



# Employment Court of New Zealand

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## Juahm Industries Company Limited v Isnanto [2015] NZEmpC 182 (15 October 2015)

Last Updated: 21 October 2015

IN THE EMPLOYMENT COURT CHRISTCHURCH

[\[2015\] NZEmpC 182](#)

EMPC 139/2015

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN JUAHM INDUSTRIES COMPANY LIMITED

Plaintiff

AND APRIL ISNANTO AND 52 OTHERS Defendant

Hearing: 6 October 2015 (heard at Wellington)

Appearances: T Cleary and T Jeffcott, counsel for the plaintiff

C Hirschfeld and P Dawson, counsel for the defendants

Judgment: 15 October 2015

JUDGMENT OF JUDGE B A CORKILL

### Introduction

[1] The defendants have applied to strike out a challenge brought by the plaintiff against a determination of the Employment Relations Authority (the Authority).<sup>1</sup>

[2] The defendants are Indonesian seamen who worked on a fishing vessel operated by Juahm Industries Company Limited (Juahm). Initially, 53 crew members claimed unpaid wages totalling \$2,687,454, albeit their statement of problem stated that this is a provisional figure.

[3] When the statement of problem was filed in the Authority, Mr Dawson signed it as lawyer for each crew member. Subsequently Juahm raised an issue as to

<sup>1</sup> *Isnanto v Juahm Industries Co Ltd* [2015] NZERA Christchurch 56.

JUAHM INDUSTRIES COMPANY LIMITED v APRIL ISNANTO AND 52 OTHERS NZEmpC CHRISTCHURCH [\[2015\] NZEmpC 182](#) [15 October 2015]

whether Mr Dawson could satisfy [s 236\(3\)](#) of the [Employment Relations Act 2000](#) (the Act) which provides:

### 236 Representation

...

(3) Any person purporting to represent any employee or employer must

establish that person's authority for that representation.

[4] Eventually the Authority was provided with original copies of retainer letters and copies of identity documents so that it could determine whether Mr Dawson had established the requirements of [s 236\(3\)](#) of the Act. The Authority issued its determination which was described as a "Determination of the Authority on a Preliminary Issue".<sup>2</sup> The Authority determined on the balance of probabilities that identities were established in respect of 46 of the 53 applicants; and that accordingly Mr Dawson had established his authority to represent those individuals for the purposes of their claims. The Authority was not satisfied on the balance of probabilities that authority was held for the remaining seven individuals.

[5] In light of that conclusion, the Authority dealt with "next steps and directions".<sup>3</sup> Mr Dawson was invited to provide either missing documents or to produce sworn affidavit evidence in respect of the individuals whose identities had not been established. Juahm was directed to provide copies of time and wage records as a matter of urgency, and no later than seven days from the date of the determination. Costs were reserved, the Authority stating that representations in that regard could be made "after the substantive issue has been determined".

[6] Subsequently, the Authority ruled that authority had been established in respect of a further three applicants.

[7] On 2 June 2015, Juahm instituted a challenge to the Authority's determination. The statement of claim referred to the determination as having related to a "preliminary issue". Juahm sought a declaration that Mr Dawson had failed to satisfy the requirements of [s 236\(3\)](#) of the Act in relation to the

46 defendants, and that the Authority's determination should be set aside.

<sup>2</sup> *Isnanto v Juahm Industries Co Ltd*, above n 1, at [1].

<sup>3</sup> At [5].

[8] On 15 June 2015, the proceeding was stayed by the Authority until the Court determined the challenge, or until further order of the Authority.

[9] On 8 September 2015, the defendants filed and served a notice of interlocutory application for an order that the Court lacks jurisdiction to hear the plaintiff's claim. It is contended that contrary to [s 179\(5\)](#) of the Act, the plaintiff is purporting to challenge a preliminary determination of the Authority which relates to the procedure which it has followed, is following or is intending to follow. Juahm opposes the application on the basis that the determination did not relate to a matter of procedure.

### **Legal principles**

[10] The principles applying to a strike-out application are well established. They may be summarised in this way:<sup>4</sup>

a) The facts pleaded in the statement of claim are assumed to be true.

b) The proceeding must be clearly untenable before it can be struck out. c) The jurisdiction to strike-out is used sparingly and only in clear cases.

d. The jurisdiction to strike-out is not displaced by the need to decide difficult questions of law.

[11] The issue raised in the present application is one of jurisdiction. If there is no jurisdiction to resolve the challenge, then it must be regarded as being "clearly untenable" so that it should be struck out.

[12] [Section 179](#) of the Act provides for challenges to determinations of the Authority. Where a party to a matter before the Court is dissatisfied with a written determination of the Authority, that party may elect to have the matter heard by the Court. This, however, is subject to the provisions of [s 179\(5\)](#) which provides that a

right to challenge does not apply:

<sup>4</sup> *Attorney-General v Prince* [1997] NZCA 349; [1998] 1 NZLR 262 (CA) at 264.

(aa) to an oral determination or an oral indication of preliminary findings given by the Authority under [s 174\(a\)](#) or (b); and

(a) to a determination, or part of a determination, about the procedure that the Authority has followed, is following, or is intending to follow; and

(b) without limiting paragraph (a), to a determination, or part of a determination, about whether the Authority may follow or adopt a particular procedure.

[13] These provisions have been considered on several occasions. In *Employment*

*Relations Authority v Rawlings* the Court of Appeal stated:<sup>5</sup>

We are satisfied that [s 179\(5\)](#) and [184\(1A\)](#) are intended to prevent challenge or review processes disrupting unfinished Authority investigations. But once the investigation is over and a determination has been made, there is no reason for limiting the challenge and review jurisdictions of the Employment Court. If the procedure adopted by the Authority has had a decisive influence on result (e.g. by refusing an adjournment and proceeding in the absence of a witness), the affected party, in the course of questioning that result, will be entitled to put in issue that procedure.

[14] More recently a full Court of this Court considered the issue in *H v A Limited*,<sup>6</sup> where there was an issue as to whether there could be a challenge to a refusal to grant a non-publication order. After discussing previous decisions, the Court said:<sup>7</sup>

[23] It is clear that the policy intent underlying [s 179\(5\)](#) is to enable the Authority to settle matters coming before it at the appropriate level, with as little judicial intervention during the investigative process as possible. A balance is struck between the policy imperatives underlying the reforms and access to justice considerations in the retention of the right of challenge or review once the Authority has made a final determination on the matter before it.

[24] We do not, however, consider that [s 179\(5\)](#) is to be construed as wholly ousting access to the Court at an interlocutory stage. This would be the effect of adopting the defendant's approach in the present case. Instead, the Court must have regard to the effect of the Authority's determination in light of the policy objectives set out above.

[25] While not impacting on (and, in particular, delaying) the substantive outcome of a proceeding, a refusal to grant a non-publication order may well cause significant and irreversible damage – not only to the applicant but also affected non-parties. Although an ability to challenge the refusal of a non-publication order at an interlocutory stage may disrupt unfinished Authority

<sup>5</sup> *Employment Relations Authority v Rawlings* [[2008\] NZCA 15](#), [[2008\] ERNZ 26](#) at [[26](#)].

<sup>6</sup> *H v A Ltd* [[2014\] NZEmpC 92](#).

<sup>7</sup> (footnote omitted).

business, in the sense identified by the Court of Appeal in *Rawlings*, its distinguishing characteristic is that it is not the sort of determination that can subsequently be remedied on a challenge or by way of review. The horse will have well and truly bolted by that stage.

[26] A refusal to make a non-publication order does not fall within s

179(5), not because such an order directly impacts on a party's rights or

obligations but rather because the denial of such an order has an irreversible

and substantive effect. It cannot have been Parliament's intention that a litigant in the plaintiff's shoes would have such an important issue (non-publication) determined at first and last instance by the Authority, with no recourse to the Court to review the Authority's refusal.

[27] In this regard, it is evident that the new sections introduced by the

2004 amendments are not intended to deny a party access to justice, but are rather intended to facilitate the resolution of employment relationship problems through providing a forum that is not unduly preoccupied with legal technicalities. [Section 179\(5\)](#) operates to *defer*, in order to give effect to the important policy imperatives underlying the provisions, but not *deny* access to the Court. To apply subs (5) to the circumstances of this case would be to deny access to justice.

[28] Accordingly, a determination of the Authority will be amenable to challenge where it has a substantive effect, which cannot otherwise be remedied on a challenge or by way of review.

[15] In summary, the Court must have regard to the effect of the Authority's determination in light of the policy objectives of the Act. A determination of the Authority will be amenable to challenge where it has a substantive effect which could not subsequently be remedied on a challenge or by way of review. Where [s 179\(5\)](#) operates, it defers a party's right of a challenge, but it does not deny access to the Court.

[16] The other statutory provision requiring consideration is [s 236\(3\)](#) of the Act. This provision is very similar to its predecessor, s 59(3) of the [Employment Contracts Act 1991](#). The previous section was often considered where an issue arose as to whether workers had authorised their union to represent them for the purposes of proceedings in the Court. In that context, Chief Judge Goddard made the following useful observations as to the purpose of that statutory provision, in *Adams*

This is a sensible rule for a number of reasons, not the least of which is that an unsuccessful applicant may find himself or herself liable to the burden of an order for costs. Moreover there is the well-known rule, as much in force

8 *Adams v Alliance Textile (NZ) Ltd* [1991] NZEmpC 77; [1992] 1 ERNZ 982 (EmpC) at 988-989, (footnote omitted).

in this as in any other Court, that no person may become an applicant or plaintiff against his or her will or, I would add, without his or her express consent.

[17] Under that Act, difficulties often arose for unions.<sup>9</sup> However, under the current Act the position is different. Because s 56 of the Act provides that where there is a collective agreement that is in force, it binds and may be enforced by a union. Consequently there is less frequent resort to the relevant section. That is not to say, however, that the rule is not important where it applies. It codifies orthodox principles which would otherwise apply under the general law of agency.

[18] The effect of an employee choosing another person to represent him or her is that the representative then has the right to do anything or take any action which the employee would otherwise have in the Authority: s 236(1) of the Act.

### Submissions

[19] Counsel for the defendants, Mr Hirschfeld, submitted that s 179(5) applied since the determination which had been made by the Authority was about how it conducted its own business. In that sense, the determination was preliminary, related to process, concerned the progressing of the case, and did not touch on or point to remedies.

[20] Counsel for Juahm, Mr Cleary, emphasised that the focus had to be on the effect of the Authority's determination in light of the policy objectives of the Act. If the determination had a substantive effect which could not otherwise be remedied on an ultimate challenge or by way of review, then it was amenable to challenge now. The order which the Authority had made was the first substantive/jurisdictional question which the Authority had been required to address, namely: was there a valid

claim? If Mr Dawson did not have authority to represent crew members, then there

<sup>9</sup> For example see *Air New Zealand Ltd v New Zealand Association of Marine and Power Engineers Inc* [1994] 1 ERNZ 186 (EmpC) at 218, where the Court, in considering claims for relief for employees employed under certain collective employment contracts under the Contracts Act 1970 and *Contractual Mistakes Act 1977*, required satisfaction as to the proper and adequate representation of all interested parties, and indicated that had the issue arisen, the Court would have required to see specific authority from each employee to his representative for the purposes of these proceedings. See also *Paul v New Zealand Society for the Intellectually Handicapped Inc* [1992] NZEmpC 3; [1992] 1 ERNZ 65 (EmpC) in which the status of 1,040 plaintiffs had to be established in the course of urgent injunction proceedings.

was no valid claim before the Authority because no applicant had signed the statement of problem. It was submitted that if the Court rejected jurisdiction to hear the challenge several irreversible and substantive injustices would follow – the plaintiff would be put to the time and expense of responding to a claim which in reality did not exist, crew members would be involved in a proceeding against their will, and crew members could potentially be liable for costs. The answer to the question was made stark when analysed from a different perspective, namely what would the position have been if the Authority had determined Mr Dawson was not a representative; on the defendants' reasoning that would have been an unchallengeable outcome.

### Discussion

[21] For several reasons I consider that it cannot be concluded that the making of a representation order by the Authority in this instance has "an irreversible and substantive effect".<sup>10</sup>

[22] First, I accept the submission made by Mr Hirschfeld to the effect that the making of the representation order did not amount to the granting of a remedy. In my view, this is a significant point.

[23] The effect of Mr Dawson being acknowledged as a representative for the purposes of the multiple claims which have been advanced is that he is thereby able to prosecute those claims, advancing and opposing interlocutory applications as may be appropriate, filing for the defendants any necessary documents such as affidavits, memoranda and at the point where the matter is set down for hearing, briefs of evidence; he has also provided an address for service for the defendants which facilitates the service of similar documents by Juahm.

[24] The claims, however, will not be established by the taking of those steps. Rather, they will be established only after evidence has been led. Mr Hirschfeld confirmed that it is anticipated applicants will travel from Indonesia to give evidence

in New Zealand. If relevant evidence is not available in respect of an individual

<sup>10</sup> *H v A Ltd*, above n 6, at [26].

crew member's circumstances – for instance because that individual does not wish to advance a claim – then his claim will not be able to be established and it will be dismissed.<sup>11</sup> In short, the entitlement to remedies will be determined by the provision of evidence called which establishes each individual's claim to the necessary degree of persuasion; remedies will not be established by the fact of representation. This conclusion suggests the order was not substantive or jurisdictional, but procedural.

[25] Notwithstanding that conclusion, are there any other irreversible and substantive injustices if the challenge is not heard at this stage? Mr Cleary submitted that there were three. The first was that Juahm would be put to the significant time and expense of responding to a claim which does not in reality exist. I do not agree that this would be an injustice without a remedy. If such a difficulty arose, the affected party would be entitled to seek costs. If there was a serious dereliction of duty by a lawyer who had represented that he or she had authority to act when he or she did not, that might well be a matter where an order for costs against the lawyer should be considered if the circumstances were sufficiently egregious: *Aarts v*

*Barnados New Zealand Limited*.<sup>12</sup>

[26] The next irreversible and substantive injustice raised by Mr Cleary is that crew members involved would have had a proceeding brought against their will. Whilst that would be a very serious matter, it would be an injustice for which there are potential effective remedies. The issue would potentially be a disciplinary matter.<sup>13</sup> If loss was actually caused, the aggrieved party may have a civil claim

against the unauthorised representative.<sup>14</sup>

[27] Then Mr Cleary referred to a potential irreversible and substantive injustice because crew members who had not authorised the advancing of a claim on their behalf would be personally liable for costs. I consider such an outcome to be

inherently unlikely, given my earlier conclusion on the issue of costs.<sup>15</sup>

11. The step of giving evidence was regarded as determinative as to whether a representative held the requisite authority in *Adams*, above n 8, at 988.

<sup>12</sup> *Aarts v Barnados New Zealand Ltd* [2013] NZEmpC 145 at [40].

<sup>13</sup> *Hung v Tse*, HC Auckland Civs-2008-404-8568, 26 February 2009 at [13] and [22].

<sup>14</sup> *Penn v Bristol & West Building Society* [1997] EWCA Civ JO416-5, [1997] 3 All ER 470 (CA).

<sup>15</sup> At [25].

[28] As for the counterfactual raised by Mr Cleary as to the position if the Authority had determined Mr Dawson was not a representative, commonsense would suggest that a lawyer or advocate in such a situation would remedy the problem by obtaining an affidavit or other appropriate evidence from any affected individual, so as to deal with the issue. I do not consider that this point suggests the decision made by the Authority was anything other than procedural.

[29] Standing back, I must have regard to the policy objectives of the Act; employment relationship problems are in the first instance to be resolved by a forum that is not unduly preoccupied with legal technicalities. For those reasons, on a matter of procedure, a challenge cannot proceed at this stage. I find that the representation order which was made in this instance is one that could, if necessary, be subsequently addressed and remedied on a challenge or by way of review. The appointment of a representative does not in my view have in this instance “a decisive

influence on result”; it is not substantive or jurisdictional.<sup>16</sup> I consider it to be an

issue about the procedure which the Authority has followed, is following, or is intending to follow.

## Conclusion

[30] Accordingly, this Court does not have jurisdiction to consider the challenge. The application to strike-out the challenge is accordingly granted. Juahm is at liberty to raise the issue on a challenge or by way of review in due course.

[31] I reserve costs. The parties are encouraged to resolve the costs relating to the application to strike-out directly. If agreement does not prove possible, the defendants may apply for an order for costs by memorandum supported by evidence within 21 days of the date of this judgment. The plaintiff may respond by

memorandum and any necessary evidence 21 days thereafter.

Judgment signed at 10.30 am on 15 October 2015

B A Corkill

Judge

16 *Employment Relations Authority v Rawlings*, above n 3, at [26].

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