

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2012] NZEmpC 60
ARC 68/11**

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

AND IN THE MATTER OF a preliminary question of jurisdiction

BETWEEN ALAN MAYNE
Plaintiff

AND POLYCHEM MARKETING LIMITED
Defendant

Hearing: By memoranda of submissions filed on 2 February and 12 and 19
March 2012
(Heard at Auckland)

Appearances: Chris Patterson and Andrea Halloran, counsel for plaintiff
John Hannan and Lauren Simpson, counsel for defendant

Judgment: 18 April 2012

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] This challenge to a determination¹ of the Employment Relations Authority raises a preliminary jurisdictional point concerning whether the Authority was, and this Court is now, empowered to determine the plaintiff's claims. Polychem Marketing Limited (PML) says that the Authority was, and the Court is, not so empowered for the following reasons.

[2] First, the defendant says that the plaintiff was never its employee. Rather, it says that the plaintiff was a director of the company but resigned from that role in 1990. Alternatively, the defendant says that even if the plaintiff was once its employee, he ceased to have that status at the latest by 31 December 1990 or perhaps

¹ [2011] NZERA Auckland 360.

even as long ago as 1986 when he ceased to perform any duties for the defendant. In these circumstances, the defendant says that there was no employment agreement or contract between the parties immediately before the Employment Relations Act 2000 (the Act) came into effect. It follows, the defendant says, that the transitional provisions of s 242 of the Act do not apply to the circumstances of Mr Mayne's claim. PML says that, in these circumstances, neither the Authority nor this Court on a challenge had or has jurisdiction to consider these claims.

[3] Some of the relevant allegations in the plaintiff's amended statement of claim are admitted, although some are denied. For the purpose of determining whether the Court has (and the Authority had) jurisdiction to enter upon the merits of Mr Mayne's claims, I will assume that those allegations of fact in the amended statement of claim which are denied, will be capable of proof by the plaintiff. That is the conventional way in which the Court determines an application to strike out a proceeding for lack of jurisdiction.

[4] The following is the statement of the issues for decision that was agreed between the lawyers:

If the plaintiff was ever an employee of the defendant, but ceased to be an employee before the coming into effect of the Employment Contracts Act 1991, does the Court have jurisdiction to determine, and if appropriate provide a remedy in relation to, the plaintiff's claim that his alleged employment contract with the defendant included an obligation to provide on-going health care and insurance cover to him after he retired?

[5] Materially, the plaintiff's claim is as follows.

[6] In 1981, Mr Mayne was both the sole shareholder in, and (as its managing director) an employee of, a company known as Polychem NZ Limited (PNZL). In that year, PNZL agreed, as a matter of contract, to provide what is described as "healthcare cover" to all its employees (including Mr Mayne) and to continue to pay for these healthcare benefits after those employees retired from employment with it.

[7] In May 1982, PNZL sold its assets and goodwill to the defendant (PML). Under the terms of sale, PNZL employees were taken on by PML on terms and conditions of employment including that these would be no less favourable than

those which they had enjoyed with PNZL and that PML would meet any and all obligations then owed by PNZL to its employees, both current and former.

[8] PML continued to pay for Mr Mayne's healthcare benefits as part of its company healthcare scheme.

[9] In mid-1986, the defendant's shares in PML were sold to English China Clay PCL Limited (ECCL). Among the terms of this sale of shares was that PML's employment obligations to its employees would continue unchanged. In particular, it is said by the plaintiff that an oral condition of this sale was that the defendant's operations would remain the same and, amongst other things, it would continue to meet any and all of its employment obligations including those to former employees under its healthcare scheme. The plaintiff says that following this sale of shares, the defendant continued to provide and pay for the plaintiff's healthcare costs. Despite this change in shareholding, PML continued in existence as the same legal entity and as Mr Mayne's employer.

[10] In 1990, Mr Mayne retired from the defendant's employment but it continued to pay for his healthcare costs under its healthcare scheme.

[11] In November 2004, the plaintiff says that he and the defendant agreed that he would remain in the defendant's healthcare scheme but that henceforth he would meet his own costs of doing so provided that PML continued to provide the full benefits of its healthcare scheme to other former employees of PNZL. Although it is not entirely clear what became of the entitlements of those other employees, if PML discontinued providing these to them, then it is arguable that Mr Mayne's conditional variation to his own employment agreement was not adhered to by PML so that he was entitled to expect the defendant to continue to maintain his benefits.

[12] On about 1 December 2005, shares in the defendant company were sold to Nuplex Industries Limited. Employment obligations, including the conditional healthcare scheme obligations to the plaintiff, remained unchanged following this sale of shares.

[13] In late September 2009, the plaintiff was advised that he and other former employees would no longer be included in the healthcare scheme with effect from 1 November 2009. Since that date, the defendant has not paid for Mr Mayne's healthcare benefits or retained him within its healthcare scheme.

[14] The plaintiff's case, in essence, is that a contractual obligation by his employer was inherited in law by the defendant and has now been breached by it. Mr Mayne's cause of action is for breach of employment contract, which breach occurred first on 1 November 2009 and has continued since then.

The Court's jurisdiction/powers

[15] On a challenge from a determination of the Employment Relations Authority, this Court draws the source of its authority to determine the proceeding from that which the Authority itself had to determine it. Put another way, if the Employment Relations Authority was empowered to investigate and determine Mr Mayne's claims, then the Court may do so on a challenge, and vice versa.

[16] Section 161 of the Act, which was in force when the breaches are alleged to have occurred in November 2009, gives the Authority exclusive jurisdiction to make determinations about employment relationship problems generally. "[E]mployment relationship problem" is defined in s 5 as including a personal grievance, a dispute and "any other problem relating to or arising out of an employment relationship". "[E]mployment relationship" means any of the employment relationships specified in s 4(2) of the Act. These include, pursuant to subs (2)(a) "an employer and an employee employed by the employer". It is well established that the Authority is empowered to determine claims of breaches of employment contracts.

[17] The transitional provisions of the Act relied on by the defendant are set out at s 242(1) as follows:

- (1) Every individual employment contract within the meaning of the Employment Contracts Act 1991 that is in force immediately before the commencement of this Act continues in force according to its tenor and is enforceable in the Authority or the court.

The Employment Relations Authority's determination

[21] Because this is a challenge by hearing de novo, it is only necessary to summarise the Authority's determination and its reasoning. In the Authority, there were two other applicants along with Mr Mayne. They were other former employees of PNZL who claimed compensation for lost benefits of the same sort as Mr Mayne claimed. The Authority dismissed their claims for much the same reasons as it rejected Mr Mayne's. These two other former employees have not challenged the rejections of their claims, so that it is only the circumstances of Mr Mayne with which this Court is now concerned.

[22] The Authority focused on its jurisdiction and powers under ss 161 and 162 of the Act. In particular, it identified its jurisdiction to resolve employment relationship problems and the definition of this phrase in s 5 including a personal grievance, a dispute, or any other problem related to or arising out of an employment relationship.

[23] The Authority relied on a conclusion that Mr Mayne ceased to be an employee of PML when he retired from employment with that company in 1990. He was therefore, in the Authority's view, not in an employment relationship with PML when the Employment Relations Act 2000 came into effect on 2 October of that year. The Authority concluded that the transitional provisions, ss 242 and 243 of the Act, did not assist the plaintiff. That was said to be because Mr Mayne did not have an employment contract (defined under the Employment Contracts Act 1991 as being a contract of service) that was in force immediately before 2 October 2000. As the Authority put it: "... as at 2 October 2000 [he was not] under any obligation to serve ... PolyMark, and no employer was obliged to offer [him] any work to perform for hire or reward."²

[24] Important in the Authority's determination was its conclusion that PNZL ceased to exist as a legal entity in 1992. The Authority found that if Mr Mayne did become an employee of PML, that relationship ceased in 1990 and was not subject to

² At [25].

transitional arrangements under either the Employment Contracts Act 1991 or the Employment Relations Act 2000. The Authority expressed its conclusion as follows: “It cannot be said that an employment contract or an employment agreement had remained “in force” immediately before the enactment of each statute.”³

[25] The Authority concluded that PML did no more than assume voluntarily the role of a provider of subsidised medical insurance to Mr Mayne which he had received originally from PNZL. Although it concluded that PML took on a responsibility, it did not commit itself to meet a legal obligation to do so. The Authority dismissed Mr Mayne’s claims as unenforceable.

Decision of preliminary point

[18] It is necessary to re-emphasise at this point that this is a judgment on a preliminary jurisdictional issue and not on the merits of Mr Mayne’s claim. It is only if it can be established by the defendant that, irrespective of merits, Mr Mayne can have no claim to relief, that the challenge should be dismissed as being outside the jurisdiction of the Court.

[19] I have concluded that the defendant has failed to establish an absence of jurisdiction and that the challenge can now be considered on its merits. That is for the following reasons.

[20] The plaintiff’s claim is founded on contract. He says that on 1 November 2009 (when it ceased to provide healthcare benefits to him) the defendant was obliged contractually to do so. Seen thus, there was no statutory impediment to the Employment Relations Authority investigating and determining a claim of breach of an employment contract which was said to have occurred at that date. Legislative transitional provisions simply did not come into the equation as the Authority held. There must also, of course, have been employment contract rights and/or obligations between the parties at that date.

³ At [37].

[21] Employment agreements or employment contracts can continue to have legal effect, at least in part, following the expiry of what is sometimes called the wage work bargain, that is, after the employee finishes performing work for the employer and being paid for that work performed. Both express and implied obligations can continue in force, be enforced and otherwise be the subject of proceedings for breach of contract, after most or even all of the other elements of the contract have expired. An example of a term (often implied but sometimes expressed in an employment agreement) having this effect is the obligation not to disclose the employer's confidential information both during and after the term of the contract. An example of an express provision having post-termination effect and enforceability is a lawful restraint of engagement in competitive economic activity, sometimes called a restraint of trade.

[22] There are other examples and there is nothing in principle that would prevent parties from entering into an enforceable term that, in consideration of the work performed by the employee during the term of the agreement, the employer will make payments or provide other benefits to the former employee on an indeterminate basis following the end of the employment.

[23] Where a corporate employer continues in existence after the end of the employment, such an obligation will continue to be borne by that employer and may be enforced against it. Even where shares in a company that is an employer are sold and bought by others, the same legal entity (the company) continues to bear those obligations unaffected by the change in its shareholding. The same position applies where the assets of a business are purchased and employment contract obligations and liabilities are assumed by a new corporate identity. It will be a matter, in each case, of proving a chain of legal liability from the original employer to the person said to have had the liability and to have breached the contract.

[26] Although the Authority concluded that no contractual relationship continued between the parties after Mr Mayne's resignation, such a finding begs the question of the legal basis for other post-employment obligations such as, for example, a restraint of participation in competitive economic activity (restraint of trade), an obligation (implied or express) of confidentiality, or the like. In contractual principle

there is no difference between these obligations on employees and an obligation on an employer to continue to provide benefits related to the employment relationship but after the cessation of the wage work bargain aspects of it.

[27] There is nothing in principle to prevent parties to an employment relationship contracting that one element of the reward to the employee for the work performed will be the delayed provision of benefits including after the retirement, resignation or even dismissal of the employee. Such an obligation is enforceable against the employing legal entity so long as it continues to exist or upon a successor which adopts that liability. Indeed, such a provision may be an exemplar of good employment practice: in return for the employee's loyalty and commitment, the employer promises to look after some aspects of the employee's welfare for life.

[28] In this way, the ability to enforce the obligation is not dependent, as the Authority found it to be, upon the existence of an operating employment contract or agreement at the time legislation came into effect. That is because there was such a contract in respect of Mr Mayne at the time when new legislative regimes came into effect, albeit a significantly modified form of contractual relationship in which the only remaining operative provision was the obligation upon the employer to pay medical insurance premiums.

[24] If Mr Mayne is able to establish by evidence that the defendant assumed in law PNZL's former contractual obligations to provide him with healthcare benefits, then, to this limited extent, his former employment agreement continued in existence after his retirement from work for the employer and remuneration payment by it in 1990.

[25] It is convenient to set out again the parties' agreed statement of the issues for determination at this point:

If the plaintiff was ever an employee of the defendant, but ceased to be an employee before the coming into effect of the Employment Contracts Act 1991, does the Court have jurisdiction to determine, and if appropriate provide a remedy in relation to, the plaintiff's claim that his alleged employment contract with the defendant included an obligation to provide on-going health care and insurance cover to him after he retired?

[26] That question can best be answered as follows. If the plaintiff can establish that he was an employee of the defendant or otherwise entitled to employment contractual benefits from it, and that, although having resigned from that employment in 1990, these contractual benefits continued to accrue to him after that date, the Court does have jurisdiction to determine and, if appropriate, to provide a remedy in relation to the plaintiff's claim that his employment agreement included an obligation to provide ongoing healthcare and insurance cover to him after he retired.

[27] The plaintiff's challenge having survived this preliminary jurisdictional assault, the Registrar should now arrange for a directions conference to timetable the proceeding to a hearing. Given the largely technical and legal nature of the defence in the Authority and now in this Court, I commend to the parties the opportunity to attempt to resolve the proceeding at a judicial settlement conference if they are agreeable.

[28] The plaintiff is entitled to costs on this preliminary jurisdictional application which I reserve to be dealt with at the same time as any other issues of costs between the parties.

GL Colgan
Chief Judge

Judgment signed at 10.50 am on Wednesday 18 April 2012