

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 66/09
5102857

BETWEEN LIUBOV TROPOTOVA
Applicant

AND OCS LIMITED
Respondent

5102860

BETWEEN NATALIA TROPOTOVA
Applicant

AND OCS LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Kevin Murray, Advocate for Applicant
Paul McBride, Counsel for Respondent

Investigation Meeting: On the papers

Determination: 25 May 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] By statements of problem filed in the Authority on 12 October 2007, the applicants (Mrs and Ms Tropotova) alleged that they had been unjustifiably dismissed, had suffered disadvantage as a consequence of unjustifiable actions of the employer, been subject to unlawful trespass, had suffered unlawful discrimination, a breach of good faith, various breaches of the New Zealand Bill of Rights Act, breaches of unspecified international conventions, and a breach of the Wages Protection Act 1983.

[2] The respondent, (OCS) denies each of the claims made on the footing that any allegation of personal grievance is denied, any allegation of wages due and owing is denied and the other allegations are either not capable of being brought against OCS

(OCS not being the Crown or a Crown agency) or are outside the jurisdiction of the Authority (or both).

[3] These matters have had a tortured progress. Because the parties were willing to attend mediation, the applications were referred to mediation on 30 October 2007 and by reason of mediation having been unsuccessful, a telephone conference was convened by the Authority on 28 January 2008 at which directions were made for a possible investigation meeting over the period 3-5 June 2008. The advocate for Mrs and Ms Tropicova was to file and serve a list of witnesses and a précis of their evidence and confirm whether Mrs and Ms Tropicova wished to persevere with their unusual claims, such information to be available to the Authority and the respondent OCS by 21 February 2008. Despite reminders from the Authority's support staff, the advocate for Mrs and Ms Tropicova never provided the information requested of him in the directions conference of 28 January 2008.

[4] By email dated 2 April 2008, counsel for OCS made an application for the Authority to consider, as a preliminary issue, the issues raised by Mrs and Ms Tropicova in respect to alleged trespass, the Bill of Rights 1688 (UK), the New Zealand Bill of Rights Act 1990 and unspecified international conventions. It was suggested that a further telephone conference be convened to discuss that request.

[5] On 14 April 2008 the Authority issued a minute which referred to its inability to have Mrs and Ms Tropicova's advocate respond in any way to the Authority's request for further information, noted that the delay was unreasonable and prejudicial to OCS and accordingly vacated the indicative hearing date of 3, 4 and 5 June 2008 and noted that the file was to remain inactive *unless and until the applicant complied with the directions already set out by the Authority*.

[6] No further steps were taken by Mrs and Ms Tropicova or their advocate and on 18 November 2008 I directed that the files be closed. The advocate for Mrs and Ms Tropicova was notified of that decision.

[7] In an undated letter received in the Authority on 12 January 2009, the advocate for Mrs and Ms Tropicova protested the closing of the file and made an application to recall the decision.

[8] The Authority responded to this application by denying the request to recall the decision on the basis that there was no decision capable of being recalled and that

the files had simply been closed because of the failure of Mrs and Ms Tropicova (through their advocate) to comply with the timetabled directions set by the Authority. However, the memorandum concluded by indicating that if receipt of the 12 January 2009 letter evidenced a willingness to co-operate with the Authority's process then a further telephone conference would be arranged.

[9] That telephone conference proceeded on 24 February 2009 and resulted in an agreement that the Authority's jurisdiction to deal with what I would loosely call the *unusual claims* should be dealt with as a preliminary matter. The respondent sought costs for the delays occasioned by the applicants' behaviour and submissions in respect to costs and the Authority's jurisdiction on the unusual claims were timetabled.

[10] Those submissions came to hand on 12 March 2009 from Mrs and Ms Tropicova, on 20 March 2009 from OSC and again on 6 April 2009 from Mrs and Ms Tropicova in reply.

Issues

[11] There are two issues for determination here. The first is whether the Authority has jurisdiction to deal with the matters which are pleaded by Mrs and Ms Tropicova and which are not either personal grievances or matters to do with the payment of wages.

[12] The second issue for decision here is whether costs ought to be fixed against the applicants Mrs and Ms Tropicova and in favour of OCS because of the alleged delay in bringing the matters to hearing.

Jurisdiction

[13] In the first submission filed by Mrs and Ms Tropicova on 22 February 2008, Mrs and Ms Tropicova's advocate quite properly directs attention to s.161 of the Employment Relations Act 2000 as the primary statutory source of the rules concerning the jurisdiction of the Authority.

[14] The submissions goes on to emphasise the wide jurisdiction conferred on the Authority by s.161.

[15] Of course, the Authority has no inherent jurisdiction and is exclusively a creature of statute. Despite the wide powers given to the Authority by s.161, unless it acts within the statutory framework provided by the Parliament, its action will be *ultra vires*.

[16] Mr Murray, the advocate for Mrs and Ms Tropicova, seeks to rely on subparagraph (r) of s.161(1) of the Employment Relations Act 2000. For the avoidance of doubt, I set out the relevant subparagraph with the commencement of the subsection as well:

Section 161(1)(r)

The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including –

- (r) *any other action (being an action that is not directly within the jurisdiction of the Court) arising from or related to the employment relationship or related to the interpretation of this Act (other than an action founded on tort).*

[17] In essence, Mrs and Ms Tropicova say that the Authority's exclusive jurisdiction is extended by subparagraph (r) above so as to allow matters such as the allegations relating to the issue of the Trespass Act notice and the various human rights claims to be subsumed within the Authority's jurisdiction.

[18] Mrs and Ms Tropicova then proceed to argue in their submission that as the Authority has previously dealt with matters where human rights issues have been pleaded, it is available to the Authority to do so again.

[19] The difficulty with these postulations is that an employment relationship problem, by its very nature involves only the parties to it and specifically excludes third parties.

[20] Nothing before the Authority suggests that any of the special causes of action pleaded by Mrs and Ms Tropicova are within the employment relationship so defined and indeed, each and every one of the special causes of action pleaded relate to actions or alleged actions by a third party. It follows that it is completely unnecessary for the Authority to consider matters further because there is simply no basis on which the Authority could possibly derive jurisdiction or contemplate the granting of remedies against a *stranger* to the employment relationship who is, by definition, not

a party to the proceedings and therefore has not even been heard by the Authority on the matters in contention.

[21] However, for the avoidance of doubt I also agree with Mr McBride's submissions on behalf of OCS in respect to the particular enactments on which Mr Murray chooses to base his argument. First, in relation to the Trespass Act 1980, aside entirely from the fact that there can be no claim brought in the Authority against a third party not being a party to the employment relationship, the Trespass Act is tortious in nature and so explicitly excluded from consideration by the Authority and, if anything, relates to property rights rather than employment rights.

[22] In respect to the Bill of Rights 1688, Mr McBride, like the Authority, can find little in the submissions of Mr Murray to justify a reference to this arcane document from the United Kingdom. Assuming Mr Murray's argument rather than understanding it, the only possible basis on which it could be contended that the UK Bill of Rights applies in the present context must relate to the reference in the 1688 Bill to *cruell and unusuall punishment* but again, the Bill refers exclusively to the Crown and the limitation on Crown prerogative and if there were to be a claim for a breach of a statutory duty based on the 1688 enactment, it would be tortious and therefore outside of the jurisdiction of the Authority by definition. But, as Mr McBride makes clear, even that argument takes us one step too far because the respondent OCS is neither the Crown nor a Crown agency. It follows that the 1688 Act has no application whatever to OCS.

[23] In relation to the New Zealand Bill of Rights Act 1990 Mr McBride correctly observes that the 1990 statute is regularly used in the employment jurisdiction as an aid to interpretation but that is not the same as Mr Murray's contention on Mrs and Ms Tropicova's behalf that they can mount a claim based on an alleged breach of the statute.

[24] If one looks at the acts that the Bill of Rights applies to (as defined in the statute itself) it is absolutely apparent that the Bill of Rights Act applies broadly to public bodies and public acts performed by those bodies. Again, OCS is specifically excluded as being neither a public body nor a body performing public acts. Furthermore, any additional allegations pleaded by Mr Murray (like for instance the unlawful arrest allegation) are themselves tortious and therefore outside of the

jurisdiction of the Authority, even assuming all the other points against consideration of this pleading are themselves ignored.

[25] In relation to the nebulous concept of *human rights* the Authority can take matters no further because of the absence of specific pleadings. However, I do note the effect of s.112 of the statute requires an applicant employee to in effect choose his or her jurisdiction; either to progress a claim before the Authority or pursuant to the Human Rights Act 1993.

[26] Mr Murray's reliance on unspecified international conventions does not assist either; there is no basis on which the Authority can have jurisdiction to consider alleged breaches of such conventions (even assuming that they were identified) nor indeed could the Authority award remedies for alleged breaches. It is settled law that such conventions are not part of our law but where they have been ratified by New Zealand, they may assist in the interpretation of our domestic law.

Costs

[27] Mr McBride for OCS seeks a fixing of costs in respect to the jurisdictional issue and an award of costs against Mrs and Ms Tropotova in respect to the unreasonable delay in progressing this matter appropriately. Mr McBride correctly makes the observation that on the jurisdictional point, Mr Murray has argued matters of technical complexity but without the smallest shred of relevance and against what Mr McBride properly refers to as *the clearest of indications* by me at the initial telephone conference on 28 January 2008 that these jurisdictional claims were completely without merit or substance. Mr McBride observes (and correctly so) that it is not for OCS to absorb the cost of such manifestly unnecessary pleading.

[28] In relation to the application for costs because of the unreasonable delay occasioned by the prosecution of this matter by Mrs and Ms Tropotova's advocate, Mr McBride again makes the point that OCS should not have to bear the cost of the unreasonable delay particularly when part of that delay was of such magnitude as to lead OCS to reasonably believe that the matter was simply not being proceeded with.

[29] Mr McBride seeks an award of costs on the jurisdictional aspect at or near solicitor/client costs level to be fixed after determination of the jurisdictional point. In addition, because of the quite unreasonable delay occasioned by the applicants, an award of \$1000 over both applications is sought immediately on account of the delay

and an order that the substantive matter not proceed further until payment of that sum is obtained. Mr McBride advises that \$1,500 plus GST was expended on these two matters.

Determination

[30] I am satisfied that there is no basis whatever for any of the special heads of claim to be considered by the Authority on the footing that, aside entirely from a myriad of other arguments to exclude them, the Authority has no basis for claiming jurisdiction of them because none of them relate to the parties to the employment relationship. It follows that the only claims that remain to be considered by the Authority are those relating to personal grievance and allegedly unpaid wages.

[31] In respect to costs, costs on the substantive jurisdictional point are reserved but as to the quite unreasonable delay in prosecution of this matter I fix a sum of \$500 in total as a contribution to the reasonably incurred costs of OCS in prosecuting this matter and that sum is to be paid to OCS on whatever basis the applicants see fit but in any event within three months of the date of this determination.

[32] In terms of the power vested in the Authority by s.137 of the Act I direct that unless the costs fixed in this determination are paid within the timeframe stipulated, the Authority will take no further steps to investigate the substantive employment relationship problems.

James Crichton
Member of the Employment Relations Authority