IN THE EMPLOYMENT COURT
WELLINGTON

WC 9/08
WRC 14/08
WRC 15/08

IN THE MATTER OF	challenges to a determination of the Employment Relations Authority
BETWEEN	NEW ZEALAND PROFESSIONAL FIREFIGHTERS UNION First Plaintiff
AND	BRUCE IRVINE Second Plaintiff
AND	GARY LUFF Third Plaintiff
AND	THE NEW ZEALAND FIRE SERVICE COMMISSION First Defendant
AND	ROSS DITMER Second Defendant
AND	MARK BOERE Third Defendant
AND BETWEEN	THE NEW ZEALAND CHIEF AND DEPUTY CHIEF FIRE OFFICERS' SOCIETY Plaintiff
AND	THE NEW ZEALAND FIRE SERVICE COMMISSION First Defendant
AND	ROSS DITMER Second Defendant
AND	MARK BOERE Third Defendant

Hearing: 29 May 2008
(Heard at Wellington)

Appearances: Peter Cranney, Counsel for Plaintiffs in WRC 14/08
B A Corkill QC, Counsel for Plaintiff in WRC 15/08
C H Toogood QC and Paul McBride, Counsel for First Defendant
Andrew Marsh, Counsel for Second and Third Defendants

Judgment: 29 May 2008

ORAL JUDGMENT OF JUDGE A A COUCH

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[1] The matter before the Court today consists of two proceedings. Both are challenges to a determination of the Employment Relations Authority given last Friday, 23 May 2008.

Background

[2] The brief background to the matters is this. In January 2008, the Fire Service Commission (the Commission) advertised two positions. Both were described as assistant fire region commander positions. In February, applications closed and candidates were interviewed. In March, those two positions were offered to Mr Ditmer and Mr Boere, the second and third defendants. At that stage the offers were conditional upon the statutory review process being completed. The offers were accepted.

[3] Also in March, two other candidates were notified that they were unsuccessful. They were Mr Irvine and Mr Luff, the second and third plaintiffs in proceedings WRC 14/08. Both of those men initiated the statutory review process. On 30 April, the review process with respect to Mr Luff concluded and as a result the employment agreement between the Commission and Mr Boere became unconditional. On 12 May, the review commenced by Mr Irvine concluded and the employment agreement between the Commission and Mr Ditmer became unconditional.

[4] Mr Ditmer and Mr Boere then made arrangements to give up their existing employment or business, as the case may be, and to take up employment with the Commission. Mr Ditmer was due to commence work on 26 May. Mr Boere was due to commence work on 20 June.

The proceedings

[5] I turn now to the proceedings which have given rise to the hearings to date including the one today. On 8 May 2008, the New Zealand Chief and Deputy Chief Fire Officers' Society (the society) commenced proceedings in the Employment Relations Authority. At that stage the proceedings were confined to an allegation that the Commission had made the appointments in breach of clause 27 of the collective employment agreement between the society and the Commission. On 21 May, the New Zealand Professional Firefighters Union (the union), together with Mr Irvine and Mr Luff, commenced proceedings in the Authority. They alleged bias in the appointment process and irregularity in the review process. They also relied on allegations of breach of statutory obligations imposed on the Commission to be a good employer and to make appointments in accordance with various statutory criteria. The society then amended its proceedings to mirror some of the claims made by the union.

[6] At the same time, all of the plaintiffs sought an interim injunction preventing Mr Ditmer and Mr Boere from taking up employment in the positions to which they had been appointed. As Mr Ditmer was due to commence employment on Monday 26 May, that application was granted urgency by the Authority which conducted an investigation meeting on Friday 23 May and gave its determination the same day. The Authority declined the application. Upon being informed that all of the plaintiffs intended to challenge that determination, the Authority was subsequently persuaded to grant an interim injunction in very limited terms to preserve the position until these challenges could be made and decided.

[7] All of the plaintiffs sought a hearing de novo and the matter has proceeded before the Court on that basis. I have received and considered all of the material which was provided to the Authority. In addition, the parties have filed several more

affidavits providing additional information and amplifying opinions expressed in earlier affidavits. I have read in their entirety those affidavits and all of the documents referred to in those affidavits. That has comprised a very substantial volume of material.

[8] The issue before the Court is that which was before the Authority last Friday, namely whether to grant an interim injunction restraining Mr Ditmer and Mr Boere from commencing work for the Commission in the positions to which they have been appointed. As those two men are vitally affected by the proceedings before the Court, I directed that they be joined as defendants. They have been separately represented today by Mr Marsh.

Jurisdiction

[9] I begin by discussing the jurisdictional issues which arise in this matter. It is a fundamental principle applicable to applications for interim injunction generally that the Court will not grant an interim injunction where the substantive claim cannot justify permanent relief in a similar form. In this case the application of that principle means that an interim injunction ought not to be granted unless the claim before the Authority supports the remedy of cancellation or variation of the individual employment agreements between the Commission, on the one hand, and Mr Ditmer and Mr Boere on the other hand.

[10] I look then at the remedies sought by the plaintiffs in the substantive proceedings which remain before the Authority. In the proceedings brought by the union, Mr Irvine and Mr Luff, the remedies sought are set out at paragraph 5 of the statement of problem. The first remedy sought is "*an injunction preventing the appointment.*" In addition an order is sought "*requiring a fair process*" and that is particularised.

[11] It is too late for either the Authority or the Court to issue an injunction preventing the appointment of Mr Ditmer and Mr Boere. The appointment process is complete. In his submissions, Mr Cranney sought to persuade me that the appointments were in some way incomplete because the process of making them was

defective. I do not accept that submission. The evidence is clear that the process is complete as between the parties to the individual employment agreements involved. There exist now unconditional agreements between them which are enforceable.

[12] That leads to the conclusion that there is no relief sought in the substantive proceedings brought by the union, Mr Luff and Mr Irvine which would support the grant of an interim injunction in those proceedings.

[13] In the proceedings brought by the society, the relief sought is also set out in paragraph 5 of the amended statement of problem. The first remedy sought is a declaration that clause 27 of the collective employment agreement was breached by the appointment of Mr Ditmer and Mr Boere and an order for future compliance with clause 27. That clearly cannot support an interim injunction in the form sought.

[14] In addition, the society also seeks orders setting aside the decision of the Commission to appoint Mr Ditmer and Mr Boere and an injunction restraining the Commission from employing them in the positions to which they have been appointed. On its face, the claim for those remedies is consistent with the claim for the interim injunction sought. I note, however, that Mr Corkill was at pains to stress in his submissions that the first remedy was the principal relief sought by the plaintiff and he was somewhat equivocal as to whether the society intended to pursue the second and third claims. Assuming that it does continue to pursue those claims, however, I deal now with the question whether the Authority has jurisdiction to grant those remedies.

[15] I start with s164 of the Employment Relations Act 2000 which specifically deals with cancellation or variation of individual employment agreements. It refers to ss69(1)(b) and 162 of the Act as conferring a power to make an order cancelling or varying an individual employment agreement. It then goes on to impose conditions on the exercise of that power by the Authority.

[16] Clearly the matters at issue in these proceedings do not come within s69 of the Act which is concerned with unfair bargaining.

[17] Mr Cranney's first submission on this issue was that s164 was not exhaustive as to the circumstances in which the power to cancel or vary an employment agreement might be exercised. He submitted that the jurisdiction conferred by s161 of the Act to make determinations about employment relationship problems generally included a power to cancel or vary employment agreements as the Authority saw fit. I do not accept that submission. That would be a very powerful jurisdiction to grant to the Authority were it so and should not be implied. It would also be inconsistent with the constraints imposed by s164 on the exercise of the power conferred by ss69(1)(b) and 162.

[18] In the absence of any express power to take such action other than that contained in the sections referred to in s164, I find that the Authority's jurisdiction to do so is limited to ss69(1)(b) and 162.

[19] Both Mr Cranney and Mr Corkill then submitted that the Authority had the power to cancel or vary individual employment agreements pursuant to s162. Mr Cranney relied on the Crown Entities Act 2004. He submitted that it was an enactment relating to contracts for the purposes of s162. I do not accept that submission. In my view, when s162 refers to "*any enactment relating to contracts*", it is referring to statutes which confer specific jurisdiction on the High Court or District Court to make orders in relation to contracts. That is certainly the nature of the seven enactments specifically included within the description. The Crown Entities Act 2004 is not such a statute. It may be said to create obligations relating to employment contracts or agreements but does not confer jurisdiction to make specific orders to remedy breaches of those obligations. In any event, any cause of action which might arise under the Crown Entities Act 2004 would be for breach of statutory duty. Such a cause of action would therefore be in tort and outside the jurisdiction of both the Authority and the Court.

[20] Mr Corkill submitted that the Judicature Amendment Act 1972 was an enactment relating to contracts on the basis that it contemplated judicial review of decisions to enter into contracts. He referred me to authorities in which that had been done. On that basis, Mr Corkill submitted that s162, in combination with the Judicature Amendment Act 1972, effectively conferred on the Employment

Relations Authority powers of judicial review, or at least powers to grant the remedies provided for under the Judicature Amendment Act 1972.

[21] I do not accept that submission. The power of judicial review has always been regarded by the Courts as one requiring a high level of judicial expertise. Traditionally, it was reserved solely to the High Court but, in more recent times, it has been conferred to a limited extent upon the Employment Court and to an extremely limited extent upon the Environment Court. It would be a radical step indeed if Parliament had intended that the power of judicial review should be extended to the Employment Relations Authority. In my view, any such legislative intention would have been reflected in express provisions of the Act, not by implication.

[22] There are many reasons for that view, but amongst them is that to give the Authority the power of judicial review would be inconsistent with its very nature. One of the distinctive features of the Employment Relations Act is the unique investigative jurisdiction of the Authority which is contrasted with the judicial jurisdiction of the Court. Nowhere is that clearer than in s179 which gives parties dissatisfied with a determination of the Authority a right to elect a judicial hearing by the Court.

[23] It is trite to say that the Employment Relations Authority is a creature of statute. It can have no jurisdiction other than that which is conferred on it expressly by statute or which must necessarily be implied in order to exercise the jurisdiction expressly conferred. I can find nothing in the Employment Relations Act conferring jurisdiction on the Employment Relations Authority to cancel or vary an individual employment agreement in circumstances such as exist in this case. I therefore find, in respect of both proceedings, that there is no jurisdiction to grant the interim injunction sought.

Merits

[24] Had I not reached that view on the basis of jurisdiction, I would have reached the same view on the merits of the matter. As I have said earlier, I have fully

considered the evidence and I have listened with considerable care and interest to the very helpful submissions made by all counsel.

[25] As the substantive proceedings remain before the Employment Relations Authority and are to be determined by it, I do not think it is appropriate that I detail the views I have reached about particular issues in the proceedings. The Authority must be left to form its own views on those issues free from influence by the Court. I therefore record only my broad conclusions.

[26] On the untested evidence before me, I conclude that the plaintiffs in both proceedings do have an arguable case, but not a strong case by any means. I agree broadly with the conclusion of the Authority in its determination of 23 May that, on the evidence then before it, the defendant had a distinctly stronger case. This remains my view in light of the further evidence which has since been provided.

[27] I deal in a little more detail with the balance of convenience. It is clear that there is no issue of inconvenience to any of the plaintiffs in these proceedings. All plaintiffs rely simply on the public interest. That has been expressed by them to be the risk to health and safety of the firefighters and members of the public if Mr Ditmer and Mr Boere take up their positions and become responsible for managing fire fighting activities.

[28] The evidence in support of that proposition is mainly very general in nature. Several deponents express their concern. That concern seems to arise principally out of their perception that firefighters from a volunteer background, such as Mr Ditmer and Mr Boere, generally lack the training, skills and experience necessary for the senior positions to which they have been appointed. Significantly, there is little or no credible evidence that Mr Ditmer or Mr Boere personally are likely to pose a significant risk.

[29] The contrary evidence is that of several senior and very experienced fire officers to the effect that these particular men are capable and pose no risk. I also take into account the evidence that the systems and procedures in place within the

fire service are such that the role of any one person in a firefighting team is unlikely to lead to an overall health or safety issue.

[30] There is clear evidence of significant inconvenience to Mr Ditmer and Mr Boere if an interim injunction were granted. Principally, they would be denied the right to work. It seems to me, however, that it goes a little further than that because they would be denied the right to work at a critical time in any employment relationship, namely at the beginning of the anticipated period of employment when expectations are at their highest.

[31] Taking these factors and all other aspects of the matter into account in assessing the overall justice of the matter, I would not have issued an interim injunction.

Conclusion

[32] The effect of my decision is that the interim injunction issued by the Authority on 24 May is discharged. Mr Ditmer and Mr Boere are free to take up their appointments.

Consequential issues

[33] An issue which arose at an early stage of these proceedings before the Court was whether the plaintiffs' election to have this aspect of the matters heard by the Court would result in all aspects of them coming before the Court. Mr Corkill very helpfully provided submissions based on the decision in *Abernethy v Dynea New Zealand Ltd* [2007] ERNZ 271 which persuade me that this should not be the case. The substantive proceedings therefore remain before the Authority and I understand that an investigation meeting is to take place within a matter of weeks.

[34] As a condition of granting the limited interim injunction on 24 May, the Authority required the union to lodge the sum of $3,000 with the Employment Court on account of possible damages. I leave it in the first instance to counsel for the parties to discuss with each other what should be done with that money and, if they

are in agreement, it may be disbursed by the Registrar in accordance with that agreement. If any orders are required, counsel should file memoranda.

Costs

[35] Costs are reserved. I anticipate that counsel for the parties will try to resolve issues of costs by agreement. If they are unable to do so, counsel for any of the defendants who seek costs should file a memorandum within 21 days after today. Counsel for the plaintiffs will then have a further 21 days in which to respond.

A A Couch
Judge

Oral Judgment delivered at 6.25pm on Thursday 29 May 2008
Record of judgment signed at 2.45pm on Friday 30 May 2008