IN THE EMPLOYMENT COURT
CHRISTCHURCH

CC 11/08
CRC 15/08

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	RYAN SECURITY & CONSULTING (OTAGO) LIMITED Plaintiff
AND	KEVIN BOLTON First Defendant
AND	UP FRONT SECURITY LIMITED Second Defendant

Hearing: 8 July 2008
(Heard at Christchurch)

Court: Chief Judge G L Colgan
Judge C M Shaw
Judge A A Couch

Appearances: Peter Anderson, Counsel for Plaintiff
No appearance for First and Second Defendants
Kerry Smith, Counsel as amicus curiae

Judgment: 18 August 2008

JUDGMENT OF THE FULL COURT

---

[1] These proceedings have been removed to the Employment Court from the Employment Relations Authority. The questions at issue are whether the Authority can punish for contempt a party in breach of its orders and, if not, where such sanctions may be sought. A full Court has been convened because the jurisdiction and powers of the Authority are at issue.

[2] We were assisted by submissions from both counsel. For Ryan Security, Mr Anderson has made every point that could be made in favour of the existence of a power in the Authority to punish for contempt. We were also assisted greatly by the balanced and thoughtful submissions of Mr Smith as amicus curiae. Although we do not refer extensively to Mr Smith's submissions in this judgment, they are reflected in our conclusions and in our reasoning.

Background

[3] In mid December 2007 Ryan Security & Consulting (Otago) Limited ("Ryan Security") applied ex parte to the Employment Relations Authority for an interlocutory injunction to restrain Kevin Bolton from breaching their employment agreement. Ryan Security alleged that Mr Bolton was competing with it in breach of an express contractual restraint and/or was likely to disclose confidential information in breach of express agreement not to do so. The Authority declined to entertain Ryan Security's application ex parte and convened an investigation meeting on notice to Mr Bolton and also to two other defendants, Up Front Security Limited and Lipika Limited (trading as The Toast Bar). That meeting was held on 18 December 2007.

[4] The Authority issued an interim injunction restraining Mr Bolton from providing security services of the type provided by Ryan Security to any person for whom Ryan Security had provided such services within a period of 12 months prior to 4 November 2007. There was a further interlocutory injunction requiring Mr Bolton to abide by the specified clause of his employment agreement relating to confidential information.

[5] Ryan Security alleges Mr Bolton has breached the injunctions. It sought a declaration from the Authority that Mr Bolton was in contempt, an order that he pay all Ryan Security's costs in the litigation to date, and that a "*significant fine be imposed on Mr Bolton, with a significant proportion of this fine being payable to Ryan Security.*" The Authority removed this application to the Court under s178 of the Employment Relations Act 2000 ("the Act") on 12 May 2008.

[6] Ryan Security maintains that the Employment Relations Authority is empowered to make the orders it seeks. Mr Bolton has declined to participate in the determination of this issue. In these circumstances, the submissions made by Mr Smith as amicus curiae have included the arguments Mr Bolton might have advanced against the existence of such a power.

Contempt

[7] Contempt of a judicial body can occur in a number of ways but is usually categorised as either "criminal" or "civil". Criminal contempt comprises conduct which obstructs or interferes with the administration of justice. Civil contempt consists of disobedience of orders or processes of a court.

[8] This division is reflected to an extent in the provisions of the Act. Section 196 of the Act deals with actions which may be described as criminal contempts. These include insulting or intimidating behaviour in the course of a hearing or the wilful refusal by a person to comply with a direction of a body acting judicially given in the course of a hearing. In dealing with such contempt, the Authority has power to order the person in contempt to be detained until the end of the investigation meeting. The Court has a similar power but may also punish such contempt, either of the Authority or of the Court, by a fine or imprisonment.

[9] This case does not concern contempt covered by s196. Rather it concerns civil contempt in the form of a failure or refusal to comply with an injunction issued by the Authority. This type of contempt is not directly provided for in the Act and the question raised by this case is what the other party and the Employment Relations Authority can do about contempt of this sort.

[10] The powers of the courts of general jurisdiction to punish for contempt are both broad ranging and potentially draconian. They include fines, imprisonment and sequestration, a procedure akin to receivership. Coercive ancillary powers can be employed to effect those remedies. Punishment for contempt is a very serious matter and there must be an appropriate degree of certainty about the existence of the powers and the prerequisites for their exercise. Whether to punish and, if so, the

penalty to be imposed, are matters requiring the careful exercise of judicial discretion in accordance with principle.

Power to punish for contempt

[11] In arguing the plaintiff's case, Mr Anderson did not attempt to persuade us that the Employment Relations Authority could impose all of the sanctions for contempt that are available to other courts and, in particular, to the High Court. In particular, Mr Anderson accepted that, in light of ss6, 21 and 22 of the New Zealand Bill of Rights Act 1990, the Authority could not imprison an individual or seize property without an express statutory power to do so. Thus, he conceded that imprisonment and sequestration could not be within the jurisdiction of the Authority. Within those limitations, Mr Anderson argued that the Authority could punish contempt by a fine or other monetary penalty, potentially of an unlimited amount. Mr Anderson also submitted that other sanctions available to the Authority to deal with contempt included striking out the defence of a defendant in breach of an interlocutory injunction.

[12] Mr Anderson's submission that the Authority has a limited power to punish for contempt was based on two broad grounds. First, he referred to the powers conferred on the Authority by s162 of the Act, the relevant part of which is:

> ***162 Application of law relating to contracts***
> *Subject to sections 163 and 164, the Authority may, in any matter related to an employment agreement, make any order that the High Court or a District Court may make under any enactment or rule of law relating to contracts, …*

[13] Relying on an extension of the reasoning of the full Court in *Credit Consultants Debt Services NZ Ltd v Wilson (No 2)* [2007] ERNZ 205, Mr Anderson submitted that punishment for contempt of court orders is an order that the High Court or a District Court may make under an enactment or rule of law relating to contracts. On this basis, he submitted s162 conferred on the Authority a similar power to punish for contempt.

[14] There is no doubt that there are enactments and rules of law which authorise the High Court and the District Court to make orders by way of punishment for contempt. The issue therefore is whether those enactments and/or rules of law can properly be said to relate to contracts.

[15] Mr Anderson submitted that the availability of punishment for contempt is likely to be a powerful incentive for parties to litigation to comply with a judicial body's orders and, thereby, to comply indirectly with any contractual obligations reinforced by those orders. In this way, Mr Anderson argued that punishment for contempt of orders based on contractual obligations involved making orders "relating to contracts".

[16] While there is some superficial logic in this argument, it proceeds on a fundamental misunderstanding of the purpose of the law of contempt. As the author of *Laws of NZ,* Contempt of Court says at paragraph 5:

> *The sole purpose of the law of contempt is to preserve an efficient and impartial system of justice and public confidence [in] it, by dealing with challenges to the fundamental supremacy of the law.*

[17] This succinct statement reflects a societal expectation that people will comply with orders made by courts and tribunals, an essential part of the constitutional underpinning of the rule of law. Punishment for contempt is imposed to reinforce the authority of the courts. While it may be imposed at the instigation of a party to litigation, it is not a litigation tool to be used inter partes. Any benefit derived by a party from punishment of another party for contempt is incidental to the purpose of the power to impose such punishment. As may be seen by our subsequent analysis of the decision in *NZ Railways Corporation v NZ Seamen's IUOW and Evans* [1989] 2 NZILR 613; (1989) ERNZ Sel Cas 321, an allegation of contempt need not necessarily be prosecuted by an original party to the litigation. A court may do so of its own volition or at the request of the Solicitor-General in the public interest. It is also significant that the power to punish for contempt is the same whether the order of the court which has been breached arises out of a contract between the parties or out of some other legal obligation.

[18] In terms of s162 of the Act, therefore, punishment for contempt is an order that can be made by the High Court or a District Court under an enactment or rule of law, but it does not meet the second limb of the test that this must be an enactment or rule of law relating to contracts. The enactments or rules of law empowering those Courts to punish for contempt relate to the administration of justice and the rule of law. It follows that we do not accept the plaintiff's first argument that s162 provides an express power to the Employment Relations Authority to punish for contempt of its orders.

[19] The second argument Mr Anderson advanced on behalf of the plaintiff was that the Authority has implied power to punish for contempt of its orders because that power is necessary to make its express jurisdiction effective. In support of this proposition, he submitted that it is desirable that the judicial body considering and granting injunctive relief should have control over any subsequent breach of its orders.

[20] Whether the Authority has the implied power contended for by the plaintiff has not been the subject of any previous decision. There are, however, several judgments of the Labour Court, the High Court and the Court of Appeal in which similar issues have been discussed with respect to other jurisdictions.

[21] In *Quality Pizzas Ltd v Canterbury Hotel Employees Industrial Union* [1983] NZLR 612 the Court of Appeal addressed the jurisdiction of the Arbitration Court established under the Industrial Relations Amendment Act 1977. The specific issue was whether the High Court had the power to issue a writ of sequestration to punish contempt of an order made by the Arbitration Court. The Court of Appeal found that the Arbitration Court had no express or implied power to punish for contempt. In reaching this conclusion, the Court of Appeal rejected an argument that the Arbitration Court had inherent or implied jurisdiction to enforce its orders.

[22] By 1989, the Arbitration Court had become the Labour Court under a significantly different legislative regime, the Labour Relations Act 1987. This included an express power to grant injunctions against unlawful strikes and lockouts but did not provide any direct means to enforce injunctions if they were disobeyed.

In the *NZ Railways* case the Labour Court issued injunctions restraining a strike. The workers and their union flagrantly defied the Court's order by continuing the strike. NZ Railways Corporation then asked the Labour Court to sequestrate the property of the union. Chief Judge Goddard distinguished the judgment of the Court of Appeal in *Quality Pizzas*, finding that the Labour Court had power to directly punish contempt of the injunction it had an express power to make.

[23] In *Attorney-General v Reid* [2000] 2 ERNZ 258, the High Court was asked to declare Mr Reid a vexatious litigant under s88A of the Judicature Act 1908. As much of his litigation was conducted in the Employment Tribunal and the Employment Court, the High Court had to determine whether the Tribunal and the Employment Court were courts of judicature of inferior jurisdiction to the High Court.

[24] A full court of the High Court determined that both the Employment Tribunal and the Employment Court were *"Courts of judicature"* for the purposes of the Judicature Act but, at paragraph [32] of the judgment, said *"In … contempt of the Employment Court or the Employment Tribunal outside the Court or Tribunal, this Court retains power and the Employment Court and Employment Tribunal have no power under the ECA …"*.

[25] The Court of Appeal touched on the issue again in *Claydon v Attorney-General* [2002] 1 ERNZ 281. Former members of the Employment Tribunal made claims arising out of their non-appointment to the Tribunal's statutory successor, the Employment Relations Authority. The Court had to determine, among other issues, the status of the Tribunal and its members. It found that the Employment Tribunal and the Employment Relations Authority were not courts.

[26] Although the observations of the High Court in *Reid* are obiter dicta and not binding on us, they are not to be ignored. The judgment of the Labour Court in *NZ Railways* is also not binding but is persuasive on its facts. Unless distinguishable, the conclusions of the Court of Appeal in *Quality Pizzas* are binding, despite the lapse of time and the substantially different legislative regime that is now in effect.

[27] The decision which most strongly appears to support the plaintiff's case is the *NZ Railways* case. In discussing whether the Labour Court had jurisdiction to punish for disobedience of its injunctions, Chief Judge Goddard examined the *Quality Pizzas* decision and effectively concluded that it could be distinguished on the grounds that the Labour Court was not an "*inferior Court*" as the Court of Appeal had found the Arbitration Court to be.

[28] The Chief Judge then identified what he regarded as two sources of jurisdiction on which the Labour Court could rely to punish for disobedience of its injunctions. The first was what he described as "*the well-known rule of law*" that a Court created by statute has "*an implied jurisdiction to do whatever is necessary to make its express jurisdiction effective*". No authority was cited for this proposition. Rather, the Chief Judge sought to support it by analogy from the decision of the Court of Appeal in *Taylor v Attorney-General* [1975] 2 NZLR 675 which found that the High Court has inherent jurisdiction to make orders necessary to act effectively. He concluded:

> *I think that a Court created by statute may have a similar implied power where that power needs to be implied to enable the Court to act effectively. Where a Court is given jurisdiction to grant injunctions, it must also have the power to see to it that those injunctions are obeyed.*

[29] The second and principal source of jurisdiction relied on in the *NZ Railways* case was s307 of the Labour Relations Act. This conferred on the Labour Court a general power to make rules regarding practice and procedure and went on to provide that, where no rules had been made in relation to certain powers under the Act, including the power to issue injunctions under s243, the rules applicable in the High Court were to apply. No rules had been made. On this basis, the Chief Judge relied on certain of the High Court Rules relating to execution of judgments including the grant of a writ of sequestration.

[30] A third consideration the Chief Judge took into account was "*that it is highly desirable that the Court which makes an injunction should have subsequent proceedings upon it under its control.*"

[31] On these considerations, the Chief Judge concluded that the Labour Court had jurisdiction to immediately issue a writ of sequestration as a coercive means of persuading the union to obey the injunctions which had been issued.

[32] Of the three considerations relied on in the *NZ Railways* case, the second cannot assist the plaintiff in this case. The Employment Relations Act contains no provision equivalent to s307 of the Labour Relations Act applicable to the Authority and, for the reasons we have given earlier, we do not regard the High Court Rules relating to enforcement of orders as falling within the scope of s162 of the Employment Relations Act.

[33] We turn then to the first consideration which was that the power to punish for contempt needed to be implied into the jurisdiction of the Labour Court to make its express power to grant injunctions effective. This appeared to proceed on the unexpressed assumption that no other means of enforcing the orders of the Court was provided in the Labour Relations Act – see the discussion at the foot of pages 623 and 333 of the reports.

[34] That assumption overlooked s207 of the Labour Relations Act which gave the Labour Court power to make compliance orders and to punish breach of a compliance order by fine, imprisonment or sequestration.

[35] Another provision of the Labour Relations Act which appears not to have been fully considered in the *NZ Railways* case was s208 which provided:

> ***208. Enforcement of order —*** *Any order made under section 207 of this Act may be filed in any District Court, and shall then be enforceable in the same manner as an order made or judgment given by the last mentioned Court.*

[36] In the decision, s208 was described as a *"debt collecting"* provision but it is clearly of much wider application and capable of being used in relation to any form of compliance order, including an order to comply with an injunction.

[37] In light of these express mechanisms for enforcing orders of the Labour Court, including injunctions, we think that the Chief Judge was wrong to rely on

necessary implication of powers in the *NZ Railways* decision. It may be that the decision was supportable on the basis of s307 of the Labour Relations Act but, as the Employment Relations Act confers no comparable jurisdiction on the Authority, we do not need to decide that point.

[38] In reaching this conclusion, we are conscious of the urgency which attended all aspects of the *NZ Railways* case. A vital transport link was being disrupted by unlawful strike action. Passengers were stranded at the wharves and their interests were represented in the hearings by an advocate. The method of enforcement provided through s207 and/or s208 involved an additional step which could have further delayed resolution.

[39] On the other hand, it is clear that the Labour Relations Act provided a method of enforcement which included jurisdiction to exercise the very powers the Court sought to invoke by implication. While the statutory compliance order process involved an additional intermediate step, it must be recognised that this was what Parliament had enacted and it must be presumed that any delay inherent in the process was regarded by the legislature as acceptable.

[40] Similar processes for enforcement of orders made by the Authority are contained in the Employment Relations Act. Section 137 confers on the Authority a power to order compliance with its orders. If a compliance order made by the Authority is not obeyed, s138(6) provides that any person affected by the failure to comply may apply to the Court for the exercise of its powers under s140(6). The powers of the Court under s140(6) include a fine, imprisonment and sequestration.

[41] The option of invoking the enforcement powers of the District Court is also available under s141 which provides:

> ***141 Enforcement of order***
> *Any order made or judgment given under this Act by the Authority or the Court (including an order imposing a fine) may be filed in any District Court, and is then enforceable in the same manner as an order made or judgment given by the District Court.*

[42] It may be noted that s141 is wider in its scope than s208 of the Labour Relations Act, applying directly to all orders of the Authority.

[43] Applying the reasoning we have set out above in relation to the *NZ Railways* decision, and in light of these express powers of enforcement, it is not necessary to imply any powers of enforcement of injunctions by the Authority into the Employment Relations Act.

[44] In reaching this conclusion, we have had regard to Mr Anderson's submission that an implied power for the Authority to punish for contempt was nonetheless necessary because the process under ss137 and 140 is cumbersome, time consuming and potentially expensive. Equally, he submitted that the processes of the District Court take time to invoke. He stressed that, when breach of an interim injunction is in issue, a speedy and economical process is necessary to avoid the practical effect of the injunction being lost. While we have a measure of sympathy with these practical concerns about the enforcement processes expressly provided by the Act, we reiterate that this is what Parliament has enacted. Implication of powers to punish is a step which ought not to be taken lightly and we are not persuaded that the inconvenience of the process expressly provided necessitates the implication of a parallel process not contemplated by the legislature.

[45] Mr Anderson also submitted that it was desirable that the Authority be able to enforce its own orders. Even if that is so, what is desirable cannot prevail over a clear statement of parliamentary intention. We do not accept that enforcement of the Authority's orders through the Employment Court or through the District Court is necessarily such a time-consuming and complex operation that there is a risk to the rule of law. In any jurisdiction, an originating application for punishment for contempt must be made, and the alleged contemnor served and afforded an opportunity to respond. Urgency can be sought and granted in appropriate cases.

[46] Mr Anderson relied heavily on the observation made by the full Court in *Credit Consultants Debt Services NZ Ltd v Wilson (No 2)* that Parliament intended the Authority to be a *"one stop shop"*. That was shorthand for the proposition that different elements of a case should not have to be commenced in different courts or

tribunals. While that is desirable and is reflected in the scheme of the Employment Relations Act 2000, it is not the same as saying that all decisions made in the course of litigation should be made by the same body. Obvious examples of different judicial bodies necessarily being involved in the same litigation include challenges, appeals and judicial review. In any event, while a scheme underlying legislation may assist in interpreting the provisions of the statute, that scheme cannot prevail over the express provisions of the enactment. Although Parliament intended that a party should be able to bring all aspects of an employment relationship problem to the Authority in the first instance and have the Authority deal with it according to the substantive merits, rights of challenge and judicial review must be exercised in the Court. The same applies to enforcement of the Authority's orders. Some of these are enforceable at first instance in the Authority itself by compliance order but any further steps must be taken in the Employment Court or the District Court.

Conclusions

[47] We find that the Authority has no power to punish for contempt. In the context of this case, the Authority has no jurisdiction to make the orders sought by the plaintiff consequent upon the contended breach by the first defendant of the interim injunctions issued by the Authority.

[48] As we have outlined earlier, it is open to the plaintiff to seek compliance with the injunctions made by the Authority through the process provided for in ss137 and 140 of the Act.

[49] It is also open to the plaintiff to seek orders for punishment for contempt in the District Court pursuant to s141.

Comment

[50] In his separate judgment in the final *Credit Consultants* case (*Credit Consultants Debt Services NZ Ltd v Wilson (No 4)* [2007] ERNZ 446), the Chief Judge urged parliamentary reconsideration of the position that had been reached in that case. The result of the *Credit Consultants* litigation was that the full Court felt

obliged by the scheme and wording of the Act to conclude that the Authority had exclusive primary jurisdiction to grant injunctions in employment matters (except strikes and lockouts), notwithstanding that this may not have been the actual intention of Parliament.

[51] But for the conclusion to which the Court was reluctantly driven in that case, this case would not have arisen. The fact that it did arise and the conclusion we have reached serve only to emphasise the awkward division of jurisdiction which currently exists between the Authority, the Employment Court and the courts of general jurisdiction and the need for legislative reconsideration.

Where to now?

[52] We are sympathetic to the plaintiff's position and appreciative of its preparedness to instruct counsel to research and argue the points dealt with in this judgment. The proceeding as a whole has been removed to this Court and, irrespective of the outcome of the application to punish for contempt, the plaintiff is entitled to have its substantive claims for damages heard and determined. That can be done by a single Judge of this Court. The Registrar should arrange a telephone conference call with counsel for the parties to set the parameters for such a hearing.

[53] Although the plaintiff asks that costs be fixed now in relation to this hearing, we consider that costs should be dealt with as part of the overall disposal of the case on its merits and for that purpose we reserve costs.

GL Colgan
Chief Judge
for the full Court

Judgment signed at 3.30 pm on Monday 18 August 2008