IN THE EMPLOYMENT COURT
WELLINGTON

[2013] NZEmpC 210
WRC 21/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	MAS ZENGRANGE (NZ) LIMITED Plaintiff
AND	HDT LIMITED First Defendant
AND	MARK RALPH CLIFFORD Second Defendant
AND	IAN CHRISTOPHER GARNETT Third Defendant
AND	JOHN EMERY SULE Fourth Defendant

Hearing: 20 November 2013
(Heard at Wellington)

Appearances: Charles McGuinness, counsel for plaintiff
P B Churchman QC and R E Webby, counsel for defendants

Judgment: 21 November 2013

JUDGMENT OF CHIEF JUDGE G L COLGAN

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[1] This judgment decides what purports to be a challenge to a determination of the Employment Relations Authority.[1] Just why I have so described it will become clear when I outline the nature of two preliminary jurisdictional points that arise in the case.

[1] [2013] NZERA Wellington 113.

[2] The first is whether there is indeed a "determination" of the Authority which may be challenged under s 179 of the Employment Relations Act 2000 (the Act). Even if what the Authority has done to which the plaintiff objects is a determination, the second preliminary point is whether s 179(5) of the Act precludes the challenge because it is to a determination or part of a determination about the procedure that the Authority has followed, is following, or is intending to follow, or is about whether the Authority may follow or adopt a particular procedure.

[3] The plaintiff (to which I will refer for convenience as MAS) has brought proceedings in the Authority against three former employees (the second, third and fourth defendants, Mark Clifford, Ian Garnett and John Sule) in respect of alleged breaches of their employment obligations to MAS. The first defendant is said to be the new corporate entity and perhaps also the new employer, of Messrs Clifford, Garnett and Sule, against whom a penalty is sought for being a party to their breaches of their employment agreements.

[4] The Authority proceedings are still at the preparatory stage of its investigations. The defendants want to see and have copies of a number of documents that they believe the plaintiff possesses or controls, including documents that passed between MAS's Managing Director, Roger Ballantine, and an entity described as Hall & Watts Defence Group of Companies. It is unnecessary to deal further with the particulars of these requests at this stage.

[5] The plaintiff declined to provide directly to the defendants the documents sought by them because it considered these documents were not relevant to the litigation in the Authority.

[6] By application dated 5 September 2013, the defendants sought a direction from the Authority under s 160(1) of the Act requiring the plaintiff to disclose the documents to the defendants. Section 160(1) specifies some of the Authority's powers and, because it will be relevant also to the issues to be decided in this case, I set it out as follows:

(1) The Authority may, in investigating any matter,—
  (a) call for evidence and information from the parties or from any other person:
  (b) require the parties or any other person to attend an investigation meeting to give evidence:
  (c) interview any of the parties or any person at any time before, during, or after an investigation meeting:
  (d) in the course of an investigation meeting, fully examine any witness:
  (e) decide that an investigation meeting should not be in public or should not be open to certain persons:
  (f) follow whatever procedure the Authority considers appropriate.

[7] The defendants' application of 5 September 2013 did not specify how the documents were to be disclosed or especially to whom they were to be provided. The plaintiff opposed the defendants' application.

[8] The Authority heard submissions in support of, and in opposition to, the application during a telephone conference call with counsel on 13 September 2013. The Authority Member declined orally to make an order under s 160(1) requiring the documents be provided directly by the plaintiff to the defendants, but eventually requested the defendants to lodge a draft form of order. The document at the heart of the challenge is called "Direction of the Authority" and is dated 23 September 2013.

The Authority's "Decision"

[9] I will use the word "decision" as a neutral term for the document produced by the Authority but which should not be taken as implying whether it amounts to a "determination" of the Authority.

[10] Much of the plaintiff's case is based on a literal interpretation of what the Authority intended and some of that interpretation, I have to say, is unrealistic. Nevertheless, counsel agree that the Authority could have expressed itself more clearly. That said, it would have been open to the plaintiff to have asked the Authority to clarify what it meant although I suspect that any clarification would not have avoided this challenge being brought.

[11] I think it is best that I set out the operative paragraphs of the Authority's decision and then my interpretation of that.

[12] It wrote:

> [1] Pursuant to s.160(1)(a) and (b) of the Act, the managing director of the applicant, Mr Roger Ballantine, has been directed to attend an investigation meeting of the Authority in order to give evidence by way of producing for the Authority any books, papers, records or things in Mr Ballantine's possession or under Mr Ballantine's control in any way relating to the matter between the parties. Alternatively, Mr Ballantine may file a sworn affidavit attaching the relevant documents. I am satisfied of the relevance of these documents, on the basis of Mr Churchman's submissions to that effect.
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> [2] Those documents are copies of all correspondence since February 2012 (however sent) and notes or records of telephone or other similar communications since February 2012 between Roger Ballantine and the directors, managers or employees of any of the Hall & Watts Defence group of companies relating to the respondents (whether jointly or separately) in these proceedings, including communications with John Hoskins and Arvind Thakkar.
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> [3] Mr Ballantine is not required to provide documents that are subject to legal professional privilege, or would tend to incriminate the applicant, or if provided would be injurious to the public interest.
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> [4] If Mr Ballantine chooses not to provide the information sought by attaching it to an affidavit, he is to appear at an investigation meeting of the Authority on Monday, 14 October 2013 at 10am at the Authority's offices. This process has been adopted because of concerns that the Authority may lack jurisdiction to order disclosure of documents between the parties in the absence of voluntary agreement.

[13] First is the direction in [1] to produce "…for the Authority any books, papers, records or things in Mr Ballantine's possession or under Mr Ballantine's control in any way relating to the matter between the parties." I interpret this as a reference to the Authority's powers to issue witness summonses under cl 5(2) of sch 2 to the Act which uses those words. I do not interpret them, however, as being the specific requirement upon the plaintiff or Mr Ballantine. That is set out in [2] which was indeed what the defendants had asked the Authority to direct.

[14] Next, I interpret the final sentence in [1] not as determining the relevance of those documents which the Authority had not seen but, rather, the Authority being satisfied that there was a sufficiently arguable case of their relevance, that it should

call for them. Counsel for the defendants, Mr Churchman, acknowledged, at least obliquely, that it would be unlikely that he could have satisfied the Authority Member of the relevance of documents that had not been seen and the existence of at least some of which had not been admitted by the plaintiff. So interpreted, the Authority's remarks about the relevance of documents would have been sufficient to have justified its decision to call for those documents to determine, first, the relevance of them to the proceedings and, if they are relevant and subsequently, the weight that will be given to them in the context of its investigation.

[15] In this regard, the plaintiff submits that the justification advanced for the documents' relevance (if indeed such documents exist, which has not been confirmed or denied by the plaintiff), does not justify their production to the Authority. They are said to relate, at least potentially, to the plaintiff's motive in bringing the proceeding. The plaintiff says that its motive for doing things is irrelevant to the issue in its proceeding. However, I accept that motive may be relevant to the discretionary remedy of a compliance order which is sought, and also to another issue in the proceeding. That is the potential validation of restraint provisions in the employment agreements if these are found to have been void as contrary to public policy.

[16] In relation to [4] of the Authority's decision, the final sentence appears to be misplaced. I do not interpret the Authority's decision to mean that it adopted the process it did to provide Mr Ballantine with the alternative option of filing an affidavit. I consider that it intended to convey that he was required to attend an investigation meeting and produce documents to the Authority (a course about which it had no doubt of its jurisdiction), rather than to require an inter partes production of the documents without the intermediate filter of the Authority's consideration of their relevant and admissibility. The Authority's comments on its adoption of the process relate to the whole of the decision rather than to that part of it referred to it in the first sentence of [4].

The grounds of the plaintiff's challenge

[17] These are set out in an amended statement of claim dated 18 October 2013. After setting out background circumstances, at para 15 the statement of claim asserts that the Authority delivered "an oral determination" during a telephone conference call with counsel for the parties on 13 September 2013 in which it declined to make an order under s 160(1) of the Act and instead asked that the defendants provide a draft order to enable the Authority to issue a summons to the plaintiff's Managing Director. This was done but the Authority then entertained further submissions from MAS opposing the making of any orders that the Authority may have indicated it was minded to make.

[18] In addition to asserting that the Authority's written direction of 23 September 2013 is a determination, the plaintiff says, both in an attempt to avoid the application of s 179(5) and with respect to its substantive challenge, that the Authority's direction is one requiring the plaintiff to give "general discovery" of documents and is thus beyond the Authority's jurisdiction and powers. Alternatively, the plaintiff says that even if the Authority was empowered to give those directions, the documentary records which are the subject of them must be, but are not, relevant to the proceeding. It claimed originally that the Authority is bound to follow the document disclosure scheme for the Employment Court contained in regs 37-52 (inclusive) of the Employment Court Regulations 2000 (the Regulations), but has now thought better of this argument and has abandoned it.

[19] The plaintiff relies, however, on reg 38 which defines relevance for the purposes of document disclosure in the Employment Court and says that the categories of documents which are the subject of the Authority's direction all fall outside that definition.

[20] Further, the plaintiff says that the purpose of the Authority's order is to determine its motivation for bringing proceedings in the Authority which it says is not a relevant consideration to the proper determination of the proceedings in that forum.

[21] Next, the plaintiff claimed (at paras 24-26 of its amended statement of claim) that by making an order that it provide all documents "in any way relating to the matter between the parties", the Authority has acted in excess of jurisdiction but this head of claim was likewise abandoned at the start of the hearing.

[22] The plaintiff then contends that the Authority acted in breach of the principles of natural justice to which it is required to adhere pursuant to ss 157(2)(a) and 173(1)(a) of the Act. It says that by summonsing its Managing Director to an investigation meeting and requiring him to produce "an irrelevant and unnecessary class of documents", the Authority's direction "is unfair and unnecessarily far reaching".

[23] Penultimately, the plaintiff says that the Authority's "determination" is unreasonable having regard to its investigative role. Section 173(1)(b) of the Act requires that the Authority act in a manner that is reasonable having regard to that role and its impugned directions are said to breach that section.

[24] Finally, the plaintiff contended (at paras 42-47 of its amended statement of claim) that the direction amounts, in effect, to a witness summons but which is invalid. It relies on cl 5(1) of sch 2 to the Act which empowers the Authority to issue a summons to any person to attend before the Authority and give evidence. It says that although such a summons may require a person to produce before the Authority books, papers, documents, records or things in that person's possession or under that person's control in any way relating to the matter, such a summons must be in the prescribed form with which the Authority has failed to comply. It says that what amounts effectively to the Authority's summons in this case is too broad and fails to identify the documents to be produced in a reasonably specific way. Further, it says that the documents specified do not relate to the matter before the Authority. This head of claim was, however, likewise abandoned at the commencement of the hearing.

[25] The remedy sought on the challenge is that the Authority's directions be set aside.

Is there a "determination"?

[26] Even applying the liberal definition of a determination of the Authority that the Court did in its first interlocutory judgment in *Morgan v Whanganui College Board of Trustees*,[2] I conclude that the Authority's "Direction" of 23 September 2013 does not constitute a determination of the Authority. This is for the following reasons.

[27] Section 174(a) requires that a "determination" state relevant findings of fact, state and explain findings on relevant issues of law, express the Authority's conclusions on matters or issues it considers require determination in order to dispose of the matter, and specify what orders (if any) it makes. In *Morgan* the Court wrote with respect to s 174(a) that:[3]

> To decide whether an utterance of the Authority amounts to a determination can … be assisted by a consideration of whether the minimum requirements under s 174(a) have been met. That is not to say, of course, that the presence or absence of those mandatory features determines whether a decision is a determination or not. The Authority might issue to the parties what would, for other intents and purposes, be a determination (in the sense of being its final decision on a case) but fail inadvertently to specify what orders it is making. That would not disqualify the result from being a determination1 but the appearance of those factors in s 174(a) is helpful in determining whether what the Authority has issued is a "determination".

[28] Such interpretive assistance is not only available from s 174(a) but also by reference to s 174(b) which sets out what an Authority determination need not include. That is in the sense that s 174(b) specifies a number of factors that the Authority is expected to have taken into account but need not record in its determination. Whether, in any particular case, the Authority has considered such factors is also relevant in deciding whether its decision is a "determination". Those factors set out in s 174(b) include having heard or received evidence, having received submissions made by the parties and, if appropriate, having made assessments of the credibility of any evidence or person.

[29] As *Morgan* noted also, s 179(5) contemplates that the Authority may issue a determination about its procedure in any particular case.

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[2] [2013] NZEmpC 55.
[3] At [13].

[30] Also in *Morgan*,[4] the Court considered a relevant (but not determinative) consideration to be the Authority's description of the document in which it gave directions, in that case a "Minute" about the admissibility of evidence. Finally, the Court concluded that it is "the substance rather than the form of the document that is important …".[5]

[31] Turning to the document issued by the Authority which the plaintiff wishes to challenge, this is entituled, including with references to the names of the parties, the names of their representatives, and the date (of what is referred to as a "Determination" in the entituling), a "Direction of the Authority". It says, in essence, that pursuant to a specified statutory provision, a named person is directed to attend an investigation meeting of the Authority to give evidence by producing certain specified documents in the possession or under the control of that person who is the Managing Director of the plaintiff company. The documents to be produced to the Authority are specified as "correspondence" or "notes or records of telephone or other similar communications". The documents are limited both by time ("since February 2012"), and as between sender (Mr Ballantine) and recipients ("the directors, managers or employees of any of the Hall & Watts Defence group of companies"). The documents are limited to those relating to the respondents in the proceedings and are further particularised to include "communications with John Hoskins and Arvind Thakkar". The Authority's direction exempts from production to it such documents as may be subject to legal professional privilege or would tend to incriminate the applicant or, if provided, would be injurious to the public interest.

[32] Alternatively, the Authority's direction allows Mr Ballantine to adduce this evidence by affidavit. Although no time is specified for the filing of such an affidavit, I assume that it would have been required to be filed before the date of the investigation meeting at which Mr Ballantine was directed to attend.

[33] Examining first the s 174(a) factors, the Authority's direction does not state any relevant findings of fact in the case as the Authority does not appear to yet be in a position to do so. It does not state and explain findings on relevant issues of law

[4] At [19].
[5] At [21].

and, indeed, it expresses only some doubts about what the law might be in the final paragraph where it states: "This process has been adopted because of concerns that the Authority may lack jurisdiction to order disclosure of documents between the parties in the absence of voluntary agreement".

[34] It does not express the Authority's conclusions on matters or issues it considers require determination in order to dispose of the matter, although it does specify the orders it is making.

[35] Applying the factors set out in s 174(b), while the Authority clearly did receive submissions from the parties, it does not appear that it either heard or received evidence or was called upon to make any credibility findings.

[36] In essence, what the plaintiff contends is a determination of the Authority is actually a direction to a named person to bring specified documents to the Authority or to provide these by affidavit. It is not a determination amenable to challenge under s 179(1) of the Act.

Is s 179(5) engaged?

[37] Assuming for the purposes of this judgment (but contrary to my conclusion on this issue) that there is a determination, I also conclude that it concerns the procedure that the Authority has followed, is following or is intending to follow, and so is excluded from the challenge procedure pursuant to s 179(5). The issue that MAS wishes the Court to address in setting aside the Authority's direction or order is one about how documents arguably relating to the case, are put before the Authority.

[38] Although not referred to in argument by counsel who relied principally on the judgments in *Morgan, McConnell* v *Board of Trustees of Mt Roskill Grammar School*,[6] *Oldco PTI (New Zealand) Ltd* v *Houston*[7] and *Keys* v *Flight Centre (NZ) Ltd*,[8] there is a recent judgment of this Court dealing with the justiciability of a challenge to an Authority direction requiring someone to produce documents to it.

[6] [2013] NZEmpC 150.
[7] [2006] ERNZ 221.
[8] [2005] ERNZ 471.

That judgment is currently the subject of an application for leave to appeal although I do not understand the particular point at issue in this case to be the subject of the intended appeal. That judgment is *Aarts v Barnardos New Zealand.*[9] In that case the Authority refused to issue a summons to the Commissioner of Police requiring him to produce to it evidential videotapes. At [69] and following the Court determined:

> [69] There are two questions raised under this head of the challenge. The first is the correctness of the Authority's reasoning in refusing on legal grounds to direct production to it of the evidential videotapes. The second is whether it should have done so by summonsing a representative of Police to produce those items to the Authority.
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> [70] The first question is justiciable, the second is not because of s 179(5) of the Act. The Court cannot entertain a challenge to a procedural determination. Whether evidence should, and how it may be provided to the Authority (that is, whether by requiring a person to send it to the Authority or by summonsing someone to an investigation meeting with the documents), is not challengeable. It is a matter for the Authority to determine. …
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> [71] Section 179(5) of the Act prohibits a challenge to a determination or part of a determination about the Authority's procedure, that is the manner in which it conducts its investigations. However, although the Court cannot advise or direct the Authority how to conduct its investigations (including what evidence it should call for and consider), whether it has made an error of law in making such a determination is justiciable. So, in the circumstances of this case, whether the Authority determined correctly that it was prevented in law from calling for a certain piece of evidence is properly the subject of this challenge, although whether it should have done so as a matter of discretion in its investigative role is not for consideration.

[39] It is clear that the Authority is empowered to summons a person to an investigation meeting to give evidence, and to produce relevant documents to it, not the least from s 160(1) already set out. Not only is its intended course covered by s 160(1)(a) and (b), but (f) allows it expressly to "follow whatever procedure [it] considers appropriate". Unlike *Aarts,* there is no question in this case of a blanket statutory prohibition upon the provision of such documents to a court or tribunal

[40] The presence or absence of substantive consequence is probably the plaintiff's strongest argument against the application of s 179(5) of the Act. Mr McGuinness's argument, however, that even the slightest hint of a substantive consequence is enough to disqualify the application of subs (5), cannot be right. As

[9] [2013] NZEmpC 85.

the Court concluded in *Morgan*, it must stand back from such minutiae and assess the overall nature and consequences of the issue that is the subject of challenge. In this case, all that the Authority has done is to direct that some documents (if they exist) which may be relevant to the case before it, be produced so that it can assess their relevance and, if appropriate, the weight to be given to them in its investigation of the plaintiff's claims. It is, at best from the plaintiff's point of view, a premature challenge although I should not be taken to encourage a subsequent interlocutory challenge if the Authority does determine that these documents are relevant to its investigation. Even this strongest ground for the plaintiff does not avail its position.

[41] The Authority is an investigative body with extensive statutory powers to regulate its own procedure. Whilst there are some broad constraints on that (for example it must comply with the principles of natural justice), it is not only free to determine how it will investigate a case but the statute prohibits challenges to such decisions by the Authority, including before it determines a case finally. The quid pro quo for this unique approach is that a party dissatisfied with either the result in the Authority, or the way in which it was achieved, may challenge that by hearing de novo so that the Court embarks upon the case effectively with a clean slate. The twin legislative intents are that the Court should not direct the Authority about its procedures (so long as these are lawful), either generally or in particular cases, but also that an Authority investigation of an employment relationship problem or other proceeding should generally (but not invariably) be allowed to run its course without the delays inherent in interlocutory appeals.

[42] There being no question that the Authority was empowered to adopt the procedure it did, the question whether it should have done so is caught by s 179(5) and the issue cannot be challenged, at least at this stage of the Authority's investigations.

The substantive challenge

[43] If I am wrong and there is a determination that can be challenged, and s 179(5) is not applicable, then I do not think that the plaintiff's challenge could succeed in any event. That is for the following reasons.

[44] The Authority's "Direction" does not exceed its powers. As noted already, these are very broad, and what it requires of the plaintiff and Mr Ballantine falls well within the scope of s 160(1)(a), (b) and (c) of the Act.

[45] The scheme of the Act is that proceedings before the Authority are not in the nature of adversarial litigation. This includes its regime of document disclosure which does not provide for this to occur between parties directly and contrasts with the position in this Court. The process is under the control of the Authority including the ability to determine what witnesses it will hear from and what documents it will consider. Clearly there are documentary disclosure constraints of relevance, but the plaintiff has not established that the documents it has required Mr Ballantine to produce to it are irrelevant to those proceedings. Whether and how the Authority uses those documents in its investigation is yet to be determined. If they are irrelevant or insufficiently relevant, the Authority may elect not to make any further use of them, but that is for the future and for the Authority to determine.

[46] The plaintiff is wrong in its contention that the Authority has purported to allow what it describes as "general discovery" between the parties. The Authority's determination, although not expressed with ideal clarity, does not require the plaintiff to disclose to the defendants all documents that might have relevance to the proceeding. As already identified in this judgment, the nature and scope of the documents have been limited by the Authority's direction. If anything, particular disclosure has been directed rather than "general discovery".

[47] The plaintiff has now abandoned its submission that the statutory disclosure regime under the Regulations is applicable to any orders that the Authority makes. That is a realistic concession. Parliament has deliberately not provided for a statutory disclosure regime in respect of the Authority as it has for the Court. The Court's regime does not apply by default. As Mr McGuinness submitted, however, that does not mean that elements of the Court's statutory process cannot be adopted on a case by case basis as the Authority has, for example, by exempting from the requirements imposed on Mr Ballantine documents which may be privileged, which may incriminate the plaintiff, or which would not be in the public interest to be disclosed.

General principles relating to privilege as expressed in the Regulations can guide the Authority's exercise of its broad powers.

[48] The plaintiff's assertions of breach of the principles of natural justice by the Authority are also unsustainable. Indeed, the Authority went to some lengths to involve the plaintiff in how the defendants' application to the Authority was considered including allowing the plaintiff additional time to make written submissions before the Authority issued its direction. The principles of natural justice concern process, and the plaintiff's complaint appears to be one of outcome rather than process. The plaintiff's submission really comes down to one which says that by failing to set out in detail its reasoning, the Authority both breached the rules of natural justice and made a decision that was unreasonable. As I have already found, the plaintiff's complaint about the result is not properly one of a natural justice breach. In the circumstances set out, reasonableness of result is neither a question of natural justice nor a conclusion that can be reached fairly on the facts of this case. This ground of challenge could not have succeeded.

[49] Finally, I am satisfied, also, that the Authority's direction cannot be said to be "unreasonable having regard to its investigative role". That is tied to the plaintiff's case that the documents required to be produced to the Authority are "irrelevant and unnecessary" to the proceedings before it. As already noted, that is an issue both for the Authority and for the future.

Conclusions

[50] Even on its merits, the plaintiff's challenge would have failed and would have been dismissed. It is, however, dismissed first because there is not a determination of the Authority to challenge, and second because even if there is a determination, a challenge to it is prohibited by s 179(5) of the Act.

[51] The defendants are entitled to costs and I encourage the parties to attempt to settle these. If they cannot do so, the defendant may apply by memorandum filed

and served within 30 days of the date of this judgment with the plaintiff having 21 days thereafter to respond by memorandum.

GL Colgan
Chief Judge

Judgment signed at 4.15 pm on Thursday 21 November 2013