Employment Court of New Zealand

Tradefog Global Co Limited v Bartholomeusz [2017] NZEmpC 24 (8 March 2017)

Employment Court of New Zealand

Tradefog Global Co Limited v Bartholomeusz [2017] NZEmpC 24 (8 March 2017)

Last Updated: 13 March 2017

IN THE EMPLOYMENT COURT CHRISTCHURCH

[2017] NZEmpC 24

EMPC 209/2016

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	TRADEFOG GLOBAL CO LIMITED First Plaintiff
AND	TRADEFOG INTERNATIONAL LIMITED Second Plaintiff
AND	CHRISTOPHER DAVID BARTHOLOMEUSZ Defendant

Hearing:	On the papers filed on 31 August 2016 and 13 and 20 September 2016
Appearances:	D Beard, counsel for plaintiffs M McDonald, advocate for defendant
Judgment:	8 March 2017

JUDGMENT OF JUDGE K G SMITH

Introduction

[1] This proceeding is a challenge arising from a determination of the Employment Relations Authority (Authority) joining Tradefog International Ltd (Tradefog International) to an existing proceeding between Christopher Bartholomeusz and Tradefog Global Co Ltd (Tradefog Global).1 A preliminary issue has arisen about the jurisdiction of the Court to consider the challenge by the

plaintiffs because of s 179(5) of the Employment Relations Act 2000 (the Act).

1 *Bartholomeusz v Tradefog Global Co Ltd* [2016] NZERA Christchurch 120.

TRADEFOG GLOBAL CO LIMITED v CHRISTOPHER DAVID BARTHOLOMEUSZ NZEmpC CHRISTCHURCH [2017] NZEmpC 24 [8 March 2017]

Background

[2] On 21 July 2016 the Authority ordered that Tradefog International be joined to the proceeding before it brought by Mr Bartholomeusz against Tradefog Global. At the time the Authority joined Tradefog International it had not concluded its investigation and no substantive determination about Mr Bartholomeusz's alleged personal grievance had been made. That grievance has still not been resolved by the Authority. This background material is drawn from the Authority's determination, the statement of claim in this challenge, and the submissions made on behalf of the plaintiffs and defendant.

[3] The reason for the Authority's decision to join Tradefog International to the existing proceeding lies in confusing responses to Mr Bartholomeusz's personal grievance claim eventually placing in issue the identity of his employer. That issue did not materialise until the Authority received closing submissions from Tradefog Global at the end of the investigation meeting after evidence had been heard.

[4] According to the determination, Mr Bartholomeusz was offered a job as a salesperson on 19 June 2015. An individual employment agreement with Tradefog International's name on it was signed that day by Mr Bartholomeusz. On 17

September 2015 Mr Bartholomeusz's employment was terminated by letter, purportedly relying on the employment agreement containing a 90-day trial period under ss 67A and 67B of the Act. That letter was signed by the sole director of Tradefog International, and Tradefog Global, Mr Xueyuan Ye, on behalf of "Tradefog Global Co Ltd T/A Tradefog International Limited".2

[5] Mr Bartholomeusz was dissatisfied with his dismissal and instructed his advocate, Mr McDonald, to raise a personal grievance which was done directly with Mr Ye.3 Mr Ye replied to Mr McDonald by email, signing his correspondence as

managing director of "the respondent trading as TIL".4 The acronym TIL means

Tradefog International Ltd. That grievance was not resolved and on 18 November

2015 Mr Bartholomeusz filed a statement of problem in the Authority citing

2 At [4].

Tradefog Global as the respondent employer. All subsequent steps in the proceeding took place as if Tradefog Global employed Mr Bartholomeusz. For example, a statement in reply was filed by Tradefog Global but the defence to the claim did not include a denial that the company was Mr Bartholomeusz's employer.

[6] Mr Bartholomeusz and Tradefog Global were referred to mediation. When mediation was unsuccessful the Authority took steps to schedule the investigation meeting and did so by convening a telephone conference on 29 March 2016.5 The issues discussed at that conference did not include identifying Mr Bartholomeusz's employer. The identity of Mr Bartholomeusz's employer was not raised when the parties received a notice of direction, or a notice scheduling the investigation meeting. Statements of evidence filed in the Authority in anticipation of an investigation meeting did not call into question Tradefog Global's status as Mr Bartholomeusz's employer.6 The Authority began the investigation meeting with a discussion about the issues to be decided and asked if there were any other matters to be addressed. Nothing new was raised and the investigation meeting proceeded.7

[7] At the conclusion of the investigation meeting Mr McDonald provided submissions for Mr Bartholomeusz. Tradefog Global was represented by Mr Ye. The Authority decided it would be appropriate to provide Mr Ye with an opportunity to supply written submissions within a few days if he wished to do so.8 Tradefog Global then instructed its present counsel, Mr Beard, to file those submissions. Mr Beard did so on 7 July 2016 and in them, for the first time, submitted that Tradefog Global did not employ Mr

Bartholomeusz. He submitted the claim against Tradefog Global should be dismissed with costs.9 Those submissions relied on Tradefog

International's name being on the employment agreement of 19 June 2015.10 It is

not clear from the determination if Tradefog Global's submissions explained the letter of termination being signed by Tradefog Global trading as Tradefog International, or why Tradefog Global took part in the investigation meeting, at least

initially, as if it was Mr Bartholomeusz's employer.

5 At [11].

6 At [12].

7 At [13].

8 At [14].

[8] The Authority's response to Tradefog Global's submissions was to advise Mr Beard and Mr McDonald of the proposed joinder of Tradefog International to the proceeding.11 Mr Beard submitted to the Authority that the proceeding had ended and, consequently, Tradefog International could not be joined to it; the proceeding was a nullity so joining Tradefog International to it would be an abuse of process; and the matter before the Authority should be dismissed.12

[9] Those submissions were rejected by the Authority. The Authority noted its investigative role and concluded that the investigation was only at an end when it considered that point to have been reached. That point had not been reached because of the emergence of an issue about Mr Bartholomeusz's true employer. The Authority also noted that there had to be some reality about the matter because a substantial body of evidence had already been heard about Mr Bartholomeusz's employment and dismissal. In relation to the submission that the proceeding should be dismissed, meaning Mr Bartholomeusz would need to start again with a new proceeding if he was to pursue his personal grievance claim against Tradefog

International, the Authority decided:13

That could hardly be said to effectually dispose of the matter. It would result in waste of time and duplication of expense and the Authority has already heard evidence including from Mr Ye about the signing of the employment agreement and the justification of the dismissal.

[10] The Authority was obviously concerned about confusing evidence, pleadings and submissions, over the identity of Mr Bartholomeusz's employer. It said:14

... Mr Ye is the sole director of both the respondent and TIL. The respondent has never suggested at any time including by way of reply that it did not employ the applicant. The statement in the reply includes a statement that *unless he* [the applicant] *signed the contract he could not be an employee of the Respondent*. The letter of termination was written on the letterhead of the respondent T/A TIL. The reply to the grievance being raised from Mr Ye had at its conclusion the name of the respondent again trading as TIL. The respondent participated fully in the claim against it.

(original emphasis)

11 At [18].

12 At [23]-[26].

[11] The closing submissions to the Authority for Tradefog Global clearly raised the identity of Mr Bartholomeusz's employer as an issue to be decided. Given what had transpired the decision to join Tradefog International under s 221(a) is understandable and was inevitable. That step was also pragmatic. Joining Tradefog International meant the Authority placed itself in a position to make a determination about both Mr Bartholomeusz's employer and his personal grievance without the necessity of a further proceeding and the associated cost and delay.

[12] For completeness it is necessary to record that the Authority decided Mr Bartholomeusz's personal grievance had been raised with Tradefog International within the 90-day period allowed for doing so under s 114(1) of the Act. There is no challenge to that part of the determination.

The challenge

[13] The Authority's determination is challenged by both Tradefog Global and Tradefog International although on a different basis by each company. Both companies allege the Authority made errors of law and fact. Tradefog Global's challenge is based on an assertion that it was wrongly named as the respondent in the Authority proceeding and, because it did not employ Mr Bartholomeusz, there is no valid cause of action against it. The relief sought from the Court by Tradefog Global is the dismissal of the Authority proceeding.

[14] Tradefog International's challenge acknowledges that it had an individual employment agreement with Mr Bartholomeusz but it says that agreement contained a trial period complying with ss 67A and 67B of the Act. Tradefog International seeks a declaration that the termination of Mr Bartholomeusz's employment complied with his employment agreement and ss 67A and 67B of the Act. It also seeks an order dismissing the Authority proceeding by Mr Bartholomeusz against it on the grounds that "the prerequisites" for exercising the power in s 221(a) of the Act were not met and/or that the Authority proceeding was an abuse of process, frivolous or vexatious. This pleading asserts that it was too late in the investigation meeting for the Authority to join another party to that proceeding.

Direction

[15] In a minute of 17 August 2016, Chief Judge Colgan directed the plaintiffs to provide written submissions to persuade the Court that the proceeding is within the Court's jurisdiction and is not barred by s 179(5) of the Act. Mr Bartholomeusz was not required to file a statement of defence in the meantime. However, he did file submissions on the subject of s 179(5).

Sections 179(1) and 179(5) of the Act

[16] The right to challenge an Authority determination is conferred by s 179(1) of the Act which reads:

179 Challenges to determinations of Authority

(1) A party to a matter before the Authority who is dissatisfied with a written determination of the Authority under section 174A(2),

174B(2), 174C(3), or 174D(2) (or any part of that determination)

may elect to have the matter heard by the court.

[17] However, s 179(5) precludes a challenge to a determination about the procedure that the Authority has followed, is following or intends to follow. That subsection reads:

(5) Subsection (1) does not apply—

(aa) to an oral determination or an oral indication of preliminary findings given by the Authority under section 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.

[18] There is no definition in the Act of what "the procedure" in s 179(5)(a) means. However, it was common ground between the

parties that the approach to apply is in *H v A Ltd*, a decision of the full Court of the Employment Court.15

[19] What was in issue in *H v A Ltd* was the way in which the Authority had dealt with an application for an interim non-publication order. The Authority had granted

15 *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38.

the order but provided for it to lapse on a specified date, whereas the plaintiff considered that it should have prohibited publication of the information sought to be restricted until 28 days following the Authority's substantive determination. The consequence of the Authority's determination was that publication might have occurred before a challenge to the substantive decision could be heard. In the absence of a right to challenge that determination no effective remedy was available to the plaintiff.

[20] In that case the Court said:

[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.

[21] In the following passage of the decision the full Court continued:

[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.

[22] Later the Court said:

[27] ... 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.

[23] While the parties agreed that *H v A Ltd* applies they disagree about its application to the circumstances arising from the determination of 21 July 2016. There is no dispute that the Authority has the power to join a party to a proceeding. It is the exercise of that power that is in dispute.

[24] It is convenient to consider the case for Tradefog International first.

Case for Tradefog International

[25] In response to the Chief Judge's Minute, Mr Beard submitted that the determination to join Tradefog International had a substantive effect and was susceptible to challenge "in the ordinary way" pursuant to s 179(1) of the Act. He repeated submissions made to the Authority that the proceeding before the Authority was a nullity. Building on that submission, he said that the determination to join Tradefog International was an attempt to cure "defective proceedings" and that it is "a jurisdictional issue as opposed to a procedural one". Presumably the alleged defect arises from the assertion that Tradefog International was the employer named in the employment agreement not Tradefog Global; the proceeding should have named Tradefog International as Mr

Bartholomeusz's employer from the outset and, somehow, the fact that it did not do so was fatal.

[26] Mr Beard said:

It is a theory of the Second Plaintiff's case that the claim is ultimately one of the Defendant changing his pre-contractual and during-contractual mind/intent after the [sic] he was dismissed in accordance with the employers written contractual rights set out in what the Second Plaintiff submits is a valid written Trial Period clause. The term of the trial period was definite, only the Second Plaintiff had the right to dismiss within the 90 days, and the clause was written to be in accordance with the provisions of Section 67A and Section 67B of the Act (which are written sections of legislation).

(original emphasis)

[27] Given the acknowledgment by Tradefog International that it was Mr Bartholomeusz's employer, the only basis for the submission that the Authority should not have joined it to the proceeding requires accepting that the proceeding was a nullity or that it was too late in the investigation meeting for that step. Both are misconceived. The proceeding was not a nullity; it was properly brought before the Authority to resolve the employment relationship problem, one aspect of which became the identity of the employer. The Authority has jurisdiction to investigate and resolve that matter. Furthermore there was nothing precluding the Authority

from joining Tradefog International just because that decision was made at a late stage.

[28] Tradefog International has supported its submission that the determination is susceptible to being challenged under s 179(1) of the Act by relying on *SAI Systems Ltd v Bird.*16 In that case the Court said: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.

[29] While Tradefog International accepts that it is more important to have regard to the substantive effect of the determination, relying on *H v A Ltd*, no further analysis of the determination was provided to explain why the challenge is not caught by s 179(5) of the Act. Tradefog International does not explain why the decision to join it was not entirely procedural within the meaning of s 179(5) of the Act.

[30] However, in support of the submission that the determination was substantive, Mr Beard referred to *Oldco PTI (New Zealand) Ltd v Houston*, which decision was also referred to by the full Court in *H v A Ltd*.18 In *Oldco* the Court distinguished between a determination that was procedural and one that was substantive. The Court noted that a key indication of whether a determination was substantive was whether it affected the remedies sought by the parties or otherwise formed part of the resolution of the employment relationship problem.19 Conversely, a procedural determination directed the manner in which the employment relationship problem between the parties was resolved or would "determine the

environment in which the investigation process takes place."20

16 *SAI Systems Ltd v Bird* [2014] NZEmpC 177.

17 At [17].

18 *Oldco PTI (New Zealand) Ltd v Houston* [2006] NZEmpC 26; [2006] ERNZ 221 (EmpC).

19 At [49].

20 At [50].

[31] Applying the approach in *Oldco* to the circumstances of this case, all the determination did was ensure that when the investigation meeting concludes Mr Bartholomeusz's actual employer is before the Authority. The Authority determination did not include a decision about whether the trial period was valid, or for that matter whether the dismissal was otherwise justified or unjustified. What the Authority was concerned with was a practical way to progress the investigation meeting given the confusing state of affairs that

had emerged about the identity of Mr Bartholomeusz's employer. Viewed in that context the determination was about the "environment in which the investigation process takes place". Applying *H v A Ltd*, the determination did not result in any outcome for Tradefog International that cannot be remedied, if required, on a challenge to any subsequent determination.

[32] The quote from *SAI Systems* relied on by Tradefog International does not assist in showing that a determination with substantive effect was made, and therefore that the determination falls within s 179(1) of the Act. The circumstances facing the Court in *SAI Systems* were fundamentally different from the present case. *SAI Systems* involved Part 6A of the Act, which provides for continuity of employment for employees sometimes referred to as "vulnerable workers". The novel situation the Court was invited to entertain in *SAI Systems* was the possibility of joining the employee's former employer to the proceeding so that the present employer might be able to pursue the former employer to resolve outstanding issues between them arising from the employee exercising rights under Part 6A. No employment relationship existed between those employers and it was inevitable that the application would fail. That is the background to the Court's observations on joinder in that case and probably explains why they were made. In any event, the passage of *SAI Systems* referred to contains a qualification in the words "must almost inevitably ...", contemplating circumstances where joinder would not be a substantive decision open to challenge. Finally, if *SAI Systems* can be read as going so far as Tradefog International submits, I would respectfully decline to follow it.

[33] The submission that the determination is susceptible to a challenge under s

179(1), and is not precluded by s 179(5), is unpersuasive. This challenge is precisely what s 179(5) of the Act was enacted to address, ensuring investigation meetings are concluded with as little judicial intervention as is possible. It follows that the

challenge by Tradefog International to the determination of the Authority joining that company to the existing proceedings is barred by s 179(5) of the Act.

Case for Tradefog Global

[34] There are two problems facing this challenge. First, establishing that a determination affecting Tradefog Global was made. Second establishing that any such determination is not caught by s 179(5). In closing submissions to the Authority, repeated in submissions to this Court, Tradefog Global maintained that it was wrongly cited as Mr Bartholomeusz's employer and that the proceeding against it should be dismissed. To be successful in that submission, it would need to be accepted that the employment agreement correctly recorded the employer and employee and to conclude that the subsequent correspondence (and steps taken by Tradefog Global) have no relevance to establishing the identity of Mr Bartholomeusz's employer.

[35] Mr Beard relied on Chief Judge Colgan's decision in *Morgan v Whanganui College Board of Trustees* to say that a relevant determination had been made.21 As that case held, there is no definition of "determination" in the Act. *Morgan* concluded that a determination is required to state relevant findings of fact, state and explain findings of relevant issues of law, express the Authority's conclusions on matters or issues that were required for the determination to dispose of the matter, and to specify orders (if any) being made.22

[36] Chief Judge Colgan said in *Morgan*:23

The full Court considered the definition of a "determination" for the purposes of s 179 in *Abernethy v Dynea New Zealand Ltd*. Although not on an analogous point to that which arises in this case, the Court nevertheless held that what is a "determination" is to be interpreted broadly and encompasses not just the matters on which the Authority relied in disposing of proceedings but also the entirety of the employment relationship problem before it. That is an approach which is consistent with a definition that is not restricted to the single document that the Authority issues containing its decision and reasons for it at the conclusion of its investigation.

21 *Morgan v Whanganui College Board of Trustees* [2013] NZEmpC 55, (2013) 10 NZELC 79-

22 At [11].

23 At [18].

[37] What was in issue in *Morgan* was a minute by the Authority dealing with the admissibility of evidence and whether or not that minute was a determination. In the context of that case, and given the subject matter of the minute, the Court was able to hold that it was a determination and was open to a challenge under s 179(1).

[38] However, *Morgan* does not support Tradefog Global's challenge. Tradefog Global's challenge assumes the Authority made a determination rejecting its submission that it was not Mr Bartholomeusz's employer. That is not what happened. The Authority's determination did not decide anything affecting that company. Aside from the determination acknowledging that the identity of Mr Bartholomeusz's employer had to be addressed, it did not do anything more than add Tradefog International. Everything else was left for a later decision, possibly after receiving further evidence and submissions.

[39] This challenge anticipates an adverse decision, before the Authority has had an opportunity to review the evidence and to reach a decision. In a sense, this challenge is a pre-emptive strike in which the Court is asked to reach a conclusion about the identity of Mr Bartholomeusz's employer before the Authority does. Whether or not Tradefog Global has a strong case is a matter to be determined by the Authority once all the evidence and submissions are received and evaluated, including anything further that is received from the parties before the substantive determination is made. There was no determination by the Authority about Tradefog Global. Consequently, there is nothing to challenge.

[40] However, in case I am wrong, and the Authority did make a determination about Tradefog Global, I would hold that the challenge is precluded by s 179(5). The determination was purely procedural because it is about "the environment in which the investigation process takes place". Furthermore, if the Authority subsequently determines that Tradefog Global was Mr Bartholomeusz's employer, and that decision is disputed, a challenge to the Court is available. If such a challenge succeeds, any result adverse to Tradefog Global can be reversed. It follows that there are no circumstances of the type referred to in *H v A Ltd* to justify intervention in the Authority investigation process now.

[41] The challenge by Tradefog Global is premature. Even if it is not premature, it is about a matter which is wholly procedural and is therefore barred by s 179(5) of the Act.

Conclusion

[42] The challenges by Tradefog Global and Tradefog International are precluded by 179(5) of the Act. Consequently, those challenges are dismissed.

[43] Mr Bartholomeusz is entitled to an award of costs. In the absence of agreement between the parties, he may make submissions on costs no later than 15 working days from the date of this judgment. Tradefog Global and Tradefog International have a further 15 working days to reply.

KG Smith

Judge

Judgment signed at 12 noon on 8 March 2017