NOTE: This determination contains an order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

I TE RATONGA AHUMANA TAIMAHI TĀMAKI MAKAURAU ROHE

[2023] NZERA 30
3184080 and 3184079

BETWEEN	A LABOUR INSPECTOR Applicant in 3184079 and 3184080
AND	BRAK BURNS LIMITED (FORMERLY BURGERED RESTAURANTS AUCKLAND LIMITED) Respondent in 3184080
AND	F & B REMUERA LIMITED Respondent in 3184079

Member of Authority:	Robin Arthur
Representatives:	Joshua Barlow, counsel for the Inspector Ray Harris, advocate for F&B Remuera Limited
Investigation:	By telephone conference on 20 January 2023
Date:	23 January 2023

SECOND DETERMINATION OF THE AUTHORITY

A. The applications for "recall" of the Authority determination of 17 January 2023 in these two matters is declined.

B. This determination and the Authority's determination of 17 January 2023 are prohibited from publication before Monday 13 February 2023, subject to any further orders that the Employment Court may make meanwhile in relation to these two determinations.

C. **Costs are reserved.**

[1] BRAK Burns Limited (BRAKBL) and F&B Remuera Limited (FBRL) applied for "recall" of the Authority determination issued on these two matters on 17 January 2023.[1] The determination ordered both companies to comply with a Labour Inspector's notice to supply pay and leave records for former employees and imposed a penalty on them for not having done enough to comply sooner.

[2] The two companies said, in effect, that the Authority went ahead too quickly making that determination because they had already asked for the Labour Inspector's case against them to be removed to the Employment Court to consider rather than the Authority. They said the Authority was wrong to act on its understanding that the fee required with such applications had not been paid because each company had paid that fee before the determination was issued.

[3] Their recall applications also said the Authority had failed to hear and determine two earlier requests from them – firstly, that the Authority should conduct separate, not joint, investigations of the Labour Inspector's claims against each company; and secondly, that the Inspector's claims should not be determined on the papers.

[4] They also sought an interim order prohibiting publication of the Authority's 17 January determination, "pending final determination of this matter".

Investigation

[5] Mr Harris, advocate for F&B Remuera Limited, and Mr Barlow, counsel for the Inspector, attended a telephone conference convened to hear from the representatives about the recall applications. Murray Osmond, advocate for BRAKBL, did not attend but provided written submissions which, among other points, adopted written submissions Mr Harris had also provided in advance. In discussion during the conference Mr Harris also provided some additional information.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues

[1] *Labour Inspector v BRAK Burns Limited & F&B Remuera Limited* [2023] NZERA 19.

necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Grounds for recall not established

[7] Generally a determination, once issued, must stand for better or worse, subject to any challenge that may be made to it by application to the Employment Court under s 179 of the Act.[2] However, where grounds to do so are established, the Authority may recall a determination to reconsider its content.[3] There are three recognised categories of such grounds: firstly, where since the investigation meeting, a relevant statute or regulation has been amended or a new judicial decision of high authority and relevance has been issued; secondly, where the parties' representatives failed to direct the Authority's attention to a relevant legislative provision or authoritative decision that materially affected the result; and, thirdly, where for some other very special reason, justice requires a determination to be recalled.[4]

[8] The first two grounds did not apply to the circumstances or reasons for seeking recall in this case. Neither did the so-called "slip rule" that may be used to recall a determination in order to correct mistakes in names or calculations. Rather, this particular application was made on the basis of the third ground of some "very special reason" of justice.

[9] The discretion to recall for such very special reasons must not be used in a way that undermines the general principle of finality:[5]

> It is available only where a substantial miscarriage of justice would result if [a] fundamental error in procedure is not corrected and where there is no alternative effective remedy reasonably available.

Failure to provide confirmation of payment of the fee

[10] The Authority determination set out the context in which the two respondent companies had sought to lodge applications for removal on 22 December 2022 – BRAKBL by email at 1.59pm and FBRL by email at 4.17pm. It was at the end of timetable directions that had run over several weeks and were set by the Authority in late November. Those directions had provided the two companies with the indulgence

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[2] Employment Relations Act 2000, s 179.
[3] *Carrothers v Jason Travel Media Limited* (ERA Auckland, AA30A/07, 21 March 2007) at [23]-[28].
[4] *Horowhenua County v Nash (No 2)* [1968] NZLR 632 at 633.
[5] *R v Smith* [2003] 3 NZLR 617 (CA), at [36].

of an additional opportunity to lodge a statement in reply and then to make written submissions to be considered in determination of the Labour Inspector's application, which (under those directions) was to be made on the papers.

[11] The Inspector's final submissions were also lodged on 22 December 2022 so, by that date, the Authority had all material necessary for going ahead to determine the matter on the papers.

[12] As counsel for the Inspector submitted in the telephone conference, neither application attached to those emails from the companies on 22 December was set out in the form and with all the information required for a removal application by r 12 of the Employment Relations Authority Regulations 2000. However the concern that the Authority promptly raised with their representatives was not the technical issue of the form but why they had not provided proof of paying the required fee. Both the regulation and the statutory form say every application *must* be accompanied by the prescribed fee.

[13] By email on the morning of 23 December an Authority Officer advised the representatives of both companies that they needed to provide "proof" of paying the filing fee of $153.33 in order for lodging of the removal applications to be accepted. An hour later they were sent a more detailed message, from me, stating that it was not clear that the parties had paid the fee and if they had, to "please immediately forward the receipt or other acknowledgement to the Authority Officer", copying that message to counsel for the Inspector. The message explained that the date they confirmed paying the fee would be taken as the date from which the Inspector would then have 14 days to lodge a statement in reply to the removal applications.

[14] By email on 9 January 2023, copied to the respondent companies' representatives, counsel for the Inspector asked the Authority Officer dealing with the file whether the fees had been paid. Responding the next morning, in an email message copied to those representatives, the Authority Officer said the respondents had not paid any fees yet and "no verification" had been provided.

[15] As explained in the Authority's 17 January determination Authority staff had checked relevant records on 17 January and confirmed no payment of those fees or any further correspondence had been received about them.

[16] Both companies say the Authority was wrong. With their recall applications they each provided a copy of a bank record showing payment of an amount of $153.33 to a bank account of the Ministry of Business, Innovation and Employment (MBIE). BRAKBL's payment to that MBIE account was dated 23 December 2023. FBRL's payment to the same account was dated 10 January 2023.

[17] FBRL's submissions on its recall application said the payment was made "by credit to the Authority's listed bank account" however, as Mr Harris accepted in answer to questions during the telephone conference, this is not correct. The bank account number on the bank record submitted by each company on 18 January is not an Authority "listed" number. I am advised by Authority staff that it is not an account to which they have electronic access. The Authority does not publicly "list" an account number for parties and representatives to use in paying required fees. Rather its website tells payers to contact the Authority offices for the bank account number. It also states that parties or representatives should "include a copy of your bank statement or a screenshot from internet banking with your application".

[18] As Mr Harris accepted during the telephone conference, there was no evidence that anyone acting on behalf of BRAKBL or FBRL had contacted the Authority offices to get the necessary bank account number or at any time before 18 January had provided any confirmation of payment of the fee, even if that was to the unrelated MBIE bank account.

[19] Mr Harris said he had not paid the FBRL fee himself. That was done by Matt Young, another person involved in the businesses of FBRL and BRAKBL, on 10 January. Mr Harris said he had been told that the payment was made to the particular MBIE account number because it "comes up as a prompt" when the letters MBI (sic) are put into the payee section of the bank accounts from which those amounts were being paid.

[20] It is also reasonably inferred from the submissions and information provided with or since the 18 January recall applications that staff involved with the business of FBRL and BRAKBL were aware of the Authority's emails of 23 December and 10 January and the need for the companies to take further steps to complete the removal applications emailed to the Authority on 22 December. This is because, as a bank record now supplied shows, a BRAKBL payment of $153.33 was made to an MBIE

account on 23 December and BRAKBL's recall application says this was "initiated by a staff member". And, as Mr Harris advised, Mr Young has made a payment on behalf of FBRL to the same MBIE account on 10 January, which was the day after the email query from the Inspector's counsel and the same day that an Authority Officer's reply email advised that no fee had been paid.

[21] In that light, and contrary to the companies' submissions, there was no "perfected" or "extant" and "properly filed application" before the Authority at the date of the 17 January determination that "should have been apparent from a proper checking of the bank account". The two companies had, by that date, failed to comply with the Authority's directions to provide proof of any payment made and they had not, as a matter of fact, made the payment to an account used for the purposes of paying fees or that could be checked by the Authority staff. If the companies had sent the directed proof of payments, their omission and error could have been corrected. They had not.

No substantial miscarriage of justice

[22] However, even if a generous view was taken that the bank records now supplied show that the companies had intended to make the required payments, the companies had not established that a substantial miscarriage of justice would result from the Authority's determination not being recalled. This is for two reasons.

[23] Firstly, an alternative effective remedy is reasonably and immediately available to the companies – that is by way of challenge to the court of the Authority's determination of 17 January under s 179 of the Act. If the companies wish to file that challenge, they may also apply to the court for a stay of the orders made in the Authority's determination and for the interim order regarding publication which they say they want. The opportunity to make those applications does not depend, now, on success in a removal application in the Authority or a special leave application to the Court. Rather, they have immediate access now to the very judicial forum that they said, in their incomplete attempt to lodge removal applications, they wished to have consider the case.

[24] Secondly, considerations about procedural justice in a proceeding do not apply solely to or for the benefit of only one party. The Inspector, and the complainants relying on her being able to progress her investigation, were entitled to have her application about the supply of records determined without undue delay. The

companies had an opportunity, after being clearly advised by the Authority about what they needed to do, to meet the requirements of a removal application if they wanted to make one that late in the piece. Some 24 days after being advised of that requirement, they had not told the Authority that they had attempted to meet it. In those circumstances, there was no substantial miscarriage of justice.

Authority may jointly investigate claims

[25] BRAKBL's recall application incorrectly asserted that the Authority had not addressed a concern that the company had raised earlier about the procedure adopted by the Authority in conducting a joint investigation of the Inspector's claims against BRAKBL and FBRL. The Inspector had lodged, on 17 August 2022, a separate application against each separate corporate entity for a compliance order and a penalty.

[26] The Authority's discretion to investigate matters jointly is well within the scope of its statutory powers of investigation, including to give necessary or expedient directions to more effectively dispose of any matter according to its substantial merits and equities.[6]

[27] Directions issued to the parties on 20 December, in response to submissions lodged by the two companies, directly addressed the issue of joint investigation:

> [3] **Joint investigation:** I directed these two applications by the Inspector be jointly investigated because they involve related companies, similar circumstances and some common personnel, specifically Mr Osmond, and I consider joint investigation is an effective and efficient means of addressing both applications. Joint investigation is not the same as joinder. They remain two separate matters.
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> [4] I acknowledge the references in Mr Harris' memorandum of 13 December 2022 to separate corporate personalities. The Authority will have regard to relevant legal principles concerning incorporated bodies but may also, in investigating these and any subsequent matters involving the two respondent companies, consider evidence concerning the context and reality of the operation of businesses and employment relationships in which they were involved, including questions which may arise regarding control and direction. In that regard I note that Companies Office records presently show
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> - F& B Remuera Limited (8117276),
> - BRAK Burns Limited (8093096), and
> - the company identified in FBRL's statement in reply as having conducted its human resources and wage processing function, Delta Shared Services Limited (5916248) in liquidation

[6] Employment Relations Act 2000, s 160(1)(f), s 173(1) and s 221(d).

> are each owned by Delta Private Equity Limited, [which is] in turn owned by Deltrust Limited (8338561), in which Mr Osmond is registered as director and 100 per cent shareholder.

Matters may be determined on the papers

[28] Similarly, the Authority made directions in a case management conference held on 28 November 2022 that the Inspector's two applications, for orders for supply of records and penalties, were to be determined on the papers.[7]

[29] It did so in the context that the Authority could have, at that time, proceeded to make a determination without input from the respondent companies because they had been, up to that point, unresponsive and failed to lodge statements in reply despite receiving adequate and timely notice of the Inspector's claims and the opportunity to respond.[8] The Authority had taken steps beyond what was strictly necessary to get the companies to take part in a case management conference on 28 November and this had resulted in a representative of one of them attending the call.

[30] Leave granted to the companies to lodge a statement in reply and then to make submissions was part of directions providing for eventual determination on the papers, not an opportunity to further delay an outcome.

[31] The fairness of an 'on the papers' investigation was maintained by accepting the respondent companies' objections when the Inspector's counsel had later sought to lodge some additional information that was held to be beyond the scope of the directed timetable and which papers would be considered.[9]

Interim order prohibiting publication

[32] In their recall applications BRAKBL and FBRL sought orders prohibiting publication of the Authority's 17 January determination and any determination on recall "pending final determination of this matter". Mr Osmond's written submissions gave this reason for the request: "[T]here are matters referred to that may impact evidence given by interested hostile witnesses that the respondent may call to give evidence". During the telephone conference Mr Harris could not expand on that reason but agreed

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[7] The Directions issued following that conference call on 28 November 2022 are incorrectly dated 30 November 2022.

[8] Employment Relations Act 2000 s 173(2), s 174D(1) and Schedule 2 clause 12, and Employment Relations Authority Regulations r 8(3) and (4).

[9] Directions of the Authority, 20 December 2022, at paragraphs [5]-[9].

it was based on speculation that publication of the determinations might affect the evidence of witnesses. He said there had "already been some publicity about the matter", referring to an article published on the *Stuff* website on 15 January 2023.[10]

[33] There is no presumption that a business or failed business is entitled to an order prohibiting publication of an Authority determination which might contribute to negative publicity about that enterprise. Rather, as in all cases, a party or person seeking orders prohibiting publication of names, identifying details or evidence in an Authority proceeding must show specific adverse consequences which would justify a departure from the fundamental rule that justice should be administered openly.[11] The balancing of the competing factors is necessarily case-specific.

[34] The submissions of BRAKBL and FBRL did not establish specific adverse consequences sufficient to warrant granting an open-ended order lasting until whenever "final determination of this matter" might be reached.

[35] However, if the two companies were to now exercise their right to file a challenge in the Employment Court to the 17 January determination and/or this determination, publication may be an issue that they ask the court to consider. If so, whatever consideration the court might give could be made futile or useless if the Authority's determinations have already been published online through the Employment Law Database.[12]

[36] To protect the respondent companies' right to seek such orders as part of filing a challenge in the Employment Court, and to preserve the effectiveness of such orders if the court were persuaded to make them, an interim order was appropriate.

[37] Accordingly, this determination and the Authority's determination of 17 January 2023 are prohibited from publication before Monday, 13 February 2023.[13] The order is subject to whatever orders of its own that the court might, if asked, make during that period or subsequently.

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[10] https://www.stuff.co.nz/business/130796192/the-auckland-ghost-kitchen-that-ghosted-its-own-staff.
[11] *Erceg v Erceg* [2016] NZSC 135 at [13].
[12] https://www.employment.govt.nz/elaw-search.
[13] Employment Relations Act 2000, Schedule 2 clause 10.

[38] In the absence of any different or additional orders by the Authority or the Court prohibiting publication of these determinations meanwhile, the parties can expect both determinations to be uploaded to the public database on Monday, 13 February 2023.

No stay sought or granted meanwhile

[39] As of the date of this determination no stay of the orders made in the Authority's determination of 17 January 2023 has been sought or made in the Authority or, as far as I am aware, by the Employment Court. If a challenge to that determination is filed under s 179 of the Act, that election does not operate as a stay of the orders made unless so ordered by the court or the Authority.[14] Accordingly the respondent companies, presently, remain subject to the compliance and penalty orders made in that determination and the timetable for consideration of costs set in it.

Costs

[40] Costs are reserved. If costs in relation to this determination of the recall applications cannot be resolved between the parties, costs are to be considered on the same basis and under the timetable already set in the 17 January determination.

Robin Arthur
Member of the Employment Relations Authority

[14] Employment Relations Act 2000, s 180.