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LEGAL FORUM

Developments Since the Introduction of the Employment Relations Act 2000

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Introduction

The Employment Relations Act ("the ERA") came into effect on 2 October 2000. We are now 12 months on from the introduction of this legislation and employment law has undergone some significant changes. The Employment Court has had to consider its own jurisdiction and role in relation to the Employment Relations Authority. The nature of the relationship has taken on new meaning and the law relating to redundancy seems to have taken an about turn. Some of the significant changes and decisions under the ERA are discussed further below.

The real nature of the relationship

The ERA has reemphasized the real nature of the relationship. The Authority and the Court have been directed the title given to the relationship by the parties is not decisive when determining whether a person is an independent contractor or an employee. The Court or Authority is now guided by section section to determine what is the real nature of the relationship. The Authority and the Employment Court have considered this question in two significant cases, *Hook v JB Contractors Ltd*[1] and *Koia v Carlyon Holdings Ltd.*[2]

The section six of the ERA provides that the Court or Authority:

1. must consider all relevant matters including any matters that indicate the intention of the persons,[3] and

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1 Unreported AA 21/01.

2 Unreported, Goddard CJ, Travis, Colgan JJ, 20 August 2001 AC 56/01.

3 ERA section 6(3)(a).

2. is not to treat as a determining matter any statement by the persons that describes the nature of their relationship[4].

The leading case under the Employment Contracts Act 1991 ("ECA") was the Court of Appeal decision of *Cunningham v TNT Worldwide (NZ) Ltd.*[5] The Court stated:

> "... in the end when the contract is wholly in writing it is the true interpretation and effect of the written terms on which the case must turn."

The approach of the Authority and the Court has been altered by the ERA. The Authority in *Hook* looked at the question of what was the real nature of the relationship. The Authority's approach was to ask the following questions:

1. what was the intention of the parties?
2. what other matters are relevant?
3. having regard to 1 and 2 what was the real nature of the relationship?

The Authority relied on established law to determine the parties' intention. This can be determined by the following:

1. a written agreement;
2. the parties' oral declarations of intention;
3. the conduct of the parties; and
4. the context of the commercial environment in which the contract is made.

When considering what other matters are relevant, the Authority used the following established tests:

i. the control test;
ii. the fundamental test; and
iii. the integration test in some cases.

The Authority found that *Hook* intended to enter into an employment contract. However, JB's intended to enter into a contract for services. The intention test favoured JB's. The determining factor was that in the building industry it was usual to enter into contracts for services.

The Authority found that *Hook* was an employee when it considered other relevant matters. The relevant matters were:

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4 ERA section 6(3)(b).

5 *[1993] 1 ERNZ 695.*

1. JB's exercised a high degree of control over Hook;
2. Hook was not in business for himself and it followed that he was not his own man (the fundamental test); and
3. the work Hook did was an integral part of JB's business (the integration test).

The Authority found that when the question was asked of what was the real nature of the relationship it was clear that this was one of employment. It was an employment relationship despite the intention to enter into a contract of services and the label being "contractor".

The Authority stated "to determine otherwise would allow the possibility that any employer and employee could form an intention and state that their relationship was one of principal and independent contractor for it to be so".[6]

The Employment Court considered the issue of status in *Koia*. This was another fact situation where the contract labelled the relationship as an independent distributor.

The Court stated that intention is only one of the relevant matters that it must consider. The label is not decisive but cannot be disregarded if it reliably indicates the real nature of the relationship.[7]

The question asked by the Court was whether the arrangement is more consistent with a contract of service than with a contract for services.[8] The way the relationship has worked in practice may be relevant[9] as the Court is again now more concerned with substance than form.[10]

The control exercised by Carlyon did not exceed the degree of control and supervision necessary for the efficient and profitable conduct of a business being run by an independent contractor.[11]

The Court found that this was a contract of services. The one factor that could not be explained as being consistent with an employment relationship was the purchase of

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6 Hook page 8.

7 Above no.4 pp.2 para 27.

8 Above no.4 pp.13 para 30.

9 Above no.4 pp.13 para 31.

10 Above no.4 pp.13 para 32.

11 Above no.4 pp.14 para 35.

goodwill and the later attempt to sell it.[12] Other factors that supported the Court's finding included Mr Koia's entitlement to:

i. work his own hours

ii. select his own vehicle;

iii. carry goods for other manufacturers; and

iv. deal with other outlets on his terms (although he did not take advantage of this).

Redundancy

It has not come as a surprise that the ERA has had significant impact on the law relating to redundancy. The leading case on redundancy under the ECA was the Court of Appeal decision in *Aoraki Corporation Ltd v McGavin*.[13] The focus of the Court in *Aoraki* was the terms of the contract between the parties. The Court found that redundancy compensation could only be enforced where it was provided for in the contract.[14] Since the introduction of the ERA there have been two significant redundancy cases.

The first significant case was *Baguley v Coutts Cars Limited*.[15] *Baguley* was also a significant judgment because it was a *de novo* hearing in the Employment Court and was heard by a full bench.

Mr Baguley had been employed by Coutts Cars as an onsite car groomer from November 1998 to the end of October 2000. Coutts Cars sought to reduce its costs by making two groomers redundant, one of which was Mr Baguley. In declaring Mr Baguley's position redundant Coutts Cars did not:

a. engage in consultation with Mr Baguley;

b. consider retraining or redeployment;

c. inform Mr Baguley of any selection criteria to be used; or

d. take any steps to "soften the blow".

The Court stated that the ERA requires a new approach to what constitutes a fair and reasonable employer. The question is one of fact and degree and involves a common sense assessment of the situation bearing in mind the following:

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12 Above no.4 pp.15 para 41.

13 [1998] 1 ERNZ 601.

14 Page 619-20 line 46 to 5.

15 [2001] ERNZ.

i. the employers business requirements;

ii. the employees right to relevant information;

iii. the employers ability to mitigate the blow to the employee; and

iv. the nature of the employment relationship as one calling for good faith.[16]

The Court also reiterated the principle in *Aoraki* that consultation is not mandatory in all cases. However, the Court added that it usually would be.[17]

In relation to good faith and consultation, the Court stated "if an employer chooses to consult even if not bound to do so, it must observe the dictates of good faith expressly required by the Act to be observed when consultation is being undertaken or a proposal is being made than can possibly impact on the employer's employees."[18]

The Court confirmed that the ERA requires the Employment Relations Authority to "aim to promote good faith behaviour" and create stronger employment relationships found in s.3 and s.4 of the Act.[19]

The conduct of Coutts Cars was well short of the required standard of fair dealing. Its behaviour amounted to deceptive conduct in pretending that the assessment lay ahead, refusing to disclose the selection criteria and concealing adverse conclusions already reached.[20]

The Court considered the issue of redundancy compensation in *Vaughan v Canterbury Spinners Ltd.*[21] Under the ECA a formula could not be fixed for redundancy compensation through the disputes procedure.[22] This was made clear in *Aoraki*[23] where the Court of Appeal found that the ECA did not provide any basis for implying a term that redundancy compensation was payable under the contract.[24]

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17 Baguley pp.24 para 75 and pp.18 para 55.

18 Page 18 para 56.

19 Page 16 para 48.

20 Baguley pp.20 para 63.

21 Unreported, Goddard CJ, Travis, Palmer JJ 26 July 2001, CC 18/01.

22 Section 46 ECA.

23 [1998] 1 ERNZ 601.

24 Above 11 at page 620.

The issue before the Corut in *Vaughan* was whether Parliament had enacted a similar provision to section 46 of the ECA in the ERA.[25]

The Court considered whether setting a level of redundancy compensation would amount to fixing a term or condition of employment. If it did this would be outside the Authority's jurisdiction.[26] The Court found that the dispute was not invoked for the purpose of fixing new terms and conditions.[27]

The Court referred to *Otago & Southland Federated Furniture etc IUOW v Timbercraft Industries Limited*[28] which was a case decided under the Labour Relations Act 1987. The Court in *Timbercraft* found that the award provision allowed the redundancy compensation to be resolved by the disputes procedure where the parties were unable to reach an agreement. This was despite exclusion from jurisdiction of the power to fix new terms and conditions of employment.

The Court in *Vaughan* found that section 46 of the ECA had not been replaced by a similar provision in the ERA, which would exclude the jurisdiction of the Court in determining redundancy compensation.

The Court's decision in *Vaughan* will have a significant impact on claims where an agreement provides for redundancy compensation to be negotiated. This is an example of the movement away from the strict contract based approach under the ECA to the emphasis on the relationship.

Good faith

The ERA is underpinned with the concept that parties to an employment relationship must deal with each other in good faith. Good faith is not comprehensively defined and it is not limited to instances specified in the ERA and the code of good faith. An "employment relationship" by definition includes parties whom would not usually be considered to be in an employment relationship such as unions and their members. The Court and the Authority have placed some reliance on the case law from North America when considering good faith issues.

The concept of good faith was considered in *Ports of Auckland v New Zealand Waterfront Workers Union Inc.*[29] This case was removed from the Authority to the Court under s178

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25 Above no.9 page 4.

26 Section 5, section 101, section 161.

27 Above no.9 pp.13.

28 [1988] NZILR 1334.

29 Unreported, Travis J, 27 June 2001, AC 44/01.

of the ERA. The issue was whether a duty of good faith, which applies when the parties are in mediation, particularly in accordance with section 92 of the ERA, precludes the issue of an otherwise lawful strike notice on an employer.[30]

The parties commenced bargaining for a new collective agreement after the expiry of five collective employment contracts. The union gave notice of bargaining in October 2000 and a mediator aided the negotiations.

The Port argued that parties who are attempting mediation have a duty to deal with each other in good faith. The issuing of a strike notice undermines the requirement of good faith.

The Union argued that the requirement of good faith did not apply. The only question should be whether the strike is lawful. The union relied on the lack of express good faith requirements in the ERA relating to strikes and lockouts.

The Court held that to be entitled to a remedy the Port had to show that issuing the strike notices whilst engaged in mediation was a breach of good faith.

Travis J found that there was no evidence that the actions of the union undermined the mediation or had the potential to do so. The mediations continued.[31]

Mediation under section 92 is aimed at keeping the parties talking with the intent of avoiding strike or lockout. To require a party to withdraw from mediation before issuing a strike notice would introduce a step, which could undermine continuing negotiations. This step was not expressly provided for in the ERA.[32] Therefore, it would be unlikely that Parliament had contemplated this.

Travis J concluded that the action of the Union did not amount to a breach of the duty to act in good faith.[33] This finding was supported by the fact that nowhere in the ERA was there any express provision rendering a strike or lockout unlawful because it was in breach of the duty of good faith.[34]

It might be possible to apply the Court's reasoning to other aspects of the employment relationship involving mediation, including personal grievances. It could also be argued that because the ERA does not expressly prohibit parties from attending mediation without an intention to settle, there can be no breach of good faith in if this happens.

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30 Above no.14 pp.1 para 1.

31 Above no.14 pp.10 para 27.

32 Above no.14 pp.11 para 29.

33 Above no.14 pp.12 para 33.

34 Above no.14 pp.34.

Procedure under the ERA

The relationship between the Court and the Authority has also been considered in *David v Employment Relations Authority & Ors.*[35] This case was presided over by the full bench of the Court. The issues considered related to the Authority's proposed procedure and its compliance with principles of natural justice.

The case originated as a personal grievance for unjustified dismissal. The parties exchanged briefs of evidence and relevant questions prior to the hearing. However, the Authority would not permit cross-examination. Counsel for Mr David sought leave from the Authority to refer the matters of cross examination and the exchange of briefs to the Court. The Authority declined this application but the Court granted special leave to do so under section 178(3) of the ERA.

The case focused around the practice note issued by the Chief of the Authority which provided that cross examination would not generally be allowed in investigative meetings.

The Attorney General and the NZ Law Society were granted leave to intervene and be heard as interested parties.

The Attorney General for the Authority relied on section 188(4) of the ERA. This section states:

> "It is not a function of the Court to advise or direct the Authority in relation to the exercise of its investigative role, powers and jurisdiction".

The Court found that section 188(4) applies only to discourage it from advising the Authority while a matter is still before the Authority. It does not limit the Court's role in determining matters removed from the Authority. Therefore, this section is more of a guideline than a prohibitive clause. The Court has jurisdiction where the practice and procedure of the Authority is challenged.

The Court held that section 184 did not preclude it from judicial review based on the premise that the Authority's orders are invalid for, say, being in breach of the principles of natural justice. The Court could only be precluded if the section expressly say so.

The Court questioned whether the proposed procedure of the Authority was in breach of natural justice. The Court stated "having regard to the nature of the Authority and the subject matter of most of the matters that come before it, cross examination is a necessary ingredient of the principles of natural justice at every hearing at which a party wishes to exercise that right, being a hearing or meeting that can lead to the establishing of facts and a determination based no them of the merits of an employment relationship problem".

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[35] Unreported Full Court, 7 May 2001, WC 16A/01.

However, the Authority could control cross-examination by disallowing questions on proper grounds. The test is whether in all the circumstances the Authority can refuse cross-examination yet still discharge its obligation to comply with the principles of natural justice and act in a manner that is reasonable having regard to its investigative role.

After the Court's decision in *David* the parties before the Authority can request the right to allow cross-examination. This decision has practical consequences. Investigative hearings could be delayed and issues of a more technical nature could be more frequent. However, these impediments have to be weighed against the necessity for natural justice in judicial forums.

Conclusion

The ERA has been enacted with the objective of returning to collectivist principles and as such a movement away from the pure contract approach of the ECA. The focus is on the relationships, which is emphasized by the requirement of good faith dealings. In future employment law practitioners can expect to see further developments in what the Authority, Court and Court of Appeal interpret good faith to mean and where it is applicable. The law relating to redundancy has been altered yet again. Only time will tell how far the specialist institutions and the Court of Appeal are prepared to go in cases involving redundancy compensation.