IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2012] NZERA Wellington 84
5358852

	BETWEEN	HEALTHCARE OF NEW ZEALAND LIMITED Applicant
	AND	CAPITAL & COAST DISTRICT HEALTH BOARD First Respondent
	A N D	ACCESS HOMEHEALTH LIMITED Second Respondent
	A N D	PRESBYTERIAN SUPPORT CENTRAL Third Respondent
	A N D	PUBLIC SERVICE ASSOCIATION and BERYL BARR Fourth Respondent
Member of Authority:	James Crichton	
Representatives:	Megan Richards, Counsel for the Applicant No appearance for First Respondent Rachael Brown, Counsel for Second and Third Respondents No appearance for Fourth Respondent	
Investigation Meeting:	On the papers	
Submissions Received:	22 June 2012 from Applicant 24 May 2012 from Second and Third Respondents	
Determination:	25 July 2012	

DETERMINATION OF THE AUTHORITY

Introduction

[1] This matter first came before the Authority towards the end of 2011 and an investigation meeting in October 2011 resulted in a consent determination (the consent determination) dated 14 October 2011 and a subsequent determination of the Authority dated 20 November 2011 (the November determination).

[2] The consent determination resolved the substantive issue between the parties while the November determination reserved leave for the parties to revert to the Authority for the resolution of unresolved issues.

[3] A telephone conference between the Authority and counsel was convened on 8 May 2012 as a consequence of which the Authority agreed to receive submissions from the parties wishing to be heard, on the question of what can loosely be referred to as the "Leave Liability issue".

[4] The leave liability issue arose as a consequence of the earlier determinations of the Authority, having been referred to in argument by counsel during the October 2011 investigation meeting. In the determinations that followed, the Authority opined that, if the parties wished to have a determination in relation to matters not dealt with in the consent determination (including the leave liability issue), then leave was reserved.

[5] The leave liability issue essentially relates to a decision about who is liable for the accrued annual and alternative leave of employees who have transferred employment from the applicant (Healthcare) to the second and third respondents (Access and Presbyterian Support) under Part 6A of the Employment Relations Act 2000 (the Act).

Employment relationship problem

[6] The essence of the determination now being sought from the Authority is whether the leave liability issue is within the Authority's jurisdiction, or not. Access and Presbyterian Support maintain that it is while Healthcare maintains that it is not. The only issue for decision in the present determination is whether it is within the Authority's remit or not to deal with the leave liability issue. If the Authority were to decide that the matter is within its determination to dispose of, then further submissions would be called for on the substantive argument. It follows that the only matter for determination here is the question of whether the Authority has the jurisdiction or not to rule on the issue.

[7] Following the telephone discussion between counsel and the Authority on 8 May 2012, helpful and full submissions were received from counsel for the affected parties and the matter proceeded exclusively on the basis of a consideration of those submissions.

The first limb of s.161(1)(r)

[8] Section 161 of the Act establishes the Authority's exclusive jurisdiction to determine matters concerning employment relationship problems.

[9] In particular, s.161(1) confers the general jurisdiction in the following terms:

> *The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally …*

[10] Further, subsection (r) of s.161(1) particularises one such basis in the following terms:

> *(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).*

[11] It is the meaning of the phrase *"arising from or related to the employment relationship"* from s.161(1)(r) of the Act that is pivotal to the Authority's determination on this first leg of the disjunctive provision in s.161(1)(r).

[12] It is common ground, and trite law anyway, that the Authority has no inherent jurisdiction, and is a creature of statute. It follows that the Authority's powers are limited to that which is contemplated by statute. Further, it is common ground that the portions of the Act which the Authority has quoted above are the relevant portions of the statute.

[13] However, while Access and Presbyterian Support simply invite the Authority to apply the law following the decision of the Employment Court in *Waikato Rugby Union (Inc) v. New Zealand Rugby Football Union (Inc)* [2002] 1 ERNZ 752 and decisions which follow that judgment, Healthcare seeks first to make a preliminary distinction. Healthcare's argument runs that the decision in the instant case cannot be within the Authority's jurisdiction because it does not fall within any of the categories identified in s.161(1) of the Act. This is because, so the argument goes, the leave liability issue does not relate to an employment relationship problem and thus cannot

arise from or relate to **the** employment relationship as required by subpara.(r) of the Act, and in any event is not related to the interpretation of the Act as required by the alternative set out in subpara.(r) of the Act.

[14] To assist its argument, Healthcare first refers to the definition of an employment relationship problem which is referred to as a plural in s.161(1). Employment relationship problem is, of course, defined in s.5 of the Act which definition *"includes a personal grievance, a dispute, and any other problem related to or arising out of an employment relationship …"*. On the face of it then, a plain reading of that definition is that it is not exhaustive because the operative word in the definition is the word *"includes"*. It follows that types of employment relationship problems other than the personal grievance and disputes that are particular mentioned may be contemplated. That view of matters is further supported by the phrase in the definition immediately following words *"a dispute"* which are *"and any other problem related to or arising out of an employment relationship …"*. The Authority is satisfied then, in terms of s.5, the Parliament contemplated a broad definition of what constituted an employment relationship problem.

[15] However, Healthcare relies on the provisions of s.4(2) of the Act to narrow the focus. That subsection, according to Healthcare, lists *"an exhaustive list of employment relationships, none of which includes the 'relationship' between Healthcare on the one hand and Access and/or Presbyterian Support on the other"*.

[16] Because it is said that the leave liability issue is neither a personal grievance nor a dispute (plainly true), nor is it *"any other problem related to or arising out of an employment relationship"*, it cannot constitute an employment relationship problem and thus the Authority has no jurisdiction to decide the question.

[17] It follows from the foregoing argument that, in order for Healthcare to succeed, the Authority must be satisfied that the employment relationship from which the employment relationship problem springs is one of the employment relationships listed in s.4(2) of the Act. In particular, Healthcare submits that the leave liability issue is a purely commercial matter *"and does not relate to the employment relationship or to any employment agreement"*.

[18] In considering the proper interpretation of s.161(1)(r) of the Act, the Authority is referred to two distinct tests. The first is the *"but for"* test promulgated by the

Employment Court in its decision in *Waikato Rugby Union* (supra). In that decision, Her Honour Judge Shaw held, at para.[52] *"it is helpful to ask whether the action would have arisen if there was no employment relationship"*. This is the *"but for"* test.

[19] Access and Presbyterian Support say that the leave liability issue would not have arisen *"but for"* the employment relationship the affected employees previously had with Healthcare and now have with Access and Presbyterian Support.

[20] But Healthcare says that is drawing a long bow and that the leave liability issue is, in truth nothing more than an argument between providers of health services.

[21] Notwithstanding that, as a matter of fact, there is no commercial relationship between Healthcare on the one hand and Access and Presbyterian Support on the other. Their relationship, if it can be called that, is derived from the fact that each competed for a commercial contract to provide services to the Capital & Coast District Health Board (the Board). The tender process which the Board ran resulted in Healthcare losing a tender to Access and Presbyterian Support acting in concert. The original proceedings filed in the Authority were on the footing that Healthcare sought an injunction to stop the termination of its contract with the Board and was unsuccessful, the Authority taking the view that the relief sought in the original matter did not relate to an employment agreement and thus was *ultra vires* the Authority's remit.

[22] It follows, according to Access and Presbyterian Support, that as this instant matter plainly does not involve any commercial relationship between the parties but does involve employment agreements, it must be available to the Authority to determine the issue on its merits.

[23] Whereas Healthcare seeks to encourage the Authority to follow the judgment of Panckhurst J in the High Court in *Pain Management Systems (NZ) Ltd v. McCallum* (unreported, High Court, Christchurch, CP72/01), Access and Presbyterian Support refer to the High Court approach as providing a *"narrow interpretation of the phrase 'arising from and relating to the employment relationship'"* and suggest that as the High Court is not binding on the Authority, it ought to prefer the line of authority generated from the decision in the *Waikato Rugby Union* case.

[24] Notwithstanding that submission, Justice Panckhurst's reasoning is attractive and must be a factor that the Authority ought properly to consider, especially when Panckhurst J's reasoning was explicitly approved by the Full Bench of the High Court in *BDM Grange Ltd v. Parker* [2006] 1 ERNZ 353.

[25] In *Pain Management Systems*, Justice Panckhurst opined at para.[22]:

> *To my mind the core concept which is determinative of the exclusive jurisdiction of the Authority is whether the determination which is required is indeed about an employment relationship problem. In the words of the definition of that concept is the underlying problem one relating to, or arising out of, an employment relationship. I think it is important to distinguish between a claim which may have its origins in an employment relationship on one hand, and a claim the essence of which is related to or arises from the employment relationship of the parties on the other. Is the issue in the particular claim an employment relationship one, or is such a matter of the claim some right or interest which is not directly employment related at all?*

[26] That formulation was developed somewhat in *BDM Grange* where the Full Bench of the High Court said at para.[66] that the expression *"relating to"* in the statutory definition of *"employment relationship problem"*, *"must be read in a limited way to mean any cause of action, the essential character of which is to be found entirely within the employment relationship itself"*.

[27] Applying that formulation to the instant matter, it is plain that the dispute between Healthcare on the one hand and Access and Presbyterian Support on the other is not a cause of action the essential character of which is to be found entirely within the employment relationship itself. Indeed, while it might have had its origins in an employment relationship (as Justice Panckhurst suggests in one of his disjunctive examples), it cannot be said that *"the essential character"* of the dispute is found entirely within the employment relationship itself.

[28] Indeed, it would be more accurate to say that the dispute between these parties had its genesis in an employment relationship but now concerns itself exclusively with a commercial dispute between significant corporate entities about the appropriate treatment of the funding for the leave entitlements of employees who have transferred from the employment of one entity (Healthcare) to the employment of others (Access and Presbyterian Support). In particular, significant sums of money are involved and Access and Presbyterian Support maintain that, as part of its original provision of services, Healthcare was funded for the leave costs of the subject employees, and has

improperly retained those funds which ought to have been transferred, it is said, with the employees.

[29] But the transfer of the employees was not a transfer pursuant to an employment agreement but rather pursuant to statute because the transfer was effected as a consequence of Part 6A of the Act so the involvement of an employment relationship in the essence of the dispute between these parties is arguably even more remote.

[30] Indeed, it might be truthfully said that there is not only no employment relationship between the parties in the present dispute but also no other relationship either. Healthcare was the provider of certain services to the Board. Those services are now provided by Access and Presbyterian Support. The only relationship that these parties now have is as significantly resourced corporate litigants who seek a forum in which they can deal with a dispute which, certainly when it began, had employment connotations.

[31] But even if the Authority were to ignore the reasoning of the High Court completely and relied exclusively on the so-called *"but for"* test enunciated by the Employment Court in *Waikato Rugby Union*, the Authority's considered view is that its decision on the point would be the same. It is true that the dispute between the parties emanates from an employment relationship initially between one of them and a group of employees, which employees are now employed by the other parties in this dispute. So, in a very narrow sense, it might be that one could say that this action would not have arisen had there been no employment relationship. But the employment relationship is not really at the heart of this dispute. This is a commercial dispute involving a very large amount of money which is claimed by two of the present parties (Access and Presbyterian Support) against Healthcare. Were it not for the fact that the money claimed relates to a contingent entitlement which the respondents claim from the applicant, that entitlement relating to one of the normal instances of the employment relationship, there would be no suggestion that the Authority was the appropriate forum in which to litigate the parties' dispute. The essence of the claim is that Access and Presbyterian Support say that Healthcare has improperly retained funds to which they (the respondents) are entitled. The respondents say that those funds are payments which Healthcare has received over time from the Board in respect of the funding of leave entitlements for employees.

[32] Looking at the matter exclusively as an issue of statutory interpretation, the Authority is persuaded that the appropriate place to start is s.5 of the Act styled *Interpretation*. That section contains two critical definitions. First, it defines an employment relationship as meaning *"any of the employment relationships specified in s.4(2)"*. A proper construction of that provision would suggest that the list of alternatives in s.4(2) is an exclusive one. The Authority accepts the submission of Healthcare that none of those listed matters in s.4(2) of the Act relate to the present dispute. For the avoidance of doubt, the Authority sets out now the complete provisions in s.4(2) of the Act:

> *The employment relationships are those between –*
>
> *(a) An employer and an employee employed by the employer:*
>
> *(b) A union and an employer:*
>
> *(c) A union and a member of the union:*
>
> *(d) A union and another union that are parties bargaining for the same collective agreement:*
>
> *(e) A union and another union that are parties to the same collective agreement:*
>
> *(f) A union and a member of another union where both unions are bargaining for the same collective agreement:*
>
> *(g) A union and a member of another union where both unions are parties to the same collective agreement:*
>
> *(h) An employer and another employer where both employers are bargaining for the same collective agreement.*

[33] The next definition contained in s.5 is the definition of an employment relationship problem. It is in the following terms:

> ***Employment relationship problem** includes a personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship, but does not include any problem with the fixing of new terms and conditions of employment.*

[34] Unlike the definition of *"employment relationship"*, the definition of *"employment relationship problem"* on a normal construction of the words would not appear to be an exclusive or complete list of the kinds of problems constituted within an employment relationship problem. Amongst other things, the statute uses the word *"includes"* as the very first word in the definition and also has the very general phrase *"and any other problem relating to or arising out of the employment relationship"*.

Those two expressions just referred to, must, in the Authority's view, be seen as creating a definition of wide scope.

[35] In principle then, it might be argued that an *"employment relationship problem"* is wide enough to encapsulate the sort of application made by Access and Presbyterian Support. However, the fallacy in that contention would appear to be that it rather overlooks the much more narrow (and arguably complete) definition of *"employment relationship"* referred to earlier in this determination and contained within the statute. On general principles, an employment relationship problem must be a problem to do with an employment relationship and if, as is evident, the definition of *"employment relationship"* is clear and delineated by the statute, then an employment relationship problem can only be a problem relating to one of the classes referred to in s.4(2) of the Act.

[36] That being the position, the Authority accepts the submission of Healthcare that the relationship between itself and Access and Presbyterian Support is not a relationship that falls within the terms of s.4(2) of the Act. It follows then that, on that footing, the Authority has no power under s.161 of the Act to decide the question.

The second limb of s.161(1)(r)

[37] In the previous section of this determination, the Authority dealt with the first limb of the test in s.161(1)(r) of the Act which was, of course, concerned with actions not otherwise specified in the statute *"arising from or related to the employment relationship"*. This section of the determination concerns the second limb of the subsection, namely *"any other action … related to the interpretation of this Act (other than an action founded on tort):"*.

[38] Access and Presbyterian Support rely on their submission that the leave liability issue emerges directly from the interpretation of a part of s.69J. This section broadly provides for the situation where an employee affected by a Part 6A proposal has their employment treated as continuous when they move from one employer to another.

[39] The particular sub-paragraphs that Access and Presbyterian Support rely upon are ss.69J(2)(a)(i) and (ii) and (iii).

[40] For the avoidance of doubt, the Authority sets out below the relevant portions of the section:

> *69J Employment of employee who elects to transfer to new employer treated as continuous*
>
> *(1) The employment of an employee who elects to transfer to a new employer is to be treated as continuous, including for the purpose of service-related entitlements whether legislative or otherwise.*
>
> *(2) To avoid doubt, and without limiting subsection (1), -*
>
> *(a) In relation to an employee's entitlement under the Holidays Act 2003, -*
>
> *(i) The period of employment of an employee with the employer that ends with the transfer must be treated as a period of employment with the new employer for the purpose of determining the employee's entitlement to annual holidays, sick leave, and bereavement leave; and*
>
> *(ii) The employer must not pay the employee for annual holidays not taken before the date of transfer; and*
>
> *(iii) The new employer must recognise the employee's entitlement to*
>
> *(A) Any sick leave including any sick leave carried over under s.66 of that Act, not taken before the date of transfer; and*
>
> *(B) Any annual holidays not taken before the date of transfer; and*
>
> *(C) Any alternative holidays not taken or exchanged for payment under s.61 of that Act before the date of transfer:*

[41] Access and Presbyterian Support note that the section just recited requires them to recognise the various leave entitlements of transferring workers, but *"does not expressly address who is liable for these accrued entitlements"*.

[42] Access and Presbyterian Support maintain that it is this very aspect that they seek the Authority's determination on and while acknowledging that the Act does not expressly address the issue of who pays, suggest that by the Authority agreeing with their interpretation, the Authority is effectively doing no more than issuing an interpretation of the relevant statutory provisions.

[43] But in the Authority's view, Access and Presbyterian Support are not asking for an interpretation of s.69J at all. Indeed, the provisions contained in s.69J are plain on their face and there is no interpretation needed. What the provision says is that Access and Presbyterian Support, as the successors in title as employer of the subject employees, are obligated to recognise the leave entitlements of those employees and to be liable for them.

[44] In fact, properly construed, the Authority considers that what Access and Presbyterian Support are asking the Authority to do is to write into the statute a provision in respect of who pays. There is, simply put, no issue of interpretation at all in the present case. The words in the statute that Access and Presbyterian Support rely upon are clear on their face and what the respondents are asking of the Authority is not interpretation at all. It follows that in the Authority's judgment, this leg of the disjunctive provision in s.161(1)(r) of the Act must also result in a finding for Healthcare, Access and Presbyterian Support having failed to satisfy the Authority that the Authority has the power to reach the conclusion that the respondent parties seek.

Determination

[45] The Authority is not persuaded that it has the power to grant the application of Access and Presbyterian Support under either part of s.161(1)(r) of the Act. The Authority reaches this conclusion because it is not persuaded that it has the jurisdiction under the statute *"arising from or related to the employment relationship"* on the one hand or *"... related to the interpretation of this Act ..."* on the other..

[46] That being the Authority's conclusion, the application filed by Access and Presbyterian Support fails in its entirety.

Costs

[47] Costs are reserved.

James Crichton
Member of the Employment Relations Authority