IN THE EMPLOYMENT COURT
WELLINGTON

WC 18/06
WRC 4/06

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	a preliminary issue of jurisdiction
BETWEEN	PROGRESSIVE MEATS LIMITED Plaintiff
AND	MEAT AND RELATED TRADES WORKERS UNION OF AOTEAROA INC Defendant

Hearing: by written submissions filed on 9 June and 17 and 23 August 2006

Court: Chief Judge GL Colgan
Judge BS Travis
Judge AA Couch

Appearances: Tim Cleary, Counsel for Plaintiff
Simon Mitchell, Counsel for Defendant

Judgment: 15 September 2006

JUDGMENT OF THE FULL COURT

---

[1] The judgment deals solely with a preliminary jurisdictional issue arising out of this challenge to a determination of the Employment Relations Authority. The issue is whether the Authority had jurisdiction to determine a dispute about entitlements under the Holidays Act 2003 following the earlier determination of that same dispute by a labour inspector.

Background

[2] Progressive Meats Limited operates a meat processing plant at which it employs members of the Meat and Related Trades Workers Union of Aotearoa Inc. In 2004,

a dispute arose between the parties whether the Queen's Birthday holiday that year (Monday 7 June) was *"otherwise a working day"* for the purposes of the Holidays Act in relation to the plant's lamb slaughter day shift and lamb boning day and night shifts. The union sought a determination of the dispute from a Department of Labour labour inspector and Progressive agreed to this course. The inspector met with the parties' representatives in September 2004 and subsequently made a determination supporting Progressive's position that the Queen's Birthday holiday was not otherwise a working day for either shift. Although not expressed in the determination, it was common ground that this determination was made under s13(2) of the Holidays Act.

[3] The union then filed a statement of problem raising the same issue in the Employment Relations Authority which carried out an investigation on 19 December 2005. The Authority determined that 7 June 2004 was otherwise a working day for all shifts, contrary to the inspector's determination.

[4] Progressive now asserts that the Employment Relations Authority had no jurisdiction to make that determination. Although this jurisdictional point advanced here was not taken by Progressive before the Authority, it is entitled to do so now and places this at the forefront of its challenge.

Legislation

[5] The starting point for determining whether the issue was properly before the Authority is s161 of the Employment Relations Act 2000 the relevant parts of which are as follows (with our underlining to highlight specific provisions):

> ***161 Jurisdiction***
> *(1) The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including—*
> *(a) disputes about the interpretation, application, or operation of an employment agreement:*
> *(b) matters related to a breach of an employment agreement:*
> …
> *(g) matters about the recovery of wages or other money under section 131:*
> …
> *(m) actions for the recovery of penalties—*
> *(i) under this Act for a breach of an employment agreement:*
> *(ii) under this Act for a breach of any provision of this Act (being a provision that provides for the penalty to be recovered in the Authority):*

(iii) under section 76 of the Holidays Act 2003:
(iv) under section 10 of the Minimum Wage Act 1983:
(v) under section 13 of the Wages Protection Act 1983:

(n) compliance orders under section 137:

…

(r) any other action (being an action that is not directly within the jurisdiction of the Court) arising from or related to the employment relationship or related to the interpretation of this Act (other than an action founded on tort):

(s) determinations under such other powers and functions as are conferred on it by this or any other Act.

[6] Section 13 of the Holidays Act 2003 is one of a number of similar sections that permit labour inspectors to determine certain questions in practice. It provides:

> ***13 Labour Inspector may determine what would otherwise be working day***
>
> *(1) This section applies if an employer and employee cannot agree under section 12 on whether a day would otherwise be a working day for the employee.*
>
> *(2) A Labour Inspector may determine whether the day would otherwise be a working day for the employee.*
>
> *(3) In making a determination, the Labour Inspector must take into account the factors listed in section 12(3).*

[7] Also relevant are the following sections of the Holidays Act 2003:

> ***54 Questions about whether sections 50 to 53 complied with***
>
> *(1) This section applies if an employer and employee cannot agree on the amount of pay that should be paid to the employee for work done on a public holiday.*
>
> *(2) A Labour Inspector may determine the amount of pay for the employer and employee.*
>
> *(3) In making the determination the Labour Inspector must apply the provisions of this subpart to the circumstances as determined by the Labour Inspector.*
>
> *(4) To avoid doubt, a dispute about whether an employer is complying, or has complied with, section 50, section 51, section 52, or section 53 is an employment relationship problem for the purposes of the Employment Relations Act 2000.*
>
> ***74 Who can enforce Act***
>
> *(1) The provisions of this Act may be enforced in accordance with this Act by—*
>
> *(a) an employee:*
> *(b) an authorised representative:*
> *(c) a representative of a union of which the employee is a member:*
> *(d) an employer:*

(e) a Labour Inspector.

(2) An employee's entitlement to annual holidays, public holidays, sick leave, or bereavement leave that are in addition to entitlements under this Act may be enforced only by the persons listed in subsection (1)(a) to (c).

76 Proceedings by Labour Inspector for penalty

(1) A Labour Inspector is the only person who may bring an action in the Authority against an employer to recover a penalty under section 75.

(2) A claim for 2 or more penalties against the same employer may be joined in the same action.

(3) A claim for a penalty may be heard in conjunction with any proceedings for the recovery of holiday pay or leave pay.

(4) After hearing an action for recovery of a penalty, the Authority may—
(a) give judgment for the amount claimed; or
(b) give judgment for an amount that is less than the amount claimed; or
(c) dismiss the action.

(5) An action for the recovery of a penalty must be commenced within 12 months after the earlier of when the cause of action became known, or should reasonably have become known, to the Labour Inspector.

(6) A penalty that is recovered must be paid,—
(a) if, and to the extent, ordered by the Authority, to any person the Authority specifies; or
(b) in any other case, into Court and then into the Crown Bank Account

77 Proceedings by Labour Inspector to recover arrears of pay

(1) A Labour Inspector may take proceedings on behalf of an employee to recover unpaid holiday pay or leave pay that the employee is entitled to under this Act.

(2) If a Labour Inspector takes proceedings under subsection (1), the Labour Inspector must not issue a demand notice under section 224 of the Employment Relations Act 2000 in respect of the same pay.

(3) Section 131 of the Employment Relations Act 2000 applies, with all necessary modifications, to proceedings taken under subsection (1).

(4) An action initiated or taken under this Act by a Labour Inspector may be completed by another Labour Inspector.

…

<u>79 Determinations by Labour Inspector</u>

<u>Except to the extent that, in any proceedings before the Authority, the Authority makes its own determination on the matter, a determination made by a Labour Inspector under section 11(2), section 13(2), section 17(2), section 54(2), or section 85(2), is binding on the employer and employee.</u>

[8] The predecessor to the Holidays Act 2003 was the Holidays Act 1981. Section 20 of that Act deemed employment to be continuous for the purposes of holiday

entitlements if a worker was dismissed and re-employed within one month. Subsection (1) provided that: *"… unless a Labour Inspector certifies in writing that he is satisfied that in terminating the employment the employer acted in good faith and not for the purpose of evading or attempting to evade any obligation imposed by this Act or any payment required to be made under it."* Subsection (2) provided that any employer or worker affected by a labour inspector's determination under subs (1) was entitled, within a limited time of communication of the labour inspector's determination, to appeal *"in the prescribed manner"* to the (now) Employment Relations Authority and that the Authority's decision would be final and binding on all parties.

Discussion

[9] Except as just identified under the Holidays Act 1981, determinations by labour inspectors in respect of a number of disputes about entitlements were new to holidays legislation in 2003. There are no fewer than five circumstances in which this method of dispute resolution is applicable. These include under s11(2) (ordinary weekly pay/relevant daily pay), s13(2) (otherwise a working day), s17(2) (a working week), s54(2) (pay for working a public holiday) and s85(2) (continuous employment).

[10] Section 79 declares that a labour inspector's determination is binding on the employer and the employee. If not complied with, remedies include claims for arrears and compliance orders under the Employment Relations Act and a penalty under s75 of the Holidays Act. All of these remedies can be granted by the Employment Relations Authority.

[11] Section 80 of the Holidays Act requires a labour inspector to discuss disputes referred to him or her with the parties and to give them an opportunity to comment before making a determination. We consider that a labour inspector would be bound by the rules of natural justice in such an exercise. These provisions are clearly intended to be a no or low cost, low level and speedy dispute resolution mechanism if the parties are unable to agree for themselves.

[12] Mr Cleary for the plaintiff accepted that if one or both parties did not agree to an inspector's determination either would be able to refer the dispute to the Employment Relations Authority. In this regard, Mr Cleary accepted that, although

s161 of the Employment Relations Act does not refer expressly to disputes under the Holidays Act, the list of employment relationship problems in that section is not exhaustive. This is reinforced by s54(4) of the Holidays Act which specifies that public holiday pay and agreement term disputes are employment relationship problems. The plaintiff's case is, however, that agreement to an inspector's decision and its delivery preclude later recourse to the Authority.

[13] The plaintiff also accepts that the Employment Relations Authority has a parallel jurisdiction to decide, as an employment relationship problem, a dispute about matters which a labour inspector may determine. Mr Cleary submitted, however, that s79 of the Holidays Act should be interpreted as meaning that, once a labour inspector has determined a dispute within his or her jurisdiction, the fact of that determination having been made prevents either party referring the same dispute to the Employment Relations Authority.

[14] Mr Cleary for the plaintiff argues that s79 should be interpreted to mean that unless the Authority, in dealing with the dispute as an original application, makes a different determination, the labour inspector's decision is binding on the parties. It follows, in counsel's submission, that there would need to be parallel proceedings on foot in the Authority before a labour inspector's determination is issued before it could lose its binding character.

[15] Consistent with this proposition, Mr Cleary submitted that it would remain open to parties wishing to preserve a right of recourse to the Authority to instigate proceedings in that forum before a labour inspector had made a determination. Mr Cleary accepts that in these circumstances a labour inspector would probably be disinclined to make a determination knowing of the existence of proceedings before the Authority.

[16] Mr Cleary accepts that for this argument to succeed in light of the exception contained in the opening words of s79 ("*Except to the extent that, in any proceedings before the Authority, the Authority makes its own determination on the matter,…*"), there must be read into this part of the section the words "in dealing with the dispute as an original application". The effect of this is that the opening words of the section would have to mean, "Except to the extent that, in any

proceedings before the Authority, the Authority, in dealing with the dispute as an original application, makes a different determination, …".

[17] Mr Cleary accepts that an Authority determination will prevail over a labour inspector's if it is inconsistent with the latter. Counsel submitted s79 should not be interpreted to extend the Authority's jurisdiction to include determining an application made subsequent to a labour inspector's determination. That would be, in effect, a challenge to, or review of, a labour inspector's determination. Counsel submits there is nothing in the wording of either s79 of the Holidays Act or s161 of the Employment Relations Act to support this.

[18] Mr Cleary noted that the statute does not provide for an appeal to the Authority from, or review by the Authority of, a labour inspector's determination. He submitted that if the Authority purports to determine a dispute after it has already been determined by a labour inspector, then the Authority must necessarily be acting as a supervising tribunal. Counsel submitted that even if the Authority in its determination purports to treat the matter as a fresh employment relationship problem, that does not mean that the inspector's determination can be ignored as it has legal force and cannot continue in some sort of legislative vacuum. Allowing such a process would negate the purpose of having labour inspectors arbitrating disputes at a low level.

[19] Mr Cleary was at pains to submit that his argument was not that a labour inspector's determination is necessarily a final outcome. Even if no parallel application has been made to the Authority before an inspector's determination is issued, counsel submitted that a dissatisfied party may seek judicial review of the inspector's determination in the High Court. Counsel submitted that an inspector's determination would be reviewable if, for example, the inspector had failed to carry out initial consultation or took into account irrelevant matters.

[20] Mr Cleary sought to persuade us that the Human Rights Act 1993 provides an analogous example of such a process having been intended by Parliament. Counsel submitted that the Employment Relations Authority does not have the power to review a Human Rights Commission decision or otherwise entertain an employment relationship problem based on the same facts as, for example, a complaint of sexual harassment lodged under the Human Rights Act.

[21] Finally, in relation to s161 of the Employment Relations Act, Mr Cleary submitted that it is remarkable that Parliament did not address the Authority's role in relation to holidays disputes and, in particular, where these are able to be and are determined in the first instance by a labour inspector. If these were to be open to challenge in the Authority, counsel submitted that this would have been provided for expressly.

[22] In summary, the plaintiff's case is that any party is entitled to commence proceedings in the Authority asking it to determine one of the prescribed disputes under the Holidays Act at any time until a labour inspector determines that dispute but not afterwards. Any proceeding so commenced could continue to be investigated and determined and, subject to rights of appeal, the Authority's determination would be binding and take precedence over any determination by a labour inspector. If proceedings in the Authority have not been commenced prior to the determination of a labour inspector being given, the inspector's determination is final except for judicial review.

[23] Although we have not summarised Mr Mitchell's submissions made on behalf of the defendant, our conclusions reflect these and we accept those submissions in their entirety.

Decision

[24] We conclude that Parliament intended to add a low or no cost informal and expeditious dispute resolution mechanism to the Holidays Act 2003. But it did not do so in substitution for the long established and authoritative mechanism of dispute resolution by independent expert tribunals, now the Employment Relations Authority and subsequently the Employment Court with rights of appeal.

[25] The plaintiff's arguments require the logical addition of a number of words to those Parliament used in s79 to achieve the proposed interpretation. Where the unadorned words used by Parliament can be given a sensible meaning, that meaning should normally be preferred to any other meaning requiring the addition of words Parliament did not use. Mr Cleary's argument also requires the inclusion of a sequencing or timing of actions that Parliament has not addressed. This too is a powerful indication that the interpretation by the plaintiff, relying as it does upon that timing or sequencing, is unlikely to be correct.

[26] We conclude that the plain meaning of s79 is to both give effect to an inspector's decision properly reached but also to allow parties to have such questions determined, in all cases, authoritatively and independently by the Employment Relations Authority, the Employment Court and even, in appropriate circumstances, the Court of Appeal and the Supreme Court. Parliament cannot have intended that the only option for a party disagreeing with, and seeking to challenge, a labour inspector's determination would be the very limited right of judicial review in the High Court that would address only the decision-making process and not the merits of an inspector's decision.

[27] A dispute such as this may be, or may be dealt with as, an employment relationship problem and thus falls within the Employment Relations Authority's jurisdiction under s161 of the Employment Relations Act.

[28] It follows that the plaintiff's jurisdictional challenge must fail and the case should now be determined on its merits. We see no reason why that cannot be undertaken by a single Judge and the Registrar should now take the necessary steps to set the challenge down for hearing.

[29] The defendant is entitled to costs on this preliminary issue and, if these cannot be agreed between the parties within the next month, the defendant may apply by memorandum with the plaintiff having the period of 2 weeks thereafter within which to reply by memorandum.

GL Colgan
Chief Judge
for the full Court

Judgment signed at 9 am on Friday 15 September 2006

Solicitors: EMA Legal, PO Box 1087, Wellington
Gubb Mitchell Crawshaw, PO Box 5530, Auckland