IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2023] NZERA 44
3055653

	BETWEEN	LYNSEY FRY First Applicant
	AND	CORRECTIONS ASSOCIATION OF NEW ZEALAND INCORPORATED Second Applicant
		THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent
Member of Authority:	Marija Urlich	
Representatives:	Sam Houliston, counsel for the Applicants Renee Butler and Emma Loveard, counsel for the Respondent	
Investigation Meeting:	10 November 2022 (by audio visual link)	
Submissions received:	At the investigation meeting from Applicants At the investigation meeting from the Respondent	
Determination:	27 January 2023	

SECOND PRELIMINARY DETERMINATION OF THE AUTHORITY

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[1] The Chief Executive of the Department of Corrections (Corrections) applies to have Corrections Association of New Zealand Incorporated's (CANZ) employment relationship problem dismissed because the action was not commenced within the 6-year statutory limit, or for lack of standing or because the problems CANZ brings are frivolous or vexatious.[1] It says it is necessary to bring this application because CANZ approach has created significant uncertainty as to its litigation risk.

[1]Sections 142, s 29, schedule 2, clause 12A and s 157 Employment Relations Act 2000.

[2] CANZ opposes the application. It says its problem is properly before the Authority. As a trade union it has a proper interest in ensuring the terms of the relevant collective employment agreement are not breached. The problem is an action for damages for breach of the relevant collective employment agreement the substance of which has been made clear from the outset.

The Authority's investigation

[3] On 16 September 2022 Corrections lodged a dismissal application accompanied by a memorandum of counsel. On 27 September CANZ filed a notice of opposition. A case management conference was held with the parties on 10 October and timetable set for the filing of submissions and supporting information with which the parties complied. The representatives spoke to their submissions at the investigation meeting which was held, by agreement by audio visual link.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Background

[5] The subject statement of problem was lodged on 7 March 2019. Ms Fry and CANZ were named as the applicant parties. The statement of problem starts, under the subheading "The problem that the applicant wishes the Authority to resolve" with:

> (a) The applicant seeks determinations that:
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> (i) On or about 1 June 2013, and as a result of a prisoner riot which occurred at the Spring Hill Correctional facility (SHFC), the respondent breached clause 6.2.1 of the Department of Corrections Frontline Staff (Non-Management) and the Corrections Association of New Zealand (CANZ) collective employment agreement for the frontline staff, which was in force between 15 May 2012 and 30 June 2013 (the CEA); and/or
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> (ii) The respondent failed or neglected to provide and/or maintain a safe place of work at SHFC for the applicant, both prior to and during the riot (the SHFC riot), and in doing so breached the obligations it owed to the applicant under the health and safety in Employment Act 1992 (HSEA) which was in force at the time of the 1 June 2013 riot; and/or

(iii) The respondent neglected or failed to provide and/or maintain a safe place of work when the applicant returned to work following the SHFC riot, and in doing so breached obligation it owed to the applicant under both the HSEA and, from 4 April 2016, the Health and Safety at Work Act 2015 (HSWA); and/or

(iv) In the alternative, the respondent breached its implied common law duty to provide a safe place of work, and take all practicable steps to ensure the safety of employees while at work; and/or

(v) The respondent breached its 2011 Code of Conduct ("the Code of Conduct) as it did not;

(1) act as a good employer and work with employees in good faith;
(2) model the standards of behaviour described in the Code;
(3) treated the applicant fairly and provided a safe work environment;
(4) address any behaviour that is inconsistent with this Code and managed it objectively; and
(5) display accountability for its failures.

(vi) The applicant seeks general damages as compensation for humiliation, loss of dignity, and injury to her feelings which have resulted in the applicant…

[6] The statement of problem then narrates the facts relied on under the subheading "the facts that give rise to the problem are" and includes a section titled "Breaches" under which clause 6.2.1 of the relevant CEAs are set out, findings from the relevant inquiry report into the riot and at paragraphs (fff) and (ggg) specifies failures "…to take all practicable steps to ensure the safety of employees while at work…" and "…did not keep staff safe in the workplace, including Ms Fry".

[7] The statement in reply dated 26 March 2019 includes a denial of "the applicants' claims" and states there are no grounds for the remedies sought. It also records the parties had attended mediation twice and Corrections was willing to attend further mediation. It appears, in this first response, that Corrections understood CANZ sought to resolve an employment relationship problem as well as Ms Fry.

[8] During the first case management conference held on 16 April 2019 the Authority raised a jurisdictional issue as to the alleged breaches of health and safety legislation. This issue was subsequently determined and the Authority held it did not have jurisdiction to investigate and determine those problems.[2] In the same

[2] *Fry & CANZ v Corrections* [2019] NZERA 461 at [19].

determination the Authority declined Corrections' request that the Authority dismiss all the problems brought by Ms Fry and CANZ.[3] The determination was not challenged.

[9] Subsequent to the determination of that preliminary issue the Authority scheduled a case management conference to set a timetable to proceed with the investigation. In late August 2019 the parties jointly sought adjournment of the case management conference to allow settlement discussions to continue. The request was granted.

[10] In March 2022 Ms Fry and CANZ, through counsel advised settlement had not been possible, requested the Authority resume its investigation of the matter and to that end convene a case management conference. This duly occurred on 14 April during which timetabling directions were made including for the filing of amended statements of problem and reply in light of the preliminary determination, filing of witness statements and supporting information and investigation meeting dates. The notice of direction dated 14 April records the witnesses from whom the parties were to serve witness statements. In addition to Ms Fry and her partner the direction records in support of the application two CANZ representatives and four corrections officers were to file written witness statements. The direction included the case management conference was to resume on 7 July to progress the investigation including confirming issues for investigation and remedies sought.

[11] In May the scheduled investigation meeting dates were vacated by consent due to witness availability.

[12] The first amended statement of problem was filed on 16 June. The problems relating to health and safety legislation were removed and breaches of clause 1.6.1 of the relevant CEAs added. The amended statement of reply was filed on 30 June and included that Corrections opposed the addition of breach of clause 1.6.1 because they were fresh problems and had not been brought within the 6-year statutory time frame. The amended statement in reply also included at paragraph 58 "The second respondent has not made any claims nor sought any remedies".

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[3] Above at [21].

[13] On 7 July Corrections filed a memorandum in preparation for the case management conference in which it raised a number of issues including that it opposed the alleged breaches of clause 1.6.1 of relevant the collective employment agreements in the amended statement of problem as new problems statute barred by the six-year limitation period and it accepted it had breached clause 6.2.1 of the relevant CEAs.

[14] During the course of the resumed case management conference, Mr Houliston advised Ms Fry and CANZ did not intend to pursue the clause 1.6.1 breaches. The Authority directed second amended statements of problem and reply be filed to clarify the employment relationship problem and the response. With respect to witnesses, Ms Fry and CANZ indicated they intended to file written witness statements only for Ms Fry and her partner. The notice of directions dated 7 July records the witnesses directed to file written statements "…may be subject to change".

[15] On 14 July a second amended statement of problem was filed. It included removal of breaches of clause 1.6.1 and the following amended remedy to paragraph 1(b):

> The first applicant and the second applicant seek general damages as compensation arising from the respondent's breaches of the 2012-2013 CEA and/or the 2013-2015 CEA and/or the Code.

[16] By second amended statement of reply dated 28 July Corrections opposed CANZ claim for damages set out at paragraph 1(b) of the second amended statement of problem. Its position is summarised at paragraph [59] of that document:

> The second applicant has not made any claims and therefore there is no basis to award the second applicant any remedies. As further, the riot occurred in 2013, some nine years ago and as such, the second applicant is well out of time to raise a claim in connection with the riot or seek any remedies.

[17] By memorandum of counsel dated 28 July Corrections requested the Authority dismiss the problem made at paragraph 1(b) of the second amended statement of problem.

[18] By memorandum of counsel dated 5 August Ms Fry and CANZ responded there were no grounds for the dismissal because the amendment was to the remedies sought and not the underlying problem.

Issues

[19] There are three issues for consideration:

- did CANZ commence its problem within the statutory time limit?
- does CANZ have standing to bring its problem?
- should CANZ's application be dismissed as frivolous and/or vexatious?
- is either party entitled to an award of costs?

Did CANZ commence its problem within the statutory time limit?

[20] In the Authority, proceedings are commenced by lodging an application that complies with the relevant regulations.[4] Section 142 of the Act provides any action in the Authority that is not a personal grievance must be commenced within 6 years of the date on which the cause of action arose.[5] A 'cause of action' has been defined as "the act on the part of the defendant which gives the plaintiff the cause of complaint".[6] No matter before the Authority is to be held bad for want of form, or be void or in any way vitiated by reason of any informality or error of form providing the Authority with the necessary flexibility to determine matters on the basis of the merits of cases before it without regard to technicalities and not inhibited by strict procedural requirements. [7] [8]

[21] The 7 March 2019 statement of problem makes clear Corrections alleged breaches of clause 6.2.1 of the relevant CEAs are the cause of complaint to Ms Fry and CANZ. CANZ is an applicant party, the first part of the statement of problem does not expressly exclude CANZ and the narration of facts places the alleged effect of the breaches of the CEAs on all employees not only Ms Fry. The parties' subsequent engagement in resolution of the employment relationship problem acknowledges CANZ's problem, in particular the statement in reply and the first preliminary determination.

[22] Damages are a remedy. It is not unusual for remedies to be amended by variation or addition after an application has been lodged. In such circumstances the question for

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[4] Employment Relations Authority Regulations 2000, clause 5.
[5] Section 142 Employment Relations Act 2000.
[6] *Dillon v MacDonald* (1902) 21 NZLR 375.
[7] Employment Relations Act 2000, schedule 2, clause 13.
[8] Employment Relations Act 2000, section 143(f) and 157(1).

the Authority may then be whether the respondent has had a fair opportunity to respond or, in the case of the addition of a penalty, to the extent it could be described as a remedy, whether it has been brought within the relevant statutory limit. This question does not arise here – the applicants do not problem a penalty and Corrections will have a fair opportunity to respond to the problems.

[23] CANZ's cause of action has been commenced within the statutory 6-year time limit.

Does CANZ have standing to bring the problem?

[24] The test for standing is whether there is a real and obvious interest having regard to, and with emphasis placed upon, the totality of the facts.[9] This matter concerns a collective employment agreement. CANZ and Corrections are in a good faith relationship and are parties to collective employment agreements which Corrections accepts it has breached.

[25] Corrections' position is understood to be that a union party to a collective employment agreement cannot bring a problem for general damages arising from an alleged breach of a term of the relevant collective employment agreement because the problem involves Ms Fry's individual problem and CANZ will not be able to establish any loss consequent to the breach. It seeks to rely on *Service and Food Workers Union Nga Ringa Tota Inc v Spotless Services (NZ) Limited* as authority for that proposition.[10]

[26] In *Spotless* the court held the wording of s 131 of the Act required any wage arrears claim be brought by the effected employee, the plaintiff union could not issue proceedings in its own name and the issue was easily remedied by the 'swapping out' of plaintiff parties.[11] This principle is restated in *E Tu Inc v Carter Holt Harvey LVL Ltd* [2022] NZEmpC 141 which concerned the lawfulness of directed annual holidays under the Holidays Act 2003.

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[9] *New Zealand Air Line Pilots Association IUOW v Air New Zealand Limited* [1992] 880 at 887.
[10] *Service and Food Workers Union Nga Ringa Tota Inc v Spotless Services (NZ) Limited* EmpC Auckland AC50/07, 23 August 2007.
[11] Above [4].

[27] The situation is different here – it is understood CANZ is not seeking to stand in the shoes of Ms Fry but to bring its own problem as a party to a CEA who says it has suffered damage consequent to a breach. Whether it is able to establish any damage is a matter for investigation.

[28] Corrections also argues s 29 prescribes the types of proceedings which may be brought relating to a union. Section 29 lists persons who can commence or be a party to an action arising under part 3 of the Act. Again, this is a different situation, the problem is not brought under part 3 but rather s 162 which allows the Authority to make orders relating to contracts.[12]

Is CANZ's problem frivolous or vexatious?

[29] Clause 12A of Schedule 2 of the Act gives the Authority power to dismiss frivolous or vexatious proceedings. In *Lumsden v Sky City Management Limited* the court recognised that the Authority's power to dismiss proceedings on the grounds that they are frivolous or vexatious is limited and the threshold for establishing that is high.[13] Dismissing a problem is a serious step, not one to be taken lightly.

[30] Corrections says CANZ's problem is frivolous because:

- the problem is misconceived and therefore unable to be taken seriously; and
- there can be no basis for an award of general damages because CANZ, as a union, will not be able to establish it has suffered damage directly as a result of the purported breach.

[31] Corrections says CANZ's approach is vexatious because:

- it has failed to properly articulate any problem at the outset and this has caused significant delays and frustrated the Authority process;
- the addition of new problems in the two amended statements of problem have put Corrections to additional expense; and

[12] The ambit of which extends to collective employment agreements: s 163 Employment Relations Act 2000.
[13] *Lumsden v Sky City Management Limited* [2015] NZEmpC 225.

- CANZ has sought to add problems by stealth for example, by misleading the Authority and Corrections as to the witnesses it says will have evidence relevant to the Authority's investigation.

[32] CANZ says whether its problems have merit is a matter for the substantive investigation and are not "impossible to be taken seriously":

[33] The Authority's jurisdiction comes from s 161 of the Act. This provides that the Authority has "exclusive jurisdiction to make determinations about employment relationship problems generally". Section 4(2) of the Act identifies the employment relationships that are covered by the Act. Section 5 of the Act defines an employment relationship problem.

[34] The Supreme Court considered the jurisdiction of the Authority arising out of s 161 in *FMV v TZB* including that s 161:[14]

> […] reflects the relational framework of the Act and drives the fact-based, problem-solving approach of the Authority. The Authority has exclusive jurisdiction to make determinations about "problems generally", not specific causes of action. **The only requirement is that the problem must be an "employment relationship" one; that is, it must relate to or arise from the "employment relationship"** in its entire sense […] (emphasis added.)

[35] CANZ and Corrections are in an employment relationship and CANZ has raised a problem with that employment relationship for which it seeks resolution. The problem concerns obligations to provide a safe and healthy workplace to which the parties have agreed to bind themselves in collective employment agreements. This is a not a matter which can be said to be frivolous. Because the fact of damage and the assessment of any consequent loss to CANZ may be difficult either to establish or to quantify does not preclude it from investigation by the Authority.

[36] While, it is accepted the nature of CANZ employment relationship problem could have been more clearly articulated from the outset including the remedies sought, objectively assessed it is sufficient given the following factors:

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[14] *FMV v TZB* [2021] NZSC 102 at [60].

- as the background has shown both parties have amended their problems and response;

- there is insufficient information to establish to the high standard required for a dismissal that CANZ has sought to mislead Corrections as to its intention regarding witnesses; and

- the parties have been actively engaged in resolution of this employment relationship problem for a number of years and Corrections has accepted it has breached the relevant CEAs.

[37] With respect to Corrections' concern about witnesses – the parties are reminded this is an investigation and the Authority has broad powers to call for evidence and information in investigating any matter.[15] While matters of cost and resource use are important considerations Corrections have not suggested it may be otherwise prejudiced by CANZ proceeding with its problem.

[38] A consideration of a dismissal on the grounds sought involves an exercise of a discretion. Having considered the issues raised by the parties I decline to exercise that discretion to dismiss CANZ's problem. The parties are in a good faith relationship. Ms Fry's problem is simply part of an example of the wider problem alleged about the interests of all affected employees covered by the collective employment agreements between CANZ and Corrections.

Outcome

[39] For the reasons set out Corrections' application to dismiss CANZ problem is unsuccessful.

[15] Employment Relations Act 2000, s 160.

Costs

[40] Costs are reserved.

Marija Urlich
Member of the Employment Relations Authority