IN THE EMPLOYMENT COURT
WELLINGTON

WC 16/08
WRC 28/08

IN THE MATTER OF	an application for judicial review
AND IN THE MATTER OF	an application for an interim order under section 8 of the Judicature Amendment Act 1972
BETWEEN	WESLEY COMMUNITY ACTION TRUST Plaintiff
AND	PHILLIP WILLIAM DICKSON First Defendant
AND	EMPLOYMENT RELATIONS AUTHORITY Second Defendant

Hearing: 15 and 16 September 2008
(Heard at Auckland by telephone conference calls)

Appearances: Peter Cullen, Counsel for Plaintiff
BA Buckett, Counsel for First Defendant
No appearance for Second Defendant

Judgment: 16 September 2008

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] The question for immediate decision by this Court is whether the second defendant, the Employment Relations Authority ("the Authority"), should begin its investigation of Phillip Dickson's employment relationship problem before it investigates and determines the plaintiff's application under s178 of the Employment Relations Act 2000 ("the Act") to remove Mr Dickson's proceedings to this Court for hearing at first instance.

[2] At about 5.30 pm yesterday the plaintiff, Wesley Community Action Trust ("the Trust"), requested the Court to consider urgently this issue on the basis of copies of proceedings filed with the Authority, exchanges of correspondence between the parties, and a covering letter to the Court. Mr Cullen, counsel for the plaintiff, apprehended that the Authority had directed that its substantive investigation into Mr Dickson's claims was to begin at 9 am today. It was implicit in this direction that the Authority would not first investigate and determine the Trust's application for removal under s178 which had been lodged with the Authority yesterday afternoon. When the papers were referred to me I considered that a conference call with the parties' representatives, or as many of them as might have then been available, was warranted. Only Mr Cullen was available. Miss Buckett was not contactable by the Court and although Mr Cullen told me that he had sent copies of his papers to the Authority, it had not responded and was unlikely to be contactable at about 5.45 pm yesterday.

[3] I therefore held a brief ex parte telephone call attended by Mr Cullen and the Registrar of the Employment Court in Auckland. In the course of that telephone discussion Mr Cullen advised me that he had managed to establish contact with Miss Buckett who had indicated her unavailability for a hearing or other participation in the proceeding last evening but indicated her availability at 8 am today.

[4] Mr Cullen confirmed that his proceeding is in the nature of an application for judicial review of the Employment Relations Authority and that he was seeking an interim order under s8, prohibiting the Authority from commencing its substantive investigation until it had investigated and determined the application for removal.

[5] Accordingly, I made the following directions last evening. I directed that Mr Cullen was to prepare, file and serve a statement of claim and an application for interim order under s8 of the Judicature Amendment Act 1972. I directed that Mr Cullen was to provide copies of these documents to the Court in Auckland, to Miss Buckett and to the Employment Relations Authority by fax by 8 am today.

[6] Mr Dickson's proceedings against the Trust in the Employment Relations Authority are one of a number of similar proceedings brought by employees in what

might be called the community care sector. Indeed Mr Dickson's own proceeding against a subsequent employer, and apparently on the same or very similar issues, has recently been determined by the Authority. So too has at least one other case and it appears that all of those cases determined by the Authority are destined for appeal if they have not been challenged already. The cases raise issues of principle about whether employees who sleep over at their employer's premises, or perhaps at their homes, are to be regarded as working during such times for the purposes of wages and, in particular, under the Minimum Wage Act 1983. The Trust in this case, and other similar employers against whom such claims have been brought, have instructed senior counsel to argue these challenges on their behalf. The potential financial implications of the Authority's determinations are substantial. It is in these circumstances that the Trust has applied under s178 for the removal to the Court of Mr Dickson's case against it.

[7] At 3.47 pm yesterday, the Authority advised the plaintiff's solicitors (and copied its e-mail to Mr Dickson's solicitors) that the *"Authority Member has asked me email (sic) the parties to advise that he is expecting the parties tomorrow morning at 9:00 am for the investigation meeting."* Mr Cullen advised me that when he rang the Authority to confirm that this meant that his application for removal of Mr Dickson's case would not be dealt with first, that intention was confirmed and appears to be consistent with the e-mail sent yesterday afternoon.

[8] Responsibly, Mr Cullen drew my attention to potential jurisdictional difficulties with his application.

[9] Section 184 of the Act constrains significantly the power of the Employment Court to judicially review a determination, order or proceeding of the Authority. The exception under s184(1) is where the Authority is alleged to lack jurisdiction. A lack of jurisdiction is defined in s184(2), as in the narrow and original sense of the term, that the Authority has no entitlement to enter upon the inquiry in question or that the Authority's determination or order is outside the classes of determinations or orders which it is authorised to make, or that the Authority acts in bad faith.

[10] Section 184(1A) was added in 2004 to constrain even further the exercise of a power of judicial review of the Authority. This provides that no review proceedings may be initiated in relation to any matter before the Authority unless it has issued final determinations on all matters relating to the subject of the review application between the parties and, if applicable, the party initiating the review proceedings has challenged the determination under s179, and the Court has made a decision on the challenge under s183.

[11] Mr Cullen relies on s178(1) to support his contention that the Authority lacks jurisdiction to investigate Mr Dickson's substantial employment relationship problem because an application to remove under s178 has been made to the Authority. I do not so read s178(1). The reference to the phrase *"without the Authority investigating the matter"* does not operate to prohibit the Authority investigating the matter until it has determined the application for removal. Rather, it describes the nature of an order made for removal, that is that the matter or any part of it is removed to the Court to hear and determine without the Authority investigating the matter. I do not think that the Authority's apparent intention to "park" the Trust's preliminary application and move to its substantive investigation of Mr Dickson's problem establishes that the Authority has no entitlement to investigate the substance of Mr Dickson's problem. Nor does it meet the second alternative test of its direction being outside the classes of orders the Authority is authorised to make. Just what amounts, in these circumstances, to the Authority acting in bad faith is difficult to say but there must be a high threshold for an applicant so alleging to establish, and Mr Cullen has not sought to do so in this case.

[12] The statute gives the Authority very broad powers. Among those specified in s160 is the power to follow whatever procedure the Authority considers appropriate: s160(1)(f). So, although arguably contrary to long-standing protocols (including in the Authority) and logic, the Authority's decision not to consider a preliminary application before the substantive proceeding, is effectively unchallengeable.

[13] Although the plaintiff sought interim orders *"preventing [the Authority] investigating [Mr Dickson's] claims"*, this would not have been the appropriate interim remedy even had jurisdiction to make orders under s8 existed. The Authority

being the Crown for these purposes, the appropriate remedy would have been a recommendatory declaration under s8(2) but with the expectation that it would act accordingly.

[14] Even if I had been persuaded that the Employment Court is empowered to make the orders sought, they are discretionary and the discretion would have been exercised against the plaintiff. That is for the following reason. When this matter came before me last evening on an ex parte basis, I was given the impression that today's investigation meeting in the Employment Relations Authority was to be the first investigation meeting of the employment relationship problem between the parties. It was only when Miss Buckett participated in this morning's telephone conference call hearing that she informed me that today's scheduled investigation meeting in the Authority is probably the third investigation meeting in this case and is regarded by it as a resumption of its last adjourned investigation meeting. Previous parts of the Authority's investigation in this case have included questions whether Mr Dickson was an employee and, subsequently, whether his personal grievance was brought within time. Each of these questions has been decided in Mr Dickson's favour by preliminary determinations of the Authority. That position would be a powerful factor in the exercise of the Authority's residual discretion to refuse removal, even if the statutory grounds for doing so had been made out as they may be in this case. For judicial comment on this issue, see *Auckland District Health Board v X (No 2)* [2005] ERNZ 551.

[15] But even more fundamentally on ex parte applications such as this, counsel must advise the Court of any relevant questions, even if they may be disadvantageous to his client's case. That was not done as it should have been. The plaintiff would not have been entitled to the exercise of the Court's discretion in its favour even if jurisdiction had been established.

[16] Although prevented by the legislation from making any orders for judicial review of the Authority and prohibited, also by statute, from directing the Authority how to operate (s188(4)), I nevertheless express the hope that it will proceed in a logical and principled way by investigating and determining first the Trust's application for removal. To do otherwise will render nugatory any opportunity for

that application to be dealt with on its merits. If the Authority proceeds in this way, either party will have an opportunity to challenge the Authority's determination and, in the case of the Trust at least, to seek a stay of the proceeding in the Authority or the Court pending the hearing of that challenge.

[17] For the foregoing reasons I was satisfied both that there was no jurisdictional basis for the Court to grant the interim orders claimed by the plaintiff and that even if there had been, the discretion would not have been exercised in the plaintiff's favour.

[18] At Miss Buckett's request I reserve costs on this application, noting that the hearing time earlier today occupied about 30 minutes.

[19] Although the Employment Relations Authority as second defendant did not participate in the proceeding, a copy of this judgment should be sent to the Senior Support Officer of the Authority at Wellington for Mr Paul Stapp, the Authority Member conducting the investigation in that forum.

GL Colgan
Chief Judge

Judgment signed at 12 noon on Tuesday 16 September 2008