

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2015] NZEmpC 42  
EMPC 334/2014**

IN THE MATTER OF      of a challenge to a determination of the  
Employment Relations Authority

BETWEEN                MAKANA NORTHLAND LIMITED  
Plaintiff

AND                       ANNE CARNEY  
Defendant

Hearing:                By memoranda of submissions filed on 6, 20 and 30 March  
2015

Appearances:         M McGoldrick, counsel for plaintiff  
D Vinnicombe, advocate for defendant

Judgment:             31 March 2015

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**INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN**

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[1] This interlocutory judgment decides a preliminary jurisdictional question in relation to the plaintiff's challenge to a determination or determinations of the Employment Relations Authority. Deciding this question, as a preliminary issue on the papers, will affect significantly the legitimate scope of the plaintiff's challenge when that comes to hearing.

[2] The relevant background events are as follows.

[3] In early 2013 Anne Carney brought a claim for non-payment of wages against Makana Northland Limited (Makana) following her dismissal on 26 November 2011 on grounds of incapacity. Ms Carney's claim also included a personal grievance that Makana had disadvantaged her unjustifiably in her employment. Makana asserted that Ms Carney had not raised this personal grievance within time. An alternative defence raised by Makana was that Ms Carney

was precluded from recourse to employment law claims in the Authority because these were ousted by the Accident Compensation Act 2001.

[4] Following an investigation meeting held in Whangarei on 19 March 2013 in which Makana participated, represented by its current counsel, the Authority issued its determination on these matters on 30 April 2013.<sup>1</sup> It concluded that Ms Carney had not raised her personal grievance (unjustified disadvantage) within the statutory period and, contrary to her case, that Makana had not consented to her doing so out of time. The Authority declined to investigate the personal grievance further. However, it found that Ms Carney had not been paid during her notice period as she should have been and directed:<sup>2</sup>

... Ms Carney is to be paid a sum equivalent to 90 days wages in lieu of written notice by Makana. I would anticipate that the parties can resolve the amount. If not, leave is reserved to return to the Authority.

[5] The Authority also reserved costs and gave a timetable for them to be addressed by memoranda.

[6] The parties were unable to quantify precisely by agreement the 90 days' wages directed to be paid to Ms Carney. Accordingly, she exercised the leave that had been reserved to her by the Authority's determination of 30 April 2013. The Authority received written submissions on this question on 21 October and 10 November 2014, following which it issued a supplementary determination on 2 December 2014.<sup>3</sup> The Authority made orders quantifying Ms Carney's loss and requiring Makana to pay Ms Carney, within seven days of the date of that determination, the sum of \$14,875. The Authority further directed Ms Carney to pay Makana the sum of \$2,500 in costs, such payment to be made no later than 14 days from the date of that determination. That costs award had arisen out of an earlier determination given by the Authority with which Ms Carney had not complied.<sup>4</sup>

[7] The plaintiff, Makana, filed its statement of claim in this Court on 22 December 2014. There is no question that it was within time to challenge as of right

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<sup>1</sup> *Carney v Makana Northland Limited* [2013] NZERA Auckland 151.

<sup>2</sup> At [118].

<sup>3</sup> *Carney v Makana Northland Limited* [2014] NZERA Auckland 492.

<sup>4</sup> *Carney v Makana Northland Limited* [2013] NZERA Auckland 359 (Costs determination)

the Authority's determination issued on 2 December 2014. However, the relief claimed goes further and seeks an order that the defendant "is not owed any sum by the plaintiff". To so determine the challenge, the Court would have to set aside the Authority's determination of 30 April 2013, against which no challenge was filed by Makana within the statutory 28 days of its issue.

[8] Section 179 of the Employment Relations Act 2000 (the Act) is the primary relevant statutory provision. It provides:

- (1) A party to a matter before the Authority who is dissatisfied with the determination of the Authority or any part of that determination may elect to have the matter heard by the court.
- (2) Every election under this section must be made in the prescribed manner within 28 days after the date of the determination of the Authority.

[9] The Authority's determination of 30 April 2013 both decided that Ms Carney was entitled to have been paid for her notice period and specified how that sum was to be calculated ("equivalent to 90 days wages"). What was left undecided, and for the parties to settle if they were able to, was the precise dollar amount by application of that formula. It is not uncommon for the Authority to so conclude its determinations. The exercise is largely arithmetical.

[10] The submissions for counsel for the plaintiff, Mr McGoldrick, have now clarified what it is that the plaintiff seeks to challenge. At para 1(c) of the plaintiff's written submissions it is recorded that:

it is not challenging, and is not purporting to challenge, the Authority's first determination dated 30 April 2014 (the "First Determination"). It therefore accepts that it is bound by the Authority's findings of fact and its conclusions in the First Determination, but that does not extend to anything in the Supplementary Determination.

[11] The preliminary issue arose, however, because of the content of para 31 of the plaintiff's statement of claim filed on 22 December 2014. That alleges:

The Supplementary Determination was wrong in law because, inter alia:

- a) The Defendant was provided written notice by the Plaintiff;
- b) The Defendant was not able to work for the Plaintiff during the period of her notice and therefore had no entitlement to be paid;

- c) The Defendant received all of her contractual entitlements on the termination of her employment;
- d) The Defendant was in receipt of weekly compensation pursuant to the ACC Act during the period of her notice, which is an amount of income, and therefore account must be taken of those sums in the amount required to be paid by the Plaintiff; and
- e) The Defendant was in receipt of earned income from another employer during the period of her notice, and therefore account must be taken of those sums in the amount required to be paid by the Plaintiff.

[12] However, those matters that the plaintiff's statement of claim purports to challenge were all matters determined by the Authority's first determination, either expressly or by necessary implication leading to its conclusion that Ms Carney had not been paid for her notice period and that she was entitled to a sum equivalent to 90 days' wages in lieu of written notice. So the issues set out in para 31 of the statement of claim, including that the defendant was given written notice, that she was unable to work out that period of notice and so had no entitlement to be paid, that she received all of her contractual entitlements on the termination of her employment, that she was in receipt of weekly compensation payments which were not taken into account by the Authority, and that she had other earned income during the period of her notice, are all matters which relate to and were determined by the Authority's first determination. Put another way, the only issue decided by the supplementary determination that is now under challenge was the dollar quantification of the Authority's previous direction that Ms Carney was to be paid a sum equivalent to 90 days' wages.

[13] Paragraph 31 of the plaintiff's statement of claim purports to challenge conclusions that were determined by the Authority in its first determination. What are alleged to be wrong findings of fact or failures to find relevant facts are, to use the statutory words of s 179, constituents of "... the determination of the Authority or any part of that determination ...". The plaintiff is long out of time to exercise that statutory right of challenge as pleaded in para 31. No application for leave to extend the time for lodging a challenge to the Authority's first determination has been made; and the length of the delay and other relevant and known circumstances would appear to make it difficult for such an application to succeed. Put another way, there is nothing in para 31 of the plaintiff's statement of claim about which it

purports to be dissatisfied, that it could not have raised by a challenge to the Authority's first determination filed within 28 days of its issue.

[14] The defendant succeeds in her preliminary argument about the legitimate scope of the plaintiff's challenge.

[15] In these circumstances, the plaintiff must re-plead its statement of claim accordingly, omitting any purported challenge to issues determined by the Authority's first determination.

[16] For the sake of completeness, I record that, contrary to the defendant's submissions, the plaintiff is entitled to elect to challenge the supplementary determination by hearing de novo and, in that regard, is entitled to call relevant evidence if it wishes to do so. This will, however, have to be relevant in the sense of affecting the Authority's quantification of the wage loss compensation alone.

[17] Unless the plaintiff contends that the Authority's arithmetic calculation of the remuneration loss compensation does not represent 90 day's remuneration, it is difficult to see what else it can challenge. If, however, the plaintiff elects to continue with its challenge to the Authority's second determination, it must file and serve an amended statement of claim, in accordance with the directions given in this judgment, within the next 21 days.

[18] Costs are reserved.

GL Colgan  
Chief Judge

Judgment signed at 3.30 pm on Tuesday 31 March 2015