IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2013] NZERA Wellington 82
5419717

	BETWEEN	ELBOW GREASE CLEAN SERVICES LIMITED Applicant
	AND	WESTFERRY PROPERTY SERVICES LIMITED Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Delio Fagundes for the Applicant Dominic Drumm for the Respondent
Investigation Meeting:	On the papers
Submissions Received:	28 June 2013 for the Applicant
Determination:	12 July 2013

DETERMINATION OF THE AUTHORITY

Problem

[1] Elbow Grease Clean Services Limited ("EGC") asks the Authority to resolve its problem with Westferry Property Services (Wgtn) Limited ("Westferry"). The problem arose when Westferry took over a retirement village cleaning contract from EGC.

[2] Delio Fagundes, a Director of EGC, says Westferry is demanding that EGC pay staff transfer entitlements in respect of the one employee who transferred to Westferry under the provisions of Part 6A of the Employment Relations Act 2000 ("the Act"). EGC says the obligation falls on Westferry, not on EGC. It seeks a penalty against Westferry.

[3] Dominic Drumm, who is the sole Director of Westferry, says that EGC is in default of its obligations under Part 6A of the Act. He says it should have transferred to Westferry, as the incoming employer, holiday pay and sick leave in respect of the transferring employee. Mr Drumm took the matter to the Disputes Tribunal in March 2013 and obtained a ruling that EGC should pay $754.37, being the monetary value of the employee's accrued leave entitlements.

[4] At a telephone conference on 14 June 2013, I advised the parties of my view that the Authority did not have jurisdiction in this matter as there was no employment relationship between EGC and Westferry. I informed them that I was therefore considering dismissing EGC's application and provided them the opportunity to make submissions before I made a decision.

[5] Mr Fagundes made submissions on behalf of EGC, which I have considered. Mr Drumm declined the opportunity to make written submissions, having made his view clear in the course of the telephone conference that this matter should not progress.

Background

[6] EGC lost the cleaning contract it had with a retirement village based in Paraparaumu. Westferry took over the contract on 1 November 2012, along with one transferring employee from EGC. Westferry asked EGC for $754.37, the value of the leave entitlement the transferring employee brought over to the new employer in accordance with the provisions of s. 69J of the Act. This represented leave the employee had accrued while employed by EGC.

[7] EGC refused to pay the entitlement and Westferry took the matter to the Disputes Tribunal relying on s. 69J of the Act and the High Court case of *LSG Sky Chefs NZ Ltd v. Pacific Flight Catering Ltd*.[1] The Disputes Tribunal ruled in favour of Westferry and ordered EGC to pay the sum of $754.37 to Westferry, on or before 27 April 2013. EGC has not done so.

Applicant's submissions

[8] EGC relies on two arguments in its submission that the Authority should not dismiss its claim. The first entails its interpretation of s.69J of the Act. It submits

[1] [2012] NZHC 2810, 26 October 2012.

that s. 69J means the outgoing contractor must not pay the employee its entitlements and the new contractor must recognise them. EGC also says that Part 6A and s. 69J provide for rulings on company-to-company relations and it would be fundamentally incorrect to dismiss EGC's application on the basis that there was no employment relationship between the parties.

[9] EGC's second submission is that at all times it acted on advice from what it refers to as *"Employment Relations"*. I understand from Mr Fagundes that he sought advice on two occasions from the Ministry of Business Innovation and Employment's Employment Relations 0800 number. He has also referred to being "*advised*" by an Authority support officer.

[10] Mr Fagundes referred in his submissions to bullying behaviour from Westferry towards EGC and its staff. In his view the Authority should investigate this matter.

Discussion

[11] In relation to the first of EGC's submissions, Mr Fagundes is correct that s. 69J precludes an employer from paying an employee for annual holidays the employee has not taken before the date of transfer to the new employer. He is also correct that the new employer must recognise those entitlements. Westferry has obligations under s. 69J to recognise the entitlements of the employee who elected to transfer to it when it took over the cleaning contract.

[12] However s. 69J does not address the issue of the outgoing employer's liability to meet the cost of those entitlements. The liability issue has been determined on common law principles by the High Court in the *LSG Sky Chefs* case referred to above. In reliance on that judgment, Westferry was successful in its action in the Disputes Tribunal for a ruling that EGC was liable for the monetary value of the transferred employee leave entitlements.

[13] The available avenues for EGC, if it was dissatisfied with the Disputes Tribunal ruling, were to apply for a re-hearing of the matter in the Disputes Tribunal, or to appeal the decision to the District Court. It appears not to have done either, instead relying on the Authority to provide it relief.

[14] The Authority's jurisdiction derives from s. 161 of the Act which provides that it has *exclusive jurisdiction to make determinations about employment relationship*

problems generally before specifying a non-exclusive list of particular types of such problems.

[15] Employment relationships are defined in s. 4(2) of the Act as being 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.*

[16] EGC and Westferry are not bargaining for a collective agreement and therefore do not come within (h) of s. 4(2) of the Act. They are not in an employment relationship. The Authority has jurisdiction to make determinations about employment relationship problems including making determinations with regard to matters arising under Part 6A of the Act. However, that jurisdiction does not extend to making determinations over matters that do not involve employment relationships.

[17] In relation to the second strand of EGC's submissions, that it acted on advice from *Employment Relations*, I have no evidence of any advice given to Mr Fagundes regarding s. 69J of the Act, other than his assertions regarding 2 telephone conversations he had with a named individual. I decline to accord any weight to that evidence.

[18] With regard to Mr Fagundes' comments concerning being "*advised*" by a named support officer within the Authority, I note that the Authority's website provides information about the role of support officers as follows:

> ***Support Officers***
>
> *The role of the support officer is to:*

- *process your application*
- *provide guidance on how to lodge an application with the Authority*
- *explain the process once the application has been lodged*
- *be a point of contact for your application.*

The support officer can not:

- *complete application forms on your behalf*
- *provide legal advice*
- *tell you if your case is likely to be successful*
- *explain your employment rights, responsibilities or obligations.*

[19] I am satisfied that the support officer who spoke with Mr Fagundes simply provided him with the practical details of how he could physically file a statement of problem and pay the appropriate filing fee, and did not offer substantive advice about his application.

[20] In relation to the references to "*unacceptable bullying behaviour from Westferry towards EGC and its staff*" made by Mr Fagundes in his submissions, the Authority has no jurisdiction to investigate bullying allegations made by one employer against another employer. Any allegations of bullying against EGC staff would need to have been made by the affected employees within the statutory 90 day time frame. There is no evidence that any former EGC employee had raised a personal grievance over such matters.

Conclusion

[21] The matter raised by EGC is neither an employment relationship problem nor any other matter that comes within the jurisdiction of the Authority. The application is accordingly dismissed for lack of jurisdiction.

[22] It follows that there is no basis for the penalty sought by EGC.

Costs

[23] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority