

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2020] NZEmpC 91
EMPC 10/2020**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

BETWEEN DOLLAR KING LIMITED
 Plaintiff

AND HYOWON JUN
 Defendant

Hearing: On the papers

Appearances: J Laphorne and M Hutcheson, counsel for plaintiff
 M Kim and NM Lim, counsel for defendant
 M Austen, counsel assisting the Court

Judgment: 29 June 2020

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

[1] This judgment decides a narrow, but important, issue relating to the Employment Relations Authority’s jurisdiction to impose a penalty on a party of its own motion.

[2] The issue has come before the Court on a non-de novo challenge to a determination of the Employment Relations Authority imposing a penalty on Dollar King Limited for breach of the Holidays Act 2003.¹ The penalty had not been sought by the defendant employee, and nor was there a claim for breach of the Holidays Act before the Authority at the time it came to investigate the defendant’s grievances.

¹ *Jun v Dollar King Ltd* [2019] NZERA 722 (Member Campbell).

Rather the Authority unilaterally decided to impose a penalty. Did it have jurisdiction to do so?

[3] The defendant did not wish to be heard on the challenge for reasons which are entirely understandable. He would have been content for the challenge to be dealt with by consent. I had reservations about such a course in light of the basis on which the Authority's orders had purportedly been made. It was agreed that the appropriate course was to deal with the challenge with the benefit of submissions of an amicus appointed to assist the Court.

[4] The amicus, Ms Austin, has filed comprehensive submissions, for which I am grateful. Counsel for the plaintiff have also filed helpful submissions.

[5] I have concluded that the Authority does not have the power to impose an own-motion penalty other than in the limited circumstances specified by the Employment Relations Act 2000 (the Act). Those circumstances do not include a penalty for breach of the Holidays Act, absent an application by the affected party or the Labour Inspector. That means that the plaintiff's non-de novo challenge, based on error of law, succeeds and the Authority's determination insofar as it imposes a penalty against the plaintiff must be set aside.

[6] My reasons follow.

Analysis

[7] Because the Authority is a creature of statute, it is required to act within the four corners of the Act. Whether something falls within the permissible boundary lines requires consideration of the relevant statutory provisions, including the underlying objectives of the legislation.

[8] As s 157 ("Role of Authority") makes clear, the Authority is an investigative body. Its role is to resolve employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case. This is coupled with the statutory directive that it is to discharge its role "without regard to

technicalities”.² It is also clear that Parliament intended the Authority to be an accessible forum for parties (of varying financial means, capabilities and resources) to bring their employment issues to it for speedy, non-technical, pragmatic resolution.³ The Authority was designed as a new model for dispute resolution in this jurisdiction, with the Authority member taking on an inquisitorial role and effectively driving the investigative process.⁴

[9] Ms Austen pointed out that, as an investigatory tribunal, the Authority acts as an inquisitorial body, free (in many respects) from the usual constraints of an adversarial system which apply when proceedings get to the stage of a hearing in this Court. The Authority’s inquisitorial role comes equipped with the necessary toolkit, including an enhanced ability to control proceedings. This includes powers to determine a matter without holding an investigation meeting (s 174D), to provide indications and recommendations to the parties (ss 174B; 173A), and to concentrate on substance over form (see, for example, s 160(3)). Notable too are the limitations on challenge rights (ss 179; 179A), the restrictions on judicial review (s 184), and the constraints on the Court in respect of certain matters dealt with in the Authority (see, for example, ss 179B; 179C). Underscoring the sizeable dimensions of the Authority’s toolkit is s 188(4), which provides that:

It is not a function of the court to advise or direct the Authority in relation to

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- (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.

[10] It is perhaps surprising that, although the Authority has been in existence for almost 20 years, and it is clear that the Act conferring its jurisdiction was designed to herald in a new way of approaching disputes in employment matters, the parameters of the powers conferred by s 157(1) and (3) do not appear to have been the subject of much analysis or discussion.

² Employment Relations Act 2000, s 157(1).

³ *Elisara v Allianz New Zealand Ltd* [2020] NZEmpC 13 at [26]; *McConnell v Board of Trustees of Mt Roskill Grammar School* [2013] NZEmpC 150, [2013] ERNZ 310 at [35]. See Employment Relations Act 2000, ss 143 and 157(1).

⁴ *Elisara*, above n 3, at [26].

[11] There is no doubt that the Authority has jurisdiction to award penalties under s 76 of the Holidays Act 2003, by virtue of s 161(1)(m)(iii). That provision states that the Authority has exclusive jurisdiction to make determinations, including actions for the recovery of penalties under s 76 of the Holidays Act. Actions for the recovery of penalties under s 76 may only be brought by the affected employee or the Labour Inspector. I agree with counsel for the plaintiff, Ms Lapthorne and Mr Hutcheson, that a plain reading of s 161(1)(m)(iii) excludes the imposition of an own-motion penalty by the Authority.

[12] Other statutory provisions reinforce the plaintiff's submission as to the jurisdictional point. There are five references in the Act to the Authority being able to act on its own motion – none of which relate to a breach of the Holidays Act. The five specific statutory powers are:

- (a) Section 134A(2)(a) (penalty for obstructing or delaying an Authority's investigation);
- (b) s 138(1)(a) (compliance order);
- (c) s 140A(6)(a) (transfer of workers);
- (d) s 178(1) (removal of a matter to the Court); and
- (e) s 221 (joinder, waiver, extension of time).

[13] The fact that Parliament has expressly provided for the imposition of own-motion penalties under s 134A, but that power is expressed to be limited to particular circumstances (namely where a person has unnecessarily obstructed or delayed the Authority's processes), tells strongly against a broader power to impose an own-motion penalty for other – non-specified – breaches.

[14] The proposition that the Authority has a broader penalty-imposing jurisdiction is further undermined by the well-established principle that penal provisions are to be

given a restrictive, rather than expansive, reading.⁵ Penalties have long been regarded as quasi-criminal in this jurisdiction.⁶ But even on the most expansive reading, s 134A does not empower the Authority to impose a penalty for breach of the Holidays Act.

[15] Two other potential sources of an own-motion penalty imposing power were identified by counsel assisting the Court: s 160(3) and the Authority's equity and good conscience jurisdiction.

[16] Dealing first with s 160(3). It provides that:

The Authority is not bound to treat a matter as being of the type described by the parties, and may, in investigating the matter, concentrate on resolving the employment relationship problem, however described.

[17] The difficulty with relying on this provision is two-fold. First, I have already found that the fact that Parliament has made specific provision for the Authority to impose penalties in some cases, strongly suggests that the power is limited to those particular instances. Section 76 of the Holidays Act, which relevantly post-dated s 160(3), is clearly the route Parliament intended for imposing penalties for breach of the Holidays Act. Given that s 76 is both more recent and more specific, the general power to recast, contained within s 160(3), cannot be read as providing an alternative route.⁷ Second, it is difficult to see how imposing a penalty in respect of unpaid holidays entitlements where the claim has been withdrawn, contributes to the resolution of the underlying employment relationship problem.

[18] The Authority's jurisdiction to act consistently with equity and good conscience is constrained.⁸ The Authority cannot do anything in equity and good conscience that would be inconsistent with the Act. I have already concluded that the Act does not empower the Authority to impose penalties of its own motion except in limited circumstances. Nor do I see how it would be consistent with either equity or

⁵ Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 336-337.

⁶ See, for example, *Ruapehu District Council v Northern Local Government Officers Union EmpC* Wellington W 60/92, 16 November 1992 at 17.

⁷ Carter, above 5, at 475-480.

⁸ Employment Relations Act 2000, s 157(3).

good conscience to impose a penalty on a party without first identifying the issue and giving them an opportunity to be heard.

[19] In the present case additional difficulties arise, and which otherwise support the conclusion I have reached. Those difficulties relate to the process which appears to have been followed. In this regard, the Authority imposed a penalty despite acknowledging that the defendant had withdrawn his claim under the Holidays Act. A minute issued by the Authority prior to the investigation meeting makes no mention of a penalty action as an issue for determination. Section 173(1)(a) provides that, in exercising its powers and performing its functions, the Authority must comply with the principles of natural justice. Included within those principles is the right to be heard.⁹ Imposing a penalty without hearing from the affected party constitutes an error of law.

Conclusion

[20] It follows that the challenge, which was limited to the imposition of a penalty against the plaintiff, must succeed. That part of the Authority's determination is accordingly set aside.

[21] I do not understand any issue of costs to arise.

Christina Inglis
Chief Judge

Judgment signed at 3 pm on 29 June 2020

⁹ *Re Erebus Royal Commission; Air New Zealand v Mahon* [1983] NZLR 662 (PC) at 671.