

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2021] NZERA 26
3109832 & 3109834

BETWEEN	TOMISLAV KALIC Applicant in 3109832
AND	MANUKA HEALTH NEW ZEALAND LIMITED Respondent
BETWEEN	BOJAN KOSTIC Applicant in 3109834
AND	MANUKA HEALTH NEW ZEALAND LIMITED Respondent

Member of Authority: Marija Urlich

Representatives: Allan Halse, advocate for the Applicants
Geoff Bevan, counsel for the Respondent

Submissions received: 19 November 2020, from the Respondent

Date: 22 January 2021

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

[1] This determination deals with a preliminary issue raised by Manuka Health New Zealand Limited (MHNZL) concerning authorities to act (ATAs) provided by Mr Kalic and Mr Kostic.

[2] Mr Kalic's ATA, dated 22 March 2019, includes the following clause:

I understand CultureSafe NZ will make the final decision on the most appropriate action to take in respect of this matter.

[3] Mr Kostic's ATA, dated 21 September 2019, includes the following clause:

I understand CultureSafe NZ will in consultation with me decide on the most appropriate action to take in respect of this matter.

[4] Allan Halse, the sole director of CultureSafe (NZ) Limited, is acting as the advocate for Mr Kostic and Mr Kalic.

[5] MHNZL says these sentences in the ATAs give the representative (CultureSafe NZ) the power to make decisions for the clients in respect of the appropriate action to take in respect of their claim and this is not what is contemplated by or permitted by s 236 of the Employment Relations Act 2000. MNZHL says this issue could be resolved by CultureSafe NZ providing an updated authority which makes clear the client makes the final decision about the claim. The Authority understands from Mr Halse that Mr Kostic and Mr Kalic's view is the ATAs are not relevant to the matters before the Authority and are a contractual matter between them and their representative.

The Authority's investigation

[6] MHNZL raised its concerns about the ATAs in writing with the Authority and Mr Halse prior to a scheduled case management conference (CMC) held on 15 October 2020. The issue was discussed during the CMC and recorded in a minute issued on 16 October along with other matters concerning the timetabling of the substantive application. With regard to progressing the ATA issue the minute stated:

[16] A person purporting to represent a party must establish their authority to do so.¹ MNZHL says Mr Kostic and Mr Kalic's ATAs do not establish CultureSafe NZ's authority to represent them to the necessary statutory standard. Mr Halse says this is not a relevant issue for the Authority. The following issues are raised for consideration:

- (i) do the ATAs meet that statutory requirements of s 236?
- (ii) if the ATAs do not meet the statutory standard what orders can the Authority make?

[17] The ATA issue could be remedied by Mr Kalic and Mr Kostic refiling ATAs with the sentences quoted ... above ruled out and the amendment initialled and dated by the parties to the respective ATAs. Such a practical approach would be consistent with the Authority's role to resolve employment relationship problems without regard to technicalities.² It would allow the matter to progress focussed on the resolution of Mr Kalic and Mr Kostic's employment relationship problem.

¹ Employment Relations Act 2000, s 236(3).

² Employment Relations Act 2000, s 157(1).

[18] If such an approach is not possible then, the Authority proposes to deal with the issues outlined in [16] above as a preliminary issue to be determined on the papers:

- (i) MNZHL files and serves submissions and any supporting affidavit evidence within 10 working days of the process being confirmed;
- (ii) Mr Kostic and Mr Kalic file and serve submissions and any supporting affidavit evidence within a further 10 working days;
- (iii) MNZHL files and serves any reply submissions (and evidence) within a further 5 working days; and
- (iv) The Authority will determine the issue on the papers.

[7] Neither party commented on the proposal set out in the 16 October minute at paragraph [18].

[8] In a minute dated 3 November 2020 a timetable for filing and exchange of submissions on the ATA issue was proposed along with a timeframe for comment on the proposal. No comment was received on the timetable. MHNZL filed and served submissions in accordance with it. No submissions have been received from Mr Kostic and Mr Kalic in accordance with the timetable. They have not sought to vary the timetable or sought leave to file further submissions or information.

Issues

[9] A person purporting to represent a party must establish their authority to do so.³ The ATAs raise the following issues for consideration and determination:

- (i) do the ATAs meet that statutory requirements of s 236?
- (ii) if the ATAs do not meet the statutory requirements what orders can the Authority make?

Relevant Law

[10] Section 236 of the Employment Relations Act 2000 (the Act) provides:

236 Representation

(1) Where any Act to which this section applies confers on any employee the right to do anything or take any action—

- (a) in respect of an employer; or

³ Employment Relations Act 2000, s 236(3).

(b) in the Authority or the court,—
that employee may choose any other person to represent the employee for the purpose.

(2) Where any Act to which this section applies confers on an employer the right to do anything or take any action—

(a) in respect of an employee; or

(b) in the Authority or the court,—

that employer may choose any other person to represent that employer for the purpose.

(3) Any person purporting to represent any employee or employer must establish that person's authority for that representation.

[11] On a plain reading it is a mandatory requirement of section 236 that a representative establish their authority to do so – “must establish”.

[12] Clause 2 of the second schedule of the Act provides:

2 Representation of parties

(1) Any party or person involved in a matter before the Authority, or called upon to appear before the Authority, may—

(a) appear personally; or

(b) be represented—

(i) by an officer or member of a union; or

(ii) by an agent; or

(iii) by a barrister or solicitor.

(2) The Authority may order any person to appear before it or be represented before it.

[13] Clause 1 of Schedule 2 of the Act empowers the Authority to deal with any question connected with the construction of this Act that arises in the course of any investigation. As Clause 2 allows a person to be represented before the Authority, it follows the Authority has jurisdiction to determine if such representation meets the requirements of s 236.

[14] The Employment Court judgment in *Bay of Plenty District Health Board v Culturesafe New Zealand Limited* is authority for the proposition that a representative in proceedings before the Authority⁴:

⁴ *Bay of Plenty District Health Board v Culturesafe New Zealand Limited* [2020] NZEmpC 149 at [69] – [78].

- (i) must establish their authorisation to represent under section 236;
- (ii) has a role not limited to the contractual arrangement between them and their client.

[15] The Authority has been referred to other judgments of the Employment Court which provide further guidance for the correct approach to this matter:

- (i) the role of the representative is necessarily limited so as not to substitute the representative for the person represented because the employment relationship is personal:⁵ and
- (ii) a person cannot become a party to proceedings against their will or without their express consent.⁶

The parties' positions

Mr Kostic and Mr Kalic

[16] During the CMC on 15 October 2020 Mr Halse said the ATA issue was not relevant to the matter before the Authority and was a matter between CultureSafe NZ and its clients. He referred the Authority to the judgment of the Employment Court in *Dollar King Limited v Hyowon Jun*.⁷ In *Dollar King* the Court emphasised the Authority's role as a statutory body charged with resolving employment relationship problems without regard to technicalities. This is what the Authority understands Mr Halse to be referring the Authority to in *Dollar King*.

MNZHL

[17] Mr Bevan submits a representative cannot be allowed to make decisions about an employee's employment relationship problem:

- (i) the meaning of 'represent' and 'represented' is inherently limited and does not substitute the representative for, or take the place of the parties being represented;

⁵ *New Zealand Baking Trades etc Union (Inc) v Foodtown Supermarkets Ltd* [1992] 3 ERNZ 305.

⁶ *Adams v Alliance Textiles (New Zealand) Limited* [1992] 3 ERNZ 822.

⁷ [2020] NZEmpC 91.

- (ii) the employment relationship is personal between the employee and employer and this is emphasised and supported by provisions of the Act for example, the Act acknowledges and seeks to address the inherent inequality in bargaining power in employment relationships and parties to employment relationships must deal with each other in good faith;
- (iii) given this statutory context a representative who takes or is granted the power to make ultimate decisions about what is to be done or not done in respect of a matter is not a representative for the purposes of s 236 or clause 2, schedule 2 of the Act; and
- (iv) the purpose of the representation provisions is to allow the employee or employer to act through a representative – the actions are those of the party albeit undertaken by the representative.

Discussion

[18] On a plain reading of the ATAs CultureSafe NZ can make decisions or take action with regard to Mr Kalic and Mr Kostic's employment relationship problems which could be made without their consent and would be binding on them. Such decisions could include the filing and amendment of claims, what evidence and information is put before the Authority in support of their claims, amendments to claims, terms of settlement or withdrawal of claims. These are not technical or minor matters for any party generally or, when their circumstances are considered, for Mr Kostic and Mr Kalic particularly. They are visa dependent workers for whom English is a second language and one of whom is currently off shore. Their personal circumstances put them in a category of employee whom the Employment Court has characterised as inherently vulnerable.

[19] It should be understood that the Authority makes no finding that CultureSafe NZ has an intention to make any decision or take any action which is not the intended or consented action of Mr Kalic or Mr Kostic. The issue under consideration is whether the ATAs as drafted meet the requirements of s 236. They do not. They go beyond the ambit of representation and appear to be an assignment of rights from Mr Kalic and Mr Kostic to CultureSafe NZ. The Authority does not have jurisdiction to deal with such an assignment between them and the company however it does have

jurisdiction to determine whether the ATAs as drafted meet the requirements of s 236 of the Act.

[20] I have considered whether it is possible to determine the sentences at issue have no effect and do not therefore affect the validity of the ATAs. The difficulty is the Authority does not have the power to “blue pencil” the parties’ representation agreement. The ATAs are drafted for the purpose of establishing CultureSafe NZ as representatives in this jurisdiction. As currently drafted the Authority cannot be satisfied intentions expressed or actions taken by the representative in these proceedings are in fact the authorised intentions or consented actions of Mr Kalic and Mr Kostic.

Outcome

[21] For the above reasons the authority to act of Tomislav Kalic dated 22 March 2019 and the authority to act of Bojan Kostic dated 21 September 2019 do not meet the requirements of s 236 of the Employment Relations Act 2000. The effect of this is that CultureSafe NZ has not established it is authorised to represent them as required by s 236 of the Employment Relations Act 2000.

Costs

[22] Costs are reserved.

Marija Urlich
Member of the Employment Relations Authority