

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 64/08
5111304

BETWEEN RYAN SECURITY AND
CONSULTING OTAGO
LIMITED
Applicant

AND KEVIN BOLTON
First Respondent

AND UP FRONT SECURITY
LIMITED
Second Respondent

AND LIPIKA LIMITED TRADING
AS THE TOAST BAR
Third Respondent

Member of Authority: Philip Cheyne

Representatives: Peter Anderson, Counsel for Applicant
Rachel Brazil, Counsel for first and second Respondents

Investigation meeting: Teleconference 2 May 2008

Determination: 12 May 2008

DETERMINATION OF THE AUTHORITY

[1] Kevin Bolton worked for Ryan Security and Consulting (Otago) Limited in Dunedin until he resigned. Following Mr Bolton's resignation Ryan Security came to believe that he was breaching contractual provisions about confidential information and restraint of trade said to survive the termination of the employment. Ryan Security lodged a statement of problem seeking a compliance order, penalties, an account of profits against Mr Bolton and two companies said to have aided and abetted his breaches. Ryan Security also sought an interim injunction against Mr Bolton to restrain further breaches of his surviving contractual obligations.

[2] The interim injunction claim was dealt with as a matter of urgency and, following an investigation meeting, an order was made. The parties were also directed to mediation.

[3] Subsequently, Ryan Security discontinued the claims as against the third respondent (Lipika Limited t/a The Toast Bar) but applied for a declaration that Mr Bolton was in contempt of the Authority because of his failure to comply with the interim injunction. Ryan Security says that Mr Bolton's contempt should be punished by the imposition of a fine and an order of costs.

[4] There was mediation in March but the matter remains unresolved. During a phone conference with counsel I canvassed their views about whether the Authority should refer a question of law to the Employment Court or remove the proceedings to the Court without the Authority investigating further.

[5] The present situation does not fall within the words of section 196 of the Employment Relations Act 2000 dealing with contempt. That section gives the Police power by order of the Authority to briefly detain an offender in limited circumstances, none of which apply here. The section also empowers the Employment Court to impose a sentence of imprisonment and a fine in circumstances also not currently applicable. Nonetheless, the applicant says that the Authority has an implied power to deal with any contempt being a failure to comply with the present interim injunction. That is not accepted by the respondent.

[6] In *NZ Railways Corp v NZ Seamen's IUOW* (1989) ERNZ Sel Cas 321 the then Chief Judge held that the Labour Court had power to punish a contempt that fell outside the predecessor to the present section 196. The Court's reasoning included reference to the principle that a Court created by statute has an implied jurisdiction to do whatever is necessary to make its express jurisdiction effective; so that where a Court is given jurisdiction to grant injunctions it must also have the power to see to it that those injunctions are obeyed. However, in punishing the contempt, the Court also seems to have relied on its statutory power to make rules. That power imported in certain circumstances the rules of the High Court. The Employment Court has subsequently followed *NZ Railways Corp* in a number of cases.

[7] The High Court itself had occasion to discuss the contempt jurisdiction of the Employment Court and the Employment Tribunal in *Attorney-General v Reid* [2000]

ERNZ 258. There the High Court found that the Tribunal and Court were both inferior courts for the purposes of section 88A of the Judicature Act 1908 which empowers the High Court to declare a person a vexatious litigant. It reaching that point the High Court said that the employment institutions under the Employment Contracts Act 1991 had no power to deal with contempt not in the face of the Court or Tribunal and referred to *Quality Pizzas Ltd v Canterbury Hotel Employees Industrial Union* [1983] NZLR 612 (CA). *Quality Pizzas* concerned the jurisdiction of the High Court to punish contempt of the Arbitration Court. *Reid* did not refer to the statutory differences between the constitution of the Arbitration Court and the Employment Court or the Labour Court's judgment in *NZ Railways Corp*.

[8] That leaves us in the position that the High Court considered that predecessor employment institutions did not have jurisdiction over a matter such as the present one but the Labour Court found that it did have jurisdiction. Much of the Employment Court's injunctive jurisdiction is now with the Authority: see *Credit Consultants Debt Services v Wilson (No 2)* [2007] ERNZ 205. However, it is unclear whether the Labour Court's reasoning about contempt jurisdiction could now apply to the Authority. It follows that a question of law about the Authority's power to punish for contempt not within the express words of section 196 of the Employment Relations Act 2000 arises as a central issue in this matter. This is an important question of law which should be heard by the Employment Court.

[9] Because the Court will have the contempt aspect of the employment relationship problem before it as an important question of law, there is sense in also removing the unresolved claims for compliance orders, penalties and an accounting of profits. Counsel for the parties agreed that all the matters currently before the Authority should be dealt with by the Court.

[10] There being no objection I order the removal of the whole matter to the Employment Court.

Philip Cheyne
Member of the Employment Relations Authority