

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 171/09
5135659

BETWEEN THE NEW ZEALAND FIRE
SERVICE COMMISSION
Applicant

AND STEVE WARNER AND
OTHERS, NAMED IN THE
ATTACHED SCHEDULE
Respondents

Member of Authority: P R Stapp

Representatives: Guido Ballara and Stephen Fraser, for the Applicant
Peter Cranney and Derek Best, for George Mihailoff,
Gerald Twiss, Allan Brown, Stephen Anderson, Nick
Fry and Simon Johnson.

Investigation Meeting: 1 September 2009 at Wellington

Submissions by: 23 October 2009 and 4 November 2009

Referral dated: 4 November 2009

REFERRAL OF QUESTION OF LAW TO THE EMPLOYMENT COURT

Employment relationship problem

[1] The New Zealand Fire Service Commission is seeking to recover overpayments of wages made to the named respondents following the refusal and/or failure by each of them to repay an overpayment. Replies and responses have been received by many of the respondents denying the claim. There are a various arrangements concerning the representation for the respondents and many of them are not represented. They have been kept informed of the process being followed. Each of them will be provided with a copy of this referral of question of law to the Employment Court.

[2] The matter has involved an investigation meeting held in Wellington in respect of six respondents: (George Mihailoff, Gerald Twiss, Allan Brown, Stephen Anderson, Nick Fry and Simon Johnson); selected by the applicant to at least establish a position on the matter. Two of the selected named respondents (Nick Fry and Simon Johnson) did not turn up to the investigation meeting without any explanation. The six are represented by the New Zealand Professional Fire Fighters' Union (the NZPFU), which has engaged Mr Cranney. Written submissions followed the investigation meeting and since then Mr Cranney has asked the Authority to refer the question of law to the Employment Court for an opinion.

[3] The applicant considers that the request is unnecessary. I have received submissions from Mr Ballara and Mr Cranney.

[4] They have been given an opportunity to comment on a draft of the referral.

Issues

[5] Is this a matter for referral of a question of law to the Employment Court? Is there a question of law? If so, what is the concise question of law for removal to the Employment Court for the Court's opinion?

The legal issue

[6] There is a legal issue that has emerged. On the face of it Mr Cranney has highlighted that there is at least some uncertainty over the matter. Put succinctly the issue is whether or not the Employment Relations Authority has jurisdiction to order employees to repay an overpayment paid with wages where the employer has made a mistake and the circumstances are such that the employee owes the money.

[7] The New Zealand Fire Service has discovered a mistake in the payments of wages made to each of the respondents. There are various sums claimed from each respondent in regard to an "Officership Allowance" in the collective employment agreement. The four respondents have queried the amounts paid to them, and the NZFS states that the sum of back pay that was paid on the allowance was \$1,050.82. The NZFS claims that, for example in Mr Mihailoff's case the amount of the

“Officership Allowance” that was overpaid was \$745.87 gross and the net overpayment was \$445.28. The sums applicable to Messrs Twiss, Brown and Mr Anderson are the same.

The Applicant’s position

[8] Mr Ballara has submitted that the Court has supported the Authority’s power to make an order and that the Authority has made orders of this sort in other instances. In particular Mr Ballara relies on the Authority’s jurisdiction to grant the recovery of sums it says the respondents owe because of a mistake that was made in paying them. He has relied on s161 and s162 of the Employment Relations Act 2000 and various cases decided by the Authority and Court where the recovery has been in the form of damages. These provisions are as follows:

161 Jurisdiction

(1) *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);...*

and

162 Application of law relating to contracts

Subject to sections 163 and 164, the Authority may, in any matter related to an employment agreement, make any order that the High Court or a District Court may make under any enactment or rule of law relating to contracts, including-...

[9] Mr Ballara has also relied on *BRC Limited v Magele* (unreported) 12 August 2009 Judge A A Couch WRC 12/09 that held:

“The Employment Relations Authority has exclusive jurisdiction to determine claims for money owing under an employment agreement and any other

actions relating to an employment relationship which are not specifically within the jurisdiction of the Court”.

[10] In addition Mr Ballara has relied upon various other Court precedents (paragraph 11 onwards, of his written submission) and the *Master Builders Association v Doe* [1997] ERNZ 53 to apply the principles to recover the sums sought.

[11] Furthermore he submitted that the Authority’s practice in a number of determinations is consistent with jurisdiction (paragraph 14 of his written submission).

Mr Cranney’s submissions and comments

[12] Mr Cranney has submitted that the Authority has no jurisdiction to award the applicant with the recovery of the sums sought. In particular he submitted that the respondents received the money in good faith and spent it in good faith. If the applicant had particularised the payments at the time the payments were made then the issue would have been picked up then and properly corrected, and it is now regrettable it did not do so. The precise break down has never been provided by the applicant and it is impossible to identify precisely the amount that could be potentially recovered without figures establishing the correctness of the amounts involved. That will be a matter of fact.

[13] He further submitted that the Authority has no jurisdiction to entertain any application made under s 94A and s 94B of the Judicature Act 1908. Also, the Authority’s powers are circumscribed essentially as to recovery of wages and penalties it can not make any pecuniary awards against workers. The applicant has contested the submissions made by Mr Cranney in respect of the conditions that the respondents have sought to establish to deny relief.

[14] It was submitted by Mr Cranney that s 161 of the Employment Relations Act does not confer any jurisdiction on the Authority under the various statutes listed in s 161 of the Act to make such an order as the one sought in the application. Section 162 of the Act only relates to the powers conferred on the Authority in areas that it already has jurisdiction under any enactment or rule of law “*relating to contracts*”.

Further it was submitted the Authority's jurisdiction is limited to contractual causes of action and has no power to expand its jurisdiction beyond that. Mr Cranney also submitted that the *Master Builders* case supports the proposition that the Authority has no jurisdiction.

Mr Cranney's further reply to the applicant's submissions

[15] The six respondents reject the applicant's submissions on jurisdiction because there are matters distinguishable under the Employment Contracts Act and the Employment Relations Act.

[16] In making further submissions in reply Mr Cranney submitted that the cases referred to by the applicant can be distinguished and that other cases have been decided in apparent innocence of other binding cases and dicta.

Determination of the request to refer a question of law to the Court

[17] Section 177 of the Employment Relations Act makes provision for the Authority to refer a question of law to the Court. That section reads as follows:

177 Referral of question of law

- (1) *The Authority may, where a question of law arises during an investigation,-*
 - (a) *refer that question to the Court for its opinion; and*
 - (b) *delay the investigation until it receives the Court's opinion on that question.*
- (2) *Every reference under subsection (1) must be made in the prescribed manner.*
- (3) *The Court must [provide the Authority with its opinion on the question in law and the Authority must then continue its investigation in accordance with that opinion.*
- (4) *Sub section (1) does not apply-*
 - (a) *to a question about the procedure that the Authority has followed, is following, or is intending to follow;*
 - (b) *without limiting paragraph (a), to a question about whether the Authority may follow or adopt a particular procedure.*

[18] The provision for the prescribed manner is provided under Regulation 11 of the Employment Relations Authority Regulations as follows:

11 Referral of question of law to Court

If, under section 177 of the Act, the Authority refers a question of law to the Court for its opinion, the reference must-

- (a) *state fully but concisely the material facts of the problem or matter to which the question of law relates; and*
- (b) *state fully but concisely the question of law; and*
- (c) *be signed by the relevant member of the Authority.*

[19] Mr Cranney has requested that the words “*on wages*” be deleted from the proposed question. This was opposed by Mr Ballara who made the following comment:

“The Wages Protection Act defines wages as including payments such as the Officership Allowance. Therefore the issue before the Authority relates to its jurisdiction to entertain the recovery of an overpayment of wages and not to the recovery of any nebulous “debt”. Therefore, we consider the framing of the question of law must reflect this. We therefore submit that “on wages” should not be deleted from paragraph [20] of the draft decision. Having said this, we accept that the words may have been intended to be “of [and not on] wages” and suggest this is more appropriate.”

Decision of the Authority

[20] It is my decision to refer a question of law to the Employment Court for its opinion. I am satisfied that there is a question of law that has arisen during the investigation meeting. The employment relationship problem is a significant issue involving a substantial amount of money that relies upon the proper jurisdiction for certainty and closure considering the number of respondents and the costs involved.

[21] To overcome the difference between both parties on the issue of whether or not the words “*on wages*” or “*of wages*” is incorporated in the question I have decided to also incorporate the words “and or any debt”, to try and ensure the Court can assist to provide an opinion.

[22] The question for the Court is as follows:

Does the Employment Relations Authority have jurisdiction to order employees to pay their employer overpayments of wages and or debt under the Judicature Act 1908 and or section 161 and or section 162 of the Employment Relations Act?

[23] To assist the Court I attach the statement of problem, the statements in reply from the selected respondents attending the Authority's investigation meeting and the parties' written submissions.

P R Stapp
Member of the Authority