IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 61
ARC 1/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	PACIFIC FLIGHT CATERING LIMITED First Plaintiff
AND	PRI FLIGHT CATERING Second Plaintiff
AND	SERVICE & FOOD WORKERS' UNION NGA RINGA TOTA INC First Defendant
AND	VA'A NGAKAU Second Defendant
AND	SONNY TUITI Third Defendant
AND	KEVIN MEHANA Fourth Defendant
AND	SALA PARKER Fifth Defendant

Hearing: By written submissions filed on 2, 9, 13 and 14 March 2012

Appearances: Anthony Drake and Rosemary Childs, counsel for plaintiffs
Tim Oldfield, counsel for defendant

Judgment: 18 April 2012

JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] The issues on this challenge and cross-challenge to a determination[1] of the Employment Relations Authority concern the ability and propriety of the Authority joining additional parties to proceedings before it, both applicants and a respondent, and whether a union is entitled in law to have access to the time and wage records held by the employer of an employee who is a member of that union.

[1] [2011] NZERA Auckland 525.

[2] There is a preliminary argument for the Service & Food Workers Union Nga Ringa Tota Inc (the Union) that Pacific Flight Catering Limited's (PFCL's) challenge comes within the ambit of s 179(5) of the Employment Relations Act 2000 (the Act) and so is not able to be brought to the Court. That will have to be decided as a preliminary issue.

[3] The parties have agreed, in the interests of expedition, to forego a hearing and to have the challenge and cross-challenge dealt with on the papers. That is because the Employment Relations Authority is yet to examine the merits of some of the proceedings before it: this challenge and cross-challenge address interlocutory questions in the Authority.

[4] The relevant facts can be gleaned from the Authority's determination issued on 12 December 2011 after investigations conducted by it during June and July last year.

[5] The proceeding arises out of the loss by PFCL of an airline supply contract to a competitor, LSG Sky Chefs New Zealand Ltd (LSG). Pursuant to the provisions of Part 6A of the Act, a number of PFCL's employees transferred to LSG to continue to perform the same airline work. Many of these transferred employees were members of the Union. The law provides that such transferred employees shall be employed by the new employer on the same terms and conditions as they enjoyed with PFCL.[2]

[6] Together, both the Employment Relations Act 2000 and the Holidays Act 2003, require employers to keep records of employees' time worked, wages paid, holidays taken, and entitlement to accrued holidays. Employees are entitled to have access to those records (as are labour inspectors) including by an authorised representative.

[7] The plaintiffs say (and the defendant does not disagree) that PFCL is a holding company owned exclusively by PRI Flight Catering Limited (PRIFCL). The former company is said never to have traded or employed any person. The second plaintiff is acknowledged to be in the business of providing catering services to

[2] Section 69I(2)(b) , Employment Relations Act 2000.

airlines at Auckland International Airport and employed employees who were members of the Union. The nub of the plaintiffs' complaint is that the Union ought to have applied formally to the Authority to join additional parties but did not.

[8] Even if the Union had been required to apply formally under s 221 to have the additional parties joined, s 219 enabled the Authority to treat the amended statement of problem incorporating these additional parties as an application to do so and to have validated any informality. Section 219(1) provides in this regard:

> **219 Validation of informal proceedings, etc**
>
> (1) If anything which is required or authorised to be done by this Act is not done within the time allowed, or is done informally, the court, or the Authority, as the case may be, may in its discretion, on the application of any person interested, make an order extending the time within which the thing may be done, or validating the thing so informally done

[9] To assist its members with the transfer of their employment on the same terms and conditions (including as to continuity of employment), the Union sought copies of these records erroneously from PFCL. It did so by writing to the company repeatedly over the months of February, March, April and May 2011 requesting this information on behalf of 12 of its members covering a period of 12 months before their transfer. PFCL declined to provide such records, saying that it was not the employer of the Union members.

[10] The Union then applied to the Authority for an order for compliance and for penalties which, after the parties had been to mediation unsuccessfully, the Authority began to investigate. In the course of the Authority's extended investigation, the Union sought to add four of its individual members as applicants to its claim in the Authority and to add the company closely related to PFCL, PRIFCL, as an additional respondent. The Authority did so at the Union's request.

[11] It is the actions of the Authority in joining formally those persons as parties to the proceeding before it that is the subject of the employer's challenge. In the course of its determination, the Authority concluded that the Union was not entitled to require its members' time, wage and holiday records to be disclosed to it by their employer. That decision is the subject of the Union's cross-challenge.

Jurisdiction

[12] The first issue, before the merits of the challenge and cross challenge can be considered, is whether the Court is entitled in law to hear these. The defendants submit that it is not because of the provisions of ss 179(5) and 188(4) of the Act. These sections are as follows:

> **179 Challenges to determinations of Authority**
> …
> (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.
>
> **188 Role in relation to jurisdiction**
> …
> (4) It is not a function of the court to advise or direct the Authority in relation to—
>
> (a) the exercise of its investigative role, powers, and jurisdiction; or
>
> (b) the procedure—
>
> (i) that it has followed, is following, or is intending to follow; or
>
> (ii) without limiting subparagraph (i), that it may follow or adopt.

[13] The defendants submit that, although there can be no argument that the Authority was empowered to join parties under s 221 of the Act, the companies' complaint is really about how it went about exercising that power and is, therefore, a matter of the Authority's procedure which is beyond the reach of the Court.

[14] The defendants rely on the judgment of this Court in *Pivott v Southern Adult Literacy Inc.*[3] That was a challenge to a decision of the Authority declining to join together for investigation two separately filed proceedings (albeit with different parties) affecting the same matter.

[3] [2011] NZEmpC 67.

[15] The defendants say that, as with the *Pivott* case, the circumstances of this challenge are those which Parliament sought to address in ss 179(5) and 188(4) by preventing such challenges from frustrating the speedy and informal resolution of employment relationship problems.

[16] In support of the existence of jurisdiction to entertain the challenge, the plaintiffs rely upon another judgment of this Court, *Neill v Schmidt and Paul* .[4] In the course of a challenge to an Authority determination, that judgment decided, as a preliminary issue, who should be the defendant parties to the challenge. The plaintiff applied to the Court to join two persons who, although they had been named as original parties in the Authority, were not named in the statement of claim bringing the challenge to this Court. In the course of its investigation, the Authority had unilaterally changed the parties to its proceedings to delete those two persons whom the plaintiff wished to have identified as her employer. The Court determined that the Authority was wrong to have deleted unilaterally the names of parties to proceedings before it, thus depriving the plaintiff of an opportunity to challenge that determination, at least without those persons being added back in as parties by the Court.

[17] In the course of the judgment in *Neill*, the Court addressed an argument that the Authority's determination about the identity of the plaintiff's employer was a matter of its procedure and, therefore, pursuant to s 179(5), unchallengeable. It concluded:[5]

> 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.

[18] The point in *Neill* was whether the Authority was entitled unilaterally to delete parties from the proceeding before it with the effect of depriving rights of challenge. That was not an issue about how the Authority went about exercising the power it had but, rather, whether it had that power.

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[4] [2010] NZEmpC 96.
[5] At [16].

[19] The plaintiffs submit that their challenge to the Authority's decision to join parties in an attempt to cure defective proceedings was a jurisdictional issue as opposed to a procedural one. The plaintiffs say that their challenge concerns whether the Authority was empowered to:

- join parties in these circumstances (that is to cure defective proceedings which were a nullity) without an application, in accordance with the principles of natural justice, and a fair and reasonable opportunity for affected parties to be heard;

- issue a determination when one of the applicants joined had only given retrospective authority to the Union or had given no authority; and

- join a party by referring to a shortened version and not that person's full name.

[20] Sections 179(5) and 188(4) must be interpreted and applied in light of s 157 of the Act which, in setting out the Authority's investigative powers, states:

> **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.

[21] Further, as counsel for the plaintiffs have pointed out in their submissions, albeit in a case dealing with costs, this Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*[6] said at [32] of the Authority:

> Because the Authority is not a Court, it is not subject to the application of Court rules and processes. It is a practical and pragmatic institution which is not to be constrained by technicalities. When it comes to jurisdiction, however, the Employment Relations Authority, like the Court, is limited by

[6] [2005] ERNZ 808.

> statute. It may only decide what is legislated for and in the manner prescribed by the Act.

[22] Other relevant statutory provisions include s 143(f) which states that the object of Part 10 of the Act (under which the Authority is constituted) is to establish procedures and institutions that "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".

[23] Section 160(1)(f) provides that the Authority may, in investigating any matter, "follow whatever procedure the Authority considers appropriate."

[24] Section 221 of the Act provides:

> **221 Joinder, waiver, and extension of time**
>
> In order to enable the court or the Authority, as the case may be, to more effectually dispose of any matter before it according to the substantial merits and equities of the case, it may, at any stage of the proceedings, of its own motion or on the application of any of the parties, and upon such terms as it thinks fit, by order,—
>
> (a) direct parties to be joined or struck out; and
>
> (b) amend or waive any error or defect in the proceedings; and
>
> (c) subject to section 114(4), extend the time within which anything is to or may be done; and
>
> (d) generally give such directions as are necessary or expedient in the circumstances.

[25] As to the requirement on the Authority to comply with the principles of natural justice, the defendants submit that it has done so.

[26] Because the Act requires the Authority to comply with the principles of natural justice, a challenge to a decision on the grounds that this statutory requirement was breached must be able to be heard and cannot, therefore, fall within the prohibitions contained in s 179(5). That is so despite the existence of an independent remedy of judicial review in this Court. As may be seen from the plaintiffs' grounds of challenge set out above, they say that they had no fair and reasonable opportunity to be heard on the question of whether additional parties should be joined so that the Authority acted in breach of the statutory requirement of natural justice.

[27] Section 157(2)(a) provides that, in carrying out its role, the Authority must comply with the principles of natural justice. Also relevant is s 160 ("Powers of Authority") which provides materially in subs (1)(f) that in investigating any matter, the Authority may follow whatever procedure it considers appropriate. Read together, these statutory provisions dictate that, whilst the Authority has a very broad ability to determine its own procedure and that this is largely unreviewable, that is nevertheless subject to the requirement to act, in accordance with the principles of natural justice, the exercise of which is reviewable.

[28] I conclude that, although in all other respects the plaintiffs' challenge appears to come within the prohibited category under s 179(5) of the Act, their reliance upon an alleged breach of s 157(2)(a) and the need to uphold and enforce this fundamental obligation on the Authority and how it conducts its work, means that the plaintiffs' challenges must be able to be heard on their merits. That is not to say necessarily, of course, that they will succeed but, rather, they cannot be shut out from being heard for that reason. The defendants' preliminary jurisdictional argument does not succeed for this reason.

Was the addition of parties by the Authority in breach of the principles of natural justice?

[29] Section 221 of the Act has already been set out at [24].

[30] It is clear that the Authority was entitled to join parties without an application to do so from any of the existing parties or indeed from anyone else. Did natural justice require the Authority, before doing so, to notify any of the existing parties of its proposed addition of further parties and offer them an opportunity to be heard in respect of that proposal as the plaintiffs now contend?

[31] The Authority's determination, the substantive correctness of which has not been challenged, notes at [9] that it was the Union which applied to have joined to the proceedings four of its members as well as PRIFCL. There was no natural justice requirement in these circumstances to give PFCL an opportunity to be heard on (and oppose) the joining of these additional applicants. The position is the same in relation to the joining of PRIFCL. That additional respondent in the Authority

was, of course, entitled to the exercise of natural justice once it had become a party, including formal service of the proceedings upon it, an opportunity to take advice on its position and to participate fully in the Authority's investigation thereafter including having an opportunity to oppose the orders that were sought against it. But those are not its complaints. It says that it (and PFCL) should have been heard by the Authority before it determined to join PRIFCL. But just as no defendant can insist upon an opportunity to be heard before being named as an original defendant in proceedings to be issued, neither of the plaintiffs has a sustainable ground of breach of natural justice in what happened in this case.

[32] Although not precluded by s 179(5) from being considered on the challenge, there is nothing in the plaintiffs' grounds challenging the joining by the Authority of the additional applicants and the additional respondent and their challenge is dismissed. Those parties are properly before the Authority. In case I am wrong about the exclusion of other grounds of challenge by s 179(5), I propose to deal with them in any event.

Were the Union's ERA proceedings an incurable nullity?

[33] Alternatively, the plaintiffs say that, as issued, the Union's claims for compliance orders were a nullity so that they were not able to be amended and cured by the addition of parties (both applicants and a respondent) which together would have constituted a valid proceeding. In particular, the plaintiffs say that the Union had no authority to act either on behalf of any individual members who were employees or to act in its own name alone as it purported to do when it commenced proceedings.

[34] The proceedings as issued by the Union, although misconceived, were not an incurable nullity. The first plaintiff could, if it had wished to do so, have applied to the Authority to dismiss the claims on the alternate basis that it did not employ anyone and so was not liable to maintain employee records and/or that the Union was not entitled in law to require disclosure of those records for itself. The first plaintiff did not do so. Rather, the Union tacitly acknowledged the misconception of its proceedings and, by filing an amended statement of claim including additional

parties, invited the Authority impliedly to make orders both on behalf of and against those new parties after the second plaintiff was served and had an opportunity to lodge a statement in reply and after the applicants' claims had been investigated.

[35] This ground of challenge by the plaintiffs must also and does fail.

Is a shortened given name fatal?

[36] The final ground of challenge to the Authority's determination relies on a few letters of a name. The plaintiffs' challenge to the determination of the Authority, on the ground that the fifth defendant's name is a shortened version of a longer full name, is pedantic and unworthy of any detailed analysis in its dismissal. Even if it was of any moment, it was a matter properly rectifiable by the Authority if it had been drawn to its attention. Its serious pursuit as a ground for challenge may, along with other evidence of long delay in, and other resistance to, addressing the merits of this dispute, indicate that the plaintiffs may have an agenda other than to resolve the dispute on its merits. It is difficult to imagine that the plaintiffs would not have been advised strongly not to pursue this ground of challenge. Its dismissal will sound in costs.

Union rights and access to employee records?

[37] This is the first defendant's cross challenge to the Authority's determination at [24] of its determination that the Union did not have standing to enforce, in its own name or for itself, the rights set out in s 130 of the Act. This provides materially:

> **130 Wages and time record**
>
> (1) Every employer must at all times keep a record (called the **wages and time record**) showing, in the case of each employee employed by that employer,—
>
> (a) the name of the employee:
>
> (b) the employee's age, if under 20 years of age:
>
> (c) the employee's postal address:
>
> (d) the kind of work on which the employee is usually employed:
>
> (e) whether the employee is employed under an individual employment agreement or a collective agreement:

(f) in the case of an employee employed under a collective agreement, the title and expiry date of the agreement, and the employee's classification under it:

(g) where necessary for the purpose of calculating the employee's pay, the hours between which the employee is employed on each day, and the days of the employee's employment during each pay period:

(h) the wages paid to the employee each pay period and the method of calculation:

(i) details of any employment relations education leave taken under Part 7:

(j) such other particulars as may be prescribed.

(2) Every employer must, upon request by an employee or by a person authorised under section 236 to represent an employee, provide that employee or person immediately with access to or a copy of or an extract from any part or all of the wages and time record relating to the employment of the employee by the employer at any time in the preceding 6 years at which the employer was obliged to keep such a record.

(3) Where an employer keeps a wages and time record in accordance with any other Act, that employer is not required to keep a wages and time record under this Act in respect of the same matters.

(4) Every employer who fails to comply with any requirement of this section is liable to a penalty imposed by the Authority.

[38] The Authority concluded:[7]

> … The rights and obligations under s 130 in relation to wages and time records are a feature of an employee's personal employment relationship with an employer and are enforceable by the employee. Although a union too has an employment relationship with an employer, the terms and conditions of it do not extend to access to wage and time records by the union for itself. A penalty can be sought by a union for breach of any collective agreement containing provisions similar to s 130(2) in it, but that is not the basis of the claim in this case.

[39] The Authority concluded that even after the addition of individual employees as parties to the proceeding before it, the applicant for details under s 130(2) remained the Union alone, even after the four applicant employees were added and their individual claims under s 130(2) were made on 13 July 2011.

[40] While the Authority was correct that the Union was not entitled for itself to make a request under s 130(2), it was nevertheless open to it to do so on behalf of a member employee if the Union was authorised under s 236 to represent the employee. Section 236 provides materially:

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[7] At [24].

> **236 Representation**
>
> (1) Where any Act to which this section applies confers on any employee the right to do anything or take any action—
>
> (a) in respect of an employer; or
>
> (b) in the Authority or the court,—
>
> that employee may choose any other person to represent the employee for the purpose.
>
> …
>
> (3) Any person purporting to represent any employee or employer must establish that person's authority for that representation.

[41] For the Union to have made a request under s 130(2) on behalf of any of its members, it would have had to establish its authority to represent such a member. That could either have been by a specific authority given for the purpose of a particular s 130(2) request or it may have been by a more general authority given, for example, by a Union member as a term or condition of the member's membership of the Union to make such requests on the member's behalf. Such information as might be provided in response to such a request would, however, be the member's rather than the Union's information.

[42] The Union's case in support of its cross challenge says that the Authority focused wrongly on the nature of the relationship between the Union and the employer rather than on the provisions of s 130(2). Mr Oldfield submits that the section establishes substantive rights for persons, including unions who are authorised to represent employees under s 236 of the Act. Counsel submits that the right of access to, or a copy or extract of, wage and time records held by the employer is a substantive right of the Union so long as it establishes its authority to represent an employee. Counsel submits that the employer's obligation is then to provide "that person" with the records meaning, by "that person", the Union. It submits that it is a legal person and a representative.

[43] Mr Oldfield seeks to distinguish the judgment of this Court in *Service & Food Workers Union Nga Ringa Tota Inc v Spotless Services (NZ) Ltd*[8] because that case dealt with a claim for arrears of wages under s 131 of the Act which provides materially that they could be "recovered by the employee by action commenced in

[8] AC 50/07, 23 August 2007.

the prescribed manner in the Authority." Section 131 does not grant rights to representatives as does s 130(2) which does so expressly.

[44] Also relevant is s 18 of the Act which provides:

> **18 Union entitled to represent members' interests**
>
> (1) A union is entitled to represent its members in relation to any matter involving their collective interests as employees.
>
> (2) This Act does not prevent a union offering different classes of membership.
>
> (3) A union may represent an employee in relation to the employee's individual rights as an employee only if the union has an authority from the employee to do so given under section 236.

[45] Here, the right to access to time and wage records is not part of a collective interest but is, rather, a right that is individual and personal to the employee. Subsection 18(3) is then engaged and requires authority to represent an employee in relation to the employee's individual rights as an employee where there is authority to do so under s 236.

[46] In support of the Authority's determination, the plaintiffs invoke the *Spotless* judgment by analogy. They say that, absent any express right authorising a union to initiate enforcement action on behalf of its members, principles of agency should apply so that only a party whose rights have been infringed can enforce those rights. The plaintiffs say that, as per *Spotless*, although ss 18 and 236 permit an employee to be represented by a union, they do not extend to permitting a union to issue proceedings in its own name, whether under s 130(2) or otherwise. The importance of the matter in this case, as the plaintiffs have identified, is with the enforcement of the unanswered request under ss 135 and 137 so that any enforcement proceedings ought to have been brought by the individual employees whose individual requests for access to time and wage records may have been refused.

[47] The Union's proper role in seeking time, wage and holiday records on behalf of its members was as their agent. It was not entitled to do so in law for itself but, if authorised to do so by its members, it was entitled to do so on their behalf. The plaintiffs were entitled in law to satisfy themselves reasonably of the Union's authority from its members to seek these records.

[48] The cross challenge to this aspect of the Authority's determination is disallowed.

Summary of judgment

[49] For the foregoing reasons:

- The defendants' preliminary jurisdictional point that s 179(5) of the Act precludes the plaintiffs' challenges is not upheld.

- The plaintiffs' challenges are dismissed.

- The defendants' cross challenge is also dismissed.

- The defendants are entitled to costs, although the award will need to reflect the absence of their success on the cross challenge.

- The defendants may have the period of one calendar month from final disposition of the substantive proceedings in the Authority to file and serve submissions in support of their application for costs, with the plaintiffs to have the period of one month to respond.

- It is now open to the Authority to continue to investigate and determine those aspects of this proceeding that are still before it.

GL Colgan
Chief Judge

Judgment signed at 11.15am on Wednesday 18 April 2012