Determination Number: WA 74/07
File Number: 5078593

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE

BETWEEN	Service and Food Workers Union Nga Ringa Tota (First Applicant) Persons listed in Schedule A to the application to the Authority (Second Applicant)
AND	New Zealand Racing Board (Respondent)
REPRESENTATIVES	Peter Cranney and Anthea Hughes, Counsel for the Applicants Les Taylor and Katie Elkin, Counsel for Respondent
MEMBER OF AUTHORITY	James Crichton
INVESTIGATION MEETING	Wellington, 2 May 2007
DATE OF DETERMINATION	10 May 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] By statement of problem filed in the Authority on 15 February 2007, the first applicant, Service and Food Workers' Union Nga Ringa Tota (the Union) identified the problem in these terms:

> *The problem the applicant wishes the Authority to resolve is disagreement about whether the respondent's employees are persons "who derive their livelihoods from racing" within the meaning of s.9(1)(a) of the Racing Act 2003; and whether if the respondent dismisses the employees such dismissals will be unlawful and unjustified.*

[2] The relief sought by the Union in that statement of problem included determinations that the proposed dismissals *will be unlawful and unjustified in that they breach the s.9(1)(a) obligation* and orders restraining the dismissals.

[3] In a statement in reply filed by the respondent, New Zealand Racing Board (the Board) on 1 March 2007, the Board advanced the proposition that the Authority had no jurisdiction to deal with the matter articulated in the statement of problem and sought a decision from the Authority to deal with the jurisdiction question first as a preliminary issue. In anticipation of that application being successful, the Board sought the consent of the Authority not to make any substantive response to the matters traversed in the statement of problem which do not go to jurisdiction.

[4] A telephone conference was held on 20 April 2007 at which the Authority (member Wood) set the matter down for an investigation meeting on 2 May 2007 in Wellington to deal exclusively with the jurisdictional issue. It was agreed in that telephone conference that the Union would file an amended statement of problem and that was filed on 30 April 2007.

[5] The amended statement of problem identifies the problem differently in the following terms:

> *The problems the applicant wishes the Authority to resolve are unjustified dismissals.*

[6] Of course by the time the amended statement of problem had come to be filed, members of the applicant Union (the second applicants in fact) had been dismissed from their employment by way of redundancy.

[7] The matter proceeded at the investigation meeting exclusively on the basis of the parties' submissions as to the jurisdictional question originally put into issue by the Board. After hearing counsel at the investigation meeting, I determined not to hear evidence on the basis that it seemed to me unlikely to assist me in deciding the jurisdictional issue.

The Board's position

[8] The essence of the Board's position is that it discerns the Union's argument as being founded on a particular interpretation of s.9(1)(a) of the Racing Act 2003 and it contends that the Authority has no jurisdiction to interpret that provision of the Racing Act, both under its own statute (the Employment Relations Act 2000) and because s.9(1)(a) of the Racing Act 2003 is *a non-justiciable provision*.

[9] Further, and without prejudice to the want of jurisdiction argument just advanced, the Board also argues that the Union has misinterpreted s.9(1)(a).

[10] It is appropriate to set out in full the text of s.9(1)(a) of the Racing Act 2003, but before doing that, it is useful to describe the nature of the whole section. Section 9 is entitled *Functions of Board* and subsection (1) lists 10 functions. Subsection (2) then lists two mandatory requirements in the carrying out of those functions, one of which is the requirement to comply with natural justice.

[11] The functions described in subsection (1) of s.9 are a mixture of easily identifiable and quantifiable tasks and more diffuse statements of corporate intent.

[12] Subsection (a) clearly falls into the latter category and it reads as follows:

> *9. Functions of Board*
>
> *(1) The functions of the Board are –*
>
> *(a) To develop policies that are conducive to the overall economic development of the racing industry, and the economic wellbeing of people who, and organisations which, derive their livelihoods from racing:*

[13] It is a truism that the Authority is a creature of statute and that unlike the High Court, for instance, it possesses no inherent jurisdiction but has only that jurisdiction which is conferred on it by statute.

[14] The Board refers to s.161 of the Employment Relations Act 2000 and notes that by reason of that section, *the Authority has exclusive jurisdiction to make determinations about employment relationship problems generally ….*

[15] The Board then goes on to make a submission that the Union's claim relying as it does on an interpretation of the Racing Act is *not a personal grievance* … nor *a dispute* and is simply concerned with the interpretation of the Racing Act which, in the Board's submission, is *well outside the ambit of the jurisdiction of the Authority*.

[16] The Board then goes on to contend that because the Union's claim does not fall within any of the *examples* of employment relationship problems listed in s.161 it cannot be an employment relationship problem. That submission is misconceived. The concept *employment relationship problem* is defined in the Act at s.5 and it is defined in a non-exclusive way so as to include personal grievances, disputes and *any other problem relating to or arising out of an employment relationship*. Plainly the use of the word *includes* allows of a wide ambit of meaning.

[17] That language is persevered with in s.161 where what the Board refers to as *examples* of employment relationship problems are listed but again with the preface of the word *including*.

[18] In any event, it is plain to the Authority that the Union is not relying exclusively on an interpretation of the subject provision in the Racing Act; the Union is alleging that the workers in question have been unjustifiably dismissed which on its face means that those workers either have or may lodge a personal grievance which brings the claim within the terms of para.(e) of s.161 of the Employment Relations Act 2000.

[19] That being the position, it is not necessary for the Authority to consider the Board's submissions in relation to the High Court decision in *BDM Grange Ltd v. Parker* [2006] 1 NZLR 351, 353 or the Employment Court decision in *Hulse v. Ministry of Justice* (unreported, 28 November 1997, AEC37A/97).

[20] I turn now to the Board's submissions in respect to its contention that s.9(1)(a) of the Racing Act 2003 is not justiciable.

[21] In essence, this submission proceeds on the footing that the purpose of the statutory provision is not to create a statutory duty and it refers to a line of authority beginning with the Court of Appeal decision in *Auckland Electric Power Board v. Electricity Corporation of New Zealand* [1994] 1 NZLR 551.

[22] The essence of this authority and of succeeding decisions is that there will be provisions in statutes which are of such a character and nature as to be *unsuitable for judicial assessment* to use the apt phrase from the Board's submissions. It is contended that s.9(1)(a) of the Racing Act 2003 is one such statutory provision. The Board argued that far from creating a statutory duty, s.9(1)(a) simply enunciated a function of the Board that is not expressed in *the language of duty* and cannot on a proper construction of it give rise to judicial enforcement as a statutory duty or obligation.

[23] The Board's final substantive submission is that, aside entirely from its argument as to jurisdiction, the Union's interpretation of s.9(1)(a) is also fallacious. This is because the Board contends that s.9(1)(a) does not prevent it from, inter alia, dismissing its employees and the Board contends that the Union is saying that the section does act as a prohibition to dismissal. The Authority does not understand the Union to be arguing anything of the kind; clearly, were that the Union's argument it would as the Board maintains, be patently absurd.

[24] Quite clearly, in s.9, the Board has a number of functions to fulfil and it does some of these with staff. It cannot be the position that a proper construction of s.9(1)(a) of the Act precludes it from ever dismissing staff, particularly when the schedule to the statute makes it very clear that the Board, through its Chief Executive, has indeed the power to use the colloquialism, *hire and fire*.

[25] However, the Board goes on to argue that s.9(1)(a) also does not apply to individual employees because it contends that the phrase *derive their livelihoods* in s.9(1)(a) must refer only to *those engaged in businesses separate from that of* … the Board.

The Union's position

[26] As I have already made clear, the Union denies the Board's contention that it has not raised a personal grievance in relation to the dismissal of the second applicants. In that regard, the Union drew my attention to provisions both in the original statement of problem and in the amended statement of problem, both of which I have referred to at the beginning of this determination.

[27] The Union also contended, far from relying as the Board contended on the provision of s.161(r) of the Employment Relations Act 2000 to create its jurisdiction to bring the present proceedings before the Authority, in fact the claim is brought as a personal grievance in respect of an allegation that the second applicants have been unjustifiably dismissed on the ground of redundancy and insofar as it is relevant to consider the initial statement of problem, as an application for injunctive relief to **prevent** an unjustified dismissal: *McCulloch v. New Zealand Fire Service* applied.

[28] The Union also contends that, contrary to the view advanced by the Board that the Authority lacked jurisdiction to hear the matter, in fact the position was otherwise by reason of the effect of s.113 and s.194A of the Employment Relations Act 2000.

[29] Section 113 provides generally that the only forum for an employee to challenge a dismissal is in the Employment Relations Authority as a personal grievance. Given the Union's contention that they have raised a personal grievance both in respect to the original statement of problem and in relation to the amended statement of problem, it follows that, the Union's position is that there can be no challenge to jurisdiction.

[30] The Union supports that contention by reference to s.194A. That section applies in respect of any exercise of a statutory power by an employer which gives rise to an employment relationship problem. In those circumstances, the employee is required to use the *employment relationship problem solving provisions in this Act to deal with the problem* and may not bring an application for review either in the Employment Court or the High Court.

[31] The Union urges on me the proposition that the effect of s.194A is to absolutely preclude it from bringing any claim it might have about the actions of the Board to any forum other than the Authority.

[32] The Union makes this contention precisely because it says the actions of the Board in relation to the dismissal of the second applicants falls squarely within the terms of s.194A of the Employment Relations Act 2000.

[33] If, as the Union contends, the Board has misinterpreted its own functions (and in particular misinterpreted whatever obligation it might have pursuant to s.9(1)(a) of the Racing Act 2003, then the decision to dismiss the second applicants may be unlawful. The Union notes that the Board is, like the Authority, a creature of statute and not a private employer and it can only do that which it is legally empowered to do. Insofar as it has gone further than the functions set out in its statute, and in particular, in the Union's submission, the function described and contained in s.9(1)(a) of the Racing Act 2003, then it has acted ultra vires its statute and potentially contributed to unjustified dismissals of the second applicants.

Discussion and analysis

[34] The only issue for determination here is the question whether the Authority has jurisdiction to deal with the matter before it. I am not required to dispose of the personal grievances in a substantive sense in this determination.

[35] It follows that all we are concerned with here is an analysis of whether this matter falls within the ambit of the Authority's jurisdiction as determined by the Parliament. Having considered the matter carefully, I am satisfied that it does and I now set out the reasons for that conclusion.

[36] It seems to me possible to conclude from the initial statement of problem filed in this matter on 14 February 2007 that there was no allegation of personal grievance. It may well be that the construction of the initial statement of problem by the Union's advisers was predicated on the entirely understandable footing that at the point at which that document was created, there in fact had not been dismissals, although they were in prospect.

[37] What is manifestly apparent though from any reading of the initial statement of problem is that it does properly refer to an employment relationship problem, even if that *term of art* is not actually used in the document. For instance, the remedies sought include a request for urgent mediation and an order restraining the dismissals. As I have already observed, it is clear law that an injunction will lie to prevent an unjustified dismissal. This arguably is just such a situation.

[38] It seems to me clear then that the initial statement of problem, while perhaps not falling within the terms of s.113 of the Employment Relations Act 2000 in that it does not explicitly refer to personal grievances (perhaps for the reason I identified), plainly falls within the terms of s.194A of the Employment Relations Act 2000 in that it seeks to advance an employment relationship problem by the use of the *problem solving provisions* of the Employment Relations Act.

[39] The amended statement of problem filed on 30 April 2007 refers explicitly to unjustified dismissals and pleads, inter alia, that there be a determination that the dismissals in question are unjustified by reason of unfair process.

[40] I observe in passing that Mr Cranney for the Union quite properly conceded that the Board was entitled to further and better particulars in relation to that particular claim and no doubt, if the matter proceeds further, that can be attended to in due course.

[41] For present purposes, however, the point I make is that the amended statement of problem very clearly is talking about actual personal grievances which brings the matter squarely within the terms of s.113 of the Employment Relations Act 2003.

[42] The Board sought to narrowly focus its jurisdiction argument on the question whether the Authority had the power to interpret the subject section of the Racing Act 2003. Certainly, the original statement of problem filed by the Union did rather encourage that view.

[43] Insofar as the Board was encouraged to focus its attention exclusively on the issue of the interpretation of the Racing Act by the initial statement of problem, that emphasis was properly corrected by the amended statement of problem filed on 30 April 2007.

[44] Even if the Union's original statement of problem hindered rather than helped in an understanding of the Union's position on the matter, the Employment Relations Act 2000 is very clear in the power it gives to the Authority to reach conclusions about the actual nature of a claim, in equity and good conscience, even where the pleadings are not as explicit as they might be.

Determination

[45] For reasons which I have already advanced, I am satisfied that the Union's claim is about an employment relationship problem and that that conclusion flows from a proper interpretation of both the amended statement of problem filed on 30 April 2007 (s.113 of the Employment Relations Act 2000 applied), and even the original statement of problem (s.194A of the Employment Relations Act 2000 and *McCulloch v. New Zealand Fire Service* applied).

[46] With regard to the issue about the meaning of s.9(1)(a) of the Racing Act 2003, the Union's position is that the Board has made its decision to terminate the employment of the second applicants by reason of redundancy on an improper basis because the Board has misconstrued its functions under s.9(1)(a) of the Racing Act 2003. The Union finds support for that thesis in the way in which the Board has dealt with the jurisdictional argument in the present proceedings.

[47] I have not found it necessary to hear evidence on the question of whether the Board has in truth misdirected itself in relation to its functions under the Racing Act. The issue for determination here is exclusively whether the Authority has jurisdiction to deal with the present claim. I am satisfied it does, both on the original statement of problem and on the amended statement of problem.

[48] Indeed, were I to find otherwise, it would seem that the Union had no possible redress at all, given the effect of s.194A subsection (2) which clearly precludes recourse to the High Court in the circumstances which I have found apply here; the very course of action which the Board is urging on the Union as the alternative to the Union's allegedly misconceived approach to the Authority.

Costs

[49] Costs are reserved.

James Crichton
Member of Employment Relations Authority