

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 439
3080774

BETWEEN

CREST COMMERCIAL
CLEANING LIMITED
Applicant

AND

TOTAL PROPERTY SERVICES
(CANTERBURY) LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Charles McGuinness, counsel for the Applicant
Paul McBride and Saadi Radcliffe, counsel for the
Respondent

Telephone Conference: 17 August 2020

Submissions Received: 17 May and 24 July 2020 from the Applicant
17 April 2020 from the Respondent

Date of Determination: 22 October 2020

PRELIMINARY DETERMINATION (NO.2) OF THE AUTHORITY

- A The Authority has jurisdiction to consider the application by Crest Commercial Cleaning Limited for a penalty if a breach of s 69OEA of the Employment Relations Act 2000 is established.**
- B Crest Commercial Cleaning Limited has standing to make an application for a penalty under s 69OEA of the Employment Relations Act 2000.**
- C Costs are reserved until after the substantive matter has been determined.**
- D An Authority officer will be in contact with counsel about progressing the matter.**

Employment Relationship Problem

[1] A preliminary issue has arisen in this matter about the jurisdiction of the Authority to consider and the standing of Crest Commercial Cleaning Limited (Crest Commercial) to bring an application for penalties under s 69OEA of the Employment Relations Act 2000 (the Act).

[2] It arises in the context of a claim by Crest Commercial against Total Property Services (Canterbury) Limited (Total Property) that Total Property breached its obligations under s 69OEA of the the Act to provide individualised employee information. Employees from Total Property had opted to transfer to Crest Commercial when it successfully tendered for a cleaning contract at a High School.

[3] Crest Cleaning seek findings of a breach, a compliance order and penalties.

[4] This determination resolves the preliminary issue about the penalty application.

The respondent's submissions

[5] Mr McBride and Mr Radcliffe submit that the Employment Relations Authority is a creature of statute and may exercise only powers and functions prescribed under the Act. The Authority's jurisdiction is expressed under s 161 of the Act and a party must normally be in an employment relationship in order to bring a claim under the Act except as expressly provided.

[6] Section 140A of the Act provides compliance may be ordered where there is non-observance or compliance with the requirements in Subpart 2 of Part 6 of the Act including s 69OEA. Mr McBride and Mr Radcliffe submit that the persons who can make such an application for compliance are described in s 140A(4) and include the new employer under s 60OEA to whom individualised employee information must be provided.

[7] It is submitted that to bring it within the Authority's jurisdiction s 140(8) expressly provides that for the purpose of s 161(1) any non-observance of or non-compliance with s 69OEA is to be treated as if an employment relationship problem but that jurisdiction is

confined to matters of compliance only. It is submitted that the absence of reference to s 69OEA in s 140A or s 161(1) underscores that point further.

[8] Mr McBride in response to Mr McGuinness' written submissions during the telephone conference with the Authority submits there should be a restrictive approach to who can bring an action to recover a penalty under s 135(1)(b) of the Act. He submitted that the definition of "any person in relation to whom the breach is alleged to have taken place" did not extend to one commercial entity bringing a claim against another.

The applicant's submissions

[9] Mr McGuinness accepts that the Authority is a creature of statute and has no inherent jurisdiction. However he submits that the question of jurisdiction regarding the penalty action does not turn on an interpretation of s 161(1) because the Authority has jurisdiction concerning penalties under s 133 of the Act to consider an application for a penalty for a breach of s 69OEA of the Act.

[10] Mr McGuinness also submits that it would not give effect to the purpose of the scheme enacted under the Employment Relations Amendment Act 2014 and Parliament's intention to protect employers in the position of Crest Commercial as well as transferring employees if the Authority did not have jurisdiction to impose a penalty under s 69OEA.

[11] He submits that s 140A(8) and s 161(1) expressly establish that the Authority has jurisdiction to examine and determine a breach of s 69OEA and this includes making compliance orders under s 140A and ordering penalties under s 69OEA(6). He refers to s 69OEA (2) and its obligations placed on the "employee's employer" and the "new employer."

[12] He submits that the Crest Commercial has standing to bring a penalty for a breach by virtue of s 135(1)(b) of the Act and that Crest Commercial is "a person to whom the breach is alleged to have taken place."

The Issues

[13] The Authority needs to resolve the following issues:

- (a) What does s 69OEA provide?
- (b) Is a compliance order under s 140A the only remedy available for the new employer if there is a breach established of s 69OEA of the Act read with s 161 of the Act?
- (c) Should s 135(1)(b) of the Act be read restrictively?

What does s 69OEA provide?

[14] Section 69OEA is within Subpart 2 of Part 6A of the Act. Subpart 2 of Part 6A is concerned with disclosure of information relating to the transfer of employees.

[15] The object of subpart 2 is set out in s 69OA as follows:

The object of this subpart is to make provision for the disclosure of employee transfer costs information and individualised employee information relating to employees who have elected to transfer to a new employer under section 69I.

[16] Section 69OEA was inserted as a new section by the Employment Relations Amendment Act 2014 and provides:

69OEA Disclosure of individualised employee information

- (1) This section applies if an employee elects to transfer under section 69I to a new employer.
- (2) The employee's employer must provide the new employer with individualised employee information about the employee.
- (3) The employee's employer must provide the individualised employee information—
 - (a) as soon as practicable; but
 - (b) no later than—
 - (i) the date on which the restructuring takes effect; or
 - (ii) any later date agreed to by the employee's employer and the new employer.
- (4) Subsection (5) applies if—
 - (a) individualised employee information has been provided under subsection (2); and

- (b) after the provision of the information, there is a change in the matters or circumstances that the information relates to; and
 - (c) the change makes the information provided out of date.
- (5) The employee’s employer must, immediately after the change in the matters or circumstances, provide the new employer with the information details, specifying—
- (a) the information that is out of date; and
 - (b) what the up-to-date information is.
- (6) Every employer who fails to comply with subsections (2) to (5) is liable to a penalty imposed by the Authority.
- (7) To avoid doubt, the new employer may keep, use, or disclose individualised employee information only in accordance with the Privacy Act 1993.

[17] I will start with s 69OEA in light of its text.

[18] The Supreme Court in *Commerce Commission v Fonterra Co-operative Group Limited* referred to text and purpose as the “key drivers” of statutory interpretation from s 5 of the Interpretation Act 1999.¹ It was also stated in the judgment that even if the text appears plain in isolation of purpose that meaning should be cross-checked against purpose to satisfy the dual requirements of s 5.²

[19] In subs (2) there is reference to the employee’s employer and the new employer with respect to obligations to provide individualised employee information. Subsection (3) specifies when the employee information must be provided. If after provision of employee information there is a change in the matters or circumstances that the information relates to subs (4) informs the circumstances in which subs (5) applies.

[20] Subsection (6) provides that that every employer who fails to comply with subsections (2) to (5) is liable to a penalty imposed by the Authority.

[21] It is not plain from the text of s 69OEA that the applicant for a penalty under subs (6) could only be a party not referred to in the section, an employee for example. No standing is specified in the section itself as to who may bring a penalty. This can be contrasted with other sections in the Act where standing to bring a penalty is specified. For example ss. 64, 65 and

¹ *Commerce Commission v Fonterra Co-operative Group Limited* [2007] NZSC 36.

² At [22].

223C of the Act specify standing to bring a penalty. That could support that if a limitation was intended for standing to bring a penalty application under subs (6) then it would be specified.

[22] Section 69OEA has to be considered with the purpose of the amendments in 2014. These were to create obligations between the outgoing employer and the new employer for disclosure of employee information for transferring employees. The obligations provide protections for transferring employees and the new employer. It is not inconsistent with that purpose that the new employer has standing to bring a penalty application. This conclusion is strengthened by no limitation being specified as to who has standing to bring a penalty action.

Is a compliance order under s 140A the only remedy available for a new employer for a breach of s 69OEA read with s 161 of the Act?

[23] The 2014 Amendment Act also amended s 140A(8) to include non-compliance with s 69OEA in the definition of “employment relationship problem” for the purpose of s 161(1).

[24] Section 140A was inserted by the Employment Relations Amendment Act 2006 and so the enactment of the two sections, 140A and 69OEA, occurred at different times. This diminishes the strength of any argument about the formation of a “special jurisdiction” between the two sections.

[25] Section 140A provides as follows:

140A Compliance order in relation to disclosure of employee transfer costs information and individualised employee information

- (1) This section applies where—
 - (a) any person has not observed or complied with section 69OC, 69OD, 69OE, or 69OEA; or
 - (b) there are reasonable grounds to believe that a person will not observe or comply with section 69OC, 69OD, 69OE, or 69OEA.
- (2) Where this section applies, the Authority may, in addition to any other power it may exercise, by order require that person to do any specified thing or to cease any specified activity for the purpose of preventing—
 - (a) further non-observance of or non-compliance with section 69OC, 69OD, 69OE, or 69OEA; or
 - (b) non-observance of or non-compliance with section 69OC, 69OD, 69OE, or 69OEA.

- (4) An application to the Authority for an order of the kind described in subsection (2) may be made by the following persons:
- ...
- (ba) the new employer to whom individualised employee information must be provided under section 69OEA:
- (bb) the employee to whom the individualised employee information referred to in section 69OEA relates:
- ...
- (5) Where a person alleges that a person has been or would be affected by non-observance of or non-compliance with section 69OC, 69OD, 69OE, or 69OEA, that person may take action against another person by applying to the Authority for an order of the kind described in subsection (2).
- (6) The power given to the Authority by subsection (2) may be exercised by the Authority—
- (a) of its own motion; or
- (b) on the application of a person described in subsection (4).
- (7) Sections 138(2) to (4), (5), and (6), 140(6), and 161 apply, with all necessary modifications, to a compliance order under subsection (2) as if the compliance order were a compliance order made under section 137(2).
- (8) For the purposes of section 161(1), any non-observance of or non-compliance with or proposed non-observance of or non-compliance with section 69OC, 69OD, 69OE, or 69OEA or failure to comply with a compliance order under subsection (2) is to be treated as if it were an employment relationship problem.

[26] Section 140A provides for compliance orders for those types of relationships in Subpart 2 of Part 6A. Subsection (2) of s 140A contains the power for the Authority to order compliance. It refers to this being “in addition to any other power it may exercise”. This wording is identical to that in s 137(2) that provides power to the Authority to order compliance including for breaches of various provisions of the Act under s 137 (1)(a) (ii) to (iv). Many of those provisions for which compliance can be ordered under s 137 can also be enforced through penalty. I refer to ss. 62A, 63A, 63B, 64 and 65 of the Act as examples.

[27] The wording in subs (4) provides that an application for an order for compliance is one that may be made by persons who are listed. It includes the new employer to whom individualised employee information must be provided under s 69OEA and also the employee to whom the information relates. Read with subs (5) it could be seen that the list in subs (4) is non-exhaustive and that subs (5) gives standing to persons other than those listed in subs (4).

[28] The plain words in subs (8) support Mr McGuinness' submission. There is an express connection between s 161(1) that the "Authority has exclusive jurisdiction to make determinations about employment relationship problem generally," and the jurisdiction to examine and determine breaches of s 69OEA. Section 140A(8) of the Act read within the section as a whole does not support that the jurisdiction of the Authority under s 69OEA is confined to matters of compliance only.

[29] Whilst the ability to seek a penalty for a breach of s 69OEA is not within s 140A there is express provision in s 69OEA(6) for a penalty in the event of breach. The Authority has, under s 161(m)(ii), jurisdiction for actions for the recovery of penalties under the Act for a breach of any provision of the Act that provides for the penalty to be recovered in the Authority. Section 69OEA(6) is such a section.

[30] Under 133(1)(b) the Authority has full and exclusive jurisdiction to deal with all actions for the recovery of penalties under the Act "for a breach of any provision of this Act for which a penalty is provided in the particular provision."

Should s 135(1)(b) of the Act be read restrictively?

[31] Section 135(1)(b) of the Act is relevant in terms of standing to bring an application for a breach of the Act. It provides:

135 Recovery of penalties

- (1) Any action for the recovery of a penalty may be brought,—
- (b) in the case of a breach of this Act, at the suit of any person in relation to whom the breach is alleged to have taken place; or

[32] Section 135 has identical wording to s 53 of the Employment Contracts Act 1991. The wording widened the categories of person with standing to bring a penalty for a breach of the Act from the wording in the Labour Relations Act 1987.

[33] From time to time there have been cases in the employment area that have touched on persons who may bring a claim. I have had regard to the cases however none are on all fours as to provide real assistance in this matter.

[34] I find that Crest Commercial is a person in relation to whom the breach is alleged to have taken place. That is consistent with the obligations in s 69OEA(2) for the outgoing employer to provide the new employer with individualised employee information. It is further consistent with the new employer being listed in s 140A(4)(ba) as a person who may seek an order for compliance.

Conclusion on standing and jurisdiction

[35] In conclusion for all of the above reasons I find that the Authority has jurisdiction to consider the application for a penalty and Crest Commercial has standing to bring such an application for a penalty under s 69OEA of the Act.

Costs

[36] I reserve the issue of costs until after the substantive determination.

Next Steps

[37] An Authority officer will contact counsel about progression of the matter in due course.

Helen Doyle
Member of the Employment Relations Authority