IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 64
ARC 2/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ERROL HARRISON WADE Plaintiff
AND	HUME PACK-N-COOL LIMITED Defendant

Hearing:	18 April 2012 (Heard at Rotorua)
Appearances:	Plaintiff in person Michael Sharp, counsel for defendant
Judgment:	24 April 2012

JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] The defendant applies to dismiss Errol Wade's challenge to a determination[1] of the Employment Relations Authority as being frivolous and vexatious and an abuse of the process of the Court.

[2] Although this case has been before the Court previously, that was about another issue and so it is necessary to summarise the relevant events for the purpose of this judgment.

[3] On 9 March 2004, the defendant paid the plaintiff the sum of $40,000 (less tax) in settlement of disputes that had arisen between them in their employment relationship. There was little or no documentation evidencing this agreement and it was not the subject of the Mediation Service certification process set out in s 149 of the Employment Relations Act 2000 (the Act). Mr Wade ceased his employment

[1] [2011] NZERA Auckland 548.

with the company in 2005. Almost a year and a half after the March 2004 payment, Mr Wade notified the defendant of a further claim. This asserted that the 9 March 2004 settlement had been for the sum of $70,000 and so had been short-paid $30,000. Hume Pak-N-Cool Limited (Hume) did not accept that further claim and Mr Wade issued proceedings in the Employment Relations Authority for a compliance order requiring $30,000, being the balance allegedly owed under the agreement, to be paid to him by his former employer.

[4] The Authority determined this claim on 16 October 2007,[2] deciding that the parties' agreement had been for the sum of $40,000 so that no further money was payable by the defendant to the plaintiff.

[5] Mr Wade challenged that determination in this Court, although these proceedings were discontinued by him on 6 August 2008. In 2011, he attempted to set aside the discontinuance but his application to do so was dismissed by a judgment of this Court issued on 27 May 2011.[3]

[6] Mr Wade subsequently sought leave to appeal to the Court of Appeal against the Employment Court's judgment. The Court of Appeal refused Mr Wade's application for leave in a judgment issued on 29 August 2011.[4]

[7] Mr Wade then issued further proceedings in the Employment Relations Authority applying to reopen its original investigation of his claim for the balance of the alleged settlement proceeds. His ground for doing so was that the company's witnesses had perjured themselves at the original investigation meeting about the appropriateness of Mr Wade's use of company paid petrol for his own car.

[8] This led to the Authority's determination (on the papers) from which this is a challenge. That determination was issued on 22 December 2011.

[9] As I alerted the parties to several weeks ago, I considered that there might be a fundamental jurisdictional problem with the Authority proceedings. I have now

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[2] AA 322/07.
[3] [2011] NZEmpC 57.
[4] [2011] NZCA 421.

heard submissions on this point and confirm my preliminary view that there was no jurisdiction for the Authority to have granted Mr Wade the remedy he sought, even if it may have been able to investigate his employment relationship problem. It would follow that all subsequent proceedings, including this challenge, may likewise have been without jurisdiction to provide the remedy sought. Because none of the lawyers originally and now involved, the Authority or the Courts appear to have identified this flaw in the case, I should set out my reasons for so concluding.

[10] Mr Wade originally sought from the Authority an order for compliance to enforce the payment of an employment associated debt. That was the only remedy claimed by him in the Authority. Its power to order compliance is found in s 137 of the Act. Section 137 is materially as follows:

> **137 Power of Authority to order compliance**
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> (1) This section applies where any person has not observed or complied with—
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> (a) any provision of—
>
> (i) any employment agreement; or
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> (ii) Parts 1, 3 to 6, 6A (except subpart 2), 6B, 6C, 6D, 7, and 9; or
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> (iii) any terms of settlement or decision that section 151 provides may be enforced by compliance order; or
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> (iiia) an enforceable undertaking that section 223C(1) provides may be enforced by compliance order; or
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> (iiib) an improvement notice that section 223D(6) provides may be enforced by compliance order; or
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> (iv) a demand notice that section 225(4) provides may be enforced by compliance order; or
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> (v) sections 56, 58, 77A, and 77D of the State Sector Act 1988; or
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> (vi) Parts 6 and 7 of the State Sector Act 1988; or
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> (vii) section 11(3)(c) of the Health and Disability Services Act 1993; or
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> (viii) clauses 5 and 6 of Schedule 1 of the Broadcasting Act 1989; or
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> (ix) sections 83, 83A, and 83B of the Fire Service Act 1975; or
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> (x) clauses 18, 19, and 21 of Schedule 5 of the Accident Compensation Act 2001; or
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> (xi) Part 2A (other than section 19G) and Schedule 1A of the Health and Safety in Employment Act 1992; or
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> (b) any order, determination, direction, or requirement made or given under this Act by the Authority or a member or officer of the Authority.
>
> (2) Where this section applies, the Authority may, in addition to any other power it may exercise, by order require, in or in conjunction

with any matter before the Authority under this Act to which that person is a party or in respect of which that person is a witness, that person to do any specified thing or to cease any specified activity, for the purpose of preventing further non-observance of or non-compliance with that provision, order, determination, direction, or requirement.

(3) The Authority must specify a time within which the order is to be obeyed.

(4) The following persons may take action against another person by applying to the Authority for an order of the kind described in subsection (2):

(a) any person (being an employee, employer, union, or employer organisation) who alleges that that person has been affected by non-observance or non-compliance of the kind described in subsection (1):

(b) a health and safety inspector appointed under section 29 of the Health and Safety in Employment Act 1992 who alleges that there has been non-observance or non-compliance of the kind described in subsection (1)(a)(xi).

[11] Except where a settlement such as this may have been certified by a mediator under s 149 of the Act, there is no power for the Authority to order compliance with settlement agreements between parties to an employment relationship for non or short-paid remuneration or expenses' reimbursement or other like monies. Such an agreement is a debt enforceable as such in the same way as other monetary debts, that is through the District Court, without the necessity of bringing proceedings in the Authority. The Authority simply had no power under s 137 or otherwise to adjudicate on the application for compliance that Mr Wade brought to it although it purported to do so and subsequent proceedings have assumed that this was lawful. Although it is possible for the Authority to determine the amount of money due by an employer to an employee, enforcement of payment of this would be in the District Court under s 141 of the Act in any event.

[12] The reference in Authority determinations, which appear to go both ways on this question, to s 161(1)(r) as giving it the power to enforce settlements of employment disputes which have not been the subject of Mediation Service certification, must be of at least dubious validity. That is because it begs the question how the Authority is to enforce such settlements, even if it is seized of proceedings in which that is an issue. Logically, the only answer can be by compliance order but s 137 does not permit the enforcement by compliance order of

non-certified settlements. There is no point in permitting an application to be made to the Authority to enforce settlement if it cannot do so and this, in turn, must cast doubt on the Authority's assumption of jurisdiction by reference to s 161(1)(r).

[13] As Mr Sharp pointed out, and some Authority determinations have concluded, it might be possible to categorise the settlement as a variation of the parties' employment agreement, in which case it would have been enforceable by compliance order pursuant to s 137(1)(a)(i). There is simply insufficient information before me to determine whether the settlement reached amounted to a variation of the employment agreement. Unlike in many cases, the settlement was not reached after the agreement had ended. Mr Wade's employment appears to have continued into the following year, although it is difficult to understand how the terms of the settlement varied the agreement because they simply provided for payment of a sum representing past expenditure that was not reimbursed but which did not appear to have any future application. From the information before the Court, the agreement did not evidence a variation to the parties' employment agreement.

[14] In cases where, for example, an employee has been dismissed and there has been a subsequent agreement reached settling the employee's claim to unjustified dismissal but this is not certified by the Mediation Service, such an agreement would be very difficult to categorise as a variation to an employment agreement that was already spent. Its categorisation would be an accord and satisfaction of the claim to unjustified dismissal but unless this was certified by the Mediation Service, it would not be enforceable by compliance order in the Employment Relations Authority.

[15] If the Authority was not empowered to entertain the claim to a compliance order as it did, then it follows that it could not have directed that its investigation be reopened and Mr Wade's challenge to that decision must fail. Unfortunately for Mr Wade, limitation rules on proceedings in the ordinary courts may affect his ability to now bring proceedings in those fora.

[16] In these circumstances, it is strictly unnecessary to determine whether the challenge is frivolous, vexatious, and abuse of court process and should be dismissed for that reason as the defendant has claimed.

[17] In case, however, I am wrong about the non-justiciability of this proceeding, I will nevertheless determine the defendant's strike-out application on the grounds advanced and comment on the plaintiff's application to reopen the Authority's investigation. I do so because this unmeritorious litigation is becoming interminable and costly and should now cease.

[18] The challenge would have been dismissed as frivolous, vexatious and an abuse of court process for the following reasons.

[19] Statements in Mr Wade's statement of claim such as "I refute that there was a settlement agreement and have documentation to prove that no settlement agreement existed" are not only insufficient to establish a case for reopening the Authority's investigation but also self-defeating. Mr Wade relied on the existence of a settlement agreement to support his original claim in the Authority.

[20] Ultimately, however, Mr Wade was not dismissed from his employment in connection with his fuel purchases, nor has he alleged that he was disadvantaged unjustifiably during his employment in that regard. Mr Wade's claim was to the balance of a debt that he said was owed to him by the company arising out of an agreement between the parties to settle his claims that he was not remunerated or otherwise compensated properly during his employment.

[21] Finally in this regard, I note that Mr Wade has purported to claim compensation in damages amounting to $1,080,960 on this challenge to the Authority's determination not to reopen its investigation. The history of the litigation shows that this, or a similar sum, was initially claimed by Mr Wade many years ago but reduced, by his account, to $70,000 and, by the Authority's finding, to a settlement figure of $40,000. The detail of the makeup of this substantial sum claimed bears no resemblance to compensable elements of a claim, and also illustrates, unfortunately, the disconnection between Mr Wade's hopes and expectations on the one hand, and what employment law can provide on the other.

[22] Even if I had not considered that the Court would have dismissed the challenge as vexatious, frivolous and an abuse of the court process, it was difficult to

see how Mr Wade could have persuaded the Court to reopen the Authority's investigation. That was because, although the plaintiff made assertions about the existence of new evidence, no detail whatsoever of this was provided by him, nor were the circumstances in which this new evidence had come to light. These are essential constituents of an application to reopen an investigation but have not been put forward other than in the most general and insufficient way. For this reason also, the Authority must have been right to decline to reopen its investigation.

[23] The Authority's power to reopen an investigation is set out in cl 4(1) of Schedule 2 of the Act. It is a broad power (exercised upon such terms as the Authority thinks reasonable) and is not time limited. Nevertheless, delay is a relevant consideration and here the investigation which is sought to be reopened took place more than four years ago, as did the determination of it. There is no explanation for the significant delay in applying to the Authority to reopen its investigation. Nor is there any suggestion that the circumstances leading to the request for a reopening had only come to Mr Wade's notice recently. Indeed the contrary is true, that is, he seeks to put forward the same allegations and, although asserting that he can "now prove my fraud allegations", there is no information about how he proposes to do so or about when his ability to do so came about.

[24] For the foregoing reasons, I dismiss Mr Wade's challenge and, because of the effect of s 183(2), I confirm that the Authority's investigation will not be re-opened.

[25] Although not on all of the same grounds that the defendant advanced for a strike out, the effect of my decision is the same and I consider that the defendant should be entitled to costs on the dismissal of the challenge. Taking into account what Mr Sharp advised me was the defendant's expenditure of about $5,000 in legal fees and Mr Wade's assertions of impecuniosities, I direct that the plaintiff must pay the defendant the sum of $1,500 plus an allowance for travelling expenses of $200. In fixing this sum, I have not allowed for the costs of the defendant in presenting submissions on the jurisdictional question which was hardly the fault of Mr Wade. I nevertheless express my appreciation to Mr Sharp and Mr Sparrow for the comprehensive, helpful and dispassionate submissions on the interesting and

important question of the Authority's power to enforce such settlements by compliance.

GL Colgan
Chief Judge

Judgment signed at 9 am on Tuesday 24 April 2012