

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 548
5070417

BETWEEN ERROL WADE
 Applicant

AND HUME PACK-N-COOL
 LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: E Wade in person
 M Hume, advocate for respondent

Investigation Meeting: On the papers

Determination: 22 December 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Errol Wade has applied for the reopening of an investigation. He says that during the Authority's earlier investigation in respect of his application for an order for compliance with the terms of a settlement, his former employer, Hume Pack-N-Cool Limited, made false statements to the Authority.

[2] Hume Pack-N-Cool Limited opposes the application on the ground that the matters Mr Wade seeks to raise were the subject of an unsuccessful attempt to challenge the Authority's determination in the Employment Court.

[3] I advised the parties I proposed to issue a determination on the papers, and invited them to file such further statements and submissions as they wished before I did so.

[4] I have proceeded accordingly on the material available.

Litigation history

[5] The determination of the Authority in *Wade v Hume Pack N Cool Limited*¹ was to decline an application for an order for compliance with an agreement reached in settlement of Mr Wade's claims for unpaid wages and other monies. The settlement sum had been treated as a gross figure and a deduction was made in respect of tax before payment was made to Mr Wade. The issue for the Authority was whether the settlement sum was a gross figure or was to be paid in full to Mr Wade without any deduction in respect of tax. The Authority concluded the sum was a gross figure and declined to make an order for compliance.

[6] Mr Wade sought to challenge the determination. The resulting judgement of the Employment Court² addressed Mr Wade's application for permission to pursue the challenge after a notice of discontinuance had been filed. In commenting on the merits of the challenge the court said:

[52] It appears that the applicant was basing his challenge largely on a collateral attack on the credibility of the respondent's witnesses due to what he alleges were false accusations of theft relating to the theft of petrol. I note that there appears to be no issue before the Authority as to the theft accusations. If those allegations were made, even on the evidence the applicant has led, they were not pursued by the respondent in any manner after they were allegedly raised in January 2004. They therefore do not provide a strong basis for a collateral credibility attack which is likely to result in a different finding to that which the Authority made concerning the settlement.

[53] ... I am not persuaded that the applicant's challenge has sufficient merit to warrant the reinstatement of these proceedings. The merits of the claim were weak. .

[7] Mr Wade sought leave to appeal to the Court of Appeal. The Court of Appeal declined to grant leave³ and also commented that:

[11] ... He is now attempting to raise a factual question which is collateral and unrelated to his originating application to the ERA for a compliance order. We endorse Judge Travis' observation that Mr Wade does not suggest that Hume's alleged perjury was related to the terms of the settlement agreement.

¹ AA 322/07, 16 October 2007

² [2011] NZEmpC 57

³ [2011]NZCA 421

Determination

[8] Both the Employment Court and the Court of Appeal included summaries of the background facts in their judgments. To summarise even further, Mr Wade said he had a conversation with his employer in January 2004 in which he claimed he was owed money. As set out in the judgment of the Court of Appeal, this conversation was in response to the employer's raising with him its concerns that he was allowing other people to buy petrol on his company fuel card. The settlement reached in resolution of Mr Wade's claim for monies owed was the subject of the application for an order for compliance.

[9] Mr Wade's application to reopen is based on statements contained in written statements of evidence presented at the original investigation in the Authority by witnesses on behalf of Hume Pack-N-Cool, in which the concerns about Mr Wade's use of the company fuel card were set out. Mr Wade says the statements were fraudulent or amounted to perjury. He still wishes to challenge the veracity of those statements.

[10] In particular he says that contrary to those statements:

- (i) he did not work for Hume Pack-N-Cool 'on and off for many years in various capacities,' rather he was on a WINZ benefit from 14 July 1993 to 12 October 1998;
- (ii) he did not use the company fuel card to pay for his daughter's petrol;
- (iii) he did not admit to misusing the fuel card; and
- (iv) the fuel card was not taken from him, as it had been cancelled some months earlier.

[11] The first of these is a matter of detail that does not affect the merits of any claim Mr Wade may have. Otherwise, just as with the attempted challenge in the Employment Court, the application amounts at best to a wish to mount a collateral attack on the credibility of the company's witnesses. It concerns matters not directly related to the terms of the settlement agreement and which, even if identified as concerns at the time, were not pursued by the company. Nothing in the application to reopen raises anything not already raised in the attempted challenge. Nothing in the

application raises anything capable of persuading me to take a different view of the matter from that of the Employment Court and the Court of Appeal such that a reopening of the matter is warranted, or to conclude that it is in the interests of justice to order that the investigation be reopened.

[12] The application to reopen the investigation is dismissed.

Costs

[13] Mr Hume's lack of success with this application, and the limited nature of the respondent's reply, indicate there are no grounds on which to award costs. Accordingly there will be no order for costs.

R A Monaghan

Member of the Employment Relations Authority