IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2022] NZEmpC 62
EMPC 300/2021

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application to strike out proceeding
BETWEEN	CRAIGHEAD DIOCESAN SCHOOL BOARD OF PROPRIETORS Plaintiff
AND	YVONNE THOMPSON Defendant

Hearing:	11 November 2021 (Heard at Christchurch)
Appearances:	R Harrison, counsel for plaintiff L Ryder and J Goldstein, advocates for defendant
Judgment:	6 April 2022

INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH
(Application to strike proceeding)

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[1] In the Employment Relations Authority Yvonne Thompson made a claim against her former employer, Craighead Diocesan School Board of Proprietors, for unpaid wages and other money.[1] Her claim arose from what are colloquially known as sleepovers and for on call duties during her employment. Craighead denied liability.

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[1] *Thompson v Craighead Diocesan School Board of Proprietors* [2021] NZERA 341 (Member Dallas).

[2] Craighead is a charitable trust that operates a boarding house for students of Craighead Diocesan School in Timaru. Mrs Thompson was employed by the trust in various positions between 2007 and 2018 including as a matron, boarding manager and director of boarding.

[3] Craighead conceded it was indebted to Mrs Thompson for wages of $1,183.98 arising from an underpayment for the period between October 2007 and June 2009. Otherwise it disputed her claims and argued that she was fully remunerated by an all-inclusive salary.[2]

[4] The Authority investigated and issued a determination in which it reached a conclusion that the claim for being on call could not succeed and it was dismissed.[3] That aspect of the determination was not challenged and the subject does not need to be considered further.

[5] This challenge is confined to how the Authority dealt with the remaining sleepover claim. The Authority commented that there "is a strong likelihood [Mrs] Thompson is owed sleepover wages".[4] Craighead was not ordered to pay any money to her and the Authority stopped short of saying that would be the outcome but it was directed to undertake financial calculations for further investigation according to a stated formula.[5] The Authority reserved consideration of interest on any arrears of wages, holiday pay and KiwiSaver contributions.[6]

The challenge

[6] Craighead challenged the Authority's determination on a limited basis by placing in issue paragraphs 80, 81, 83, 86, 87, 90, 95, 96 and 99 of it. Broadly speaking those paragraphs contain comments by the Authority Craighead considered rejected its defence to the claims based on having paid Mrs Thompson an all-inclusive salary.

[7] Craighead's challenge sought as remedies:

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2 At [10].
3 At [120].
4 At [78].
5 At [96].
6 At [123].

(a) a declaration that Mrs Thompson's remuneration was by salary, including an accommodation allowance, and was within the "all other cases" category of the minimum wage orders for the period 22 October 2008 to 23 October 2018;

(b) an order setting aside the methodology used by the Authority to direct a calculation of money potentially owed to Mrs Thompson; and

(c) a direction that the calculation of Craighead's compliance with the minimum wage order for the period 22 October 2008 to 23 October 2018 be in accordance with cl 4(d) of the relevant orders (that is the "all other cases" category of the order).

[8] Mrs Thompson applied to strike out the challenge as premature.

Strike out principles

[9] This is a convenient point to summarise the test to apply when considering an application to strike out a proceeding. The Court has jurisdiction to strike out all or part of a proceeding.[7] The criteria to apply are well known:[8]

(a) Pleaded facts, whether or not they are admitted, are assumed to be true. That does not extend to pleaded allegations which are speculative and without foundation.

(b) To be struck out, the cause of action or defence must be clearly untenable.

(c) The jurisdiction is to be exercised sparingly and only in clear cases, reflecting a reluctance to terminate a claim, or defence, short of trial.

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7 Employment Court Regulations 2000, reg 6(2)(a)(ii); High Court Rules 2016, r 15.1; and see *New Zealand Fire Service Commission v New Zealand Professional Firefighters' Union Inc* [2005] ERNZ 1053 (CA) at [13].

8 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267–268; *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33]; and *Performance Cleaners All Property Services Wellington Ltd v Chinan* [2017] NZEmpC 152; [2017] ERNZ 858 at [20].

(d) The jurisdiction is not excluded by the need to decide difficult questions of law requiring extensive argument.

(e) The Court should be slow to strike out a claim in a developing area of law.

[10] In limited circumstances evidence may be considered.[9]

The determination

[11] A brief summary of the determination is necessary to place into context both the challenge and Mrs Thompson's application seeking to strike it out. As already mentioned, she was employed by Craighead in a variety of positions all connected with operating the school boarding house.[10]

[12] The Authority identified four issues for investigation. They were:[11]

(a) Does Craighead owe Mrs Thompson arrears of wages, KiwiSaver and holiday pay?

(b) If so, in what amount?

(c) Should interest be made payable on arrears found owing to Mrs Thompson?

(d) Should either party contribute to the costs of representation of the other party?

[13] What followed was an assessment of the employment agreements throughout the employment relationship. The Authority found that an employment agreement was not signed at the beginning of the relationship, but Mrs Thompson understood that her annual remuneration was based on a 40-hour working week undertaken during

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9 Not relevant here but see the discussion in *Attorney-General v McVeagh* [1995] 1 NZLR 558 (CA) at 566.

10 *Thompson*, above n 1, at [2].

11 At [4].

term time.[12] That conclusion was followed by a discussion about a letter sent by Craighead to Mrs Thompson as she began work, in September 2007, referring to the position being salaried and managerial in nature.[13]

[14] The Authority then described the situation that had developed by June 2009, by which time Craighead had started to pay Mrs Thompson a daily rate rather than an hourly rate. A letter sent to her that month confirmed the change in payment method but, despite the rates referred to, stated that she was on an annual salary. It contained a calculation of her remuneration dividing the salary by 365 to produce a daily rate of pay.[14]

[15] The Authority's review of what happened in subsequent years produced an equally equivocal picture but which it decided became more comprehensive and clearer over time.[15]

[16] The Authority rejected Craighead's submission that it was "self-evident" Mrs Thompson's situation fell within the ambit of the "all other cases" categories in the relevant minimum wage orders.[16] After rejecting that submission, other observations about Mrs Thompson's remuneration pertinent to her claim were made. The Authority held that she was first paid by the hour and then by a daily rate for "the entirety of her employment", describing what Craighead should have done if it wanted to clarity that she was being paid a salary, before commenting that:[17]

> …Instead, it moved to a daily rate, which, as observed above, also had the collateral effect of systematically underpaying [Mrs] Thompson.

[17] The Authority continued:[18]

> [87] [Mrs] Thompson said Craighead's compliance with the applicable MWOs should be undertaken with reference to hourly (s 4(a)) and daily (s 4(b)) methodologies. There is considerable force in this submission. Indeed, *Sanderson* is good authority for the proposition that it is not appropriate to apply the "all other cases" category where it is clear that an

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12 At [12].
13 At [13].
14 At [20].
15 At [79].
16 At [86].
17 At [86].
18 The case referenced in the quote is *South Canterbury District Health Board v Sanderson* [2017] NZEmpC 127, [2017] ERNZ 749. MWO means minimum wage order.

> employee is effectively paid by the hour. There is nothing to suggest in principle this approach should not apply in circumstances where an employee is also clearly paid by the day (a daily rate).
>
> (footnotes omitted)

[18] That paragraph was followed by a comment arising from the Court of Appeal's decision in *Idea Services Ltd v Dickson*, about a rigid demarcation not being intended within cl 4 of the relevant minimum wage orders, and this passage:[19]

> As I am not convinced on the material before the Authority that [Mrs] Thompson has actually been paid the minimum wage for each sleepover hour of work she performed, Craighead is directed to undertake further calculations to demonstrate its compliance with the applicable MWOs. However, before turning to these calculations, it is necessary to direct Craighead as to the correct salary rate to be applied to the calculations.

[19] The Authority also dealt with Craighead's argument about an accommodation allowance. After reviewing the history of that allowance it found that Craighead could not set it off against liability under the applicable minimum wage orders. That was coupled with a finding that the accommodation payments were a distinct contractual arrangement set apart from Mrs Thompson's remuneration.[20]

[20] The Authority's analysis culminated at [96], setting out the methodology pursuant to which Craighead was to undertake further calculations and provide information. Craighead was directed to calculate what was required in the following way:[21]

> …The relevant time periods and the applicable MWO methodologies to be applied are:
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> (i) s 4(a) of the MWO to the period 22 October 2008 to 9 June 2009;
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> (ii) s 4(b) of the MWO to the period 10 June 2009 to 24 January 2016;
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> (iii) s 4(c) of the MWO to the period 22 October 2008 to 25 May 2014; and
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> (iv) s 4(d) of the MWO to the [period] 26 May 2014 to 24 January 2016.

[21] A different assessment was required from 25 January 2016 onwards. The Authority held that Mrs Thompson's salary from then on was "unambiguously stated

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19 *Thompson*, above n 1, at [89]; *Idea Services Ltd v Dickson* [2011] NZCA 14, [2011] 2 NZLR 522.

20 *Thompson*, above n 1, at [95].

21 The references to cls 4(a), (b), (c) and (d) are to the specified units of time in the minimum wage order (ie. by the hour, day, week or in all other cases).

to be $76,600" and it was directed to calculate compliance with the minimum wage order from January 2016 using it.[22]

The strike out application

[22] The application to strike out the statement of claim was based on the following grounds, some of which overlap:

(a) The Authority's determination is not one that can be challenged before the Court.

(b) Only written determinations that comply with s 174E of the Employment Relations Act 2000 (the Act) can be the subject of a challenge pursuant to s 179(1) of the Act.

(c) The determination was not a written one within the meaning of s 174E of the Act, because it did not comply with s 174E(a)(iii) and (iv).

[23] For analytical purposes the application also drew attention to s 184 of the Act.[23]

[24] If the application failed an extension of time to file a statement of defence was sought as an alternative remedy.

[25] The application to strike out concentrated on the Authority's determination not being amenable to a challenge because it had not expressed any conclusions, or made any orders, about whether Craighead owes Mrs Thompson pay for sleepovers.

[26] Ms Ryder's main submission for Mrs Thompson was that, despite the Authority's decision being labelled a determination, it had not resolved the issues or matters before it. If that is correct, the challenge is premature and the Court lacks jurisdiction to hear it.

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22 At [97].

23 Under which no review proceeding may be initiated unless the Authority has issued a determination on all matters relating to the review application between the parties.

[27] Those submissions turned on interpreting ss 174E(a) and 179(1) of the Act and the relationship between them. Section 179(1) provides for the right to challenge a determination and reads:

> A party to a matter before the Authority who is dissatisfied with a written determination of the Authority under section 174A(2), 174B(2), 174C(3), or 174D(2) (or any part of that determination) may elect to have the matter heard by the court.

[28] What is meant by a written determination is defined in s 174E. It:

> (a) must—
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> (i) state relevant findings of fact; and
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> (ii) state and explain its findings on relevant issues of law; and
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> (iii) express its conclusions on the matters or issues it considers require determination in order to dispose of the matter; and
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> (iv) specify what orders (if any) it is making; but
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> (b) need not—
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> (i) set out a record of all or any of the evidence heard or received; or
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> (ii) record or summarise any submissions made by the parties; or
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> (iii) indicate why it made, or did not make, specific findings as to the credibility of any evidence or person; or
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> (iv) record the process followed in investigating and determining the matter.

[29] The submission was that ss 174E(a)(i)–(iv) are compulsory and cumulative, coming from the use of "must" and the conjunction linking each subsection. The argument was, therefore, that only decisions satisfying s 174E become written determinations for the purposes of s 179(1). Such an outcome was said to be consistent with the object of pt 10 of the Act and, in particular, s 143(fa); that is to ensure investigations are generally concluded before any higher court exercises its jurisdiction in relation to the investigation.[24]

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[24] And see also s 184(1A) limiting review proceedings so that they cannot be initiated unless the Authority has issued a determination under ss 174A(2), 174B(2), 174C(3) or 174D(2) on all matters relating to the subject of the review application between the parties to the matter.

[30] Turning to this determination, it was said not to satisfy s 174E(a)(iii) because it did not express conclusions on the matters or issues the Authority identified. While the Authority's decision described and commented on the cases for the parties, it had not resolved whether Mrs Thompson was owed anything and, if so, how much. It followed that until the Authority reached conclusions on those subjects it could not be said that there was a determination on "matters or issues it considers require determination in order to dispose of the matter".

[31] To reinforce the argument Ms Ryder pointed out that the Authority's request for further information could only arise where it had not determined the case.[25] That was said to indicate the Authority had not intended its decision to have concluded relevant matters or issues.

[32] For two reasons Ms Ryder did not accept Craighead's argument that the Authority made a substantive and therefore challengeable determination about liability by rejecting Craighead's salary-based defence so that only quantum was left for later consideration. Her first reason was that, with one minor exception about the admitted debt, the Authority did not make any material findings. The nearest it came was a comment that there was a strong likelihood Mrs Thompson was owed wages but that was said to be self-evidently not a conclusion.[26]

[33] The second reason was that it is not possible to distinguish between quantum and liability in a claim for minimum wages because they are intertwined. Craighead will have no liability to Mrs Thompson if the further calculations show that in some or all of the categories identified by the Authority payments made were more than the statutory minimum. That means until the Authority quantifies the amounts paid and payable it cannot determine whether wage arrears are owed. On this analysis, the Authority's determination is not a written determination within the meaning of s 174E and it cannot be challenged under s 179(1).

[34] Mr Harrison took a different starting point for Craighead's response. He argued that the challenge fell within s 179(1) because the Authority dismissed Craighead's defence and the determination was not procedural attracting the restriction

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25 Employment Relations Act 2000, ss 174C(2) and (3).
26 At [78].

in s 179(5). He criticised the interpretative approach taken by Ms Ryder as creating a bar to Craighead which would, in reality, preclude it from continuing to put forward its all-inclusive salary defence. Since rejecting the defence involved findings of fact by the Authority, not challenging that conclusion now was said to put Craighead in a position where an attempt to dispute them after the next stage of the Authority's investigation would be time barred by s 179(2).

[35] Mr Harrison submitted that the changes to the Act in 2015, introducing s 174E, did not alter the approach previously taken in cases such as *Oldco PTI (New Zealand) Ltd v Houston* where the Court concluded that a substantive determination open to challenge was one affecting the rights and obligations of the parties that would prevent the same issue being decided again between them.[27] That meant, on Mr Harrison's argument, that the Authority had reached a substantive conclusion about Craighead's defence.

Was there a determination which can be challenged?

[36] The starting point is to ascertain the meaning of s 174E from the text and in the light of the purpose and context.[28] The text of ss 174E(a)(i)–(iv) does define a written determination but it provides only limited support for Ms Ryder's argument and needs to be seen against other changes made in 2015 to improve the Authority's efficiency in resolving employment relationship problems.[29]

[37] A significant change was made to the Act in 2015 by the introduction of oral determinations.[30] Where an oral determination is delivered the Authority is required to record it in writing as soon as practicable.[31] The same applies to oral indications of preliminary findings.[32] At the same time s 174C was introduced, dealing with determinations where the decision was reserved and delivered in writing later.

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27 *Oldco PTI (New Zealand) Ltd v Houston* [2006] ERNZ 221 (EmpC) at [48].
28 Interpretation Act 1999, s 5; Legislation Act 2019, s 10.
29 By the Employment Relations Amendment Act 2014.
30 A new s 174 required the Authority, wherever practicable, to give its determination orally or to give an oral indication of preliminary findings.
31 And not more than one month after the investigation concludes, but see s 174A(3) allowing the Chief of the Authority to extend that time if there were exceptional circumstances.
32 Employment Relations Act 2000, s 174B.

[38] Having provided amendments encouraging oral determinations it is not surprising that provision needed to be made for those decisions that could not be dealt with in that way. That was the context in which s 174E was enacted. That does not mean s 174E was designed to restrict challenges only to those matters that have been fully resolved by the Authority so that, for example, an interim determination cannot be challenged regardless of its findings. Recently, in *ABC v DEF* the Court considered whether a direction to mediate was open to a challenge and commented in relation to s 174E:[33]

> The document did not expressly refer to each of the requirements described in s 174E of the Act, as ABC noted. I consider that the provisions of the section are directory rather than mandatory. Parliament cannot have intended that a determination would cease to have effect by the absence of express reference to such elements.

[39] I agree with that sentiment.

[40] I am also not persuaded that the purpose of the Act supports the conclusion argued for by Ms Ryder. As an investigative body, the Authority's role is to resolve employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case. It is required to discharge its role without regard to technicalities.[34] It is intended to be accessible and to allow employment relationship issues to be resolved speedily, in a non-technical way, and with pragmatic solutions.[35] Given that role, it cannot have been Parliament's intention to exclude a challenge if the Authority had issued a determination that did not fully comply with s 174E.[36]

[41] If the approach argued for succeeded it would result in serious consequences for Authority determinations with interim effect. By way of example, in *H v A Ltd* the issue was the ability to challenge a determination declining to prohibit the publication of the names of the parties or information identifying them.[37] Very serious allegations were made that the plaintiff was dismissed from his employment for alleged sexual harassment. The Authority granted an urgent application for non-publication orders

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33 *ABC v DEF* [2021] NZEmpC 208 at [23]; See also the discussion in *WN v Auckland International Airport Ltd* [2021] NZEmpC 153, [2021] ERNZ 684 at [8]–[11].
34 Employment Relations Act 2000, s 157(1).
35 See for example the discussion in *Dollar King Ltd v Jun* [2020] NZEmpC 91, [2020] ERNZ 246.
36 See Employment Relations Act 2000, s 157(2) and (3).
37 *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38 at [1].

pending a decision on the substantive investigation but on a time-limited basis.[38] The issue in the challenge was whether the Court was precluded from considering the matter by s 179(5).

[42] In *H v A Ltd*, the Court concluded that the Authority's decision had an irreversible and substantive effect which could not otherwise be remedied on a challenge or by way of review. The Court was satisfied Parliament could not have intended a litigant in the plaintiff's shoes to have such an important issue determined at first and last instance by the Authority with no recourse.[39]

[43] While Ms Ryder looked to sidestep decisions such as *H v A Ltd* by pointing out that s 174E post-dates them, I am not persuaded that a different outcome was intended by Parliament. Had the intention been to overrule those decisions the 2015 amendments which introduced s 174E would have done so directly, not in an oblique way. The Act could have been amended so that no challenges are possible at all until the Authority completely concludes its investigation. That is not what is provided for.

[44] It is, therefore, possible for Craighead to challenge the Authority's determination if it has substantive effect. I consider the determination does have that effect. When it is read as a whole, Mrs Thompson succeeded in her claim even though the Authority is yet to make any orders for payment. The Authority was satisfied she was paid by the day and hour and, as a corollary, dismissed Craighead's affirmative defence that she was paid an all-inclusive salary.[40] It also dismissed Craighead's argument about how to treat the accommodation allowance, by deciding that it could not be applied as part of her salary.[41] In a sense, the determination is an interim one where the Authority reached a conclusion that Mrs Thompson's claim is successful but needs to be quantified.

[45] There is some force in Ms Ryder's submission that it is difficult in a Minimum Wage Act claim to separate liability and quantum. That is, however, what the Authority has done.

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38 At [2].
39 At [26]; the full Court drew one distinction between *Oldco*, above n 27, and the circumstances before it.
40 *Thompson*, above n 1, at [86]–[87].
41 At [95].

[46] The reality remains that if the investigation resumes the Authority will not reconsider its rejection of Craighead's defence or the decision that the accommodation allowance is not part of Mrs Thompson's salary.

[47] I prefer Mr Harrison's view, that if Craighead is not able to challenge the determination at this point it will face a subsequent argument that it is seeking to overturn substantive findings that are time-barred.[42]

Conclusion

[48] I am satisfied that Craighead is able to challenge the Authority's determination. It follows that the application seeking to strike out that challenge is unsuccessful and is dismissed.

[49] The time within which Mrs Thompson may file a statement of defence is extended. It is to be filed and served no later than 30 days from the date of this judgment.

[50] Costs are reserved. If they cannot be agreed Craighead may file submissions within 20 working days and Mrs Thompson may respond within a further 15 working days.

K G Smith
Judge

Judgment signed at 2.15 pm on 6 April 2022

[42] Employment Relations Act 2000, s 179(2).