IN THE EMPLOYMENT COURT
AUCKLAND

[2010] NZEMPC94
ARC 41/10

IN THE MATTER OF	referral of a question of law
BETWEEN	AYLA HUTTON AND OTHERS Plaintiffs
AND	PROVENCOCADMUS LIMITED (IN RECEIVERSHIP) AND OTHERS Defendants

Hearing: 27 May 2010

Appearances: Philip Skelton, Counsel for Plaintiffs
Tim Clarke and Liz Coats, Counsel for Defendants

Judgment: 22 July 2010

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] This matter involves a referral of a question of law from the Employment Relations Authority (the Authority) to the Employment Court (the Court) pursuant to s 177 of the Employment Relations Act 2000 (the Act).

[2] In order to answer the question posed by the Authority it is necessary to set out the material facts and the basis of the submissions made to the Authority. The plaintiffs are 113 employees who were employed at material times under individual employment contracts by one or more of the three defendant companies. Those companies are part of the ProvencoCadmus Group. They are ProvencoCadmus Limited (in receivership), Cadmus Payment Solutions Limited (in receivership) and

Provenco Payments Limited (in receivership). The companies are first, second and third defendants respectively in these proceedings.

[3] As the Authority Member states in his referral of question, during August 2009 the defendants were placed in receivership and the employment of the plaintiffs was terminated by the receivers and managers appointed by a secured creditor.

[4] Pursuant to the Receiverships Act 1993, on 17 August 2009, the receivers lawfully terminated the plaintiffs' employment agreement within 14 days after the date of their appointment. The plaintiffs were re-employed on new employment agreements. These excluded the receivers' personal liability to them. The new employment agreements were then terminated on 19 August 2009 when the receivers sold some of the companies' assets to a purchaser.

[5] The plaintiffs lodged claims in the Authority to recover unpaid wages or salary, holiday pay, redundancy compensation and other money they alleged were their entitlements under their employment agreements upon termination.

[6] Mr Clarke in his written submissions concedes the defendants do not dispute that the plaintiffs are owed the payments for wages or salary, holiday pay and redundancy compensation sought to be recovered but has challenged the jurisdiction of the Authority to order any of the ProvencoCadmus companies in receivership to make payment of preferential claims to the plaintiffs as creditors. According to the referral of question dated 10 May 2010 the defendants claimed before the Authority (and presumably now in this Court in respect of the question referred to it), that because the defendant companies are in receivership an investigation and determination of the plaintiffs' claims is not able to proceed. It is therefore on that basis that the defendants contend the Authority lacks jurisdiction and an application has been made to the Authority striking out the plaintiffs' claims in whole or in part. The Authority Member states that at an investigation meeting on 30 March 2010, the defendants submitted that the claims made by the plaintiffs are within the definition of preferential claims under s 2 of the Receiverships Act 1993, which incorporates schedule 7, cl 1(2)(a) - (c) of the Companies Act 1993. The further submission was

made that the Authority does not have jurisdiction to make an order requiring the respondent's receivers and managers to make preferential payments to creditors and for this reason it was submitted that the claims are untenable and should be struck out. There are therefore a number of separate issues arising from the defendants' submissions.

[7] During the same investigation meeting the plaintiffs clearly confirmed in their submissions to the Authority Member that the plaintiffs were not seeking orders as to how the receivers and managers should allocate any funds from the administration that may be available to meet a determination, if made in the plaintiffs' favour by the Authority. The plaintiffs confirmed that they were not asking the Authority to determine the order in which payment is to be made to them as a particular group of preferential creditors. What they sought was a formal determination or declaration on liability and the fixing of quantum. That is not just for the admitted claims of wages or salary, holiday and redundancy compensation but may include other money as well including reimbursement and compensation. If, following that determination enforcement issues arise those enforcement issues may be one in which the Authority would not be involved in any event. Those submissions on behalf of the plaintiffs were taken further by Mr Skelton during the brief hearing before me.

Question

[8] I set out the question of law that is now referred to the Court for its opinion as follows:

> Does the state of receivership that some or all of the respondent companies are now in prevent the Authority from investigating and determining the applicants' claims which have been brought to it under s 131 of the Employment Relations Act?

Submissions of counsel to the Court

[9] In his submissions on behalf of the plaintiffs, Mr Skelton emphasised that the claim by the plaintiffs is not against the receivers personally for breach of duty or for a compliance order requiring the receivers to make payment to the plaintiffs in priority to any other claim in the receivership. The object of the claim is to obtain a

determination that the plaintiffs are owed arrears of wages, holiday pay, and redundancy compensation and other entitlements from one or other of the companies named as defendants and thereby to resolve any dispute over whether the plaintiffs have the status, which then entitles them to make a claim as a preferred creditor in the receivership of the companies. Inherent is the issue as to which entity is the employer in each case, whether it be one or more of the three named defendants.

[10] Mr Skelton submitted that the Authority has exclusive jurisdiction pursuant to s 161 of the Act to determine the identity of the plaintiffs' employer and the amount of arrears of wages and other money payable to the plaintiffs pursuant to s 131 and other provisions of the Act. He submitted that the Receiverships Act 1993 does not expressly or impliedly oust the Authority's jurisdiction. He also submitted there are good policy reasons why the Authority as the low-level specialist employment institution ought to hear and determine this dispute. He submitted that the plaintiffs should not have to incur the costs of delay in having to proceed in the High Court to obtain a ruling as to whether they were employees of one or other of the defendants and therefore entitled to make a claim as a preferred creditor against those companies. In any event, he submitted that even if that were in contemplation, the High Court does not have jurisdiction at this stage to determine the issues in dispute by virtue of s 161 of the Act.

[11] The relevant provisions of s 161 of the Act provide as follows:

> **Jurisdiction**
>
> (1) The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including-
>
> (a) disputes about the interpretation, application, or operation of an employment agreement:
> (b) matters related to a breach of an employment agreement:
> (c) matters about whether a person is an employee (not being matters arising on an application under section 6(5)):
>
> …
>
> (e) personal grievances:
>
> …
>
> (g) matters about the recovery of wages or other money under section 131:
>
> …

(m) actions for the recover of penalties-
  (i) under this Act for a breach of an employment agreement:
  (ii) under this Act for a breach of any provision of this Act (being a provision that provides for the penalty to be recovered in the Authority):
  (iii) under section 76 of the Holidays Act 2003:
  (iv) under section 10 of the Minimum Wage Act 1983:
  (v) under section 13 of the Wages Protection Act 1983:
(n) compliance orders under section 137:

…

(r) any other action (being an action that is not directly within the jurisdiction of the Court) arising from or related to the employment relationship or related to the interpretation of this Act (other than an action founded on tort):
(s) determinations under such other powers and functions as are conferred on it by this or any other Act.

(2) Except as provided in subsection (1)(ca), (cb), (d), (da) and (f), the Authority does not have jurisdiction to make a determination about any matter relating to-
  (a) bargaining; or
  (b) the fixing of new terms and conditions of employment.

(3) Except as provided in this Act, no court has jurisdiction in relation to any matter that, under subsection (1), is within the exclusive jurisdiction of the Authority.

[12] So far as policy considerations are concerned Mr Skelton relied upon s 143 contained within part 10 of the Act and in particular subsections (e), (f) and (fa) as follows:

143 Object of this Part
The object of this Part is to establish procedures and institutions that –

…

(e) recognise that there will always be some cases that require judicial intervention; and

(f) 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; and

(fa) ensure that investigations by the specialist decision-making body are, generally, concluded before any higher court exercises its jurisdiction in relation to the investigations;

…

[13] What Mr Skelton submitted is that by virtue of s 161, read in the context of the objects of the Act, the Authority has the exclusive jurisdiction to determine the

identity of the employer of the plaintiffs involved and to determine their claims for arrears of wages, holiday pay and redundancy compensation and other entitlements and the quantification of the same. He conceded that once the Authority has made orders in respect of those claims, which amounts to a determination on liability, any enforcement then has to be subject to the Receiverships Act 1993. If it were otherwise the plaintiffs would be able to use the enforcement procedure under the Act to circumvent the provisions as to preference of creditors under the Receiverships Act 1993. That same position would apply in the case of an employer company in liquidation although to then pursue the issue of liability under the Act would require either a consent of the liquidator or an order of the High Court before the proceedings were commenced. Both counsel in this respect referred me to *Murphy v Smartstud Systems (in Receivership)*[1].

[14] Following the hearing of submissions I perceive Mr Clarke is now not disagreeing with the position taken by Mr Skelton. Mr Clarke submitted on the basis of the decision *BDM Grange Limited v Parker*[2] that in situations such as exist in this case the High Court and the Employment Court and the Authority have a concurrent jurisdiction. He conceded that the Authority and the Court have jurisdiction in respect of determining the identity of the employer and the liability and quantification of wage claims including the issue of holiday pay and redundancy compensation and other entitlements. However, Mr Clarke submitted that when issues of enforcement of those orders of the Authority or Court are raised they must come up against the provisions of the Receiverships Act 1993 or, in the case of a company liquidation, the Companies Act 1993. It is to this point that the strike out application apparently relates.

[15] Accordingly, the position of the parties by the time this matter has reached the Court is not too different. Apparently the strikeout application had been filed before the Authority because the defendants perceived that part of the application by the plaintiffs amounted to an attempt to enforce any order and if that is the position then Mr Clarke submitted that the Authority would have no jurisdiction in that respect.

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[1] AA115/09, 15 May 2009.
[2] [2005] ERNZ 343.

[16] One further matter which Mr Skelton did point out in his oral submissions was that to the extent that any award by the Authority as to wages, holiday pay or redundancy compensation exceeded the monetary limit for preference under the Receiverships Act 1993 or the Companies Act 1993 (amounting to $18,700) it would nevertheless remain extant as a debt owing by the company or companies. So far as preference is concerned for that portion the employee would merely assume the position of an unsecured creditor. This would also be so in respect of any claim for compensation, or other entitlements which might be made for an unjustifiable dismissal pursuant to s 123 of the Act.

Legal principles applying

[17] Both counsel referred me to authorities dealing in some respects with this somewhat thorny issue. So far as the question of whether more than one of the defendant companies can be the employer of the plaintiffs is concerned I was referred to a decision of the Authority: *Speed v Hyro New Zealand Limited (in Liquidation) v Hyro Services Pty Limited*[3]; and a decision of the Court: *Orakei Group (2007) Ltd (formerly PRP Auckland Limited) v Doherty (No 1)*[4]. Both of these decisions confirm that there are situations, particularly where related companies are involved, where more than one entity can be the employer of the respective employees. That of course is not an issue that I need to decide presently but will become an issue when this matter is referred back to the Authority when it continues its investigation.

[18] I have already mentioned the decision of *BDM Grange Limited* in which the Court dealt with the issue of division of jurisdiction between matters properly before the Authority and the Court and those specifically within the jurisdiction of the High Court. That was a case involving a cause of action based on tort but which nevertheless had a connection between an employer and an employee. Mr Skelton used that authority to submit that in the present case the essential character of the plaintiffs' claims are directed at the employment relationship itself rather than simply collateral but within the context of an employment relationship. These

[3] AA188/09, 17 June 2009.
[4] [2008] ERNZ 345.

claims relate to the identity of the plaintiffs' employer and the wages and other money payable pursuant to the employment agreement. Unlike *BDM Grange* the employment relationship does not in the present case merely provide the "factual setting for the cause of action". That seems to me to be a valid ground for distinction. It is a more correct analysis of the respective jurisdictions than there being a concurrent jurisdiction as submitted by Mr Clarke.

[19] So far as the present problem is concerned, relating the way in which the exclusive jurisdiction of the Authority and the Court as provided in the Act meshes with the Receiverships Act 1993 and Companies Act 1993, Mr Clarke referred me to passages from *Blanchard & Gedye's The Law of Private Receivers of Companies in New Zealand*[5]. The passages contained in chapter 11.12 are particularly helpful in dealing with the question now raised by the Authority Member. The following paragraphs are pertinent:[6]

> Section 32(1)(b) of the Receiverships Act conditionally extends the personal liability of a receiver to certain obligations accruing under pre-receivership employment contracts. It makes the receiver personally liable for payment of wages or salary that, during the receivership, accrue under a contract of employment relating to the property in receivership and entered into before the appointment of the receiver if notice of the termination of the contract is not lawfully given within 14 days after the date of appointment or by any later date to which that period is extended by the Court under s 32(3). If notice is not given within the prescribed (or extended) period, liability backdates to the commencement of the receivership. The receivers liability under pre-receivership employment contracts relates, however, only to wages or salary accruing during the receivership; there is no personal liability for any period prior to the appointment, although claims in respect of that period will be preferential, up to a limit of $16,420 or such greater amount as is prescribed pursuant to the three-yearly adjustment provided for in cl 3(2) of schedule 7 to the Companies Act.
>
> Liability under s 32(1)(b) arises only if the receiver does not within 14 days of being appointed, or within the extended period, "lawfully" give notice of termination of the pre-receivership employment contract. It is not necessary that the notice of termination should be given in accordance with the terms of the employment contract. To be lawful in this context the notice must simply be in accordance with the Receiverships Act and with the receiver's terms of appointment. So in *Re Weddel New Zealand Limited*,[7] despite the fact that the employees had an entitlement under their contracts of employment to one month's notice, when, three days after their appointment, the receivers had sent them notices of immediate termination, it was held by

[5] (3rd ed, Lexis Nexis, Wellington, 2008).
[6] At 11.12.
[7] [1998] 1 NZLR 30.

> the Court of Appeal that the notices were lawfully given under s 32(1)(b) and relieved the receivers of personal liability.
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> Once a notice has been lawfully given to an employee under s 32(1)(b) within the 14 days (or any extended period ordered by the Court) the receiver is relieved from any personal liability under the contract as from the date of appointment. But the employees claim for wages or salary from the date of appointment of the receiver to the date of that termination is preferential by virtue of s 30(3)(d), which was added to the Receiverships Act by s 41 of the Companies Amendment Act 2006.

[20] The authors then go on to say:

> …
>
> However, it may still be possible to argue that, although the termination can be effective immediately for the purpose of avoiding the receiver's personal liability, the employees are still left with an ability to claim from the company (but not the receiver) compensation for the wages and salary which they would have received if the contractual period of notice had been given. The point may often be largely academic since the employees would be unsecured creditors only in respect of such a claim. No preferential status is given under cl 1(2) of Schedule 7 to the Companies Act for such claims, as distinct from redundancy claims.

[21] These principles were established, as has been indicated, in the passages in the High Court and Court of Appeal decisions in *Re Weddel New Zealand Ltd (In rec and in liq.)*[8]

[22] The issue had also been the subject of discussion in the employment context in *Quik Bake Products Limited (in Receivership) & Cormac (Receiver) v NZ Baking Trade Employees* IUOW[9] and in *Spencer William Bullen (as Receiver) of Sew Hoy & Sons Limited (in Receivership)*[10]. Those decisions preceded the enactment of the Receiverships Act 1993 and the Companies Act 1993 and highlighted the injustice occasioned to employees in the event of termination of employment upon receivership (or for that matter liquidation) of the employer. The judgments in both cases referred to the need for statutory intervention, which then occurred.

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[8] [1996] 2 ERNZ 535 (HC), [1997] ERNZ 653, [1998] 1 NZLR 30 (CA).
[9] [1990] ERNZ 827.
[10] [1991] MCLR 234.

Disposition

[23] In applying those principles to the present situation it is necessary to keep clearly in mind that there is a distinction between a claim against the company as employer and any claim against the receiver that the receiver is personally liable. That distinction is clearly made in the authorities I have referred to and the *Weddel* decisions in particular. I concur with the position, which was effectively jointly reached by counsel in oral submissions before me, as to the way that the respective jurisdictions of the Authority and the Court on the one hand under the Act and the High Court on the other under the Receiverships Act 1993 and the Companies Act 1993 relate. In respect of an employment relationship problem, which this case involves, and in the event of there being a dispute or rejection of the claims, the Authority and if necessary the Court have jurisdiction to determine the liability and quantum of wages, holiday pay and redundancy compensation owing. The Authority and the Court have jurisdiction to determine the identity of the employer. They then make orders accordingly under the relevant provisions of the Act. The Authority and if necessary the Court could go on to make other awards such as compensation and penalties but those would have no preferential status in receivership or liquidation of the employer company and the employees entitled to such awards would simply stand as unsecured creditors. It should be noted, however, that to a certain extent, but at a lower priority, any reimbursement under s 123(1)(b) of the Act also ranks as a preferential claim. This is specified in clause 2(e) of Schedule 7 of the Companies Act 1993 and s 274(2)(e) of the Insolvency Act 2006.

[24] Once the Authority or the Court have determined the identity of the employer and if necessary the liability for and quantification of the wages, holiday pay, redundancy claims and reimbursement, the Receiverships Act 1993 would then take over under jurisdiction and supervision of the High Court on the matter of priority for payment of those claims from the pool of funds available. Of course if the employees wished to pursue any part of the wages, holiday pay, redundancy pay and reimbursement outside the limited monetary preference then like any award of compensation or penalty that part of those claims would also simply rank in the pool of unsecured creditors. Any attempt to enforce those claims for instance by way of actions against the directors of the employer company for breach of duties would be subject to the jurisdiction of the High Court. This is what Authority Member Mr

Dumbleton was referring to in *Murphy v Smart Stud* in the passages contained in Mr Clarke's submissions.

[25] This relationship between the Act and the Receiverships Act 1993 and the Companies Act 1993 in this way is not dissimilar from the position applying when an ordinary commercial creditor of a company in receivership or liquidation makes a claim, which is either disputed by the receiver or rejected by the liquidator. In such circumstances in order to be accepted as a creditor in a receivership or in order to prove in the liquidation of a company, where the claim is rejected, liability has to be determined first by the courts of ordinary civil jurisdiction. This could be the District Court in the event that the total debt did not exceed $200,000, or the other jurisdictional limits of that court, or the High Court: see the scheme provided by ss 233 – 242 Insolvency Act 2006 incorporated into the Companies Act 1993 by s 302 of that Act. Once liability and quantification is determined the receiver or the liquidator is then required to accept the claim and deal with its priority either as secured, preferential or unsecured whatever the case may be.

[26] I am further fortified in this analysis by virtue of the fact that clause (2)(e) of Schedule 7 of the Companies Act 1993 and for that matter s 274(2)(e) of the Insolvency Act 2006 recognise, as preferential claims, orders for reimbursement by the Authority and the Court pursuant to s 123(1)(b) and s 128 of the Act. In many ways these provisions point to the fact that the defendants' application to strike out is unsupportable but that is a matter for the Authority to determine.

[27] In conclusion therefore the issues between the parties relating to the identity of the employer and if necessary the liability for and quantification of the claims for wages, holiday pay, redundancy pay and reimbursement are required to be determined by the Authority. If a challenge is then made to any such determination such orders are required to be by way of orders of the Employment Court. In the same way, the Authority or Court must determine the liability and quantification of any other remedies sought (under the provisions of the Act) arising from the employment relationship. Once those issues are determined the receivers will be in a position to deal with those parts of the claim which have preference and then priority under the receivership. The balance may be left for enforcement against the companies in other ways. Mr Skelton handed to me copies of the receiver's second

reports for both ProvencoCadmus Limited and Provenco Payments Limited dated 9 and 20 April respectively. In the second report relating to ProvencoCadmus Limited the receivers specifically mention that they are not in a position to determine the total preferential claims of the group at this stage because of this very dispute. The Authority will now be in a position to advance the matter.

[28] Finally then, returning to the question of law, which has been posed by the Authority Member, the answer to the question is that the state of receivership that some or all of the respondent companies are now in does not prevent the Authority from investigating and determining the applicants' claims, which have been brought to it under s 131 of the Act. Nor does the receivership status prevent the Authority from investigating and determining other claims brought to it under the Act but subject to the limitations I have referred to in this judgment. It must be emphasised, however, that those claims can relate only against the companies and not the receivers personally as neither the Authority nor the Court in the present circumstances would have jurisdiction to deal with claims against the receivers personally.

[29] The matter is accordingly referred back to the Authority to continue with its investigation. So far as costs are concerned the costs incurred by the parties in having to argue this matter before the Court should lie where they fall. This was not necessarily a novel point as in one form or another it has been before the courts previously. Nevertheless the situation faced by the Authority Member posed difficult questions of law and it was not inappropriate to interrupt the investigation procedure for the question to be answered.

M E Perkins
JUDGE

Judgment signed at 4.15 pm on 22 July 2010