Employment Court of New Zealand

Hayne v ASG [2014] NZEmpC 113 (1 July 2014)

Last Updated: 4 July 2014

IN THE EMPLOYMENT COURT CHRISTCHURCH

[2014] NZEmpC 113

CRC 14/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	HARLENE HAYNE, VICE-CHANCELLOR OF UNIVERSITY OF OTAGO Plaintiff
AND	ASG Defendant

CRC 15/14

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN ASG Plaintiff

AND HARLENE HAYNE, VICE- CHANCELLOR OF UNIVERSITY OF OTAGO

Defendant

Hearing:	27 June 2014 by telephone conference call
Appearances:	RE Harrison QC, counsel for Vice-Chancellor P Cranney, counsel for ASG
Judgment:	1 July 2014

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] A fundamental issue about the nature and effect of challenges, and what are known colloquially as cross-challenges, has arisen in the course of giving directions to a hearing. This pleading issue has been argued by leading counsel, and rather than

simply giving directions to the hearing in the particular case by a memorandum

which would normally ensue, I consider that other parties in similar cases may benefit from the guidance of a judgment.

[2] The Employment Relations Authority (the Authority) heard and determined two personal grievances raised by ASG1 against his employer, the Vice-Chancellor of the University of Otago.2 First, ASG claimed that his suspension from employment constituted an

unjustified disadvantage. ASG's second personal grievance was that the final written warning issued to him by the Vice-Chancellor was a further

disadvantage incurred by him in his employment. Both were grievances as defined in s 103(1)(b) of the Employment Relations Act 2000 (the Act). In its determination, the Authority found that ASG had not been disadvantaged unjustifiably by being suspended but that he had been disadvantaged unjustifiably by being issued with a final written employment warning.3 The Authority left the question of remedies to

the parties to attempt to resolve but reserved leave to ASG to have these decided.4

[3] Both parties were dissatisfied with those aspects of the Authority's determination which went against them. Both lodged challenges with the Court. It is the nature of those challenges and the manner of their expression in the parties' statements of claim that have led to problems about the nature and scope of the hearing or hearings which require resolution.

[4] First in time, the Vice-Chancellor filed a statement of claim which generally followed the requirements of the Employment Court Regulations 2000 (the Regulations) and included the following paragraphs:

3. This election relates to that part of the Determination which concluded that the defendant had a (valid) personal grievance by reason of unjustifiable action by the defendant which had disadvantaged the defendant in his employment.

...

Hearing De Novo

28. The plaintiff seeks a full hearing of the entire matter the subject of its election (a hearing *de novo*).

1 This person's identity is recorded thus pursuant to a non-publication orders made on 27 May in CRC 14/14 and 4 June 2014 in CRC 15/14. "ASG" is the same person as is referred to as "B" in relevant Authority determinations

2 *B v Hayne* [2014] NZERA Christchurch 73.

3 At [27]-[29].

4 At [31].

[5] Within a matter of days, ASG filed a statement of claim, again generally following the form required by the Regulations, which contained the following paragraphs:

3. The election relates to paragraph [29] of the determination concluding the suspension was justified because the plaintiff was given an opportunity to comment on the proposal to suspend (which opportunity the plaintiff accepts he was given).

...

10. The plaintiff does not seek a full hearing of the entire matter (a

hearing de novo). He seeks a hearing only in relation to certain issues, namely the issues of whether the suspension and its continuation were unjustified actions.

[6] At issue is s 179 of the Act which provides materially:

(1) A party to a matter before the Authority who is dissatisfied with the determination of the Authority or any part of that determination may elect to have the matter heard by the court.

(2) Every election under this section must be made in the prescribed manner

within 28 days after the date of the determination of the Authority. (3) The election must—

(a) specify the determination, or the part of the determination, to

which the election relates; and

(b) state whether or not the party making the election is seeking a full hearing of the entire matter (in this Part referred to as a **hearing de novo**).

(4) If the party making the election is not seeking a hearing *de novo*, the

election must specify, in addition to the matters specified in subsection

(3),—

(a) any error of law or fact alleged by that party; and

(b) any question of law or fact to be resolved; and

(c) the grounds on which the election is made, which grounds are to be specified with such reasonable particularity as to give full advice to both the court and the other parties of the issues involved; and

(d) the relief sought.

[7] Mr Cranney for ASG criticises the Vice-Chancellor's statement of claim as being inconsistent in the sense that counsel submits that the Vice-Chancellor cannot, at the same time, purport to challenge only part of the Authority's determination (the unjustified warning) and yet seek also to assert that this is a challenge by hearing de novo with the attendant implications of this election. The Vice-Chancellor, through counsel Mr Harrison QC, argues that the phrase in s 179(3)(b) "the entire matter" is

the entire matter to which the (limited) election relates and not to any further parts of the Authority's determination.

[8] The consequence of this disagreement is the extent, if any, to which both parties must or must not particularise the errors in the Authority's determination, the extent to which that determination will be the subject of appellate analysis about its correctness, and which party bears an onus of persuading the Court of error and by whom.

[9] There is some relevant case law on the question. The Court in *Cliff v Air*

New Zealand Ltd addressed the nature of a non-de novo hearing as follows:5

The election that challengers must make under s 179(3) refers not so much to the nature of the presentation of the case in Court but, rather, to the extent to which the decision under appeal is challenged. An election by the challenger "seeking a full hearing of the entire matter (... a hearing de novo)" indicates that all matters that were before the Authority will be at issue on the challenge. What has become known colloquially as a "non-de novo challenge" (because of the absence of reference to this in s 179) is a narrower form of appeal in the sense that it identifies some but not all of the determination that is under appeal. That is exemplified by s 179(4) which requires a party not seeking a hearing de novo to specify what it says are errors of law or fact in the Authority's determination and other particulars as to the issues to enable the Court to conduct a restricted and more focused hearing of the appeal. But the election does not dictate the way in which the appeal will be heard. So, as here, there may be evidence or further evidence about the matters in issue in the non-de novo challenge and in such a case it is particularly appropriate, and indeed necessary, for the Court to make its own decision on the point or points as required by s 183.

[10] These questions were also dealt with in *Goodman Fielder New Zealand Ltd v Ali* in which an employer filed a challenge to a determination of the Authority finding an employee's dismissal to have been unjustified and directing reinstatement but with reductions of other remedies.6 On the day following the filing of the employer's challenge, the employee filed his own challenge to the Authority's determination against its conclusion on remedies and affecting certain other factual

findings of misconduct by him. Both parties elected not to seek "a full hearing of the

5 *Cliff v Air New Zealand Ltd* [2005] NZEmpC 14; [2005] ERNZ 1 (EmpC) at [7].

6 *Goodman Fielder New Zealand Ltd v Ali* [2003] NZEmpC 81; [2003] 2 ERNZ 65 (EmpC).

entire matter (... a hearing de novo)" under s 179(3). The employer's challenge was

framed thus:7

10. The Plaintiff does not seek a full hearing of the entire matter. The Plaintiff seeks a de novo hearing in relation to the parts of the determination challenged as set out in paragraph 3 above.

[11] At [10] and following the Court determined generally about the appellate scheme of the legislation:

[10] When enacting this new and unique procedure for challenging determinations of the Employment Relations Authority, did Parliament intend that either one or both parties could extract from a determination isolated and arguably disparate points that they regarded as having been decided against them, so that only these aspects of the case and no others would be the subject of evidence, submission and decision in this Court?

[11] The Authority's methodology is clearly not adversarial litigation in the traditional sense although it includes significant elements of that. It conducts "investigations" into "employment relationship problems" and decides these in "determinations". No record of the Authority's investigation is kept in the same way as there is a transcript of a hearing in Court, or indeed, as there was, a recording of hearings in the former Employment Tribunal.

[12] It is strongly arguable that Parliament intended parties to employment disputes of this sort, following almost mandatory mediation, to have a low-level, speedy, and inexpensive investigation of their problem and a resolution of it with a minimum of formality. Parties dissatisfied with this methodology or its outcome would have the right to either challenge aspects of it or, in effect, start again in the Employment Court in a traditionally adversarial litigious manner.

[13] Most challenges are by an election for a hearing de novo. In most such cases the Court directs that the case, in effect, starts again with the grievant going first and establishing the grievant's case, with the employer to follow. Such an approach allows the Court to fulfil its twin obligations of having regard to the Authority's determination but also of determining the matter itself on the evidence and submissions heard by it.

[14] Despite the absence of any clear statutory direction as to what is to happen in cases such as this, it is possible to infer from s 179(4)

what Parliament intended would be the nature of a non-de novo hearing. That requires a party so electing to specify errors of law or fact, any question of law or fact to be resolved, and the grounds on which the election is made with such reasonable particularity as to give full advice to both the Court and the other parties of the issues involved. Relief sought must also be specified. So where an issue of law or even of fact can be isolated and justly determined, either from the information contained in the Authority's determination or by discrete evidence, significant savings can be made by

7 At [4].

not revisiting the whole of the problem that was before the Authority. It is possible to envisage a "non-de novo" challenge to one or more aspects of a determination upon which the parties call evidence in this Court.

[15] This case, as presently pleaded, does not fall into that category. I assess that to justly determine all those matters the partie s have put in issue, as they are entitled to do, the Court must hear the whole case, in effect must conduct a hearing de novo, and from that, determine the questions that the parties have put in issue. To do otherwise would be both artificial and run the risk of doing an injustice to the cases of either or both of the parties. The Court is broadly empowered to determine such cases in such manner and to make such decisions or orders, not inconsistent with the legislation, as in equity and good conscience it thinks fit: s 189(1).

[16] To properly and fairly determine each of the matters challenged by the parties, I direct (by consent) that there be a full hearing of the entire matter that was before the Authority (a hearing de novo) at the conclusion of which those matters challenged by the parties will be determined.

[12] In *Bourne v Real Journeys Ltd*8 the plaintiff, in its statement of claim, specified the parts of the determination it wished to challenge, but did not state the scope of the hearing sought. The Court concluded that the plaintiff had effectively stipulated a non de novo challenge and was thereby non-compliant with s 179(4). In relation to the scope of s 179(3) more generally, Judge Couch noted that:

[13] The nature and scope of de novo hearings was dealt with authoritatively by a full Court in Abernethy v Dynea New Zealand (No 1). The statutory focus is on the “matter” which was before the Authority. *The “entire matter” referred to in s 179(3)(b) includes any aspect of the employment relationship problem between the parties investigated by the Authority.* Thus, in a de novo hearing, the Court may hear and decide matters which were not actually determined by the Authority, provided they were part of the Authority's investigation.

[14] Where a de novo hearing is not sought, the statutory focus is on the Authority's determination, rather than the entire matter which was before the Authority. This is clear from the requirement in s 179(3)(a) to “specify the determination, or part of the determination, to which the election relates” and is reinforced by the nature of the particulars required to be specified by s

179(4). ...

[15] It follows that, in a non de novo hearing, the Court has no jurisdiction to hear and decide issues which were not determined be tween the parties by the Authority.

[13] I have concluded that the Vice-Chancellor’s categorisation of her challenge as being both limited to the Authority’s conclusion that she disadvantaged ASG unjustifiably by giving him a final warning and, at the same time, electing a hearing

8 [2011] NZEmpC 120, [2011] ERNZ 375.

de novo, was confusing and erroneous. As the cases show, if the Vice-Chancellor’s intention had been to reserve to herself the ability to call evidence on the issue challenged, it was unnecessary and inappropriate to do so by describing the election as one of a hearing de novo. It is circular and tortuous to say, as the Vice-Chancellor does, that the “entire matter” referred to in s 179(3)(b) is the “entire matter” of the limited challenge to only part of the Authority’s determination. I interpret the phrase “the entire matter” in s 179(3)(b) to be the entirety of the “matter” referred to in s

179(1) which is the employment relationship problem that was posed for the

Authority to resolve in its determination.

[14] It follows that the Vice-Chancellor’s challenge is other than one by hearing de novo (a “non-de novo challenge”) and ought to have been so described, consistently, in her statement of claim.

[15] ASG is not, however, without fault because, as Mr Harrison pointed out, his non-de novo challenge (and there is no argument that it is such) does not meet the requirements of s 179(4). It does not specify the error of law or fact, any questions of law or fact to be resolved, or specify with reasonable particularity the grounds on which the election is made.

[16] Be all this as it may, both parties’ non-de novo challenges cover both (and therefore all) of the issues that were put before the Authority for determination. Together and in effect, they amount to challenges to “the entire matter” that was before the Authority.

[17] In these circumstances, I direct pursuant to s 182(3) that the challenges be heard together and that the hearing be in the nature of a hearing de novo. All issues that were before the Authority will be for re-consideration by the Court on evidence and relevant documents tendered, and submissions made, to the Court.

[18] ASG has alleged that he was disadvantaged in his employment unjustifiably, both by being suspended and then by being given a final written employment warning. He has made out a sufficient case in support of these allegations and, as

determined by the Authority, that the onus of justification for these acts shifts to the

Vice-Chancellor.

[19] Mr Cranney is correct that the Vice-Chancellor has not yet, either in this Court or apparently in the Authority, provided any (or at least sufficient) pleaded particulars of her justification for both the suspension and warning. Mr Harrison accepted that in these circumstances, it would not be unreasonable for the Vice- Chancellor to do so. I direct that, by memorandum, the Vice-Chancellor is to file and serve particulars of her justification for suspending and subsequently warning ASG. That memorandum should be filed and served within one month of today's date.

[20] The other directions to a hearing are uncontroversial.

[21] I am satisfied that no purpose would be served by a direction to mediation or further mediation. At its heart, the case involves legal issues from which the parties and others will benefit by a judgment. The case is not mediatable.

[22] Neither party is aware of any outstanding interlocutory issues although leave is reserved for either party on reasonable notice if these arise.

[23] The parties **w**ill confer about a statement of agreed facts which will not require proof through witnesses, and will agree on the contents of a common bundle of admissible documents. These are to be compiled and filed by the Vice-Chancellor no later than 30 days before the fixture. The documents in the bundle are, where possible, to be arranged in chronological sequence, indexed, individually tabbed, and the pages numbered sequentially. The bundle should be in both paper and electronic (PDF) forms.

[24] Briefs of evidence (in both paper and electronic (MS Word) formats) of the Vice-Chancellor's intended witnesses are to be filed and served no later than 28 days before the start of the fixture, with ASG's briefs of evidence to be filed likewise and served no later than 14 days before the start of the fixture. The evidence briefs are to

contain all relevant evidence-in-chief intended to be lead by the parties at the hearing.

[25] The Vice-Chancellor's synopsis of the legal issues for decision is to be filed and served no later than seven clear days before the start of the fixture, with ASG's synopsis to be filed and served no later than three clear days before the start of the fixture. Both paper and electronic (PDF) versions of these synopses would be appreciated.

[26] The Vice-Chancellor will present her case first followed by ASG.

[27] The hearing will be in Dunedin at a venue to be confirmed by the Registrar, beginning at 10 am on Wednesday 3 September 2014 and continuing, if necessary, on the following day.

[28] Leave is reserved for either party to apply for any further orders or directions on reasonable notice.

GL Colgan
Chief Judge

Judgment signed at 11.30 am on Tuesday 1 July 2014
