File

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IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

A.66/85

BETWEEN PAUL DESMOND FITNESS of Ngaruawahia, Freezing Worker

AND AUCKLAND FARMERS' FREEZING CO-OPERATIVE LIMITED a duly incorporated company having its registered office at Auckland and carrying on business as Meat Processors and Exporters

Hearing: 7 April 1986

Counsel: Mr Shires Q.C. and Dr Szakats for Plaintiff to Oppose
Mr Latimour for Defendant in Support

Judgment Delivered 29 May 1986 2pm

JUDGMENT OF ELLIS, J.

Mr Fitness is a freezing worker. He sues for himself and approximately 890 other freezing workers who were members of the Auckland-Tomoana Freezing Workers Union, Horotiu Branch, who were all employed by the defendant at Horotiu on or about 16 July 1984. Mr Fitness alleges that he and his fellow workers were wrongfully prevented by the defendant from working for it from 17 to 30 July 1984. On the other hand the defendant alleges through its Auckland Manager, Mr Antrim, that the plaintiff and his fellow employees were on strike at the relevant time being in breach of the terms and conditions of their employment. I do not propose to review in any

further detail the facts deposed to by Mr Antrim and responded to by Mr Fitness. The net result of the dispute is, however, that Mr Fitness claims that he and his fellow workers should have been paid their wages by the defendant during the period 17 to 30 July 1984 and in these proceedings seeks the following relief:

(a) A declaration that the Plaintiff and the said other workers are entitled to be paid their wages for normal work in respect of the period of the stoppage of work at Horotiu from the 17th until the 30th July 1984 (both days inclusive);

(b) An enquiry to ascertain the exact amounts of the wages due to the Plaintiff and the said other workers;

(c) Judgment for the totalamount of the wages found to be due with interest thereon as this Court may allow;

These proceedings were issued on 8 May 1985 and the writ served on 16 May 1985. On 18 July 1985 the defendant filed a motion asking that the plaintiff's action be stayed on the grounds that the main issue in the action is one which is within the jurisdiction of the Arbitration Court and can more appropriately be determined by that Court. For reasons reflecting no fault on either party this motion was not heard until 7 April 1986. As Ihave said an affidavit byMr Antrim was filed in support of the motion and an affidavit byMr Fitness filed in reply. The defendant has not yet filed a statement of defence.

Counsel for the plaintiff conceded that a claim for wages was within the jurisdiction of this Court and theArbitration Court but the plaintiff was entitled to proceed in the forum of his choice. Mr Latimour accepted that there was concurrent jurisdiction but maintained that the Arbitration Court was the appropriate specialist tribunal to deal with the matter. I must, therefore, consider the two jurisdictions in some detail.

It is expressly recognised in s.158 of the Industrial Relations Act 1973 (the Act) which I shall refer to later in more detail, that the common law action for the recovery of wages is preserved. An example of such an action in the context of an industrial situation is Weir v Hellaby Shortland Ltd [1975] 2 NZLR 204 in the High Court and [1976] 2 NZLR 355 in the Court of Appeal. That was a representative action claiming holiday pay for 800 workers and the remedies granted were a declaration and an inquiry as to the exact amounts due. No question as to jurisdiction was raised in either Court. The plaintiff submits that proceeding in this Court has the following advantages:

1. He can proceed in a representative capacity.
2. The parties will be entitled to full discovery under the High Court Rules.
3. There is a right of appeal to the Court of Appeal on fact and law.
4. The remedies of declaration and an inquiry into loss are available.

On the other hand the Act sets out a special procedure for recovering wages due to workers. The general jurisdiction of the Arbitration Court is set out in s.48 of the Act of which the relevant parts provide:

"Jurisdiction of Court - (1) The Court shall have -

(a) Jurisdiction for the settlement of disputes of interest, in accordance with this Act, and for the making of awards:
(b) Jurisdiction for the settlement and determination of any dispute of rights referred to it under this Act:
(c) Such other functions and powers as are conferred on it by this or any other act.

(2) Without prejudice to subsection (1) of this section, the Court may -

(a) Hear and determine any question connected with the construction of this Act or any Act relating to industrial matter or conferring functions and powers upon the Court and this paragraph shall confer on the Court authority to determine conclusively any such question for the purposes of anycase properlybrought before the Court, notwithstanding that the question concerns the meaning of the Act under which theCourt is constituted or under which it operates in the particular case:
(b) Hear and determine any question connected with the construction of any award or collective agreement, or on any particular determination or direction of the Court:
(c) Make an order determining the rights of the parties under any award or order or collective agreement:
(d) Order compliance with any award, order, or collective agreement proved to the satisfaction of the Court to have been broken or not observed:
(e) Hear and determine enforcement and recovery actions under this Act:
(f) ...
(g) ...
(h) ...
(i) ...

(3) ...

(4) In all matters before it the Court shall have full and exclusive jurisdiction to determine them in such manner and to make such decisions, orders, or awards not inconsistent with this or any order Act, as in equity and good conscience it thinks fit.

(5) ...

(6) Except on the ground of lack of jurisdiction or as provided in section 62A of this Act, no decision, order, award, or proceeding of the Court shall be removable to anyCourt by certiorari or otherwise or be liable tobe challenged, appealed against, reviewed, quashed, or called in question in anyCourt.

(7) ..."

The Court is, therefore, empowered to hear and determine an action for the recovery of wages under S.48(2)(e)

Such an action under the Act to recover wages is, however, a special procedure. S.158 provides:

"Recovery of Wages -

(1) Without affecting any other remedies for the recoveryof wages or other money payable by an employer to any worker whose position or employment is subject to an award or collective agreement, where there has been any default in payment of any such wages or other money or where any payment of any such wages or other money has been made at a rate lower than that fixed bythe award or agreement or otherwise legally payable tothe worker, the whole or any part, as the case may require, of any such wages or other money maybe recovered tothe use of the worker in the same manner as a penalty for a breach of the award or agreement, by action commenced in the Arbitration Court under section 151 of this Act, notwithstanding the acceptance by the worker of any payment at a lower rate or any express or implied agareement to the contrary.
(2) Notwithstanding section 157 of this Act, an action under this section may be commenced within 6 years after the day on which the money became due and payable.
(3) A claim under this section against any employer may be joined in the same action with a claim against the same employer for a penaltyfor a breach of the award or agreement."

It is, therefore, necessary to refer to an action for a penalty under S.151. That section provides:

"Recovery of penalties -

(1) Any action for the recovery of a penalty maybe brought -

(a) In the case of a breach of an award or collective agreement, at the suit of any party to the award or agreement; or
(b) In any case, at the suit of an Inspector of Awards and Agreements.

(2) Any such action that is brought at the suit of an Inspector maybe continued by the same or anyother Inspector.

(3) A claim for 2 or more penalties against the same defendant maybe joined in the same action.

(4) No Court fees shall be payable in respect of any such action.

(5) The decision of the Court in any such action shall be final.

(6) The procedure in any such action shall be as prescribed."

It is plain from S.151 that the only parties that can bring an action for the recoveryof a penalty are the Inspector of Awards and Agreements or the parties to an award or collective agreement, namelythe union or the employer. It follows that in this case either the union or the Inspector of Awards and Agreements only can proceed to recover wages against the defendant under S.158 but of course such recoveries are "to the use of the worker" concerned. If the union or the inspector chose, it or he could proceed on behalf of all persons represented by Mr Fitness in these proceedings. However, no worker can by himself or together with fellow workers proceed under S.158. The rights of the individual worker or workers to seek a remedy is expressly preserved by the opening words of S.158 as I have already said.

In summary, therefore, the jurisdiction of the Arbitration Court has the following features.

1. The action must be taken by a union or an Inspector. The action can be on behalf of as many workers as the circumstances require and wages recovered are for the use of the particular workers.
2. Discovery is not provided for.
3. The right to recover wages is limited by the provisions of s.48(4) which gives the Arbitration Court power to withhold relief if such would be inconsistent with equity and good conscience.
4. There would be a limited appeal to the Court of Appeal on a question of law only: s.48(6) and s.62A.

While a worker himself cannot proceed with an action to recover wages under the Act, in the present case no doubt the plaintiff and those he represents would have little difficulty in enlisting the assistance of their union or the Inspector to bring proceedings on their behalf before the Arbitration Court. It was certainly not suggested before me that this was not so. I will, therefore, proceed on the basis that it would be possible for the plaintiff to have proceedings commenced under the Act if he so chose. Another practical matter concerned me at the hearing and that was the possible delays that would be experienced in proceeding before the Arbitration Court. Counsel for the plaintiff has now advised me that such an action could be disposed of within approximately one year.

The action should be brought in Auckland where there are at present some 60 cases awaiting for fixtures. This is not markedly different from the availability of fixtures in the High Court at Hamilton and in my view it is not, therefore, a matter that need be considered further when assessing fairness to the parties in the disposal of their litigation.

It has repeatedly been said on the highest authority that the whole structure of the Act suggests that the administration of industrial affairs of industrial unions is intended to be under the control and direction of the Arbitration Court: See the statements in the Court of Appeal from Wellington District Hotel etc. Union v Attorney-General [1951] NZLR 1072 down to the recent case of New Zealand Baking Trades Employees' Industrial Union v General Foods Corporation New Zealand Ltd [1985] 2 NZLR 110. A relevant and succinct statement of the principle relevant to the present case is that of Sir Thaddeus McCarthy delivering the judgment of the Court of Appeal in Winstone Clay Products Ltd v Inspector of Awards [1984] 2 NZLR 209 at page 211:

> "Before we go to the specific issues raised in this appeal we make a few general observations concerning the nature of the Arbitration Court and its relationship with this Court.
>
> It is a fairly commonplace statement that it would be most dangerous to overlook the special nature of the Arbitration Court, its purpose and its powers. It is not to be assumed that propositions of law, however prestigious and well established in the HighCourt or the Court of Appeal, will apply with the same clear force in the Arbitration Court. That is a specialist Court, designed for a specific field. In the matters directed by the statute to come before it, it has exclusive jurisdiction, and, when exercising it, it must take into

account other considerations besides legal issues. It is concerned primarily with fairness. Thus it has been more than once said in this Court that legal technicalities or analogy of rules will not always be helpful in achieving the objects of a Court which has been given what Cooke J. has characterised as "unusual powers" (see [1981] ACJ 613, 616)."

Another relevant statement of principle is that of Eichelbaum J. in Dallimore Groundworks Limited v Hawke's Bay Road Transport etc. Union A 19/84, 16 August 1984 at page 7:

"The principal thrust of the arguments for the defendants was that here there was a specialist tribunal set up by statute to deal with industrial matters and it should be allowed to resolve the issue. I say immediately that I would hesitate to make a ruling that would have the effect of depriving the Arbitration Court of jurisdiction in a matter that truly involved an industrial issue or where the specialist expertise of the Arbitration Court would be an important consideration. However, the matter that the plaintiff wishes to argue is a contractual question based as I see it on ordinary common law principles which this Court is no less competent to try than is the Arbitration Court. There is no question of what is commonly described as an industrial situation, since I have been informed that work under the agreement has been completed and essentially the dispute is centred on the recovery of wages allegedly unpaid. Mr Thornton assured me that no question of interpretation of the agreement arose in relation to the rates payable nor any question of interpretation of the Act. If what I have described as

the critical issue, namely the applicability of the agreement to the plaintiff, is decided against the plaintiff then Mr Thornton says it will abide by that decision and meet its obligations. In summary on this aspect, it seems to me this Court has jurisdiction and so far as matters discussed to this point are concerned there is no reason why that jurisdiction should not be exercised."

I have considered the other cases referred to me by counsel and refer to two only. The first is a decision of Davison C.J. in Hanson v Dunlop New Zealand Ltd [1982] ACJ 650. There the Chief Justice was considering a claim for bonus wages in terms of a certain "house agreement" between the Canterbury Rubber Workers' and the defendant. The action involved the interpretation of that agreement, a Collective Agreement, the provisions of the General Wage Orders Act 1977 and the Wage Adjustment Regulations 1974. While the Chief Justice accepted that the High Court had concurrent jurisdiction to determine the question he considered that it was more appropriate that the matter be litigated before the Arbitration Court. He, therefore, adjourned the hearing to enable the plaintiff to have proceedings commenced on his behalf in the Arbitration Court.

The other case is New Zealand Engine Drivers' etc. Union v Gear Meat Processing Ltd [1982] ACJ 111. There the plaintiff union claimed to recover wages alleged to be due and unpaid for the period the workers were locked out. The Court gave

judgment for the plaintiff for a sum of money for each worker. In delivering the decision of the Court Chief Judge Horn applied the common law by enforcing the contract of employment in favour of the workers. However, what is important to note is the comment made by Mr Walton a member of the Court who said, "Whilst this Court could well be correct in law, the claim of this branch of the Union has no merit on the grounds of morality, and s.48(4) of the Act could well have applied to the facts of this case." I mention this case in particular to draw attention to the special jurisdiction of the Arbitration Court to assess any claim on the wider grounds of equity and good conscience. This of course may operate for or against a worker's claim depending on the facts. It is plainly an important consideration in such a case as the present where the workers contend they were locked out and the employer contends they were on strike.

Before me Mr Shires submitted that although the defendant had not yet filed its defence there was no real dispute on the facts and the question for the Court would be whether the stoppage of work was a lock out prohibited by s.125A of the Act. In my view this Court's reluctance to be involved in industrial matters extends to situations where the litigated dispute may well have much wider industrial significance than that which is apparent from the relief sought. I consider the pleadings do disclose an industrial issue of possible significance beyond that of the contractual matters raised. I consider that the special jurisdiction of the Arbitration Court to determine a matter such as this on the grounds of fairness as well as the common law is a particularly important

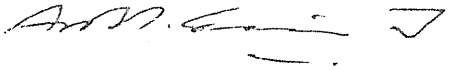
matter. While I may not be prepared to hold in all circumstances that it is inappropriate for this Court to determine whether or not the facts of a particular case amounted to a lock-out as defined by the Act I do not consider that the present case should be determined by this Court rather than theArbitration Court. While it surprised me to learn that proper discovery was not available in proceedings before the Arbitration Court I accept that proceedings there are designed to be uncomplicated. In this case it does not appear that absence of formal discovery will impede the litigation: Mr Shires advised me that questions of fact are unlikely to be in dispute. The plaintiff's contention that better and fuller relief was available in this Court does not seem to me to be significant as the end result of the case, if successful for the plaintiff, would be an award of a fortnight's wages to each of the workers which scarcely warrants a declaration or an inquiry. Another matter urged before me by the plaintiff was that he could not bring a representative action before the Arbitration Court. In my view there is no substance in this suggestion as the Union or the Inspector is able to proceed in a representative capacity and with an identity to interest.

Finally there is the submission that there is a full right of appeal to theCourt of Appeal against a decision of this Court. That is true. However, the limited appeal from the Arbitration Court to the Court of Appeal is a deliberate part of the overall treatment of litigation in the industrial field considered by Parliament to be beneficial to the community,

and I, therefore, do not agree that it should be a reason for refusing a stay of the present proceedings.

I, therefore, direct that the present proceedings be stayed to enable the plaintiff to take the necessary steps to commence proceedings through his Union or the Inspector before the Arbitration Court. In the unlikely event that the Union or the Inspector should each refuse to commence the proceedings, then of course the plaintiff is at liberty to raise the matter again in this Court.

The parties did not make any submissions to me on the question of costs. They are, therefore, reserved.



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