



Employment Court of New Zealand

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Sai Systems Limited v Bird [2014] NZEmpC 177 (22 September 2014)

Last Updated: 27 September 2014

IN THE EMPLOYMENT COURT WELLINGTON

[\[2014\] NZEmpC 177](#)

WRC 12/14

IN THE MATTER OF a challenge to a determination of
the
Employment Relations Authority

BETWEEN SAI SYSTEMS LIMITED Plaintiff

AND GRAEME BIRD Defendant

Hearing: (on the papers by submissions dated 30 June, 28 July, 5, 8
and
12 August and 9 September 2014)

Counsel: B Buckett, counsel for the plaintiff
T Kennedy, counsel for the defendant

Judgment: 22 September 2014

JUDGMENT OF JUDGE A D FORD

Introduction

[1] The plaintiff has challenged by way of a de novo hearing an oral determination of the Employment Relations Authority (the Authority) dated

24 March 2014 in which the Authority declined an application by the plaintiff to join another party as a respondent to the proceedings.¹ Both parties agreed that the challenge could be dealt with on the papers.

Background

[2] The Authority's determination was commendably brief. It did not deal with the facts of the substantive matter before it, but from the pleadings filed in this Court, the background that is not in dispute can probably best be summarised as

follows.

¹ *Bird v Sai Systems Ltd* [2014] NZERA Wellington 27.

SAI SYSTEMS LIMITED v GRAEME BIRD NZEmpC WELLINGTON [\[2014\] NZEmpC 177](#) [22 September 2014]

[3] Mr Bird was employed as a cleaner and cleaning supervisor by Seyclean Schools Ltd (Seyclean) which had a cleaning contract with Heretaunga College, Wellington. Seyclean's cleaning contract ceased on 19 April 2013 and Mr Bird claims that his employment was then transferred under [Part 6A](#) of the [Employment Relations Act 2000](#) (the Act) to Sai Systems Ltd which took over the cleaning contract on 20 April 2013.

[4] Most of the other facts pleaded in the statement of claim filed in this Court are disputed. It appears, however, that Mr Bird issued proceedings in the Authority in July 2013 against the defendant, Sai Systems Ltd (Sai), claiming that Sai had refused or failed to honour

the terms and conditions of employment that he had enjoyed immediately before it took over the cleaning contract from Seyclean. Mr Bird filed an affidavit in support of his challenge in which he claimed that he is owed over \$15,000 (gross) by Sai in wage arrears. He deposed that he does not have any issue with Seyclean.

[5] [Part 6A](#) of the Act deals with the continuity of employment if an employee's work is affected by restructuring. Its stated object is to provide protection to specified categories of employees known colloquially as "vulnerable workers" if, as a result of a proposed restructuring, their work is to be performed by another person. The categories of workers include employees providing cleaning services for schools. Relevantly and in essence, it gives employees affected by their employer's loss of a cleaning contract the right to elect to transfer to the new contractor on the same terms and conditions of employment.

[6] In her submissions, Ms Buckett, counsel for Sai, alleges that Mr Bird's employment was not transferred to Sai pursuant to [Part 6A](#) of the Act because Sai was never made aware of any election to transfer. Ms Buckett alleges that Mr Bird was employed as a result of a separate employment agreement reached between Mr Bird and Sai. In counsel's words: "Therefore, it would be substantially inequitable and unfair for Sai to be held liable for Seyclean's default."

[7] The issues raised by counsel for the respective parties regarding the application of [Part 6A](#) of the Act to the facts of this case will, of course, be central to the Authority's part-heard substantive investigation.

[8] In its determination, the Authority records that a one-day investigation meeting into Mr Bird's claims against Seyclean was held on 6 March 2014. It went on to state:

[2] ... The meeting was adjourned shortly after 5 p.m. when it became clear there was insufficient time to hear evidence from all witnesses and commitments of counsel prevented its continuation into the evening. Arrangements were then made to reconvene the investigation meeting on

24 March 2014. Following this an application for the joinder of Seyclean was made on 14 March 2014."

[9] The Authority accepted that it had jurisdiction under [s 221\(a\)](#) of the Act to direct parties to be joined at any stage of the proceedings, either of its own volition or on the application of any of the parties. It noted that its discretion to make any such order is for the purpose of enabling the matter to be more effectually disposed of according to the substantial merits and equities of the case.

[10] In concluding that Seyclean should not be joined as a party, the Authority stated:

[6] The reasons for not joining Seyclean are as follows:

i. The general rule is "*that it is for the plaintiff to decide who he or she will sue ...*". Mr Bird has not requested, and nor has he agreed to, his former employer, Seyclean, being joined to the matter he has asked the Authority to determine;

ii. Lack of jurisdiction to award the type of relief sought. SSL seeks relief against Seyclean for any failure the Authority may find against it to comply with [Part 6A](#) of the Act. It asserts that Seyclean is "*liable to indemnify Sai Systems for any loss/damage arising from its omissions and failures to comply with its responsibilities in connection with any transfer*".

I find such relief is not within my jurisdiction to award. If I found for Mr Bird under [Part 6A](#), SSL would not be absolved from any liability because of the actions or omissions of Seyclean. If I was satisfied the situation warranted it, I could impose a penalty on Seyclean under [s.69G\(4\)](#) of the Act. That would only occur if I found Seyclean had breached its obligations under [s.69G](#) of the Act. Any such penalty would be payable to the Crown not to SSL.

[11] Ms Buckett submitted that the Authority erred in law in determining that it lacked jurisdiction and in concluding that an appropriate reason for not joining Seyclean was the general rule that it is for the plaintiff to decide who he or she will sue. Ms Buckett further submitted that the "ex-employer ought to be joined as a party in the interests of law and justice." In this regard, counsel sought to rely upon the Court's equity and good conscience jurisdiction under [s 189\(1\)](#) of the Act. Ms Buckett alleged that the Authority had misdirected itself because it had not considered that its unfettered discretion was subject to the "substantial equities and merits of the case".

[12] Ms Kennedy, counsel for Mr Bird, submitted that the plaintiff's challenge was prohibited by virtue of [s 179\(5\)](#) of the Act which precludes a party from initiating a challenge to a determination of the Authority on procedural issues. Counsel contended that the application for joinder was "misguided" in that there had never been an employment relationship between Sai and Seyclean and there was no jurisdiction in the Authority relating to claims between successive employers. Even if jurisdiction could be established, Ms Kennedy submitted that the Authority in the present case had exercised its discretion correctly.

[13] In response, Ms Buckett submitted that it was not necessary that there be an employment relationship between Sai and Seyclean because: "[Part 6A](#) of the Act creates, by law, the relationship connecting both employers to the issues before the Authority. [Part 6A](#) creates a tri-partite situation."

[14] Ms Buckett concluded her submissions in reply with the plea:

20. The consequence of the denial of joinder is to potentially permanently deprive the incoming employer the right to spread the responsibility for any non-compliance caused by the failure of the outgoing employer to comply with the law. There is no other process by which the Plaintiff can bring a claim and the denial of the joinder extinguishes that right permanently.

[15] The Court has not seen and is not concerned with any documentation that has been filed in the Authority relating to the substantive claim. I mention this because in her submissions, Ms Buckett has referred to several paragraphs (identified by their

numbers only) in the pleadings before the Authority relating to the substantive claim which the Court has no knowledge of and which, in all events, are not relevant to the present challenge.

[16] I have some difficulty with Ms Kennedy's principal submission that the Court is precluded, by virtue of [s 179\(5\)](#) of the Act, from considering the present challenge on its merits on the grounds that the determination was procedural and not substantive. The scope of [s 179\(5\)](#) was considered relatively recently by the full Court in *H v A Ltd*.² I will not repeat the review of the relevant authorities which was succinctly carried out by the full Court in that decision but one of the principles it endorsed was the distinction Judge Couch had drawn in *Oldco PTI (New Zealand) Ltd v Houston*, between substantive or jurisdictional determinations on the one hand

which will be outside the scope of [s 179\(5\)](#) and open to challenge under [s 179\(1\)](#) and, on the other hand, determinations about the procedure of the Authority which will be protected from challenge by virtue of [s 179\(5.3\)](#). The full Court in *H v A Ltd* considered that a determination of the Authority will be substantive, and not procedural, where it "has a substantive effect, which cannot otherwise be remedied on a challenge or by way of review."⁴

[17] I consider that, given the potentially far-reaching effects of any determination of the Authority on the joinder or striking out of parties pursuant to [s 221\(a\)](#) of the Act, any such determination must almost inevitably be a substantive determination rather than a procedural one. As such, it would be subject to challenge in the ordinary way under [s 179\(1\)](#) of the Act.

[18] At the same time, I consider that Ms Kennedy is on much stronger grounds in submitting that the Authority correctly declined to exercise its discretion to grant the

joinder application. I agree with the Authority that it lacked jurisdiction to deal with

² *H v A Ltd* [2014] NZEmpC 92.

³ *Oldco PTI (New Zealand) Ltd v Houston* [2006] NZEmpC 26; [2006] ERNZ 221 (EmpC) at [47]- [52].

⁴ *H v A Ltd*, above n 3, at [28].

the type of issues which would arise if the joinder application was granted. In particular, it lacked jurisdiction to award the type of indemnity relief that Sai would be seeking against Seyclean.

[19] The jurisdiction of the Authority is provided for in [s 161](#) of the Act. Ms Buckett does not seek to argue that the facts of the present case come within one or other of the categories of employment relationship problems identified in [s 161](#) which make up the boundaries of the Authority's jurisdiction. Instead, she appears to rest her case on the Court's exclusive equity and good conscience jurisdiction in s

189(1) of the Act. The stated objective of that jurisdiction, however, is for the purpose of supporting successful employment relationships and promoting good faith behaviour – objectives which have no relevance to a claim by a new employer for indemnity against the old employer.

[20] With respect, I have difficulty understanding counsel's other submission that Part 6A of the Act "creates by law the relationship connecting both employers to the issues before the Authority". Ms Buckett has been unable to identify any particular provision in Part 6A, or in the definition sections of the Act, which would establish anything like an employment relationship between the two employers. Nor has she been able to point to any specific provision in Part 6A which would make the old employer liable to indemnify the new employer in the way the joinder application seemingly contemplates.

[21] The inclusive statutory definition of the term "employment relationship" in s 5 of the Act (cross-referenced with the definition in s 4(2)) does not contain any reference to two employers affected by a transfer arrangement pursuant to Part 6A.

[22] If the legislature had intended to create an "employment relationship" between two such employers then it could have so provided in s 4(2) of the Act. Section 4(2)(h), for example, defines an employment relationship existing between "an employer and another employer where both employers are bargaining for the same collective agreement."

Conclusion

[23] I accept that the Authority correctly exercised its discretion not to grant the joinder application. I agree with the Authority that it lacked jurisdiction to deal with the issues Sai sought to have the Authority resolve between the old employer and the new employer. The challenge, therefore, is unsuccessful.

[24] At this stage, I reserve the issue of costs.

A D Ford

Judge

Judgment signed at 2.00 pm on 22 September 2014

