IN THE EMPLOYMENT COURT
AUCKLAND

[2014] NZEmpC 218
ARC 64/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	PUNA CHAMBERS INC. Plaintiff
AND	TANIA SARAH CHRISTENSEN Defendant

Hearing:	3 November 2014 (Heard at Hamilton)
Appearances:	D Hayes, counsel for plaintiff S McKenna, counsel for defendant
Judgment:	26 November 2014

INTERLOCUTORY JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] Ms Christensen was previously employed by the plaintiff (formerly the Montessori Foundation) as a caregiver. She was dismissed and subsequently pursued a personal grievance in the Employment Relations Authority (the Authority) claiming that her dismissal had been unjustified. The Authority investigated the grievance. The plaintiff employer did not participate in the Authority's investigation process. Ms Christensen gave evidence before the Authority and her grievance was upheld.[1] The plaintiff was ordered to pay lost wages and compensation.[2]

[1] *Christensen v Montessori Foundation now known as Puna Chambers Inc* [2013] NZERA Auckland 470 at [68].
[2] At [69]-[84].

[2] The plaintiff did not challenge the Authority's determination. Rather it filed an application to set aside the determination on the basis that it had been obtained by fraudulent evidence. The Authority declined the application.[3] The plaintiff has filed a de novo challenge to that determination.

[3] The parties have asked the Court to determine a preliminary issue in relation to the de novo challenge, namely whether the Authority has jurisdiction to set aside a determination obtained by fraud. The question arises because of the basis on which the parties say the Authority dismissed the plaintiff's application. Both parties contend that the Authority concluded that it had no jurisdiction to set aside an earlier determination for fraud because of the right of challenge conferred by s 179 of the Employment Relations Act 2000 (the Act). Mr McKenna, counsel for the defendant, submitted that such a conclusion was correct. Mr Hayes, counsel for the plaintiff, submitted that it was not.

Authority's approach

[4] It is convenient to summarise the Authority's approach at this point. The Authority began its analysis by observing that there are limited means of challenging a determination under the Act, namely by challenge (under s 179), on the grounds of lack of jurisdiction (in the narrow sense pursuant to s 184(1)), or by way of judicial review (under s 194).[4] In relation to the first identified ground, the Authority pointed out that any challenge was now out of time, having not been pursued within the 28 day period for doing so.[5] The second ground had not been advanced and was accordingly put to one side.[6] As to the third ground, the Authority observed that this was contingent on a challenge having been pursued, so did not apply.[7] The Authority then went on to consider cl 4 of sch 2 to the Act, which provides that:

[3] *Puna Chambers Inc v Christensen* [2014] NZERA Auckland 264 [Determination under challenge].
[4] At [13].
[5] At [14].
[6] At [15].
[7] At [16].

Reopening of investigation

(1) The Authority may order an investigation to be reopened upon such terms as it thinks reasonable, and in the meantime to stay the effect of any order previously made.

[5] The Authority member concluded that:

> … I am not persuaded that I should exercise my discretion to set aside the determination *Christiansen v Puna Chambers Inc* and order the investigation to be reopened in circumstances in which the statutory regime has made provision for challenges to the determination of the Authority.
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> [24] In this respect I consider it significant that the statutory regime provides for an election to have the matter heard by the Employment Court to either take the form of a challenge to part of the determination pursuant to s 179(3)(a), or to seek: "*a full hearing of the entire matter* (… *a* ***hearing de novo***)" pursuant to s 179(3)(b).
>
> [25] The statutory regime thus permits a party to have a full hearing of the matter to which the Authority determination relates, and provides ample opportunity within the 28 days statutory time frame for doing so.
>
> [26] In circumstances in which the Applicant chose not to pursue the steps provided by the statutory regime and elect to challenge the determination … I determine that the determination … is not to be set aside.

[6] It appears from the foregoing that while the Authority accepted that cl 4 empowered it to entertain an application of the sort at issue, it was not prepared to do so in the circumstances, having particular regard to the rights of challenge available to the plaintiff but not exercised by it in this case.

Synopsis of submissions

[7] Mr McKenna submitted that the legislative scheme clearly excluded any jurisdiction to set aside the Authority's determination on the basis of fraud. He placed particular reliance on s 184(1) of the Act, which provides that:

> Except on the ground of lack of jurisdiction or as provided in section 179, no determination, order, or proceedings of the Authority are removable to any court by way of certiorari or otherwise, or are liable to be challenged, appealed against, reviewed, quashed, or called in question in any court.

[8] He submitted that this provision made it plain that once the Authority had dealt with a matter it could not be revisited in that forum or in this Court, except in limited circumstances. Those circumstances, it was said, would not extend to

allegations that the original determination of the Authority had been obtained on the basis of perjured evidence.

[9] Mr Hayes submitted that the Authority had an implied power to set aside a previous determination where it had been obtained by fraud, and that such a power was not displaced by the restrictions on challenge and review under the statutory scheme. He submitted that the reference to "any court" in s 184(1) does not prevent the Authority itself from considering an application to set aside one of its own determinations.

[10] Mr Hayes referred to a recent judgment of the District Court in *Haden v Wells*, where Judge Gibson accepted that the District Court had an implied power to set aside an earlier judgment obtained by fraud. In doing so Judge Gibson observed that:[8]

> However, a judgment obtained by fraud is, in effect, an abuse of the Court's own procedure and it is well recognised that the District Courts, while not having an inherent jurisdiction, have an inherent power to administer their statutory jurisdiction. …
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> …
>
> A judgment obtained by fraud strikes at the very heart of fair process and the administration of justice. If it could be demonstrated that such had occurred in the proceeding heard by Judge Joyce QC, the subject of his judgment of 30 July, 2008, then the fraud exception to the doctrine of res judicata and finality of judgment would apply. The District Court would remain seized of the power to set aside the judgment, irrespective of it having been appealed as its own process would have been abused and the proper administration of justice tainted. It would not need an express statutory power as it has an inherent power to prevent an abuse of its process …

Analysis

[11] In my view the issues distil to the following two points. First, whether the Authority has an express statutory power to set aside a determination obtained by fraud. Second, and if not, whether it is necessary to imply such a power in order for the Authority to fulfil its statutory functions.

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[8] *Haden v Wells* DC Auckland CIV-2012-004-696, 10 May 2013 at [14] and [16]. This finding was upheld on appeal: *Haden v Wells* [2013] NZHC 2753 at [25]-[26].

[12] The Authority, like the Court, is a creature of statute. Its powers are limited by the legislative framework within which it operates. In addition to its express powers it also enjoys a suite of implied powers necessary to enable it to exercise its jurisdiction.

[13] Parliament has made express provision for the Authority to reopen its investigations under cl 4. Implicit in the power to reopen an investigation must be the power to set aside a determination. And logically, in order to "reopen" an investigation, the investigation must first have been closed. This can occur either before an investigation meeting (where a grievance has, for example, been struck out) or once a determination has been issued. The power under cl 4(1) to stay the effect of any order previously made reinforces the point.

[14] Clause 4 is broadly worded and does not attempt to define the sort of cases that may give rise to a successful application. There is nothing to suggest that determinations based on perjured evidence are excluded from its ambit, and there are strong public policy reasons (which I will come to) which tell against any such exclusion. Because there is a statutory mechanism for dealing with an application of the sort at issue in this case there is no need to resort to any implied powers the Authority may possess.[9]

[15] It is true, as Mr McKenna submits, that Parliament has placed limits on an aggrieved party's rights to challenge or review determinations of the Authority. This is supported by s 184. Clause 4, however, confers an express ability on the Authority to revisit its earlier investigation. A review of the cases reveals that cl 4 has been resorted to in a variety of circumstances, involving applications advanced at both a pre and post determination stage.[10] Section 184 cannot sensibly be read as trumping

[9] See *Ryan Security & Consulting (Otago) Ltd v Bolton* [2008] ERNZ 428 (EmpC) where a full Court acknowledged that although the Authority may have implied powers to facilitate the exercise of its express jurisdiction, the implication of powers to punish for contempt of court were unnecessary as it already had similar powers under s 140(6) of the Act for breach of a compliance order and enforcement of any orders through the District Court pursuant to s 141. See also *White v Fellow Travel Inc* [2004] ERNZ 32 (EmpC) at 36-38 on the Authority's lack of power to serve proceedings on those outside of New Zealand given the narrowness of the Authority's procedural rules as to service.

[10] See *Employment Law* (online looseleaf ed, Brookers) at [ERSch2.4.02].

cl 4. It limits the involvement of this and other Courts, not the power of the Authority itself to reopen proceedings.

[16] Because cl 4 does not specify the sort of factors that will be relevant to the exercise of the Authority's discretion, the approach developed at common law is likely to provide useful guidance.

[17] It is well established that the power to reopen constitutes an exception to the principle of finality. The principle of finality is founded on the desirability of bringing litigation to an end, and avoiding re-litigation in the same forum. It has long been accepted that there are circumstances in which this principle must give way to the interests of justice.[11] It is also well established that judgments based on fraudulent evidence may be set aside, but the threshold which an applicant must overcome is high. In particular, an application based on fraudulent evidence needs to be fully particularised and supported by new evidence that would likely have a determinative effect on the outcome.[12] It is not uncommon for indemnity costs to be awarded where an allegation of fraud is unsuccessfully pursued.[13] This reflects the very serious nature of such allegations.

[18] As I observed during the course of argument, the threshold requirements relating to the sort of allegations being advanced in the present case may present difficulties for the plaintiff. However the strength or otherwise of the plaintiff's allegations of fraud, based on allegedly perjured evidence given at the Authority's investigation meeting, is not the issue for consideration at this stage.

[19] When read in context, it appears that while the Authority member accepted that there was jurisdiction under cl 4 to entertain the plaintiff's application, she declined to do so, including having regard to the fact that the plaintiff had failed to participate in its earlier investigation and had failed to exercise its right of challenge under s 179 within the 28 day timeframe for doing so.[14]

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[11] See *R v Smith* [2003] 3 NZLR 617 (CA) at [36].
[12] *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* [2012] NZSC 94, [2013] 1 NZLR 804 at [33].
[13] *Snowdon v Radio New Zealand Ltd* [2014] NZEmpC 180 at [57]-[64]. See also *Bradbury v Westpac Banking Corp* [2009] NZCA 234, [2009] 3 NZLR 400.
[14] Determination under challenge, above n 3, at [18]-[26].

[20] A party alleging fraud may, as Mr Hayes points out, only become aware of the grounds for such an allegation some considerable time after a determination has issued. While delay will be relevant to the discretionary exercise, so too will be the reasons for such a delay, together with consideration of the existence or otherwise of another effective remedy. The failure to exercise a right of challenge within 28 days of the date of the earlier determination cannot, of itself, create an insurmountable stumbling block to the exercise of the Authority's discretion to reopen an investigation under cl 4.

Conclusion

[21] It appears that the Authority found that it had jurisdiction to reopen its earlier investigation, and set aside its determination, under cl 4 but declined to do so.

[22] The power to reopen an investigation and set aside a determination under cl 4 is discretionary. Whether or not there is a sufficient basis for doing so in the present case has yet to be determined on the plaintiff's de novo challenge.

[23] Counsel were in agreement that if the jurisdictional issue was answered in the plaintiff's favour the matter should be remitted back to the Authority for determination. However, in *Abernethy v Dynea New Zealand Ltd (No 1)*, a full Court held that:[15]

> If the employment relationship problem survives a challenge to a preliminary point, then it is for the Court to resolve it. That is because there is no power to remit the matter to the Authority and because the Authority no longer has the matter before it. We emphasise that this judgment concerns the situation where the Authority has, by a preliminary decision, disposed of the employment relationship problem which it had before it.

[24] It therefore appears that, applying *Abernethy*, if the plaintiff wishes to proceed with its challenge, the residual issues will need to be dealt with by the Court, rather than by way of referral back to the Authority. Counsel may, however, wish to be heard on this point. If so, a telephone conference is to be convened.

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[15] *Abernethy v Dynea New Zealand Ltd (No 1)* [2007] ERNZ 271 (EmpC) at [60].

[25] Costs are reserved.

Christina Inglis
Judge

Judgment signed at 3pm on 26 November 2014