Determination Number: AA 227/07
File Number: AEA 975/04 & 1001/04

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Warren Gregory Tobin (Applicant) **AND** Joanne Louise Skinner (Second Applicant)
AND	Stayinfront Inc. (First Respondent) **AND** Great Elk Company Inc. (Second Respondent) **AND** Stayinfront (Asia Pacific) Limited formerly The Great Elk Company Limited (Third Respondent) **AND** Splashnet Inc. (Fourth Respondent)
REPRESENTATIVES	Richard Wallis, counsel for applicants Rob Towner, counsel for respondents
MEMBER OF AUTHORITY	R A Monaghan
DATE OF DETERMINATION	1 August 2007

DETERMINATION OF THE AUTHORITY ON APPLICATION FOR REMOVAL

[1] This determination addresses an application by Warren Tobin and Joanne Skinner for the removal to the Employment Court of their personal grievances. The grievances were originally filed in the Authority as separate matters, but the applicants have asked for them to be heard together. That application is granted and the matters are now dealt with together.

The proceedings to date

[2] Mr Tobin's personal grievance as set out in his statement of problem alleges he was unjustifiably and constructively dismissed, and is owed various sums of money, by all of the respondents set out above. Ms Skinner, too, says she was unjustifiably and constructively dismissed, and has a further personal grievance on the ground that she was sexually harassed in her employment. She has cited only Stayinfront (Asia Pacific) Limited as the respondent employer. For convenience, and except to the extent otherwise necessary, I continue to refer to the employer party in a general way as Stayinfront.

[3] Stayinfront replied to the grievances by saying they were covered by final and binding settlements between the parties and could not be taken any further. In separate investigations the Authority heard and determined whether the respective settlements were final and binding, concluding that they were.[1]

[4] Both of the determinations were challenged in the Employment Court, with 'a full hearing of the entire matter' being sought for both.

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[1] **Skinner v Stayinfront (Asia Pacific) Limited**, 4 May 2005, AA 161/05; **Tobin v Stayinfront Inc & Ors**, AA 314/05, 18 August 2005

[5] At the request of the parties the court ruled on a preliminary question concerning the scope of the challenges.[2] It heard both matters together. It found:

> "[33] Section 179(1) of the Employment Relations Act 2000 provides that a party who is dissatisfied with a determination of the Authority may elect to have the matter heard by the court. In the present case the full personal grievance was not investigated and determined by the Authority. It specifically limited its investigation to the preliminary issue and that is the extent of the challenge to the Court allowed by s 179.
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> ..
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> [35] This case is a de novo challenge only to the preliminary matter. As such, in the challenge the parties are not restricted on what evidence they lead so long as it is material to the preliminary question. However, that does not mean that on the challenge the Court has the jurisdiction to determine the personal grievance which has not yet been investigated by the Authority."

[6] That decision, in turn, was the subject of an application to the Court of Appeal for leave to appeal. The application was declined, with the Court of Appeal saying, among other things:

> "[10] We would have thought it self evident that it was logical and sensible for the Authority, and the Employment Court on appeal, to determine as a preliminary question whether the personal grievances of the applicants were precluded by the settlement agreements into which they had previously entered with the respondents. Such an issue is often determined as a preliminary question, because if resolved in favour of the party relying on the earlier agreement the litigation is brought to an end without putting the parties to the expense of a full hearing."[3]

The application for removal

[7] Then the application for removal to the Employment Court was filed. The application relied on s 178(1) and (2) of the Employment Relations Act 2000 - more particularly:

> "(2) The Authority may order the removal of the matter, or any part of it, to the Court if –
> …
> (c) the Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or
> (d) the Authority is of the opinion that in all the circumstances the Court should determine the matter."

[8] The application for removal did not address any matter arising out of s 114 of the Employment Relations Act. It focussed on matters arising out of s 178 of the Act. The primary focus of the argument in support seemed to be that the merits of the grievances overlapped with the issue of whether final and binding settlements were reached, to the extent that s 178(2)(c) in particular applied. However Mr Tobin and Ms Skinner lost their employment in July and April 2002 respectively. On the material currently available, nothing resembling a personal grievance on the part of either of them was raised for over two years.

[9] In its statements in reply to the application for removal, Stayinfront referred to the 90-day time limit contained in s 114 and said in respect of both applicants: "… there is no matter involving the applicant currently before the Authority capable of being removed to the Employment Court."

[10] Counsel for Mr Tobin and Ms Skinner submitted by way of further reply that there was an express or implied waiver by Stayinfront of any reliance on s 114, or that there is a procedural estoppel preventing them from raising the point now.

[11] Since counsel was not acting for Mr Tobin and Ms Skinner when their statements of problem were filed in the Authority, and did not participate in the arrangements between the Authority and

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[2] **Skinner & Anor v Stayinfront Inc & Ors**, Judge Shaw, 8 December 2006 AC 70/06
[3] **Skinner & Anor v Stayinfront Inc & Ors**, [2007] NZCA 154

the parties for the management of the Authority's investigation, he may not be aware of the detail of those arrangements.

[12] There were a number of difficulties with the contents of the statements of problem filed in the Authority. In all of the circumstances the management of the investigation involved dealing with those difficulties one at a time, and when it became necessary to do so. It was logical to begin by addressing the preliminary issues. In turn, it was logical to address first whether there were binding settlements between the respective parties. When the Authority was in the early stages of discussing with the parties arrangements for managing the investigation that matter was the focus, but the need for an application under s 114(3) of the Employment Relations Act 2000 for leave to raise the various grievances was pointed out to the then-advocate for Mr Tobin and Ms Skinner during a conference call I conducted.

[13] The determinations concerning the existence of final and binding settlements, and the aftermath, pre-empted any need to revisit the point expressly until now.

[14] Accordingly I do not accept that there is any waiver or estoppel regarding the requirement that leave to raise the grievances be sought and granted.

[15] In those circumstances I address the application for removal by saying no leave to raise the grievances has been sought or granted, there are no grievances properly before the Authority and there is nothing to remove to the court. Moreover, as far as I am aware no application for leave to raise the grievances has been filed in the Employment Court. Therefore it cannot be said that the court has before it proceedings which are between the same parties, since there is at present no grievance properly before any institution.

[16] The application for removal is declined on that ground.

[17] I was addressed on the decision of the full court of the Employment Court **Abernethy v Dynea New Zealand Limited**[4]. The full court was hearing a matter of statutory interpretation, prior to a decision by a judge alone on a challenge to a determination of the Authority on a preliminary matter. The preliminary matter concerned whether there was a binding settlement between the parties.[5] The plaintiff wanted the court to hear the substance of his grievances, as well as an application for interim reinstatement. Accordingly the full court convened to address whether, on the challenge to the determination of the preliminary matter, the plaintiff was entitled to have the court determine the application for interim reinstatement as well as the substantive questions. Section 179 of the Act, which deals with challenges to determinations of the Authority, was the focus of the issue of statutory interpretation.

[18] The essence of the decision was:

> "[59] … where a party elects to challenge a preliminary determination of the Authority which has had the effect of resolving the employment relationship problem before it, the entire employment relationship problem is then before the Court for resolution.
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> [60] If the employment relationship problem survives a challenge to a preliminary point, then it is for the Court to resolve it. That is because there is no power to remit the matter to the Authority and because the Authority no longer has the matter before it. We emphasise that this judgment concerns the situation where the Authority has, by a preliminary decision, disposed of the employment relationship problem which it had before it."

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[4] Chief Judge Colgan, Judge Travis, Judge Shaw, 10 July 2007, CC 13/07

[5] The Authority had determined there was an agreement between the parties to part company on agreed terms, that Mr Abernethy had received accord and satisfaction, and that he could not pursue his grievances: **Abernethy v Dynea New Zealand Limited**, 10 May 2007, CA 50/07

[19] The decisions of the Employment Court and Court of Appeal in respect of the Tobin and Skinner, and Stayinfront, matter were discussed in **Abernethy**. The full court in Abernethy expressly distinguished those decisions, saying:

> "[50] … *Skinner* must be read in the light of its circumstances and in particular the extent of the challenge brought by the plaintiff. It differs from the present case where the plaintiff has specifically sought a full de novo hearing of the entire determination and has asked for the remedies which relate to the original employment relationship problem."

[20] Such distinguishing of **Skinner** seems to be another way of saying **Abernethy** does not apply here. Moreover, because of the yet-to-be-addressed matters arising out of s 114, here the determinations of the Authority in respect of the existence of a final and binding settlement of the grievances have not had the effect of disposing of the employment relationship problems before it.

Costs

[21] Costs are reserved pending the final disposition of this matter.

R A Monaghan
Member of Employment Relations Authority