IN THE EMPLOYMENT COURT
WELLINGTON

[2018] NZEmpC 84
EMPC 372/2017

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	GSTECH LIMITED Plaintiff
AND	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Defendant

Hearing:	3 May 2018 (Heard at Wellington)
Appearances:	P McBride and F Lear, counsel for plaintiff C English, counsel for defendant
Judgment:	25 July 2018

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] The Labour Inspector brought an action in the Employment Relations Authority against GSTech Ltd (GSTL) and Mr Sharma, the plaintiff company's sole director and shareholder, on behalf of a former employee, Mr Kumar. The action spanned a number of claims, focusing on a claim that Mr Kumar had not been paid for his hours of work at the minimum wage.

[2] The Authority dismissed all of the Labour Inspector's claims.[1] It did, however, make a finding that Mr Kumar was owed wages and holiday pay for work undertaken

[1] *A Labour Inspector of the Ministry of Business, Innovation and Employment v GSTech Ltd* [2017] NZERA Wellington 113.

for another company, Connecting Ltd (Connecting), during his time with GSTL. It is convenient to set out relevant parts of the Authority's determination to put this finding in context:

> [51] Mr Sharma's evidence is that, as part of Mr Kumar's work for GSTL, he was asked to do some limited business development work, as provided for under his Job Description, and agreed to do so. The work entailed some sales duties which were undertaken under a contract entered into between GSTL and Connecting. Mr Kumar, as he acknowledged, remained employed by GSTL while he did the Connecting work. Mr Sharma said Mr Kumar performed the Connecting work in his GSTL hours, and in total he spent no more than 15 days on that work.
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> [52] While I accept Mr Sharma's evidence about the number of days Mr Kumar spent on Connecting work, I do not accept that payment for that work was all within his GSTL hours. …
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> …
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> [54] I accept Mr Kumar's claim that he was not paid for the work his employer arranged for him with Connecting when that work took place after 5 p.m. Taking Mr Sharma's evidence of 15 days worked, and 3 hours per day as per Mr Sharma's chat group instruction of 20 November 2015, I find Mr Kumar was not paid for 45 hours at $19.00 per hour, totalling $855 to which holiday pay would need to be added.
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> [55] Taking Mr Kumar's account of days worked and the chat group log and texts relating to the Connecting work I find the 15 days were 23 to 26 November 2015 inclusive; 1 to 4 December and 7 December 2015; and 14, 15, 19, 20, 22 and 27 January 2016. Mr Kumar was paid fortnightly on a Thursday on the basis of 40 hours at $19 per hour. … The minimum wage at the time was $14.75. Mr Kumar's fortnightly pay was $1,520 gross.
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> [56] By my calculation Mr Kumar would have been required to work an additional 23.05 hours in any fortnightly period to have been paid less than the minimum wage. Based on an assumption that his pay encompassed work performed in the previous fortnight on a Thursday to Wednesday basis, he did not do so. Accordingly, I find no breach of the minimum wage in relation to the work Mr Kumar performed for Connecting while employed by GSTL. He is, however, owed wages and holiday pay …

[3] The plaintiff's challenge (which proceeded on a non-de novo basis) was focused on particular aspects of the Authority's determination, namely in relation to the 45 hours of work undertaken over the 15-day time periods specified (which I will call the "45 hours of Connecting work" issue). No cross-challenge was pursued by the Labour Inspector. While the sole issue before the Court is a narrow one, it is complicated by a number of factors, which I will come to.

The nub of the case

[4] The plaintiff's case is that the issue for the Authority (and as it related to any Connecting work) was whether, in combination, the work done by Mr Kumar meant that he had been paid less than the minimum wage. The Authority was not satisfied that this was so and should, the plaintiff says, have gone no further.

[5] There are three key aspects to the plaintiff's challenge: first, that the Authority had no jurisdiction to delve into the 45 hours of Connecting work issue; second, that even if it did, it erred in failing to put the plaintiff on notice that it proposed to do so; and third, that (in any event) the Authority's conclusion as to the hours of work reflected a factual error and reliance on an incorrect assumption.

[6] The defendant says that matters relating to hours of work and wage entitlements were before the Authority; that the Authority has broad powers to make findings of fact (including as to hours worked), which it did in this case; and that while Mr Kumar was paid for 40 hours of work per week, he regularly worked additional hours for which he was not paid. It is said that the Authority is entitled, when resolving claims put before it, to identify and determine related claims as they emerge; that the 45 hours of Connecting work issue fell into this category; and that despite the fact that the Labour Inspector's claim on behalf of Mr Kumar was for payment for unpaid hours of work at the rate of the minimum wage, the Authority was entitled to order an enhanced contractual rate of pay. The latter point has some significance. It appears that claims in relation to minimum entitlements have not historically arisen in the context of contractual rates of pay above the minimum wage, but that such cases are beginning to emerge (the present case being one of them). The contractual rate of pay in the present case was specified to be $19 per hour.

[7] Because the jurisdictional issues are squarely in issue and, if the plaintiff is correct, they answer the challenge without the need to consider the residual issues which arise, I deal with them first.

Analysis

[8] The Authority is a creature of statute and only has the powers conferred under its empowering legislation, either expressly or by necessary implication. Similarly, the Labour Inspector's role in terms of bringing matters before the employment institutions is statutorily constrained.

[9] The Authority's jurisdiction is set out in s 161 of the Employment Relations Act 2000 (the Act). Section 161(1)(q) relevantly provides that the Authority has jurisdiction in relation to actions referred to in s 228(1). Section 228(1) refers to actions brought by the Labour Inspector on behalf of an employee to recover any wages or other money payable by an employer to that employee under the Minimum Wage Act 1983 and the Holidays Act 2003.[2] It is immediately apparent that the Labour Inspector has no power under s 228(1) (or under any other provision) to pursue a claim on behalf of an employee for the recovery of wages under any *other* statutory or contractual provision. It *must* be a claim under either the Minimum Wage Act or the Holidays Act or both.

[10] The Authority may make determinations about a raft of matters not brought by the Labour Inspector, including matters relating to the recovery of wages or other money under s 131 (arrears) and matters related to a breach of an employment agreement.[3] But it is the employee who must personally pursue such a claim.[4]

[11] Ms English, counsel for the defendant, accepted that the Labour Inspector's power to bring proceedings on behalf of individuals was limited and did not extend to pursuing broader claims in respect of unpaid wages on behalf of employees. I understood the main thrust of her submission to be that, despite the fact that it was not and could never have been part of the Labour Inspector's claim on behalf of Mr Kumar, the Authority itself was able to determine whether Mr Kumar had been paid correctly for the 45 hours of Connecting work it had identified and to make an award calculated on the applicable contractual rate of pay, in excess of the minimum wage.

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2 Section 228(1) of the Act provides that: **"**A Labour Inspector may commence an action on behalf of an employee to recover any wages or holiday pay or other money payable by an employer to that employee under the Minimum Wage Act 1983 or the Holidays Act 2003."

3 See s 161(1)(g), (a).

4 See, by way of example, s 131(1); s 113(1); s 114(1).

[12] There is an immediate attraction to the argument, including having regard to the evident statutory intent of conferring a broad range of flexible powers on the Authority to deal with matters coming before it, focusing less on form and more on substance, and resolving employment issues without getting bogged down in a procedural quagmire. However, the starting point must be the nature and scope of the Authority's statutory powers and whether what it did was within them. If it could not have made the orders at issue, the Court cannot do so on the challenge.[5]

[13] The claim before the Authority was not a claim brought by Mr Kumar personally. Rather, it was a claim in the Labour Inspector's name, brought on Mr Kumar's behalf. The Authority found that Mr Kumar's employer had not been in breach of the Minimum Wage Act's requirements, including having regard to the Connecting work, and the Labour Inspector's claim must fail. While the fact that a claim brought in relation to minimum wage entitlements did not prevent a parallel claim that Mr Kumar had been underpaid in relation to the Connecting work, I agree with Mr McBride that the only person entitled to pursue such a claim was Mr Kumar personally - presumably by way of an action for recovery of wages or breach of the employment agreement.[6] It was not a claim that the Labour Inspector could pursue on Mr Kumar's behalf because it was not within the limited class of claim the Inspector is authorised by statute to bring.

[14] If the Labour Inspector could not bring such a claim (as I conclude is the case) could the Authority itself unilaterally investigate and determine payment for the 45 hours of Connecting work issue, absent a parallel claim (investigated concurrently) by Mr Kumar personally? Section 160 sets out the powers of the Authority "in investigating any matter." Section 160(3) provides:

> The Authority is not bound to treat a matter as being of the type described by the parties, and may, in investigating the matter, concentrate on resolving the employment relationship problem, however described.

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5 Note that s 189(1) provides that the Court has jurisdiction to determine matters in such manner and to make such decisions or orders as in equity and good conscience it thinks fit, but in doing so the Court must act consistently with the Act.

6 Section 161(1)(g), (b).

[15] The underlying purpose of s 160(3) is not difficult to decipher. The focus is on the resolution of employment relationship problems, not on getting caught up in descriptive titles, too much procedural complexity, and pleadings red tape. Section 160(3) reinforces the point that the way in which parties package and label their claims for filing may, but not necessarily will, be the way in which the Authority ultimately packages and labels them on disposal. So, for example, where a party has brought a matter to the Authority and says that it gives rise to an unjustified dismissal the Authority, in investigating the matter, may conclude that it should be relabelled as an unjustified disadvantage.[7]

[16] The matter in this case was whether Mr Kumar had been paid his minimum entitlements. That is not surprising as this was the only matter the Labour Inspector was statutorily entitled to bring before the Authority.

[17] This case illustrates the difficulties of applying a very broad interpretation of "the matter" to encapsulate anything to do with Mr Kumar's wage entitlements, whether under the Minimum Wage Act or not, and regardless of the identity of the parties. Would Mr Kumar, as a non-party, have had a right to challenge the determination if he was unhappy with the findings relating to the 45 hours of Connecting work issue? What, if any, rights of challenge would the Labour Inspector, as a party, have in relation to such findings?

[18] It may be possible to argue that the Authority had jurisdiction in terms of the 45 hours of Connecting work insofar as it related to minimum entitlements under the Holidays Act, notwithstanding that no breach of the Minimum Wage Act was found to have occurred. That is because the Labour Inspector is empowered under the Holidays Act to pursue claims on behalf of employees in respect of unpaid entitlements, regardless of whether the rate of pay is above, at or below the minimum wage. The point was not raised and I form no concluded view on it.

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7 *New Zealand Van Lines Ltd v Gray* [1999] 2 NZLR 397, [1999] 1 ERNZ 85 (CA) at 96, where it was said: "We can see no error of law in the actions the Tribunal took. It was not a substitution of a new personal grievance for the grievance complained of. It relied on the same sequence of events and in respect of those events found a different type of grievance (disadvantage) from what had been asserted (dismissal)."

[19] In any event, broader difficulties arise in relation to notice and opportunity to respond, as Mr McBride pointed out. The statement of problem did not include a claim of breach of Mr Kumar's employment agreement, and did not contain any claim by him personally at all. Rather, the statement of problem (to which the plaintiff responded) was squarely focused on minimum wage entitlements (which the Authority found had not been breached).

[20] Further, Mr Sharma (Director of GSTL) gave evidence that he was unaware at any stage of the proceedings before the Authority (including during the course of the investigation meeting) that the 45 hours of Connecting work issue was live. He says that neither he nor GSTL was on notice of any such claim, or that the Authority considered it to be an issue for determination, and was not given an opportunity to respond to it. That evidence was not challenged in cross-examination and I accept it.

[21] Given my findings, I do not need to deal with a further alternative argument raised by Mr McBride that there was no employment relationship problem (as defined in the Act) for the Authority to resolve, because the claim was brought by the Labour Inspector, who was not a party to an employment relationship with the plaintiff company.[8]

[22] The plaintiff also contends that the Authority made an error of fact in terms of quantification. In this regard the Authority determined that: "In the absence of prescribed start and finish times I will assume they were 8 a.m. to 5 p.m. with an hour's unpaid lunch break."[9] A calculation as to outstanding entitlements was then made on this assumed basis. As Mr McBride observed, the employment agreement specifically provided, under "Hours of Work", that Mr Kumar's usual hours of work would be a minimum of 40 hours per week (so did not fix a start and finish time) and provided for a half-hour lunch break each day, rather than the assumed one-hour lunch break.[10] The

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8 Note that reg 5 of the Employment Relations Authority Regulations 2000 sets out two types of matters that can be lodged in the Authority, namely (a) an employment relationship problem and (b) any other matter in respect of which the Authority has jurisdiction. An employment relationship problem includes a matter relating to the breach of an employment agreement (s 161(1)(a)).

9 Authority determination, above n 1, at [53].

10 See cl 6.

stated assumption was inconsistent with the evidence, although it appears to have resulted in an underestimation of unpaid wages.

Conclusion

[23] The plaintiff's challenge succeeds. The part of the Authority's determination directing that the plaintiff must pay Mr Sharma unpaid wages and associated holiday pay for the Connecting work is set aside.

[24] The plaintiff is entitled to costs. The parties are reminded that these proceedings were provisionally assigned category 2B for costs purposes. If costs cannot be agreed, memoranda may be exchanged, with the plaintiff filing and serving within 20 working days of the date of this judgment; the defendant filing and serving within a further 10 working days; and the plaintiff filing and serving anything strictly in reply within a further five working days.

Final observation

[25] For completeness, I do not overlook Ms English's observation that adopting a constrained approach to the Authority's powers in cases such as this raises a number of issues, including for vulnerable workers. She pointed out that the Labour Inspector is seeing an increasing number of cases involving breach of minimum statutory entitlements in circumstances where the contractual rate of pay exceeds the minimum wage. While I have some sympathy for the concerns that have been raised, the Authority and the Court must apply the legislative provisions currently in place. It may, however, be that Parliament considers that further consideration of these provisions is desirable in light of the concerns that have been identified.

Christina Inglis
Chief Judge

Judgment signed at 3.30 pm on 25 July 2018