

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2010] NZEMPC 96
ARC 60/10**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

AND IN THE MATTER OF an application for joinder

BETWEEN LORRAINE NEILL
Plaintiff

AND FERENC ISTVAN SCHMIDT AND
RACHEL HURIANA PAUL
First Defendants

AND FRANK & PETER BUILDERS
LIMITED TRADING AS THE
BATHROOM STORE
Second Defendant

Hearing: 26 July 2010
(Heard at Auckland)

Appearances: Plaintiff in person
Ross France, Counsel for Defendants

Judgment: 26 July 2010

ORAL INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] Lorraine Neill challenges the Employment Relations Authority's determination¹ about her dismissal purportedly for redundancy. This judgment decides a preliminary issue about who should be the parties.

¹ AA216/10, 7 May 2010.

[2] The first issue is that Mrs Neill applies to join Ferenc Schmidt and Rachel Paul as parties to the challenge. Mr Schmidt and Ms Paul were named as original parties in Mrs Neill's statement of problem in the Authority and she tells me that when she attempted to file a challenge in this Court naming them as parties, the Registry would not accept that, perhaps understandably, because the Authority's determination only named Frank & Peter Builders Limited in the entitling.

[3] The Authority Member's first decision was to determine that Mrs Neill was not employed by Mr Schmidt and Ms Paul but, rather, by Frank & Peter Builders Limited trading as The Bathroom Store in Whakatane. The Authority changed the entitling to the proceedings before it to delete any reference to Mr Schmidt and Ms Paul. It appears also it substituted unilaterally another legal person (a company) as a respondent in the course of the investigation meeting. Because Mr France, who represented the defendant here today, was not present at the time, he could not assist me whether the Authority then dealt with issues of service on the company or any of the other usual finalities surrounding someone to be joined in proceedings in the Authority. But it is possible that counsel for Mr Schmidt and Ms Paul, Mr Marshall, may have indicated his authority to represent Frank & Peter Builders Limited, to accept service of the proceedings, and to not insist on a statement of problem being filed and served on that company.

[4] The Employment Relations Authority has the power to direct that the parties be both struck out of proceedings and joined to them. That power is in s 221(a) of the Employment Relations Act 2000 (the Act).

[5] Although, as I have indicated, it was within the Authority's power to add as a party Frank & Peter Builders Limited, even if with minimal formality, the Authority should not have deleted completely, including from the entitling to the proceedings in the Authority, Mr Schmidt and Ms Paul. The consequence of its doing so was to deprive Mrs Neill, at least temporarily, of her entitlement to challenge that part of the Authority's determination.

[6] The difficulty in the Authority following that course of unilaterally striking out a party, including from the entitling, is now illustrated by Mrs Neill's challenge to the Authority's determination of who was her employer.

[7] It is therefore not necessary for Mrs Neill to apply to join Mr Schmidt and Ms Paul as she has done, and understandably, in these circumstances. Despite the Authority's alteration of the entitling in its proceedings, in my view Mr Schmidt and Ms Paul have always been respondents in the Authority and so Mrs Neill is entitled to cite them as defendants in this challenge along with Frank & Peter Builders Limited.

[8] Mr France for the defendant relied on a judgment of this Court in *MacMillan v Hickey's Pharmacy Limited*² but that is distinguishable on several grounds. It was a case involving an oral judgment of the Employment Tribunal under predecessor legislation and turned on the date for appeal purposes when a decision was given by the Tribunal. The legislation has changed significantly in relation to challenges from determinations of the Employment Relations Authority to this Court.

[9] In view of my decision that Mr Schmidt and Ms Paul should always have remained as named respondents in the Authority and should therefore be named defendants in this proceeding, it is unnecessary for me to consider the argument for joinder on its merits.

[10] Mr France has addressed me on some aspects of that and particularly what he submits is the inappropriateness of Ms Paul as a respondent. If it transpires that either or both of Ms Paul and Mr Schmidt were not Mrs Neill's employer, that is a matter that can be dealt with subsequently in costs.

[11] In case I am wrong in this preliminary determination, it is necessary to also address a positive defence raised by Mr Schmidt and Ms Paul. They say that Mrs Neill has not challenged the Authority's determination about the identity of her employer within the time required to do so. That is because, Mr Schmidt and Ms Paul say, the Authority Member determined in the course of his investigation

² [1999] 1 ERNZ 837.

meeting in Whakatane on 10 February 2010 that, rather than Mr Schmidt and Ms Paul, Frank & Peter Builders Limited was Ms Neill's employer. Mr Schmidt and Ms Paul say that this was a determination of the Authority pursuant to s 174 of the Act and that Ms Paul had the period of 28 days from that date within which to file a challenge to that determination. Although Mrs Neill's challenge to the Authority's written determination issued on 7 May 2010 was filed in time, Mr Schmidt and Ms Paul assert that she was out of time for challenging what they was the Authority's determination given on 10 February 2010. It follows in their submission that no application for leave to challenge out of time having been made in respect of this "determination", the Court should now not join them as parties.

[12] This submission is, however, founded on a fundamental error. Whatever indication or even decision the Authority Member may have given about the employer's identity in the course of the investigation meeting, that was not a "determination" of the Authority which is a trigger for the statutory appeal period under s 179 of the Act. Determinations of the Authority must be recorded. The opening words of s 174 ("In recording its determination on any matter before it, ...") require the Authority to make a record. This is, invariably, in the form of a written determination as indeed the Authority issued in this case on 7 May 2010. Section 174(a) requires the Authority's recorded determination to:

- (i) state relevant findings of fact; and
- (ii) state and explain its findings on relevant issues of law; and
- (iii) express its conclusions on the matters or issues it considers require determination in order to dispose of the matter; and
- (iv) specify what orders (if any) it is making; ...

[13] There is no record of the Authority's decision or determination on 10 February 2010 which meets these minimum requirements. Indeed, it is debatable whether its written determination delivered on 7 May 2010 met those minimum requirements for determination of an issue that was before it. All that the Authority Member said about this issue was the following:

But the evidence before the Authority conclusively shows, that the true or legal identity of the employer is; Frank and Peter Builders Limited. The entitling of this determination reflects this and the records of the Authority will also be changed accordingly.

However, it is unnecessary to so conclude this arguable proposition.

[14] I find that the Authority did not give an oral determination on the question of employer identity on 10 February 2010. The decision of that question was made in the written (recorded) determination of the Authority issued on 7 May 2010 and so the challenge to all matters determined by the Authority (including employer identity) was within time.

[15] The defendant and Mr Schmidt and Ms Paul also argue that the Authority's determination about the identity of Mrs Neill's employer was a matter of its procedure that is unappealable by her. They rely on s 179(5) of the Act which provides, in relation to rights of challenge, as follows:

- (5) Subsection (1) does not apply—
 - (a) to a determination, or part of a determination, about the procedure that the Authority has followed, is following, or is intending to follow; and
 - (b) without limiting paragraph (a), to a determination, or part of a determination, about whether the Authority may follow or adopt a particular procedure.

[16] I do not agree that a decision about the identity of a party to litigation against whom relief is sought, resulting in the inclusion within, or exclusion from, those proceedings, is "a determination, or part of a determination, about the procedure that the Authority has followed, is following, or is intending to follow ...". It is difficult to imagine a matter that is less procedural and more substantive than this and I conclude that the point is without merit.

[17] The entitling to this proceeding must henceforth cite Ferenc Schmidt and Rachel Paul as first defendants and Frank & Peter Builders Limited trading as The Bathroom Store as second defendant. Although Mr France confirmed his authority to represent all defendants at this hearing, Mr Schmidt and Ms Paul must now be served with the challenge and given an opportunity to defend it independently of the company. For that purpose, an amended statement of claim will have to be filed and served by Mrs Neill setting out her claims in respect of each of the defendants. It will have to be served on them and they will then have to file a statement or statements of defence if they wish to contest the challenge.

[18] I should add that the statement of defence filed by the company when it alone appeared to be the defendant was inadequate and should not be repeated in amended form. It essentially consisted of a bare and blanket denial of the whole of the plaintiff's challenge. The Employment Court Regulations 2000 provide that both statements of claim and defence shall address the essential allegations and denials of the parties in such a way as to fully and fairly inform the other of the claim or defence to it.

[19] Once the amended statement of claim and a statement or statements of defence to that have been filed and served, the matter can be called over for a hearing.

Costs

[20] Mrs Neill has travelled from Whakatane to Auckland for the hearing today and although there is no loss of income to her, she seeks reimbursement of her travel costs, pointing out that in her affidavit Ms Paul calculated that the cost of travel 600 kilometres at 75 cents per kilometre would be \$450 which seems a reasonable figure in all the circumstances. The plaintiff is therefore entitled to reimbursement of her travelling costs by the defendants of \$450.

[21] Mrs Neill has indicated that she has consulted a lawyer about her challenge but that there is no breakdown of the costs that the lawyer may charge her, isolating the costs (if any) relating to this hearing. The fairest way of dealing with that is to reserve for later decision, when the challenge proper is dealt with, any question of legal costs that Mrs Neill may raise then in relation to today's hearing.

GL Colgan
Chief Judge

Judgment delivered orally at 12.46 pm