004. The nature and scope of the investigation into the preliminary matter were subsequently recorded in a Minute dated 17 December 2004.*

[8] The Authority concluded that Mr Tobin's raising of his grievance was caught by the terms of a final and binding settlement and the grievance could not proceed.

[9] In relation to Ms Skinner's challenge, the Authority stated:

> *This determination deals only with the preliminary issue of whether the agreement stops Ms Skinner from pursuing any further claim in the Authority. To determine this issue the Authority must consider the following:*
>
> *(i) What the agreement covers;*
>
> *(ii) Whether the agreement was supported by consideration;*
>
> *(iii) Whether the agreement was induced by duress or undue influence.*

[10] At paragraph 16 the Authority concluded:

> *I am satisfied on the evidence received Ms Skinner freely resigned her employment with Stayinfront having negotiated an exit which was satisfactory to her. An agreement was reached between the parties, with the benefit of legal advice, which amounts to accord and satisfaction. I found that there was no element of duress or undue influence in securing agreement. For these reasons Ms Skinner's personal grievance cannot proceed.*

The challenge

[11] Ms Skinner's statement of claim dated 31 May 2005 alleges that the decision of the Authority in effect was to strike out the Applicant's Claim. She asks for the order of the Authority to be reversed, and for the plaintiff's action for constructive dismissal and sexual harassment together with the other matters claimed to continue.

[12] Ms Skinner seeks an order setting aside the determination of the Employment Relations Authority, so that the investigation can continue before a new member of the Authority.

[13] In paragraph 4 of Mr Tobin's statement of claim dated 14 September 2005 he alleges that the decision of the Authority in effect was to strike out the applicant's claim. He asks for the order of the Authority to be reversed, and for the plaintiff's action for constructive dismissal together with the other matters claimed to continue to a full investigation.

[14] Notwithstanding these pleadings, counsel for the plaintiffs, who did not represent them at the Employment Relations Authority or draft the challenge, maintains that once the preliminary findings of the Authority are challenged the whole of the plaintiffs' original substantive claim should be heard by the Court. The defendant's stance is that the Court is limited to hearing a challenge to the matters

determined by the Authority and has no jurisdiction to consider the substantive issues which the plaintiffs wish to raise.

[15] The outcome is dependent on the interpretation of s179 of the Employment Relations Act 2000.

The plaintiffs' case

[16] In relation to the scope of appeals from the Authority to the Court, Mr Wallis cited the leading authorities *Sibly v Christchurch City Council*[1] and *Lloyd v The Museum of New Zealand Te Papa Tongarewa*[2]. He relies on the ratio in *Sibly* as expressed at paragraph 47:

> *If an issue raised in the challenge relates to the employment relationship problem or any other matter within the Authority's jurisdiction, these issues can be raised for the first time before the Court, whether or not they were raised before the Authority.*

[17] From the *Lloyd* case Mr Wallis relied on the statement at paragraph 33:

> *However, a de novo hearing is just that. It is the first opportunity for the parties to fully air the disputed matters and have them considered judicially. While the Court must hear the same matter as the Authority … there is no statutory restriction on the evidence which can be led or the issues that can be raised provided they are relevant to the original matter.*

[18] Mr Wallis submitted that "*the matter*"" referred to is to be interpreted broadly and does not limit the introduction of new evidence or issues providing these are relevant to the matter that had been brought to the Authority.

[19] It is the case for the plaintiffs that although the Authority dealt with the issue of whether or not the severance agreement was binding and enforceable and whether it should be set aside, in the course of reaching a decision it concluded that the severance agreement was not vitiated by duress in Mr Tobin's case and that it covered his claim of constructive dismissal. From this, Mr Wallis submitted that it is apparent that the Authority considered the scope of the employment problem before concluding the issue of whether or not the agreement was binding and enforceable. The Authority's findings about the applicant's state of mind and about the actions of the employer who entered into the settlement agreement, opened up the substantive

[1] [2002] 1 ERNZ 476
[2] [2002] 2 ERNZ 356

issues to challenge. The plaintiffs argued that the following matters arise from the determination of the Authority:

1. That Mr Tobin's apparent "resignation" was in substance a constructive dismissal.
2. That the method of his dismissal was procedurally and substantively unfair.
3. That the mutual release and severance agreements were an integral part of the constructive dismissal and are no more valid than the "resignation" they purport to record.
4. That the mutual release (on its proper interpretation on the relevant factual matrix) does not preclude the present personal grievance.
5. That the mutual release and severance agreements are vitiated by virtue of the fact that they were procured by duress and/or by the exercise of undue influence.

[20] Similarly in the Skinner matter, the Authority considered what the agreement covered, whether it was supported by consideration, and whether it was induced by duress or undue influence and therefore these issues are at least at large on the de novo challenge.

[21] The only matter which was not dealt with by the Authority but had been raised by the applicant in her statement of problem was the question of sexual harassment. In relation to that Mr Wallis relied on the decision of *Sibly* which held[3] that "*a party should not be penalised because the Authority did not seem to investigate every aspect of the problem*."

[22] On this basis, the plaintiffs seek the opportunity to particularise their allegations in an amended notice of appeal for Ms Skinner.

[23] Mr Wallis submitted that *Sibly* held that the Court should not be prevented from considering issues, explanations, and facts that had not previously been placed

[3] At para [45]

before the Authority provided that it was the same basic employment relationship problem that the Court has been asked to resolve on the challenge as that which was placed before the Authority. He argued that, if this precedent was applied, there would be a commonsense result in the present case which would result in the resolution of the employment relationship problem in a just, speedy and practical way by the plaintiffs being able to bring their employment relationship problem to the Court at the point where the Authority has become *functus officio* by having disposed of the problem.

[24] He pointed to the fact that because the determination of the accord and satisfaction point is dependent on factual findings which are common to those of the constructive dismissal claims, the Court is bound to hear and make findings about evidence which is relevant also to the determination of the merits of that unjustified dismissal claim. Because facts which are relevant to the determination of a preliminary issue are not within a narrow compass and are not readily isolated from the facts relevant to other issues in the case, there is a danger in having separate hearings.

[25] He relied on *Innes v Ewing*[4] in which Eichelbaum J found that except in rare cases it is unlikely to be appropriate to make orders which have the effect that substantial questions of fact are isolated and dealt with separately before trial.

Case for the defendant

[26] Mr Towner submitted that the plaintiffs cannot widen their respective challenges to include a hearing on the substantive claims because the investigation meeting by the Authority was never intended or contemplated to be one where the full substantive hearing matters were to be considered. In this he relied on the scope of the investigation meeting as set out by the Authority member and on the conclusions of the Authority member in relation to the matter being a preliminary issue.

[4] (1986) 4 PRNZ 10 at p20

[27] Secondly, Mr Towner made the point that neither of the plaintiffs raised their personal grievance within the 90 days required by s114 of the Employment Relations Act 2000. Mr Tobin's employment came to an end on 25 July 2002 but in his statement of problem he recorded that he raised his personal grievance by letter dated 5 October 2004. Ms Skinner's termination of her employment occurred in April 2002. Her statement of problem filed on 29 September 2004 states only that she told Mr Tobin that she had a personal grievance against the company. Mr Towner submitted that that does not meet the requirements of s114 for raising a personal grievance and properly bringing it to the employer's attention. Therefore neither of the plaintiffs had properly brought a grievance to the Authority and therefore the personal grievances had not been raised and are not yet matters before the Authority.

[28] Next, Mr Towner submitted that the plaintiffs' case for having the substantive proceedings heard by the Court is inconsistent with the objects of Part 10 of the Employment Relations Act 2000 one of which is to: ensure that investigations by the specialist decision-making body are, generally, concluded before any higher court exercises its jurisdiction in relation to the investigations;

[29] He argued that the mere fact that a party challenges a preliminary decision of the Authority does not mean that that party can shift the substantive matter to the Court without investigation by the Authority. One of the consequences would be to render pointless the sensible practice that has developed in the Authority and the Court to deal with jurisdictional or procedural issues in a preliminary way. For example, in *X v A*[5] and *Cabletalk Astute Network Services Ltd v Cunningham*[6].

[30] Finally, Mr Towner submitted that the decisions of the Court in *Sibly* and *Lloyd* support the right of the plaintiffs to raise new arguments and/ adduce new evidence as part of their de novo challenges to the previous determinations of the Authority but neither case is authority for the proposition that the Court can hear the substantive grievances in the circumstances of this case when they have not even been raised by either of the plaintiffs and when the substantive grievances were not

[5] [1992] 2 ERNZ 1079
[6] [2004] 1 ERNZ 506

an aspect of the matter that was investigated by the Authority in either case. He reiterates that the Authority's determinations dealt only with the issue of whether the prior settlements precluded the plaintiffs from proceeding with their personal grievances. He therefore distinguishes this case from the factual situations in *Lloyd* and *Sibly*.

Decision

[31] In determining the question before the Court, the essential question is what was the matter before the Authority that is now subject to challenge.

[32] I find that even though the content of the Authority's deliberations included aspects of the substantive case as alleged by the plaintiffs such as the allegation of duress by Mr Tobin, the Authority was at pains to emphasise that what was being considered was the preliminary question of what is effectively accord and satisfaction. That was the only matter before the Authority and the only matter which it determined. The Authority did not embark on a full investigation of the employment relationship problems as alleged in the statements of problem.

[33] Section 179(1) of the Employment Relations Act 2000 provides that a party who is dissatisfied with a determination of the Authority may elect to have the matter heard by the Court. In the present case the full personal grievance was not investigated and determined by the Authority. It specifically limited its investigation to the preliminary issue and that is the extent of the challenge to the Court allowed by s179.

[34] The cases of *Sibly* and *Lloyd* are not applicable. *Sibly* was concerned with whether in the course of a challenge to a determination an alternative cause of action could be raised. Similarly, in *Lloyd* the issue was whether on a de novo challenge the Court was limited to the cause of action that had been dealt with by the Authority. Therefore, each was about the scope of a de novo hearing on the substantive issues which were already before the Court.

[35] This case is a de novo challenge only to the preliminary matter. As such, in the challenge the parties are not restricted on what evidence they lead so long as it is

material to the preliminary question. However, that does not mean that on the challenge the Court has the jurisdiction to determine the personal grievance which has not yet been investigated by the Authority.

[36] The answer to the question posed by the parties is that the plaintiffs' challenges are limited to the Authority's determination on the preliminary matter.

C M Shaw
JUDGE

Judgment signed at 9.30am on 8 December 2006

Solicitors: D B Hickson, Auckland, for Plaintiff
R L Towner, Bell Gully, Auckland, for Defendant