Employment Court of New Zealand

Rawlings v Employment Relations Authority CC8/06 [2006] NZEmpC 83; [2006] ERNZ 729; (2006) 7 NZELC 98,396 (23 August 2006)

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Last Updated: 3 May 2011

IN THE EMPLOYMENT COURT CHRISTCHURCH

CC8/06
CRC 27/05

IN THE MATTER OF an application for judicial review

AND IN THE MATTER OF an application to strike out proceedings

BETWEEN Kenneth Benjamin Rawlings

Plaintiff

AND Employment Relations Authority

Defendant

Court: Judge A A Couch

Hearing: 10 April 2006

(Heard at Christchurch)

Appearances: Mr F Wall, advocate for plaintiff

Ms C Inglis, counsel for defendant

Judgment: 23 August 2006

JUDGMENT OF JUDGE A A COUCH

Introduction

[1] The plaintiff commenced proceedings in the Employment Relations Authority alleging he had been unjustifiably dismissed. The statement of problem contained extensive submissions about the law and statements about members of the Authority which were gratuitous and offensive.

[2] The Authority directed the plaintiff to file an amended statement of problem in a more acceptable form or the proceedings would be regarded as having been withdrawn. The plaintiff took no steps and the proceedings were regarded by the Authority as at an end.

[3] The plaintiff wishes to challenge that direction by the Authority. He has done so by way of an application for judicial review. The defendant has applied to have the proceedings struck out on the grounds that the Court has no jurisdiction to conduct a judicial review in these circumstances because the plaintiff had a right of challenge under s179 of the Employment Relations Act and did not exercise it.

Background

[4] Until 2002, the plaintiff was employed by Sanco NZ Ltd as a salesman. In July 2002, that part of Sanco's business in which he worked was sold to Gabbett NZ Ltd. The plaintiff's employment with Sanco ended and he was offered and accepted employment with Gabbett. In April 2005, the plaintiff was dismissed by Gabbett.

[5] On 5 May 2005, the plaintiff commenced proceedings in the Employment Relations Authority alleging that he was entitled to receive redundancy compensation from Sanco as a result of the termination of his employment in 2002 (file number CEA131/05).

[6] On 6 May 2005, the plaintiff commenced separate proceedings in the Authority alleging that he had been unjustifiably dismissed by Gabbett and seeking, amongst other things, interim reinstatement (file number CEA132/05).

[7] In all matters, the plaintiff was represented by Mr Wall as his advocate.

[8] The two sets of proceedings were considered by Mr Cheyne, a member of the Authority, who issued a direction concerning them on 9 May 2005. I set out that direction in full:

File Number: CEA 131-2/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH OFFICE

***BETWEEN** Kenneth Rawlings of Christchurch (Applicant) **AND** Sanco NZ Limited of Christchurch (Respondent) **AND** Gabbett Machinery Limited of Auckland (Respondent)*

***NOTICE OF DIRECTION TO** the Applicant*

***AND TO** the Respondents*

1. Both these applications have been referred to me. In CEA 131/05, Mr Rawlings's problem is a personal grievance claim against a former employer (Sanco NZ Limited) in respect of the termination of that employment in July

2002 without payment of redundancy compensation. At the time, Mr Rawlings commenced employment with the company (Gabbett Machinery Ltd) that purchased the business of Sanco NZ Limited. In CEA 132/05, Mr Rawling's [sic] *problem concerns his dismissal in April 2005 from employment with Gabbett Machinery Ltd. In CEA 132/05, Mr Rawlings seeks interim reinstatement.*

2. Sanco NZ Limited, the respondent in CEA 131/05, should lodge a statement in reply in accordance with the usual requirement to lodge a reply within 14 days of service of the statement of problem. A phone conference will be arranged in due course after the statement in reply has been received.

3. In CEA 132/05, the statement of problem contains much irrelevant material about Mr Wall's views on the law and some abusive material about the Christchurch Employment Relations Authority.

4. CEA 132/05 will not be investigated until an amended statement of problem has been lodged devoid of Mr Wall's views about the law and without the abusive comments about the Christchurch Employment Relations Authority. The respondent, Gabbett Machinery Ltd, is not required to lodge a statement in reply until directed to do so by further order of the Authority. CEA 132/05 will be treated as withdrawn if no amended statement of problem has been lodged within 4 weeks of today's date.

5. This notice of direction is to be served on both respondents and Mr

Rawlings personally as well as through his representative.

***DATED**: 9 May 2005*

[signed]

[sealed]

Philip Cheyne

Member of Employment Relations Authority

[9] In accordance with Mr Cheyne's directions, the proceedings against Sanco progressed and were determined by the Authority on 26 September 2005. The plaintiff challenged that determination under s179 of the Employment Relations Act and that challenge (file number CRC28/05) has so far been the subject of two interlocutory judgments by the Chief Judge

(judgment numbers CC2/06 and CC2A/06).

[10] In relation to the proceedings against Gabbett, neither the plaintiff nor Mr Wall responded to the direction that an amended statement of problem be filed. On 9

June 2005, the senior support officer of the Authority in Christchurch, Mr Gallen,

wrote to Mr Wall saying:

CEA 132/05 Kenneth Rawlings And Gabbett Machinery Limited

(personal grievance)

I refer to the direction of the Authority dated 9 May 2005 and in particular paragraph 4.

There has been no response to the requirement in this paragraph. The

Authority proceedings are thereby deemed to be withdrawn. Yours faithfully

[11] On 1 July 2005, Mr Wall sent proceedings to the Registrar of this Court for filing. Those proceedings were in the name of Mr Rawlings as plaintiff and cited Mr Gallen and Mr Cheyne personally as defendants. On 7 July 2005, the Registrar of the Court wrote to Mr Wall in the following terms:

Rawlings v Office Manager Tony Gallen, Authority Member Philip

Cheyne

This application was received on 1 July 2005. The application has not been accepted for filing for the following reason.

The application states that it is an "appeal" against a decision of a staff member of the Authority and a statutory officer of the Authority. However, the intituling states that it is an "Election to have matter heard in the Employment Court". *This is the wording used in section 179 of the Employment Relations Act 2000 which provides:* "A party to a matter before the Authority who is dissatisfied with the determination of the Authority...may elect to have the matter heard by the Court." *There has been no determination issued by the Authority, only a notice of direction.*

It is my opinion that you are not able to challenge, by way of section 179, an action by a staff member of the Authority or an Authority Member. You may wish to consider section 194 "Application for review" and I would also draw your attention to section 184 "Restriction on review".

Your application, together with the $200 which accompanied it, is therefore returned to you.

Yours faithfully

[12] On 10 October 2005, Mr Wall initiated the proceedings which are now before the Court. They originally cited as defendant

The Christchurch Authority

Authority Member Philip Cheyne

The intituling records that the proceedings are an *"Application Under s194 seeking an order of, or in the nature of mandamus, prohibition, or certiorari, or declaration that the Personal Grievance of the Applicant be restored."*

[13] Paragraph 1 of the statement of claim is as follows:

1. I, the Plaintiff, by filing this statement of claim, am commencing in the

Employment Court at Christchurch an action against you in which I

seek from the Employment Court an order or declaration that it was wrongful, misconceived, or an abuse of power on the part of the Authority Mr Philip Cheyne to strike out the Applicants causes of action when lawfully submitted in accordance with the Act."

[14] In response to the statement of claim, counsel for the Authority challenged the jurisdiction of the Court to entertain the proceedings. In place of a statement of defence, an appearance under protest to jurisdiction was filed. In addition, on behalf of the Authority, Ms Inglis filed an application for orders:

a) striking out the proceedings for want of jurisdiction; and

b) substituting the Authority as defendant in place of Mr Cheyne; and c) as to costs.

[15] Subsequently, Mr Wall filed a notice of opposition to the application to strike out. This consisted of nine pages of closely typed text, a large part of which was devoted to insulting and offensive allegations about Judges of this Court and of the Court of Appeal. Towards the end of this document, Mr Wall invited the Attorney- General to prosecute him for contempt so that he might have an opportunity to air his legal theories in the High Court.

Identity of defendant

[16] In his handling of the proceedings initiated by the plaintiff, Mr Cheyne acted at all times in his capacity as a properly appointed member of the Employment Relations Authority. Section 9(4A) of the Judicature Amendment Act 1972 requires that *"where the act or omission is that of a Judge, Registrar, or presiding officer of any court or tribunal …that court or tribunal, and not that Judge, Registrar, or presiding officer, shall be cited as a respondent".* Accordingly, it was inappropriate that Mr Cheyne be cited personally as a defendant in these proceedings. The proper defendant was and is the Employment Relations Authority. At the commencement of the hearing, I raised this with Mr Wall who consented to the change of name sought by Ms Inglis. I then made an order that the Employment Relations Authority be substituted for Mr Cheyne as the defendant.

Right of defendant to make application

[17] One of the grounds of opposition advanced by Mr Wall was that the defendant did not have standing to appear because no statement of defence had been filed on its behalf. In support of this proposition, Mr Wall appeared to rely on regulation 19

of the Employment Court Regulations 2000 and in particular, the following parts of it:

19 Obligation to file statement of defence

(1) Except where the Registrar of the Court or a Judge otherwise orders, every defendant who intends to defend any proceedings in the Court must file a statement of defence with the Registrar of the Court.

....

(4) Every defendant who fails to comply with subclauses (1) to (3) may defend the proceedings only with the leave of the Court.

[18] Mr Wall correctly observed that neither the Registrar nor a Judge had relieved the defendant of its obligation under subclause (1) of this regulation and that leave to appear had not been obtained. On this basis, he submitted that the defendant was precluded from defending the matter and lacked standing to make an application to strike out the proceedings.

[19] This submission overlooked the provisions of regulation 6:

6 Procedure

(1) Every matter that comes before the Court must be disposed of as

nearly as may be in accordance with these regulations.

(2) If any case arises for which no form of procedure has been provided by the Act or these regulations or any rules made under section 212(1) of the Act, the Court must, subject to section 212(2) of the Act, dispose of the case—

(a) as nearly as may be practicable in accordance with—

(i) the provisions of the Act or the regulations or rules affecting any similar case; or

(ii) the provisions of the High Court Rules affecting any similar case; or

(b) if there are no such provisions, then in such manner as the Court considers will best promote the object of the Act and the ends of justice.

[20] From the outset, the position of the defendant has been that the Court lacked jurisdiction to hear and determine the plaintiff's application for judicial review. Where a party objects to the jurisdiction, it will be properly reluctant to take any step which may be interpreted as submission to the jurisdiction, such as filing a statement of defence. This situation is not provided for in the Employment Court Regulations 2000 nor in any rules made under s212(1) of the Employment Relations Act 2000.

[21] This situation is, however, expressly provided for in rule 131 of the High Court

Rules, the initial part of which is:

131 Appearance under protest to jurisdiction

(1) A defendant who objects to the jurisdiction of the Court to hear and determine the proceeding in which he has been served may, within the time limited for filing his statement of defence and instead of so doing, file and serve an appearance stating his objection and the grounds thereof.

[22] In my view, this procedure was particularly apt to deal with the situation of the defendant and it is a proper application of regulation 6(2)(a) of the Employment Court Regulations to permit the defendant to initially respond to the proceedings in this manner. Accordingly, I do not accept Mr Wall's submission that the defendant lacked standing to appear and be heard.

Statutory provisions

[23] There is a clear and logical structure to the provisions of the Employment Relations Act conferring jurisdiction to conduct judicial review of the kind contemplated by the Judicature Amendment Act 1972. The primary provisions are contained in s194:

194 Application for review

(1) If any person wishes to apply for review under Part 1 of the Judicature Amendment Act 1972, or bring proceedings seeking a writ or order of, or in the nature of, mandamus, prohibition, or certiorari, or a declaration or injunction, in relation to the exercise, refusal to exercise, or proposed or purported exercise by—

(a) the Authority; or

(b) an officer of the Authority or the Court; or

(c) an employer, or that employer's representative; or

(d) a union, or that union's representative; or

(e) the Registrar of Unions; or

(f) the Minister; or

(g) the chief executive; or

(h) any other person—

of a statutory power or statutory power of decision (as defined by section 3 of the Judicature Amendment Act 1972) conferred by or under this Act or any of the provisions of Parts 5, 6, 7, or 7A of the State Sector Act 1988, the provisions of subsections (2) to (4) apply.

(2) Despite any other Act or rule of law, but subject to section 184(1A), the Court has full and exclusive jurisdiction to hear and determine any application or proceedings of the type referred to in subsection (1) and all such applications or proceedings must be made to or brought in the Court.

(3) Where a right of appeal (which includes, for the purposes of this subsection, the right to make an election under section 179) is conferred on any person under this Act or the State Sector Act 1988 in respect of any matter, that person may not make an application under subsection (1) in respect of that matter unless any appeal brought by that person in the exercise of that right of appeal has first been determined.

[24] Subsection (1) of s194 defines the scope of judicial review which is to be dealt with under the Act.

[25] Subsection (2) of s194 declares that the jurisdiction to conduct judicial review within the scope of subs (1) is conferred fully and exclusively on the Employment Court.

[26] Subsection (3) of s194 restricts the exercise of the Court's jurisdiction by providing that any appeal brought in respect of the matter must be determined before an application for judicial review can be made.

[27] Other significant restrictions on the Court's jurisdiction are imposed by s184. This provides:

184 Restriction on review

(1) Except on the ground of lack of jurisdiction or as provided in section

179, no determination, order, or proceedings of the Authority are removable to any court by way of certiorari or otherwise, or are liable to be challenged, appealed against, reviewed, quashed, or called in question in any court.

(1A) No review proceedings under section 194 may be initiated in relation to any matter before the Authority unless—

(a) the Authority has issued final determinations on all matters relating to the subject of the review application between the parties to the matter; and

(b) (if applicable) the party initiating the review proceedings has

challenged the determination under section 179; and

(c) the Court has made a decision on the challenge under section

183.

(2) For the purposes of subsection (1), the Authority suffers from lack of jurisdiction only where,—

(a) in the narrow and original sense of the term jurisdiction, it has no entitlement to enter upon the inquiry in question; or

(b) the determination or order is outside the classes of determinations or orders which the Authority is authorised to make; or

(c) the Authority acts in bad faith.

[28] Subsection (1) provides that the actions of the Authority may only be challenged by election under s179 or *"on the ground of lack of jurisdiction"*. The term *"lack of jurisdiction"* is defined in subs(2) in terms which effectively exclude the wide concept of jurisdiction recognised in certain English cases.

[29] Subsection (1A) limits review proceedings under s194 *"in relation to any matter before the Authority"*.

[30] Further restrictions are imposed by s194A which effectively prevent an application for judicial review being made in respect of a statutory power of decision by an employer which is within the jurisdiction of the Authority. Those provisions are not relevant to this case.

Case for striking out

[31] In support of the defendant's application to strike out these proceedings, Ms Inglis began by referring me to the principles applicable to an application to strike out proceedings. These are well established. The jurisdiction to strike out is to be exercised sparingly and in cases where the claim has no prospect of success. Ms Inglis submitted that this was such a case.

[32] Ms Inglis then went on to base the defendant's case on two key submissions. The first relied on s194(3) of the Act. The second relied on s184(1A) of the Act.

Section 194(3)

[33] Ms Inglis' primary submission in support of the application to strike out was:

11. Section 194(3) of the Act provides that an application for review can only be brought after any right of appeal has been exercised. A right of appeal includes a right of election under s179 (refer: s 194(3)).

[34] This submission proceeded on an erroneous interpretation of s194(3) of the Act. Section 194(3) does not provide that the existence of a right of appeal precludes an application for judicial review unless and until the right of appeal is exercised. What s194(3) requires is that any appeal which has been brought must be determined before an application for review may be made. If a right of appeal exists but is not exercised, the existence of that right does not operate as a bar to an application for judicial review.

[35] In this case, the plaintiff has not exercised any right he may have to appeal the directions of the Authority by way of an election under s179. Ironically, that was what he initially attempted to do but was dissuaded from doing by the Registrar's letter to Mr Wall of 7 July 2005. It follows that s194(3) has no application in this case.

Section 184(1A)

[36] The second broad submission advanced by Ms Inglis was that s184(1A) also applied to preclude a judicial review in this case. She characterised this subsection as excluding scope for a judicial review unless two conditions were met:

a) the Authority must have issued a "final determination"; and

b) "if applicable", a challenge has been brought and determined.

[37] As to the first of these conditions, Ms Inglis submitted that, because the Authority's actions brought the proceedings to an end, they should be regarded as a "final determination". Ms Inglis therefore accepted that this first condition was met. I agree.

[38] Ms Inglis submitted that the second condition turned on the meaning of the words "if applicable" as they are used in s184(1A)(b). She referred me to the decision of the full Court in *Keys v Flight Centre (NZ) Ltd* [2005] NZEmpC 59; [2005] 1 ERNZ 471 at paragraph [50] where the full Court said that, in this context, the term *"if applicable"* means *"if a right of challenge (appeal) exists."* Based on a number of detailed submissions, Ms Inglis concluded that a right of challenge under s179 did exist and, given that the plaintiff had not exercised that right, submitted that an application for judicial review was precluded by s184(1A).

[39] The conditions imposed by s184(1A) on the right to seek judicial review are clearly different to those imposed by s194(3). Whereas s194(3) does not apply if any right of appeal has not been exercised, s184(1A) requires that any right of appeal must be exercised and decided by the Court before an application for judicial review can be made. To that extent, Ms Inglis' second submission was on stronger ground than the first.

[40] The difficulty with this submission, however, is that s184(1A) only applies in relation to *"any matter before the Authority"*. Neither Ms Inglis or Mr Wall addressed me on the meaning of this expression in the context of s184(1A). It is, however, an important matter of statutory interpretation which affects the jurisdiction of the Court and which deserves careful consideration.

[41] The plain meaning of the words used in the expression *"any matter before the*

Authority" is that it refers to matters which are currently before the Authority.

[42] In the context of the Employment Relations Act as a whole, the meaning of the expression is not so clear. The phrase *"before the Authority"* appears in 30 or so places in the Act but it is not explicitly defined. Equally, there is no indication in the Act when matters dealt with by the Authority are no longer *"before the Authority"*.

[43] In most cases in which the phrase *"before the Authority"* is used in the Act, the context suggests that it is intended to mean currently before the Authority as opposed to having been before the Authority at some time. An example is s39 which provides:

39 Authority or Court may have regard to code of good faith

The Authority or Court may, in determining whether or not a union and an employer have dealt with each other in good faith in bargaining for a collective agreement, have regard to a code of good faith approved under section 35 that—

(a) was in force at the relevant time; and

(b) in the form in which it was then in force, related to the circumstances before the Authority or the Court.

[44] Another example is s158 which provides:

158 Lodging of applications

Proceedings before the Authority are to be commenced by the lodging of an application in the prescribed form.

[45] In other cases, it is clear from the context in which the phrase is used that it is intended to apply also to matters in respect of which the Authority has entirely completed its role. The clearest example of this is in s179(1):

179 Challenges to determinations of Authority

(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.

[46] In some provisions incorporating the phrase, additional words have been used to specifically fix a point in time. An example is in s178(1):

178 Removal to Court

(1) Where a matter comes before the Authority, any party may apply to the Authority to have the matter, or part of it, removed to the Court for the Court to hear and determine it without the Authority investigating the matter.

[47] Another example may be found in clause 14 of schedule 2 of the Act:

14 Withdrawal of matter

Where any matter is before the Authority, it may at any time be

withdrawn by the applicant or appellant.

[48] A further example is in clause 3 of schedule 3 of the Act:

3 Privileged communications

(1) Where any party to proceedings before the Court is represented by a person other than a barrister or solicitor, any communications between that party and that person in relation to those proceedings and to the matter in issue (if it has been before the Authority) are as

privileged as they would have been if that person had been a barrister or solicitor.

[49] What these examples demonstrate is that the phrase *"before the Authority"* does not have a consistent meaning throughout the Act and that its meaning in any particular instance must be determined from its context and its purpose.

[50] Section 184(1A) was inserted into the Act by the Employment Relations Amendment Act (No 2) 2004. At the same time, that amending statute also inserted an additional paragraph into the object section of Part 10 of the Act in which s184 appears. That is s143(fa) which provides:

143 Object of this Part

The object of this Part is to establish procedures and institutions that -

...

(fa) ensure that investigations by the specialist decision-making body are, generally, concluded before any higher court exercises its jurisdiction in relation to the investigations;

[51] Considering the words used in s184(1A) in light of this object, it becomes apparent that its purpose is to restrict the scope for judicial review of interlocutory determinations of the Authority.

[52] This is consistent with the materials showing the policy and legislative intention behind the enactment of s184(1A). In a 2003 paper to cabinet which set out the policy considerations behind many of the provisions which were to be enacted in the 2004 Amendment Act ("Review of the Employment Relations Act

2000: Outstanding Matters"), the Minister of Labour noted the restrictions imposed on the Court's ability to judicially review the Authority's actions and went on to say:

31. The Court has, however, twice exercised its review jurisdiction over the Authority and declared that initial procedural directions made by the Authority were invalid. Neither decision considered the possibility that any defect in initial procedural directions might subsequently have been cured during the actual investigation, nor even that the right to challenge the matter in the Court de novo caters for any need to correct procedural defects. Judicial review at the stage of preliminary directions, before the Authority has issued its determination, means that the significance of any potential breach is being assessed in isolation from the overall natural justice of the whole investigation process. It has been a long-standing principle that apparent breaches of natural justice can be cured by subsequent actions. Judicial review at this early stage also fails to adequately recognise the availability of a de novo hearing as a superior remedy for any breach of natural justice.

[53] The explanatory note to the Bill, as first introduced, was:

... the Bill makes specific provision to ensure –

...

accessible and effective problem resolution mechanisms that encourage employees and employers to address problems themselves, but also to enable such matters to be dealt with effectively and in a relatively non- legalistic way when self resolution is not possible. The Bill enhances the flexibility of mediation services, as well as ensuring that the novel investigative approach of the Employment Relations Authority can function as intended without legalistic intervention in its processes. At all stages of the problem resolution continuum, the focus is placed on the employment relationship problem that the parties have, rather than on how the various institutions have handled it: (page 2)

....

In addition, the Bill improves the ability of the Employment Relations Authority to deliver speedy, effective, and non-legalistic problem resolution services by restricting the ability of the Employment Court to intervene during Authority investigations. This will ensure that the focus remains on the immediate employment relationship problem itself, rather than on how the institutions deal with it. The Bill also reinforces the primacy of the Act's problem resolution mechanisms by requiring State sector employees to use those mechanisms to resolve employment relationship problems rather than judicial review. (page 7) (emphasis added)

...

[54] The words used, their context and the purpose of the section all lead me to the conclusion that the expression *"any matter before the Authority"* in s184(1A) means any matter which remains within the Authority's jurisdiction and in respect of which the Authority has not completed its role. In traditional legal terminology, it refers to matters the Authority is still seised of.

[55] I note that this conclusion is consistent with the view expressed by the full Court in *Axiom Rolle PRP Valuations Services Ltd v Kapadia* unreported, Colgan CJ, Travis J and Shaw J, 4 August 2006, AC 43/06:

[57] ... Provisions such as ss177(4), 178(6), 179(5) and 184(1A) (especially) all purport to give the Authority forensic carte blanche to conduct and complete its statutory role of solving employment relationship problems even to the extent that orders made or directions given by it along the way that may be significant and irreversible in their effect, are unchallengeable by appeal or review. (emphasis added)

[56] Applying this construction of s184(1A) to this case, the effect of the Authority's direction was to cause the plaintiff's proceedings to be no longer *"before the Authority"* after 7 June 2005, that being 4 weeks after the date of the Authority's directions of 9 May 2005. It follows that s184(1A) ceased to have any application to the matter after that date and does not preclude the plaintiff from seeking judicial review of the Authority's action.

[57] For these reasons, the application to strike out must fail.

Case for the plaintiff

[58] On behalf of the plaintiff, Mr Wall provided me with extensive written submissions to which he spoke. His substantive written submissions consisted of

19 pages supplemented by a further nine page summary of his response to Ms Inglis' submissions. I have considered those submissions in full but, in light of the decision I have reached that the defendant has failed to establish a proper basis for striking out the proceedings, I need not refer to them in detail. I make only the observation that my dismissal of the application to strike out should not be interpreted as an endorsement or acceptance of all or any part of the submissions made by Mr Wall.

Future of these proceedings

[59] A consequence of my dismissing the application to strike out is that the defendant can no longer protest the jurisdiction of the Court to hear and determine this matter. It should therefore file a statement of defence. That raises further issues.

[60] While the Employment Court Regulations 2000 require that a statement of defence be filed and prescribe the form it is to take, that is in the context of similar requirements as to the form of the statement of claim. A defendant ought not to be required to file a statement of defence to a statement of claim which is seriously deficient or otherwise irregular.

[61] The requirements for a statement of claim are set out in regulation 11, the relevant parts of which are:

11 Statement of claim

(1) Every statement of claim filed under regulation 7 or regulation 8 must specify, in consecutively numbered paragraphs,—

(a) the general nature of the claim:

(b) the facts (but not the evidence of the facts) upon which the claim is based:

(c) any relevant employment agreement or employment contract or legislation and any provisions of the agreement or the contract or the legislation that are relied upon:

(d) the relief sought, including, in the case of money, the method by which the claim is calculated:

(e) the grounds of the claim:

....

(2) The matters listed in subclause (1) must be specified with such reasonable particularity as to fully, fairly, and clearly inform the Court and the defendant of—

(a) the nature and details of the claim; and

(b) the relief sought; and

(c) the grounds upon which it is sought.

(3) Each paragraph of a statement of claim must be concise and must be confined to 1 topic.

[62] It is implicit in this regulation that a statement of claim should be limited to what is required by it. It is also well established by decisions of courts in numerous jurisdictions that pleadings not be prolix, that is they should not be excessively long, wordy or tedious.

[63] The statement of claim filed in these proceedings purports to follow the requirements of regulation 11 in that it has headings in it broadly corresponding to paragraphs (a) to (e) of subclause (1). Its content, however, is not that of a proper statement of claim. The allegations of fact are mixed with evidence, wide ranging social commentary, legal theories and legal submissions. It also contains statements suggesting bias on the part of Christchurch members of the Authority unrelated to any clear allegation and without particulars. The paragraphs are far from *"concise"* as required by regulation 11(3) and the document as a whole contains a large amount of material which it ought not to contain.

[64] The statement of claim concludes with a statement of the *"Relief Sought"* consisting of eight paragraphs. In the first six of these paragraphs, answers are sought to what Mr Wall describes in most cases as *"profound"* questions of law. In the final two paragraphs, he seeks an order restoring the proceedings in the Authority and costs.

[65] It needs to be said clearly at this stage of the proceedings that they may not be used as a vehicle to seek the wide ranging declarations of law sought in the first six paragraphs under the heading *"Relief Sought"* in the statement of claim. As I have

noted earlier, the scope for judicial review of the actions of the Authority is restricted by s184(1) to *"lack of jurisdiction"* as that term is defined in s184(2).

[66] It also needs to be clearly understood at this stage that pleadings, memoranda, synopses of submissions and other documents filed in Court are not to contain scandalous material. In particular, they are not to contain gratuitous criticism of the judiciary based on the judgments they have given. While it is entirely acceptable to submit that a particular case was wrongly decided, it is entirely unacceptable to question the integrity, character or ability of the judge or judges who decided that case.

[67] Before this matter can proceed, a proper statement of claim must be provided. This is not only to save the defendant from having to respond to an irregularly expressed claim but also for the benefit of the Court. It is essential to the orderly and efficient disposal of proceedings in the Court that the issues be clearly defined and limited to those which are both within the Court's jurisdiction and necessary to resolve the particular dispute between the parties.

[68] Within 21 days after the date of this judgment, the plaintiff is to file and serve an amended statement of claim which complies with the requirements of regulation

11 and with the other constraints I have referred to above. If the plaintiff intends to rely on an allegation that the Authority's directions of 9 May 2005 were tainted by bias, that must be clearly expressed and properly but concisely particularised.

[69] The defendant is to file a statement of defence within 30 days after service of such an amended statement of claim. If the defendant wishes to assert that any amended statement of claim materially fails to comply with regulation 11, that should be done by way of an application to the Court filed and served within 14 days of service of the amended statement of claim.

[70] As I have noted, the scope for judicial review of the actions of the Authority is distinctly limited. For a discussion of the nature of the jurisdiction and the limitations on it, I refer the parties to paragraphs [52] to [57] of the decision in *Metargem v Employment Relations Authority* [2003] NZEmpC 26; [2003] 2 ERNZ 186.

[71] I draw the parties' attention in particular to the fundamental principles enunciated by the former Chief Judge at paragraph [55] of the decision in *Metargem*:

[55] A review under the Judicature Amendment Act 1972 is not an appeal. If a dissatisfied party has grounds for appeal, then that party is generally expected to exercise those rights. The nature of the complaint upon an application for review is of irregularity in process as opposed to substantive error.

[72] It appears from the statement of claim in the present proceedings that the plaintiff's complaint relates both to the substance of the Authority's direction dated 9

May 2005 and to the process which led to that direction being given. As a general principle, the existence of an unexercised right of appeal or challenge in these circumstances is likely to be a factor taken into account by the Court conducting a judicial review in the exercise of its discretion to grant a remedy.

[73] If the judicial review is to proceed, another matter the plaintiff may need to consider is whether Gabbett should be joined as a defendant in these proceedings. The guiding principle is that every person directly affected by the remedy sought should be joined as a party. If that is not done, the Court may well decline to enter judgment until those parties have been cited and given an opportunity to be heard. The obverse of that principle is that any person not joined as a party will not be bound by the judgment.

[74] This principle is reflected in s9(4) of the Judicature Amendment Act 1972 which provides that *"every party to the proceedings (if any) in which any decision to which the application relates was made, shall be cited as a respondent."*

[75] In light of these issues, and the limited nature of the judicial review process generally, the plaintiff may wish to reconsider his options. To that end, I now deal with the question whether the plaintiff would be entitled to challenge the Authority's direction by way of an election under s179.

Challenge under s179?

[76] In the course of arguing the issues perceived by counsel and advocate to be involved in the application to strike out, I was provided by them both with detailed submissions about whether it was open to the plaintiff to challenge the Authority's direction dated 7 May 2005 by way of an election under s179. In addressing this issue, I have had regard to those submissions.

[77] The relevant parts of s179 are:

179 Challenges to determinations of Authority

(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.

...

(5) Subsection (1) does not apply—

(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.

[78] It is clear from s179(1) that the right of election to have a matter heard in the Court applies where the Authority has given a *"determination"* in relation to that matter. Thus, the first issue is whether the direction of the Authority dated 9 May

2005 was a *"determination"* for the purposes of s179.

[79] It is equally clear from s179(5) that, if the determination is about the procedure of the Authority, s179(1) does not apply and there is no right of challenge. Thus, the second issue is whether the direction of the Authority dated 9 May 2005 was about the procedure of the Authority.

[80] In deciding what is meant by the term *"determination"*, what is important is the substance of the action in question, not the name given to it.

[81] The concept of a "determination" is an important one under Part 10 of the Act, but it is not defined. The various contexts in which the word is used in the Act, however, offer some guidance.

[82] In s157(1) the Authority's role is described as *"resolving employment relationship problems by establishing the facts and making a determination".* This suggests that determinations are part of the process of resolving employment relationship problems. This is consistent with s161 where the jurisdiction of the Authority is declared to be *"to make determinations about employment relationship problems generally"*.

[83] Section 161 goes on to say, however, that this includes, in paragraph (s), *"determinations under such other powers and functions as are conferred on it by this or any other Act."* The Act confers a wide range of powers on the Authority. These

include the powers conferred by s160 and by clauses 4, 5, 7, 8 and 12 of the Schedule 2 to the Act. It is clear from the range of purposes and functions served by those powers that *"determinations"* may be made about matters of procedure as well as substance. This is consistent with s179(5) which specifically refers to determinations *"about procedure".*

[84] In *Keys v Flight Centre (NZ) Ltd*, the full Court considered a determination of the Authority about its jurisdiction, demonstrating that decisions of the Authority about its jurisdiction may also be *"determinations"*.

[85] Section 174 is entitled *"Determinations"* and prescribes what the Authority is required to do and is not required to do in *"recording its determination on any matter"*. This expression suggests that a *"determination"* is something separate from a record of a determination and that a *"determination"* need not be in writing.

[86] I conclude that, in the context of s179(1) of the Employment Relations Act, the term *"determination"* should be given a wide meaning encompassing any exercise by the Authority of a power of decision affecting proceedings before it.

[87] Turning to the directions of the Authority in this case, their effect was to bring the proceedings to an end. In that way, they vitally affected the proceedings before the Authority.

[88] As to the document recording those directions, it substantially complies with the requirements of s174 in that it states the facts giving rise to the directions, the orders made and, implicitly, the reasons for making those orders. It is also notable that the document is both signed and sealed by the Authority. I infer from this that the Authority itself saw the document as recording information important to the parties and intended to be binding on them.

[89] I conclude that the directions given by the Authority on 9 May 2005 were a determination for the purposes of s179(1).

[90] I turn then to the second issue which is whether the determination was one about the procedure of the Authority. In dealing with this issue, I adopt the approach I took in *Oldco PTI (New Zealand) Ltd v Houston* unreported, 28 March

2006, AC18/06:

[46] It is important to emphasise that the scope of s179(5) does not depend on the nature of the power being exercised by the Authority in its determination but rather on the effect of the determination itself. That effect must be analysed in order to decide whether or not the determination falls within the restriction imposed by s179(5) on the right of challenge. Thus, while I have given examples of powers conferred on the Authority which might readily be exercised in a manner which is procedural as opposed to substantive, the application of s179(5) will always depend on the effects of the particular determination sought to be challenged.

[47] The effects of determinations of the Authority will generally fall into three categories – substantive, procedural, and jurisdictional.

[48] A substantive determination is one which affects the rights and obligations of the parties. It may be interim or final. Usually, its effect will be limited to the rights and obligations of the parties with respect to each other but may, in some cases, extend to the obligations of the parties with respect to non-parties. Where a substantive determination is final, the doctrine of res judicata will prevent the same issue being determined again between those parties.

[49] A key indication of whether a determination is substantive will be whether it affects the remedies sought by the parties or otherwise forms part of the resolution by the Authority of the employment relationship problem

between the parties. If it does, the determination will almost certainly be a substantive one.

[50] A procedural determination will direct the manner in which the employment relationship problem between the parties is resolved or determine the environment in which the investigation process takes place.

[51] A jurisdictional decision will determine whether the Authority has the power to make a particular substantive or procedural determination.

[52] If a determination is substantive or jurisdictional, it will be outside the scope of s179(5) and open to challenge under s179(1). If it is neither substantive or jurisdictional, it is likely to be "about the procedure" of the Authority. Section 179(5) will then apply and no right of challenge will be available.

[91] Applying this approach to the directions of the Authority in this case, it is immediately apparent that some of those directions are procedural, such as that in paragraph 2 that Sanco should lodge a statement in reply within 14 days. This is procedural because it directs the manner in which the employment relationship problem is to be resolved as opposed to affecting the rights and obligations of the parties to each other or to third parties. Equally, the implied direction that the plaintiff file an amended statement of claim and the specific direction that Gabbett not file a statement in reply in the meantime are also procedural.

[92] On the other hand, the direction that the proceedings before the Authority were to be *"treated as withdrawn"* must be regarded as substantive. In bringing the proceedings to an end, it prevented the plaintiff having his personal grievance determined on its merits and thereby deprived him of the opportunity to obtain any remedies in those proceedings.

[93] On this basis, I find that it was open to the plaintiff to challenge the direction of the Authority that the proceedings be regarded as withdrawn if the plaintiff did not lodge an amended statement of problem within 4 weeks. To this extent, the advice given by the Registrar in her letter of 7 July 2005 was in error.

Conclusions

[94] In summary, the conclusions I have reached are:

a. The Employment Relations Authority is substituted for Mr Cheyne as defendant.

b) The plaintiff's challenge to the standing of the defendant fails.

c. The defendant's application to strike out the proceedings fails and is dismissed.

d) The Authority's direction that the proceedings before it should be regarded as withdrawn was open to challenge under s179 of the Employment Relations Act.

e) If the present proceedings are to continue, the parties are to file further pleadings in accordance with the directions I have given earlier in paragraphs [68] and [69].

Other considerations

[95] If the plaintiff pursues the present proceedings or decides to pursue a challenge instead, the most he can achieve is the

restoration of his proceedings in the Authority and the opportunity to pursue them further in that venue. That would place this claim against Gabbett even further out of step with the plaintiff's claim against Sanco than it currently is.

[96] In paragraph [21] of his second interlocutory judgment in the Sanco proceedings currently before the Court (CC 2A/06), the Chief Judge referred to the possibility of amalgamation of those proceedings with the plaintiff's claim against Gabbett. As the Chief Judge observed, however, Sanco is entitled to a prompt resolution of the claims made by the plaintiff against it. With that in mind, the plaintiff may care to consider whether it would be more expeditious and economical to simply recommence his proceedings against Gabbett in the Authority and apply to have those proceedings removed into the Court for hearing in the first instance relying in particular on s178(2)(c).

Costs

[97] Both parties explicitly sought costs in relation to the application to strike out. In his written submissions, Mr Wall said:

The Plaintiff applies for costs in this matter and requests that they not be reserved beyond this hearing. To reserve costs beyond a hearing has a great tendency to complicate matters, particularly as this matter is ultimately likely to fluctuate between different judges and possibly a return to Authority level.

[98] In the particular circumstances of this case, I accept that submission. The plaintiff is entitled to a reasonable contribution to the costs he has incurred in responding to the application to strike out and to have those fixed at this stage.

[99] Mr Wall is to file and serve a memorandum as to costs within 14 days of the date of this judgment. Ms Inglis is to have a further 14 days to file and serve a memorandum in reply.

A A Couch
Judge

Judgment signed at 10.30am on 23 August 2006

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