IN THE EMPLOYMENT COURT
AUCKLAND

AC 48/09
ARC 69/09

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	DISCOUNT CRANE HIRE LIMITED Plaintiff
AND	ANTON LIONEL TALJAARD (LABOUR INSPECTOR) Defendant

Judgment: 9 December 2009

JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] The defendant Labour Inspector, Mr Anton Taljaard, lodged a statement of problem in the Employment Relations Authority in February 2009 claiming under the Holidays Act 2003 against the plaintiff, Discount Crane Hire Limited ("DCHL"). Mr Taljaard sought to recover annual holiday pay for two former DCHL employees and a penalty of $10,000 for failing to pay out holiday pay on termination of employment and failing to provide a holiday record upon request.

[2] The Employment Relations Authority delivered its determination on 10 August 2009 (AA 268/09). The Authority there recorded that DCHL failed to attend mediation as directed and notified by the Authority on 28 April 2009. Following that, DCHL also failed to take part in the Authority's telephone conference before the investigation meeting.

[3] At the investigation meeting, DCHL was represented by Adrian Raihman. The determination records that at the investigation meeting, Mr Raihman asserted that he was in possession of all the information needed to verify whether the

employees were entitled to holiday pay and that they had been overpaid wages but had failed to bring it with him to the investigation meeting. Mr Raihhman is also recorded as having suggested at the investigation meeting that mediation was the proper place to discuss the issues involved, despite DCHL's failure to previously attend mediation. The determination further records a defence and cross-claim that DCHL considered but never took up.

[4] At paragraph [20] of the determination, the Authority stated that it seemed that DCHL had "*remained intent on obstructing, evading or delaying the resolution of the employees claims brought through Mr Taljaard*".

[5] The Authority found that the two employees were entitled to recover gross outstanding statutory holiday pay plus interest and that DCHL had deliberately tried to evade its obligations to pay its employees holiday pay and to supply information to Mr Taljaard as required to do so by statute. It therefore ordered DCHL to pay a penalty of $5,000.

[6] On 7 September 2009, DCHL filed a statement of claim in this Court seeking to challenge the determination by hearing de novo. On 8 September 2009, I issued a minute recording that the statement of claim did not comply with reg 11 of the Employment Court Regulations 2000 meaning that the challenge could not proceed, and the time for filing a statement of defence would not begin to run until an amended statement of claim was filed.

[7] In addition, I advised the parties that the determination had triggered the requirement for a good faith report under s181 of the Employment Relations Act 2000 ("the Act"). Pursuant to s181(2) I considered that the plaintiff may not have participated in the Authority's investigation of the matter in a manner that was designed to resolve the issues involved. I therefore requested a good faith report under s181(1) and encouraged the plaintiff to seek professional legal advice.

[8] On 10 September 2009, the Authority issued its draft good faith report. The Authority recorded that DCHL obstructed the investigation despite some minimal facilitation. The Authority stated that Mr Taljaard acted in good faith at all times but

that DCHL did not. The Authority reiterated its comments from paragraph [20] of its original determination and gave the parties until 18 September 2009 to make any comments on the draft report.

[9] In his comments to the Authority on its draft report, Mr Taljaard affirmed the Authority's views and elaborated upon the delays that he met in his own investigation of DCHL. Mr Taljaard recorded that DCHL failed to comply with notices served under s229(c) of the Act and telephone follow-ups which led to what he described as "*considerable delays*". Mr Taljaard stated that DCHL had "*purposefully attempted to stall the investigation process by not cooperating*".

[10] DCHL did not comment on the draft report.

[11] On 23 September 2009, the Authority issued its final good faith report in which it confirmed its earlier draft.

[12] On 28 September, I issued a further minute providing a further opportunity to the parties to make submissions to the Court within 14 days. I noted that DCHL had still not filed and served an amended statement of claim pursuant to my minute of 8 September 2009 and warned DCHL that a challenge did not operate as a stay and it would be open to Mr Taljaard to seek enforcement. Finally, I put DCHL on notice that a failure to file a legally compliant amended statement of claim ran the risk of the challenge being dismissed. I reiterated my suggestion that DCHL take professional advice.

[13] On 12 October 2009, the Court received a request by facsimile from Mr Raihman for an extension of 2-3 days for DCHL to file the amended statement of claim. I granted this by minute on 12 October giving the DCHL until 4pm on Friday 16 October 2009 to file an amended statement of claim and submissions on the good faith report.

[14] I issued a further minute on 28 October 2009 after the submissions on the good faith report and the amended statement of claim were still not filed, noting that while it was optional to file submissions on the good faith report, compliance with

the Court's direction as to DCHL's pleadings was not. I then directed that unless an amended statement of claim complying with reg 11 of the Regulations, as advised in the minute of 28 September 2009, was filed and served by 4pm on Wednesday 4 November 2009, the challenge would be dismissed. I reiterated my suggestion that DCHL seek legal advice.

[15] On 3 November 2009, DCHL's managing director, Ward H Pearce, filed an amended statement of claim on behalf of the company that also failed to comply with reg 11.

[16] In the meantime, the inspector had gone to the Authority to enforce its orders with which DCHL had not complied. An investigation meeting was held and a determination issued by the Authority on 5 November in which it granted Mr Taljaard compliance orders under s137 of the Act to enforce its original determination of 10 August 2009. DCHL did not lodge a statement in reply nor attend that investigation despite having received notice thereof. In its compliance determination at paragraph [11]-[12], the Authority records

> *At 9.23am on 5 November (37 minutes before the notified time for commencement of the investigation meeting) a fax was received by the Authority from Ward H Pearce who is a director of the respondent. He applied for a stay or proceedings on the grounds simply that a challenge had been made against the Authority's determination.*
>
> *A challenge to the Court is expressed by s180 of the Act not to operate as a stay of proceedings on the determination of the Authority unless the Court, or the Authority, makes an order to that effect. No order has been made by the Authority, or the Court to my knowledge*.

[17] This latter point was also made by me in my minute of 28 September 2009, more than a month earlier.

Decision

[18] Clause 15 of Schedule 3 of the Act provides:

> ***Power to dismiss frivolous cases***
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> *(1) The Court may, in any proceedings, at any time dismiss any matter or defence before it which it thinks frivolous or trivial.*

> *(2) In any such case the order of the Court may be limited to an order against the party bringing the matter or defence before the Authority for payment of costs and expenses.*

[19] The issue for decision in this judgment is therefore whether I consider that the challenge should be dismissed otherwise than on its merits.

[20] DCHL's approach to its legal obligations has been non-existent, or woeful at best. Parliament has established a regime by which parties to an employment relationship problem are required to resolve their problems at the lowest possible level, avoiding the need for judicial intervention with good faith obligations attaching at each step.

[21] DCHL failed to engage meaningfully, or sometimes to engage at all, with Mr Taljaard's investigation, the Mediation Service, two Authority investigations, the good faith report exercise and the Court's directions as to its pleadings. All along, every effort was made to clearly outline to DCHL the inexorable consequences of its misconceived approach. It has been urged to take advice if it is unclear about its rights and obligations.

[22] I conclude that DCHL's case is frivolous. It has not acted in good faith. I am driven to the view that DCHL is using the procedures of the Court to buy time and spin out the proceedings as long as possible to avoid payment of the remedies granted and orders given. It cannot do so.

[23] DCHL's challenge is now dismissed as frivolous under cl 15 of Schedule 3 to the Act.

[24] The respondent is entitled to costs which may be sought by memorandum.

GL Colgan
Chief Judge

Judgment signed at 2 pm on Wednesday 9 December 2009