IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2019] NZEmpC 147
EMPC 286/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for leave to file amended statement of claim
BETWEEN	CAROL BAKER Plaintiff
AND	HAURAKI RAIL TRAIL LTD First Defendant
AND	MAURICE BARNETT Second Defendant
AND	PETER MAYNARD Third Defendant

Hearing:	18 June 2019 (Heard at Auckland)
Appearances:	A Halse, advocate for plaintiff No appearance for defendants
Judgment:	17 October 2019

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] These proceedings involve a non-de novo challenge to a determination of the Employment Relations Authority (the Authority) dated 22 August 2018.[1] That

[1] *Baker v Hauraki Rail Trail* [2018] NZERA Auckland 266.

determination followed an investigation meeting which was conducted on the papers. The purpose of the investigation was to decide whether the Authority should re-open an earlier investigation where the plaintiff, Carol Baker, was found to have a personal grievance against the first defendant, Hauraki Rail Trail Ltd, as her employer and significant compensation was awarded in her favour. The application to re-open the investigation was to deal with the matter of enforcement, and as the Authority Member stated in the determination of 22 August 2018, it was really a kind of compliance order application. However, Ms Baker was also seeking to join Maurice Barnett and Peter Maynard, the second and third defendants in this challenge, as respondents in those enforcement proceedings in the Authority.

[2] In respect of the issues which were before the Authority, it agreed to re-open the investigation. In respect of the application to join the second and third defendants as respondents in the Authority proceeding, Chief Authority Member Crichton stated:

> [22] For reasons which will become clear, I am not persuaded I need to join Mr Maynard or Mr Barnett to this proceeding although I shall certainly want to talk with each of them.

[3] Later in the determination, the Authority Member stated:

> [33] I have not thought it necessary to join either Mr Maynard or Mr Barnett to this proceeding but I reserve the right to reconsider that in the future.

[4] It is the decision of the Authority Member not to join Mr Barnett or Mr Maynard to the proceedings in the Authority that is now challenged. Pending the outcome of the non-de novo challenge by Ms Baker, the Authority has simply held its proceedings in abeyance. Once the challenge is determined, the matter will need to proceed further in the Authority to deal with issues of compliance.

Service of the Challenge

[5] The defendants were served with a copy of the challenge and the determination. None of the defendants took steps in the proceedings and once I was satisfied that service of the challenge had been correctly carried out, I set the matter down for a formal proof hearing. This took place on 18 June 2019, when Ms Baker

gave evidence in support of her challenge. Prior to embarking on that hearing, I arranged for the defendants to be called within the Court precincts and was advised that none of them were present.

Pleadings Issues

[6] On the sole issue to be decided in this challenge, paragraph 22 of the statement of claim states as follows:

> 22. I do not seek a full hearing of the entire matter. I seek a hearing only in certain issues involved in the matter.
>
> (a) The plaintiff believes Member Crichton's decision to not include the second and third defendants in the reopening of the investigation is inconsistent with the rest of his determination which identifies false testimony made by the third respondent. The plaintiff believes that the remedies originally awarded can be received only by including the second and third defendants in the reopening of the investigation.
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> (b) Giving false testimony during an ERA investigation breaches the Crimes Act 1961 section 111 and is a breach of obligations of good faith in section 4 of the Employment Relations Act 2000. The second and third defendants deliberately subverted the determination and orders made by member Crichton in August 2015.
>
> (c) The grounds on which the plaintiff makes the appeal to include the second and third defendant in reopening of the investigation are breaches of the Crimes Act 1961 s111, the Employment Relations Act 2000, s134A(1) and section 4. In addition, the plaintiff seeks a compliance order under section 139(1)(b); 139(3) against the second and third defendant.
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> On the above basis the plaintiff seeks the following relief or remedy:
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> 1. A determination that the second and third defendant are included as defendants in the re-opening of the investigation.
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> 2. That the third respondent is subjected to the penalties applied by law for providing false testimony and subverting the course of justice for continued personal gain.

[7] Since the hearing, Ms Baker has sought leave to file an amended statement of claim. This is an endeavour to have the Court reconsider and increase the remedies awarded in favour of Ms Baker by the first determination of the Authority dated 26 August 2015 and add new claims.[2] It is not open to the Court to deal with those

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[2] *Baker v Hauraki Rail Trail Ltd* [2015] NZERA Auckland 259.

amended claims. The Court has no jurisdiction to do so. Those claims, if they are to be pursued by Ms Baker, will need to be made in the Authority when it resumes its investigation. I can, however, foresee substantial difficulties relating to limitation issues if an attempt is made in the Authority to revive the original claims. Leave would be needed to commence a claim out of time.

[8] In any event the amended statement of claim endeavours to raise issues well beyond the ambit of the non-de novo challenge. Even if the Court had jurisdiction, before it could consider the amended claims it would need to ensure that the amended statement of claim was served upon the defendants so that they had a further opportunity to decide whether they wished to participate in the proceedings. Since the Court, however, does not have jurisdiction to consider those matters which are now inserted in the amended statement of claim, leave to file the amended statement of claim is refused.

[9] Both the original statement of claim and the amended statement of claim were drafted by Mr Halse, who is Ms Baker's advocate. Mr Halse conceded at the formal proof hearing that he is not a lawyer and was unable to make submissions at the conclusion of Ms Baker's evidence in support of her applications. This may explain the nature of some of the grounds or remedies now sought and contained in the pleadings and the attempt to have Ms Baker's original claim for remedies re-opened. I indicated to Ms Baker and Mr Halse at the hearing, however, that I would consider possible methods whereby joinder of the second and third defendants to the Authority proceedings could be made. I also indicated that there may be remedies against those former directors of the first defendant but in a jurisdiction other than the Authority or the Employment Court. I shall refer to that later in this judgment.

Mr Maynard's undertaking to the Authority

[10] Before turning from Chief Authority Member Chrichton's determination of 22 August 2018, I set out the following paragraphs from the determination which have relevance to the issue of whether Mr Maynard, the third defendant, should be joined to the proceedings before the Authority:

> [26] As I have already noted, Mr Peter Maynard attended my original investigation meeting on behalf of Hauraki Rail Trail Limited and represented that Hauraki Rail Trail Limited could not fund any settlement and that he was endeavouring to fund a settlement from alternative sources.
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> [27] Those observations of his must be regarded now with some suspicion as the evidence before me suggests that the totality of the settlement proceeds for the sale and purchase of Hauraki Rail Trail Limited was paid to Mr Peter Maynard personally and presumably that happened on or about 8 December 2014. So, by the time my investigation was on foot, it would seem that he had been paid the total amount of $386,000 to his personal bank account.
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> [28] The apparent basis for this payment is the contention that the plant of Hauraki Rail Trail Limited was owned by Mr Peter Maynard and therefore sale proceeds ought properly to have been paid to him. In his statement to the Authority in anticipation of this further proceeding brought by Ms Baker, Mr Peter Maynard says: "*the plant of Hauraki Rail Trail Limited was owned by Peter Maynard, hence the sale of plant was paid to Peter Maynard*".
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> [29] Because the information helpfully identified by Ms Baker and put before me now, is at variance to the official record, I am bound to make further enquiries if only to ensure that the basis of my understanding of the factual matrix stands up to scrutiny.
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> [30] To put the same point another way, it is conceivable that in the original hearing, I was misled into a false sense of security by the evidence given by Mr Maynard that he was finding alternative sources of funds to meet the company's obligations to its former employee. Had I known then what I have now been told, I should have proceeded differently, although the Authority's decision would not have changed fundamentally.
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> [31] Accordingly, I am satisfied the interests of justice require me to reopen this investigation. I shall require to speak with both Mr Maynard and Mr Barnett so that I understand the factual matrix correctly and in particular, why what appears to be cogent evidence before me is not supported by the official record.

[11] It is clear from what transpired at the investigation meeting on 13 August 2015, resulting in the determination of 26 August 2015, that Mr Maynard had given either an express or implied undertaking to the Authority as to payment of money owing to Ms Baker by the first defendant from funds held by him or under his power. In the context of what he told the Authority, it must be presumed that the funds from alternative sources to which Mr Maynard referred included the funds from Hauraki Rail Trail Ltd. The effect that the undertaking had on the Authority is recorded then in the determination of 22 August 2018 in the passages I have set out.

Legal issues relating to joinder

[12] In the *Northern Clerical IUOW v Lawrence Publishing Co of New Zealand Ltd,* the Labour Court had previously ordered payment of an amount in settlement of a personal grievance, and the applicant had not been successful in recovering the amount from the respondent.[3] The applicant sought to join the directors and shareholders. The employing company had a total issued capital of 500 shares, of which 499 were held by another company. The two directors of the employer between them owned three-quarters of the shares in the other company.

[13] The Labour Court, when faced with an application to assist compliance by joining the directors of the respondent company, considered its powers under s 207 of the Labour Relations Act 1987. The relevant portions of that section read as follows:

> **207. Power to order compliance**–(1) Where any person has not observed or not complied with–
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> …
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> (b) Any order, determination, direction, or requirement made or given under this Act by the Labour Court or …
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> the Labour Court … may, in addition to any other power it may exercise, by order require in or in conjunction with any proceedings under this Act to which that person is a party, that person to do any specified thing, or to cease any specified activity, for the purpose of preventing further non-observance of or non-compliance with that provision, order, determination, direction, or requirement, and shall specify a time within which that order is to be obeyed.
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> (2) Where any person (being a union or an employers organisation or an association or a worker or an employer …) alleges that that person has been prejudicially affected by a non-observance or non-compliance of the kind described in subsection (1) of this section, that person may commence proceedings against any person in respect of the non-observance or non-compliance by applying to the Labour Court for an order of the kind described in subsection (1) of this section.

[14] The Court held firstly that s 207(2) of the Labour Relations Act provided jurisdiction to the Court to enforce its own orders and that such compliance could be made against any person.[4] Secondly it held that to join the directors of the company for the purposes of enforcement was not a matter of lifting the corporate veil, but rather of establishing who was responsible for carrying out the employer's obligations; it was

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3 *Northern Clerical IUOW v Lawrence Publishing Co of New Zealand Ltd* [1990] 1 NZILR 717 (LC) (*Northern Clerical*).

4 At 720-721.

not a matter of imposing personal obligations on the respondents. The other company was being sued as a third respondent. The second respondent was the managing director of the employing company, a director of both companies and a major shareholder in the other companies.

[15] In the *Northern Clerical* case, Judge Finnigan referred to several precedents where individuals had been "in a position to ensure that the employer made payment". He reached the view that:

(a) The orders referred to in s 207(1)(b) of the Labour Relations Act included monetary orders.

(b) The policy of that Act required the Court to exercise a jurisdiction to enforce its own order for payment of wages.

(c) Section 207(2) of the Labour Relations Act enabled application against any person in respect of non-compliance.

[16] On the issue of lifting the corporate veil, Judge Finnigan stated:[5]

> ... I think the matter falls to be decided without the necessity to go into that area of the law. On this approach, it is not a matter of looking behind a veil for a true personality hidden in the shadows. It is rather a matter of seeing who is responsible to carry out the act which Lawrence Publishing Limited has been ordered to perform and has not so far performed. This is what the Court did in *Garage Builders, Drywall* and *Bain*. After hearing the matter fully and competently argued in the present case I am satisfied that what was done in those three earlier cases is consistent with the policy of the Act and was a proper application of s 207(2). In each of those cases third persons were bound by compliance orders, not to make payment of a respondent's debt from their own pockets, but to take the steps which were in their power to ensure that the liability was met by the person upon whom the liability fell.

[17] The *Northern Clerical* case was not taken on appeal. However, the decision was drawn to the attention of the Court of Appeal in *Peter Reynolds Mechanical Ltd v Denyer*.[6] While the Court of Appeal was not dealing with the specific issue which arises in the present case, it outlined what had occurred in the *Northern Clerical* case

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5 At 721-722.

6 *Peter Reynolds Mechanical Ltd v Denyer* [2016] NZCA 464; [2017] 2 NZLR 451 at [46].

and implicitly affirmed the Labour Court's interpretation of s 207 of the Labour Relations Act relied on in its judgment.

[18] The *Northern Clerical* case was also applied in *ABC01 Ltd (formerly Primary Heart Care Ltd) v Dell* and *Christiansen v Sevans Group (NZ) Ltd*.[7] These cases were dealing with the successor provision to s 207 of the Labour Relations Act which is now found in s 139 of the Employment Relations Act 2000 (the Act). The same powers the Labour Court held under s 207 are now held by the Employment Court under s 139. The words "any person" contained in s 207(2) are repeated in s 139(4). However, not all the powers under s 207 of the Labour Relations Act now vested in the Employment Court were diverted to the Authority, which is the subject of comment later in this judgment.

[19] In *ABC01 Ltd v Dell*, Chief Judge Colgan (citing the *Northern Clerical* case in support) regarded a director's ability to influence the company to meet its legal obligations, including its debt, as a legitimate circumstance in which an individual corporate office-holder might be joined to an action for enforcement of a compliance order. The Court held that it would not be possible to join the director under s 221 of the Act to enable the director's personal assets to be used in satisfaction of the judgment, because the employer was clearly the company. The alternative (*Northern Clerical*) route was appropriate.

[20] In *Christiansen v Sevans Group Ltd* Judge Inglis (as she then was) acknowledged that there is authority for the proposition that the Court may make a compliance order against persons who have been joined in proceedings who are able to compel the defendant employer to meet its legal obligations. In that case the plaintiff made a successful application to the Court to join a director of the employer company for the purposes of enforcing a compliance order.

[21] These cases are distinguishable from the present case. This is because the present proceedings have not yet reached the stage where the Authority has made compliance orders which have not been obeyed, and the matter then referred to the

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7 *ABC01 Ltd (formerly Primary Heart Care Ltd) v Dell* [2012] NZEmpC 188; *Christiansen v Sevans Group (NZ) Ltd* [2013] NZEmpC 11.

Court for exercise of powers that are available to the Court under s 139 of the Act but not available to the Authority.

[22] As indicated earlier, when the powers under s 207 of the Labour Relations Act were re-enacted in the Act, the section was divided so that, with the creation of the Employment Relations Authority as a first instance tribunal, the first part of the previous s 207 was vested in the Authority under s 137 of the Act (The Power of the Authority to Order Compliance). The powers under s 207(2) which Judge Finnigan had relied upon in the *Northern Clerical* case were not transferred to the Authority but were vested solely in the Employment Court. Section 137, therefore, did not contain the same provisions as contained in s 207(2), and the words "any person" were not repeated. That is, the power exercised under s 207(2) of the Labour Relations Act was not contained in the Authority's empowering section in the Act to order compliance, and the *Northern Clerical* case would have no application to the Authority's jurisdiction. This means that the Authority would not have power to join Mr Barnett or Mr Maynard as parties in reliance upon the principles enunciated in that case.

Enforcement of Mr Maynard's undertaking

[23] As indicated earlier in this judgment, when Mr Maynard appeared before Chief Authority Member Crichton in 2015 he gave an express or implied undertaking to the Authority, upon which it relied, that payments of whatever orders were made by the Authority in Ms Baker's favour would be met by him personally using his own funds or funds from another source. The background to all of this is contained in the brief of evidence of Ms Baker which she read to me at the formal proof hearing, as well as in the documents produced by her. It paints a concerning picture of the actions of the second defendant, Mr Barnett, and the third defendant, Mr Maynard, where assets belonging to the first defendant, Hauraki Rail Trail Ltd, of which they were both directors and/or shareholders, were diverted to a company then under the control of Mr Barnett, as well as to Mr Maynard personally.

[24] It is clear from the determination of the Authority, which is the subject of the present challenge, and Ms Baker's evidence in its entirety, that Mr Maynard not only misled the Authority but has also breached the undertaking that he gave and is in

contempt.[8] In view of the fact that the investigation meeting is now to be re-opened, the Authority may consider it appropriate that Mr Maynard be joined to the proceedings in the Authority to answer for his contempt.[9] While the Authority does not possess any implied power to punish a party for contempt, it does have wide powers to require Mr Maynard (and for that matter Mr Barnett) to attend its investigation meeting.[10] It also has powers under s 134A of the Act to penalise a person who obstructs or delays an investigation of the Authority or fails to attend when required to do so.[11] The remedy of a penalty, while of some assistance to Ms Baker, could not encompass other remedies she obtained in the 2015 determination.

[25] These circumstances, however, would not empower the Court to interfere in the investigative process of the Authority by ordering the joinder of Mr Maynard to the Authority's proceedings. Section 188(4) of the Act provides:

> (4) It is not a function of the court to advise or direct the Authority in relation to—
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> (a) the exercise of its investigative role, powers, and jurisdiction; or
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> (b) the procedure—
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> (i) that it has followed, is following, or is intending to follow; or
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> (ii) without limiting subparagraph (i), that it may follow or adopt.

[26] Whether or not the Authority decides to deal with Mr Maynard for his contempt or require Mr Maynard or Mr Barnett to attend the re-opened investigation meeting, are matters within the exercise of its investigative role, powers and jurisdiction. The Court is not, therefore, to interfere. The exercise of the Authority's own role, powers and jurisdiction may, nevertheless, still see some progress in the enforcement Ms Baker seeks.

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8 *Propellor Property Investments Ltd v Moore* [2015] NZCA 357 at [36]. The Court affirmed that undertakings to a Court are enforceable by contempt proceedings.

9 Note that the Authority's powers to deal with contempt of orders or undertakings will be wider when the recently enacted Contempt of Court Act 2019 comes into force.

10 *Ryan Security & Consulting (Otago) Ltd v Bolton* [2008] ERNZ 428 (EmpC).

11 *Ahuja v Labour Inspector* [2018] NZEmpC 31.

Alternative action

[27] As I indicated to Ms Baker at the formal proof hearing, it is possible that as a creditor of the first defendant company, Hauraki Rail Trail Ltd, she may have remedies against its former or present directors who are the second and third defendants in these proceedings. Much will depend upon the exact circumstances surrounding the diverting of assets from Hauraki Rail Trail Ltd and the timing of those actions in the context of the company's liability to Ms Baker as its former employee. However, those are remedies which may be available to Ms Baker only under the Companies Act 1993. The High Court, therefore, is the Court having jurisdiction to review those actions of Mr Barnett and Mr Maynard as were disclosed to me by Ms Baker in her evidence. She would need to have sound legal advice before embarking on such action for investigation into the directors' behaviour if she chose to do so.

Conclusion and disposition

[28] In summary, therefore, Ms Baker cannot rely upon the decision in the *Northern Clerical* case to have Mr Barnett and Mr Maynard joined to the Authority proceedings for the purposes of compliance and enforcement.[12] This is an unfortunate consequence of the way in which the powers formerly vested in the Labour Court under s 207 of the Labour Relations Act were diverted in different ways to the Court and the Authority, upon enactment of the Employment Relations Act. However, Mr Maynard is in breach of the undertaking that he gave to the Authority and is in contempt. He could be joined as a party to the proceedings in the Authority when it re-opens its investigation as it has decided to do and as recorded in the determination which is the subject of this challenge. That decision, however, is one for the Authority to make and not this Court. Ms Baker's challenge is dismissed.

[29] The attempt by Ms Baker to have the Court reconsider and add to remedies which were ordered in her favour in the Authority's earlier determination in 2015 cannot succeed, and the application for leave to file the amended statement of claim

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[12] The circumstances of the present case, and the purposes of the application, make it distinguishable from the recent case in the Court of *Sfizio Ltd v Freeborn* [2019] NZEmpC 143 where joinder of directors and shareholders was granted. In *Sfizio* the joinder was for the purposes of a challenge yet to be heard to determine the true identity of the employer.

for that purpose is dismissed. For the record and with reference to paragraph 22 of Ms Baker's statement of claim, this Court has no jurisdiction under the Crimes Act 1961, and is unable to provide the second head of relief or remedy claimed.

[30] The matter is now referred to the Authority to enable it to continue its investigation into the compliance application made by Ms Baker there. Mr Maynard may become a party to that re-opened investigation. He has shown a marked reluctance to co-operate in the Court proceedings but if joined in the Authority proceedings he may wish to reconsider his stance when the Authority's investigation is re-opened.

Costs

[31] Ms Baker, being unsuccessful in her non-de novo challenge, is not entitled to costs.

M E Perkins
Judge

Judgment signed at 10 am on 17 October 2019