

**IN THE EMPLOYMENT COURT
WELLINGTON**

**WC 25/09
WRC 31/09**

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

AND IN THE MATTER OF interlocutory applications

BETWEEN DIANE ELIZABETH MEENKEN
 Plaintiff

AND RIGG ZSCHOKKE LIMITED
 First Defendant

AND COMMISSIONER OF INLAND
 REVENUE
 Second Defendant

Hearing: 16 November 2009
 (Heard at Wellington)

Appearances: Diederik Meenken, Agent for Plaintiff
 Wendy Aldred, Counsel for First Defendant
 Joanna Holden, Counsel for Second Defendant

Judgment: 16 November 2009

ORAL INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] There were two interlocutory applications for determination today.

[2] The first was the plaintiff's application that the first defendant's statement of defence be struck out and that judgment be entered for the plaintiff on the basis that no defence available in this Court is disclosed by the first defendant's statement of defence. Mrs Meenken has now abandoned that application.

[3] The second application is the second defendant's to strike out the plaintiff's proceedings or, alternatively, to stay them pending any application for judicial review of the Commissioner of Inland Revenue's deduction notice.

[4] Diane Meenken is employed by Rigg Zschokke Limited as a receptionist. Her terms and conditions of employment are contained in an individual employment agreement. Mrs Meenken is indebted to the Commissioner for arrears of income tax. The Commissioner has elected to recover this debt by statutory deduction from Mrs Meenken's wages with Rigg Zschokke. The Commissioner has given notice to the employer (and to Mrs Meenken) of the amounts of those deductions and, after taking professional advice, Rigg Zschokke has accepted that it is bound to make the deductions from Mrs Meenken's wages and to remit these to the Commissioner. Mrs Meenken objects to her employer making deductions from her wages and says that it is not entitled in law to do so.

[5] Mrs Meenken took her claim to the Employment Relations Authority which, in a written decision dated 29 August 2009 (WA 121/09), found for Rigg Zschokke and declined to interfere with the deductions.

[6] Mrs Meenken has challenged the Authority's determination and has elected a hearing de novo. She asserts that ss4 and 11 of the Wages Protection Act 1983, what she asserts are "*equitable maxims*" and her employment agreement all preclude her employer from making such deductions without her written consent that she has not given. She says, in particular, that s157 of the Tax Administration Act 1994, relied on by both the Commissioner and her employer, are trumped by her entitlement in law to refuse to have deductions made from her wages. Mrs Meenken claims as relief "*an order directing the [first]defendant to pay me all deductions withheld from my wages to date, and further directing the [first] defendant to make no further deductions except in accordance with s5 of the Wages Protection Act 1983.*" She does not seek interest on those arrears and does not seek costs against her employer.

[7] In order to assist the parties in resolving this matter by mediation that I directed to take place under s188 of the Employment Relations Act 2000, I directed that the Commissioner be joined as a party in the expectation or at least the hope that

a knowledgeable and objective representative of the Commissioner might be able to explain to Mrs Meenken her statutory obligations and those of her employer in an effort to resolve this matter without further and, particularly from the first defendant's point of view, costly litigation.

[8] I am told that, regrettably, mediation has been held but it has not resolved the case.

[9] The uncontested evidence satisfies me of the following facts relevant to the strike out and/or stay applications. It is unnecessary for the Court to know, and I do not know, the circumstances in which the Commissioner says that Mrs Meenken owes the Crown money. There are established ways in which taxpayers can challenge the Commissioner's assessments, and the use by the Commissioner of the s157 procedure to recover monies by deductions from wages. These are not matters determinable in this Court even although they affect the employment relationship between the plaintiff and the first defendant. As the Commissioner has explained, the plaintiff is able ultimately to challenge the Commissioner's actions by an application for judicial review in the High Court.

[10] Section 157 of the Tax Administration Act 1994 provides materially:

157 Deduction of tax from payments due to defaulters

[(1) Where a taxpayer has made default in the payment to the Commissioner of any income tax (or a part of any income tax) or any interest under Part 7 payable by the taxpayer or any civil penalty (or a part of any civil penalty) incurred by the taxpayer, the Commissioner may from time to time by notice ... require any person to—

...

(b) Subject to subsection (3), deduct or extract from time to time, by way of instalment, from any amount that is, or from time to time becomes, an amount payable in relation to the taxpayer such sum as is equal to the lesser of—

(i) The amount that, at the time at which the deduction or extraction is required to be made in compliance with the notice, is the amount required to be so deducted or extracted:

(ii) The amount that, at the time at which, according to the notice, the amount of the instalment is required

to be deducted or extracted, is the amount payable,—

and require that person to pay to the Commissioner, within such time as is specified in the notice, every sum so deducted or extracted, to the credit of,—

(c) *To the extent that that sum is in respect of or in relation to income tax (or any part of any income tax) or any interest under Part 7 assessed on an income tax liability, the taxpayer who has that income tax liability:*

(d) *To the extent that that sum is in respect of or in relation to the whole or any part of [[an amount of tax withheld or deducted]] or interest payable to the Commissioner or a civil penalty, an account maintained by the Commissioner in relation to [[that amount of tax]] or that interest or that civil penalty.]*

[(1A) *A notice of amount to be deducted or extracted issued under subsection (1) may include a daily amount of interest as well as the amount required to be deducted or extracted.]*

[(1B) *The daily amount of interest notified under subsection (1A) shall be calculated for each day, commencing on the date of the notice and ending on the day on which the sum required by the notice is deducted or extracted.]*

(2) *This section shall bind the Crown.*

(3) *Where any notice under this section relates to any amount payable that consists of wages or salary, the sums required to be deducted from that amount shall be computed so as to not exceed the greater of—*

(a) *An amount equal to the lesser of—*

(i) *An amount calculated at the rate of 10% per week of the income tax due and payable by the taxpayer at the date of the notice:*

(ii) *An amount calculated at the rate of 20% of the wages or salary payable:*

(b) *\$10 per week.*

(4) *Any notice under this section may be at any time revoked by the Commissioner by a subsequent notice to the person to whom the original notice was given (in this section referred to as the debtor), and shall be so revoked at the request[, by notice,] of the taxpayer (being a taxpayer who is a taxpayer otherwise than as an employer) at any time when the Commissioner is satisfied that all income tax then due and payable by the taxpayer has been paid, and that the Commissioner holds to the credit of the taxpayer an amount not less*

than the amount of the income tax (if any) to become due and payable by the taxpayer during the then current [tax year].

- (5) *A copy of every notice given, under subsection (1) or subsection (4), to any person in respect of any taxpayer shall be given forthwith by the Commissioner to the taxpayer*
- (6) *Whenever by virtue of a notice under this section any deduction or extraction is made from any amount payable to any taxpayer, the taxpayer shall be entitled to receive from the debtor a [notice] of the fact of the deduction or extraction and of the purpose for which it was made.*
- (7) *Any person making any deduction, extraction, or payment in accordance with a notice under this section shall be deemed to have been acting under the authority of the taxpayer to whom the notice relates and of all other persons concerned and is by this subsection indemnified in respect of such deduction, extraction, or payment.*
- (8) *The sum deducted or extracted from any amount in accordance with a notice under this section shall be deemed to be held in trust for the Crown, and, without prejudice to any other remedies against the debtor or any other person, shall be recoverable in the same manner in all respects as if it were income tax payable by the debtor.*

...

[11] Sections 4 and 15 of the Wages Protection Act 1983 provides:

4 *No deductions from wages except in accordance with Act*

Subject to sections 5(1) and 6(2) of this Act, an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.

15 *Act subject to other enactments*

Subject to sections 6(2) and 16 of this Act, this Act shall be read subject to the provisions of any other Act.

[12] Section 6, which is referred to in both ss4 and 15, relates to overpayments of wages by employers in certain circumstances. Section 16, which is referred to in s15, relates to provisions in collective agreements. Section 5, which is referred to in s4, deals with express authorisations by employees in writing to deductions from their wages, and there is no question in this case that Mrs Meenken has given such an authorisation.

[13] The effect of s15 is that the protections against deductions without consent in s4 of the Wages Protection Act are subject to other statutory provisions such as s157

of the Tax Administration Act which I find prevail in the event of a conflict. In any event, s157(7) of the Tax Administration Act deems a deduction under that section to have been made with the necessary authority of the employee. These principles have been confirmed by the Court of Appeal in the case of *Attorney-General v Sears*¹.

The law relating to striking out of proceedings

[14] This has been restated recently in employment law by the Court of Appeal in *New Zealand Fire Service Commission v New Zealand Professional Firefighters' Union Inc*². At paragraph [13] O'Regan J, delivering the judgment of the Court, stated:

As this Court has often made clear, where a claim depends on a question of law which is capable of decision on the material before the Court, the Court should determine the question at the strike out stage, even though extensive argument may be necessary to resolve it: Gartside³ at p 45, ... We can see no reason for the Employment Court to approach strike out applications on any basis other than that applying to the High Court.

The plaintiff's claim to strike out the first defendant's statement of defence and/or for summary judgment

[15] Because this has now been abandoned I do not need to decide it but only say that if it had been pursued I think it was very clearly destined to fail. That is not only because s187(2) of the Employment Relations Act provides expressly that the Court does not have jurisdiction to entertain an application for summary judgment but, more importantly, because the first defendant's pleadings do not admit the plaintiff's claims or at least the nub of them.

Second defendant's application to strike out or stay plaintiff's proceedings

[16] Given the reason for the second defendant's inclusion as a party earlier set out in this judgment (to assist achieving a mediated settlement), it is surprising that he has now gone on the front foot seeking to dismiss the plaintiff's claims although

¹ [1995] 1 ERNZ 627

² [2005] ERNZ 1053

³ [1983] NZLR 37 (CA)

less surprising perhaps in seeking a stay. Nevertheless, the second defendant is a party and entitled to so apply.

[17] The plaintiff's claim against the first defendant can only succeed on one or both of two grounds. The first is that no valid s157 deduction notice has been given by the second defendant to the first defendant. Mrs Meenken does not allege either that she is not indebted to the Commissioner or that his s157 notices are inherently invalid. Although there was a hint of an argument of invalidity as a result of these not having been signed, Mr Meenken acknowledges that s13 of the Tax Administration Act permits printed signatures such as appear on the deductions notices in this case. As the Commissioner submits, those are questions that will have to be determined in other proceedings.

[18] The second and only other way in which the plaintiff can succeed against the first defendant is to establish that, in law, her rights to resist deductions from wages under the Wages Protection Act trump the Commissioner's entitlement in law to call upon her employer to make deductions from her wages and the first defendant's obligations to do so.


[19] That is a question of law on which I am satisfied the plaintiff cannot succeed. That is for two reasons. First, s15 of the Wages Protection Act makes s4, upon which Mrs Meenken relies, subservient to other relevant legislative provisions which include s157 of the Tax Administration Act. Put another way, s157 prevails over s4 of the Wages Protection Act because of s15 of that Act.

[20] The second reason why Mrs Meenken's claim against her employer cannot succeed is that s157(7) of the Tax Administration Act deems a s157 deduction from wages to have been authorised by the plaintiff even although it has not been in fact by Mrs Meenken. Subsection (7) goes on to indemnify the first defendant (as well as the Commissioner) in respect of such deductions. This is one of those instances where Parliament gives with one hand (rights under s4 of the Wages Protection Act) and takes away with the other hand (some of those rights under s15 of the Wages Protection Act and s157 of the Tax Administration Act).

[21] Framed as it is as an assertion that s4 of the Wages Protection Act prevails over s157 of the Tax Administration Act, I am satisfied that the plaintiff's claim against her employer cannot succeed in law.

[22] For these reasons, the plaintiff's proceeding must be and is struck out.

[23] The first defendant is entitled to costs from the plaintiff. Because it was the Court and not Mrs Meenken which joined the Commissioner as a party, I would not require her to contribute to the Commissioner's costs. In any event, the second defendant may gain some value from this decision of law in this case if there are other future challenges to s157 deduction notices.



GL Colgan
Chief Judge

Judgment delivered orally at 3.43 pm on Monday 16 November 2009