IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2008-485-1721

UNDER	The Judicature Amendment Act 1972
BETWEEN	JUDITH KIRK Plaintiff
AND	THE ELECTORAL COMMISSION First Defendant
AND	NEW ZEALAND AMALGAMATED ENGINEERING, PRINTING AND MANUFACTURING UNION Second Defendant

Hearing: 23 August 2008

Counsel: P T Kiely with D J Erickson for plaintiff
P J Gunn with D Brookes for first defendant

Judgment: 28 August 2008

In accordance with r540(4) I direct the Registrar to endorse this judgment with a delivery time of 1.15pm on the 28th day of August 2008.

RESERVED JUDGMENT OF MACKENZIE J

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[1] This proceeding is a sequel to the earlier proceeding between the same parties which was the subject of my judgment delivered on 21 May 2008 - *Kirk v The Electoral Commission & Anor* HC WN CIV 2008-485-756 21 May 2008. The background is set out in that judgment. The second defendant (the Union) had applied to the first defendant (the Commission) for listing as a third party under s 15 of the Electoral Finance Act 2007 (the EFA). Section 13(2)(f) of the EFA excludes from eligibility as a third party a person involved in the administration of the affairs

of a political party. I held that the word "person" in that section bore the extended meaning given to it by s 29 of the Interpretation Act 1999, and so included the Union.

[2] Following that decision the Commission then considered whether the Union is involved in the administration of the affairs of the Labour Party. It reached the conclusion that it is not and, by a decision dated 29 July 2008, the reasons for which were given on 1 August 2008, it indicated that the Union would be listed as a third party. These proceedings were issued on 6 August 2008. Interim orders to prevent listing in the meantime were sought. An urgent fixture was arranged and the Commission agreed that it would take no action to list the Union pending the Court's decision. The Union, by memorandum, indicated that it did not intend to defend or participate in the proceedings and would abide by the judgment of the Court. In light of that, the Commission very helpfully adopted a similar approach to that which it had adopted in other proceedings before me in *Kirk v The Electoral Commission* HC WN CIV 2008-485-805 9 June 2008. It instructed counsel to advance submissions in support of its decision. That goes further than would ordinarily be appropriate for a decision-maker. That stance has once again been of considerable assistance.

[3] Eligibility for listing as a third party is determined by s 13 of the EFA. Under s 17, if it determines that there are no grounds for refusing the application, the Commission must list. It must refuse the application for listing if it is not satisfied, on the basis of the application, that the applicant is eligible to be listed as a third party. It must give notice of that refusal to the applicant, setting out the reasons. It is common ground that the Union is eligible to be listed as a third party unless it is "a person involved in the administration of the affairs of a party".

[4] The Commission considered the decision in the earlier proceedings at a special meeting on 30 May 2008. It had before it further communications from both the Union and from Mr Farrar. It gave both Mr Farrar and the Union an opportunity to provide any further facts by its next meeting on 12 June. A further letter was received from the Union. The matter was considered at the meeting on 12 June but no final decision was made and the matter was adjourned for further consideration at the Commission's next meeting on 29 July 2008. At that meeting the Commission

decided that the Union would be listed. The reasons for that decision were set out in the formal decision signed by the Chief Executive on 1 August as follows:

> In the view of the Electoral Commission the EPMU is eligible unless disqualified under section 13 (2) (f) (i) as being "involved in the administration of …… the affairs of a party". The involvement must be in "administration of" the affairs, and not merely "in the affairs" of the party. The EPMU is an affiliate member of the NZ Labour Party. The EPMU has the voting and nomination rights of a member. The Commission does not regard the exercise of those rights as involvement in "the administration of the affairs" of the party. The EPMU is a member of a so-called Affiliates Council of the party, a body with uncertain formal status and functions. The Commission views that membership similarly. The present Secretary of the EPMU, Mr Andrew Little, is Affiliates Vice President of the NZ Labour Party and sits on its governing Council through being Affiliates Vice President. Affiliates Vice Presidents are elected by the Annual General Meeting of the party. He is not a representative of the EPMU. The Commission accepts he does not act on the Council under directions from the EPMU. If the possibility of influence from the EPMU may be relevant (a question of law which the Commission leaves open) the Commission finds no evidence of such influence or of the likelihood of such influence to the requisite degree. It these circumstances the Commission is satisfied the EPMU is not involved in the administration of the affairs of the party, and is eligible for listing. The EPMU will be listed on Monday 4 August 2008 unless the Commission previously is restrained by court order. Should credible evidence emerge in the future that the Affiliates Vice President is <u>acting under EPMU direction</u> the listing can be reassessed under section 20.

[5] The plaintiff raises two bases for contending that the Commission's decision involves an error of law. First, it says that the Commission had misinterpreted s 13 by adopting an unduly restrictive interpretation of what constitutes administration of the affairs of the Labour Party. Second, it submits that the Commission erred in law by failing to take into account certain relevant considerations.

[6] The approach of this Court, on judicial review, in such a case is akin to that described by the Supreme Court in *Bryson v Three Foot Six Ltd* [2005] 3 NZLR 271. That case was concerned with a right of appeal on a question of law only. The relevant principles are equally applicable to a case of judicial review where error of law is alleged. A misinterpretation of the relevant legislation is clearly an error of law. Apart from that situation, the way in which an error of law may arise from the application of the law to the particular facts as found by the tribunal was described by Blanchard J delivering the judgment of the Court in these terms:

> [25] An appeal cannot, however, be said to be on a question of law where the fact-finding Court has merely applied law which it has correctly understood to the facts of an individual case. It is for the Court to weigh the relevant facts in the light of the applicable law. Provided that the Court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding Court, unless it is clearly insupportable.
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> [26] An ultimate conclusion of a fact-finding body can sometimes be so insupportable – so clearly untenable – as to amount to an error of law: proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known words of Lord Radcliffe in *Edwards v Bairstow*, a state of affairs "in which there is no evidence to support the determination" or "one in which the evidence is inconsistent with and contradictory of the determination" or "one in which the true and only reasonable conclusion contradicts the determination".

[7] The plaintiff's first contention is that the Commission here has misinterpreted the law, by adopting an unduly restrictive interpretation. As both counsel note, the phrase "involved in the administration and the affairs of a party" is not a phrase which has been the subject of judicial interpretation so as to have acquired a particular meaning. The term "party" is defined in the Act to mean a political party registered under the Electoral Act 1993, and the Labour Party clearly falls within that term. Apart from that, the words bear their ordinary meaning, and are to be interpreted accordingly, having regard to their context within the Act as a whole. What is required is an examination by the Commission of the relevant facts, and a determination whether, on those facts, the Union falls within that phrase. The essential issue is not the interpretation of the phrase, but its application to the facts as found by the Commission. That is what the Commission has done. I consider that no error of law based on misinterpretation is made out.

[8] The plaintiff's claim is essentially that the evidence should have led the Commission to the view that the Union was involved in the administration of the affairs of the Labour Party. It is not for this Court to substitute its view on the facts for that of the Commission. The decision whether the statutory test is met is one for the Commission, not the Court. The function of the Court is limited to ensuring that the Commission has not overlooked any relevant matter or taken account of some irrelevant matter, and to considering whether this is one of those rare cases in which

the decision is clearly untenable, in that the proper application of the law requires a different answer.

[9] The Commission found, on the facts, that the Union is an affiliate member of the NZ Labour Party, and has the voting and nomination rights of a member. The Commission did not regard the exercise of those rights as involvement in the administration of the affairs of the party. The Commission took a similar view of the Union's position as a member of the Affiliates Council of the party. The plaintiff does not challenge the general proposition that the Union's membership of the party does not in itself fall within the statutory test. However, it submits in effect that the relationship between the Union and the party is more than that of membership. It submits that the Union is represented at all levels in the Labour Party, and that under r 13(ii) of the Labour Party Constitution an affiliate is part of the Labour Party organisation. Mr Kiely further submits that the Labour Party rules demonstrate that the Union as an affiliate has constitutional entitlements to be represented on committees that are involved in the administration of the affairs of the Labour Party. He notes in particular that the Union, as an affiliate, has rights to appoint delegates to each Labour Electorate Committee (under r 48); to the six Labour Regional Councils (r 110); and to each Labour Local Body Committees (r 84).

[10] The assessment of the effects of the membership and other rights which the Union has under the Labour Party Rules, and the making of a judgment as to whether these rights are such as to constitute involvement in the administration of the affairs of the party, are matters for the Commission. The Commission has clearly taken into account that the Union has the voting and nomination rights of a member. The decision does not contain a detailed analysis of the rights. That is not required. There is no basis in the decision for a submission that the Commission has proceeded on a mistaken view as to the nature and extent of the rights under the Rules. This is not a case where the Commission has failed to take this relevant matter into account. It is not for the Court to substitute its view, based on its own assessment of the Rules. The question on this application for judicial review is not whether the Court would have reached the same conclusion. Rather, it is whether the Commission has reached a conclusion which is so clearly untenable as to amount to

an error of law. The plaintiff has failed to meet that high hurdle, on this aspect of the case.

[11] An important element of the plaintiff's case is the contention that the Union's role in the Labour Party is wider than that of membership, and of the right to nominate persons to positions within the party. The essence of the claim is that persons so nominated are required to act in the interests of the Union. The secretary of the Union, Mr Little, is Affiliates Vice President of the NZ Labour Party and in that capacity sits on the governing council of the party. Mr Kiely submits that the Commission failed to take into account the obligations imposed on Mr Little as national secretary pursuant to the Union's Rules. He submits that, on a proper analysis of these rules, the national secretary is required, when acting as Affiliates Vice President, to advance the interests of the Union and as such, he is not acting as Affiliates Vice President in an individual or personal capacity but instead as a officer of the Union who is generally responsible for the administration of the affairs of the Union. Mr Kiely further submits that it is not necessary to show that the Union is giving directions to people like Mr Little when they are serving on the various bodies of the Labour Party and all that one needs to show is that Mr Little and others as nominees of the Union are involved in the administration of the affairs of the Labour Party. In this regard, he submits that the Commission was required to have regard to the Rules of the Union, and to the obligation imposed by these rules (particularly Rule 23) on Union representatives to the Labour Party. He submits that it cannot be sensibly contended that individuals appointed to the Labour Party are not acting, organised by, or under the mandate of, the Union.

[12] I consider that, as a matter of law, if Mr Little, or any other Union representative on any Labour Party committee or body, were acting under the direction or control of the Union, then that would bring the Union within the statutory criterion of involvement. Indirect involvement through a nominee in this way is caught, as well as direct involvement. It is not appropriate to place a judicial gloss on the statute by attempting to define precisely when such a situation will arise. A useful test may be an analogy with the extended definition of a director of a company in s 126 of the Companies Act 1993, namely whether the Union appointee

may be required or accustomed to act in accordance with the directions or instructions of the Union.

[13] It is clear from the Commission's decision that it was of the view that a person who was acting in this way would come within the statutory test. The Commission left open, as a question of law, the possibility that influence, short of direction, might suffice. I consider that the Commission was correct in law to leave that question open. I do not consider that a definitive answer can be given in the abstract. There can be no clear distinction between influence on the one hand, and direction on the other. There is a spectrum of degrees of influence which, at one end of that spectrum, will merge into direction or control. The nature and extent of influence is an intensely factual question, best left for decision on the facts of a particular case. Accordingly, no error of law as to the principles to be applied has been demonstrated.

[14] The Commission noted that the office of Affiliates Vice President is subject to election by the annual general meeting and that Mr Little is not in that capacity a representative of the Union. The Commission accepted on the evidence that he does not act on the council under direction of the Union. The Commission's finding that there was no evidence that Mr Little was acting under the direction of the Union was open to it on the evidence. Again, the question for the Court is not whether it would have reached the same conclusion on the facts, but whether the conclusion which the Commission reached is clearly untenable. The Commission was alive to the possibility that if Mr Little were to act under direction from the Union, or if there was evidence of influence, then the result may be different. The plaintiff submits that regard should have been had to the Rules of the Union in deciding this question. I do not consider that the Commission was required to undertake an examination of the Union's rules. The extent of inquiry which the Commission makes is a matter for it. It is relevant that s 15(3)(b)(iii) of the EFA envisages that a declaration by the applicant will ordinarily be sufficient to determine eligibility. I consider that the provisions of the Rules on which the plaintiff relies do not impose an obligation on persons nominated by the Union to an office in the Labour Party to act under the direction of the Union. Accordingly, I do not consider that an examination of the Rules must lead to the conclusion that the actions of a person so nominated

constitute an involvement by the Union. The Commission noted that if evidence of direction or influence should emerge the question may have to be re-examined. However, it found no such evidence. That was an assessment which it was for the Commission to make, on the basis of the evidence before it. On this aspect of the case, too, the plaintiff has failed to meet the high hurdle for judicial review.

[15] For these reasons, the application for judicial review is dismissed. The parties may submit memoranda as to costs.

"A D MacKenzie J"

Solicitors: Kiely Thompson Caisley, Auckland, for plaintiff
Crown Law Office Wellington for first defendant
J A Wilton, NZ Engineering Printing and Manufacturing Union Inc. Wellington for second defendant