IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2013] NZEmpC 32
CRC 13/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND OF	an application for stay of proceedings
AND OF	an application to strike out proceedings
BETWEEN	PIEFECTION FOODS LIMITED Plaintiff
AND	IAN HUME Defendant

Hearing: on the papers - affidavits and submissions received 5 and 18 December 2012 and 16, 17 and 25 January 2013.

Appearances: Andrew McEwan, agent for the plaintiff.
Robert Thompson, advocate for the defendant.

Judgment: 13 March 2013

INTERLOCUTORY JUDGMENT OF JUDGE A A COUCH

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[1] This judgment deals with two interlocutory applications. The plaintiff seeks a stay of proceedings for enforcement of the orders made by the Authority. The defendant applies to have the proceeding struck out on the grounds that the plaintiff has failed to comply with directions of the Court.

Sequence of events

[2] In order to put the current applications into context, it is necessary to traverse the history of the matter.

[3] The plaintiff company is wholly owned and managed by its sole director, Andrew McEwan. He lives in Auckland but the company operates a pie making business located in Christchurch.

[4] In June 2011, the plaintiff advertised for a general manager for its Christchurch operation. The defendant was appointed to that position. In September 2011, Mr McEwan sent an email to the defendant which effectively removed him from the position. I use this neutral terminology because there was subsequently a dispute whether the defendant was employed or engaged as an independent contractor.

[5] The defendant pursued a personal grievance on the basis that he was employed and had been unjustifiably dismissed. This was investigated by the Employment Relations Authority which determined[1] the issues in favour of the defendant. He was awarded remedies of more than $16,000 comprising arrears of wages and holiday pay, reimbursement of lost wages and compensation for distress.

[6] The background to the applications now before the Court is apparent from the minutes I issued following directions conferences. The first minute was dated 6 August 2012:

> [1] This matter was the subject of a telephone conference with the parties' representatives today.
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> [2] The Employment Relations Authority determined that the defendant was employed by the plaintiff, that he was unjustifiably dismissed and that he was entitled to remedies totalling a little over $15,000. It also determined that the defendant was entitled to arrears of wages of a little under $2,000.
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> [3] The plaintiff has challenged the whole of that determination and seeks a hearing de novo.
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> [4] On 4 May 2012, Chief Judge Colgan requested a good faith report from the Authority pursuant to s 181 of the Employment Relations Act 2000 (the Act). That report was duly provided, together with the parties' comments on it. The parties were then given a further opportunity to make submissions on the report directly to the Court. I have considered all of that material.
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> [5] The Authority's conclusions were summarised in the report as follows:

[1] [2012] NZERA Christchurch 58.

> [4] Piefection Foods Limited did not facilitate the Authority's investigation. It failed to take part in pre-arranged telephone conferences, it failed to provide documents that it had been directed to provide, and it failed deliberately to attend the investigation meeting. Although it did provide written comments to the Authority prior to the investigation meeting in a number of emails, no substantial supporting evidence in documentary form was supplied, and no sworn evidence was submitted.
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> [5] Piefection Foods Limited, through its director, Mr Andrew McEwan, did not act in good faith towards Mr Ian Hume. It refused to communicate with Mr Hume's representative, refused to take part in telephone conferences with Mr Hume and his representative present, and made serious, but unsubstantiated allegations about Mr Hume's conduct towards its female staff.
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> [6] Piefection Foods Limited did not constructively assist in resolving the employment relationship problem in a timely, economic and efficient way. Resources of Ian Hume and the Authority were wasted as a result of the conduct of the respondent noted in the appendix to this report.

[6] Having regard to the report and the comments made by the parties on it, I am satisfied that the plaintiff did not participate in the Authority's investigation in a manner that was designed to resolve the issues involved.

[7] In the conference today, I established through Mr McEwan that the plaintiff is dissatisfied with the Authority's determination on several grounds. The plaintiff's position may be summarised as:

a) The defendant was not an employee of the plaintiff.

b) If the defendant was an employee of the plaintiff, the employment agreement between them was for a fixed term and was subject to a trial period pursuant to s 67A of the Act.

c) If the defendant was an employee of the plaintiff, he did not validly raise a personal grievance alleging unjustifiable dismissal.

d) The personal grievance remedies awarded by the Authority were excessive.

[8] This is a case where I find that it is not appropriate to permit the plaintiff to challenge all aspects of the Authority's determination in a hearing de novo. The first three aspects of the summary of issues above effectively go to the Authority's jurisdiction to consider the defendant's personal grievance. It is just and appropriate that the plaintiff be able to challenge those aspects of the matter. Having failed to take the opportunity to participate constructively in the Authority's investigation, however, it is not appropriate that the plaintiff be permitted to challenge the quantum of remedies awarded, which reflect the exercise by the Authority of its discretion.

[9] I direct that the extent and nature of the hearing be as follows:

Extent: The hearing will be limited to the following issues:

(a) Whether the defendant was an employee of the plaintiff.

(b) If the defendant was an employee of the plaintiff, whether the employment agreement between them was effectively for a fixed term and/or whether it was subject to a trial period pursuant to s 67A of the Act.

(c) If the defendant was an employee of the plaintiff, whether the defendant validly raised a personal grievance alleging unjustifiable dismissal.

Nature: These issues will be decided de novo on the basis of evidence adduced before the Court.

[10] It will be apparent from this direction that the plaintiff will not be permitted to challenge the quantum of the personal grievance remedies awarded by the Authority or the Authority's determination that the plaintiff must pay arrears of wages to the plaintiff. In colloquial terms, any hearing will have an "all or nothing" outcome for the parties so far as personal grievance remedies are concerned.

[11] The statement of claim filed on behalf of the plaintiff is not in appropriate form, containing as it does large amounts of proposed evidence and critical analysis of the Authority's reasoning. The plaintiff is directed to file and serve **by 4pm on Monday 3 September 2012** an amended statement of claim complying fully with regulation 11 of the Employment Court Regulations 2000 and limited to the issues set out above in paragraph [9].

[12] In giving this direction, I am conscious that Mr McEwan is not experienced in litigation. While it is the right of the plaintiff to be represented by an agent, it is the obligation of that agent to become familiar with and to abide by the rules applicable to litigation in the Court. That information is available on or through the Court's website. If, after acquainting himself with the regulations, Mr McEwan still anticipates difficulty in drafting a compliant amended statement of claim, he may wish to seek assistance through the Auckland District Law Society programme which has recently been established to help litigants in person to draft pleadings. To do that, Mr McEwan should contact Desiree Costello at the Employment Court's Auckland registry who will advise him of the process involved.

[13] The parties have not had mediation assistance to resolve their issues. Pursuant to s188(2) of the Employment Relations Act 2000, I am required to direct the parties to mediation unless I am persuaded that it would not assist in resolving the matter. Both Mr McEwan and Mr Thompson told me that the parties they represent would willing attend mediation and participate in good faith in that process. Accordingly, I direct the parties to mediation. That should take place in Christchurch and be attended by both Mr McEwan and Mr Hume in person.

[14] Mr Thompson is to advise the registrar promptly in writing or by email of the date fixed for mediation and of the outcome.

[15] Costs are reserved.

[7] My second minute was dated 24 October 2012:

[1] In my minute of 6 August 2012, I gave directions that the parties attend mediation and that the plaintiff file and serve an amended statement of claim by 4pm on Monday 3 September 2012. To date, no amended statement of claim has been filed and no date for mediation has been arranged. On 9 August 2012, Mr McEwan filed an application for a stay of proceedings but it appears this has not been served.

[2] To address those issues, I asked the Registrar to arrange a further telephone conference with Mr McEwan and Mr Thompson. The Registrar reported to me that he made repeated efforts to arrange a time for the conference which was convenient to the parties' representatives but that Mr McEwan's response was that he was unavailable at any time this week and would only be available next week after 4.30pm. The only reason given by Mr McEwan was that this was the first week after school holidays. Without elaboration, that was unacceptable to me and I had the Registrar arrange the conference call at 9.00am this morning. Mr McEwan was told that he was required to attend the conference but he failed to answer his telephone when called. The conference therefore proceeded in his absence with only Mr Thompson in attendance.

[3] In the course of the conference, I dealt with the three issues identified above. In respect of each issue, I heard what Mr Thompson had to say. I also had regard to the memoranda filed by both Mr Thompson and Mr McEwan during the last two weeks.

Application for Stay of Proceedings

[4] On behalf of the plaintiff, Mr McEwan filed an application for stay of proceedings on 9 August 2012. Mr Thompson told me that, although Mr McEwan had referred to this document, it had not been served on him.

[5] When a party files a document in the course of proceedings, that party is obliged to promptly serve a copy of the document on all other parties. The application for stay cannot be considered by the Court unless and until it has been served. If the plaintiff wishes to proceed with the application, it must now be served without further delay and either service acknowledged by Mr Thompson or proof of service in affidavit form filed **within 10 working days after today**. Unless that is done, the application for stay of proceedings will be struck out.

[6] I note that the application for stay was not accompanied by any evidence of the facts relied on in the grounds for the application. If the plaintiff wishes to rely on any facts, they must be established by affidavit. Any affidavits the plaintiff wishes to rely in support of the application for stay must be filed and served **within 10 working days after today.**

[7] The plaintiff's attention is drawn to s 180 of the Employment Relations Act 2000:

> **180 Election not to operate as stay**
> The making of an election under section 179 does not operate as a stay of proceedings on the determination of the Authority unless the court, or the Authority, so orders.

The significance of this section is that it remains open to the defendant to enforce any orders made by the Authority unless and until an order for stay is made.

Direction to mediation

[8] In the directions conference on 6 August 2012, Mr McEwan assured me that the plaintiff was willing to participate in mediation and would do so in good faith as it is required to do by s 188(3) of the Employment Relations Act 2000. In his memoranda and in the conference today, Mr Thompson has said that Mr McEwan has frustrated the process of arranging a date for mediation by rejecting all dates proposed without good reason.

[9] This assertion is supported by the sequence of emails attached to Mr Thompson's memorandum of 11 October 2012. This shows that several dates have been proposed by the mediation service and rejected by Mr McEwan on the grounds that the plaintiff cannot afford the cost of his travel to Christchurch to attend mediation.

[10] This is not acceptable. The direction to mediation is an order of the Court. Parties to proceedings in the Court must comply with all orders of the Court. A plaintiff who fails to do so risks having its claim struck out.

[11] The suggestion that the plaintiff is unable to afford the cost of Mr McEwan's travel to Christchurch does not justify Mr McEwan's failure to agree a date for mediation. This is a proposition that Mr McEwan advanced throughout the Authority's investigation and which I am told he has repeated in his correspondence with the Registrar. It is common ground that the defendant was employed to work for the plaintiff in Christchurch. That being so, the plaintiff must accept that any litigation relating to the defendant's employment by the plaintiff will be dealt with in Christchurch. That is the natural consequence of the plaintiff's decision to carry on business in Christchurch.

[12] The last date for mediation offered by the mediation service was 29 November 2012 in the afternoon. The mediation service has confirmed that this date is still available and has agreed to keep it available for a further week. The parties are directed to attend mediation as arranged by the mediation service in Christchurch at **1.30pm on 29 November 2012** unless, **within 5 working days after today,** the plaintiff establishes to the satisfaction of the Court that it is unable to do so. If the plaintiff takes that course, any facts relied on must be established by evidence in affidavit form.

[13] The parties are reminded that the direction to mediation included an order that Mr McEwan and Mr Hume attend the mediation in person.

Amended Statement of Claim

> [14] In my minute of 6 August 2012, I directed the plaintiff to file and serve by 4pm on Monday 3 September 2012 an amended statement of claim complying with regulation 11 of the Employment Court Regulations 2000. Acknowledging that Mr McEwan was unfamiliar with drafting such documents, I suggested that it was open to him to seek assistance through the scheme established by the Auckland District Law Society to help litigants in person draft pleadings.
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> [15] To date, the amended statement of claim directed has not been filed and no application has been made to extend the time limit for doing so. The plaintiff is therefore seriously in default of a Court order. In his memorandum of 21 October 2012, Mr McEwan says that he has received assistance from a lawyer through the ADLS scheme and that the amended statement of claim is 80% complete. He also says that the lawyer who has assisted him is confident that he can complete the remaining 20% without her involvement.
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> [16] The only explanation Mr McEwan offers for his delay is that the lawyer who received his initial application for assistance left the scheme and did not hand his application on to someone else. This is confirmed by the Court's registry officer in Auckland who dealt with Mr McEwan but she also reports that, at the last minute, he cancelled his first appointment with the lawyer appointed to help him.
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> [17] While the plaintiff's compliance with the order to provide an amended statement of claim has been far from satisfactory, it does now appear that an effort to comply is being made. It is therefore appropriate that the plaintiff have one further opportunity to complete the task. The time for filing and service of the amended statement of claim complying with regulation 11 is extended until **4pm on Wednesday 14 November 2012.** If the order is not complied with by that time, the plaintiff's claim will be struck out.
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> [18] I reiterate that every party to litigation has an absolute obligation to comply with orders made by the Court in the course of that litigation. If a party is unable to comply with an order of the Court as a result of circumstances which have materially changed since the order was made, the proper course is to apply to the Court to discharge or vary the order in question. It is never acceptable that a party simply fails to comply with the order. That principle will be applied strictly in this case from now on.
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> [19] Costs are reserved.

[8] A copy of each of these minutes was sent to Mr McEwan.

[9] The plaintiff complied with my revised direction regarding the statement of claim. An amended statement of claim in acceptable form was filed on 11 November 2012, three days before the deadline I had given.

[10] The plaintiff's application for stay of proceedings was served on Mr Thompson on 13 November 2012, six days after the expiry of the period of 10 working days within which I directed it be served. No explanation for the delay has been offered and no affidavits have been filed in support of the application.

[11] Following my direction that the parties attend mediation at 1.30 pm on 29 November 2012, the mediation service gave the parties formal notice that it would be conducted then and details of the place at which it would be conducted. Mr McEwan responded by email to the mediation service that he could not attend mediation "at that time and location". No other time for mediation was arranged and, accordingly, it did not take place.

[12] On 5 December 2012, the defendant filed an application to strike out the application for stay of proceedings and the plaintiff's claim as a whole. On 5 December 2012, I set a timetable for dealing with this application:

> [5] If the plaintiff wishes to oppose the application, notice of that opposition should be filed and served by **noon on Thursday 20 December 2012.** Any such notice must specify the grounds on which the application is opposed and be accompanied by evidence in affidavit form of any facts relied on by the plaintiff.
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> [6] If notice of opposition is given in accordance with that direction, the parties may then provide memoranda containing any submissions they wish to make about the application. Those memoranda are to be filed and served by **4pm on Friday 18 January 2013.** Any submissions in reply are to be made in supplementary memoranda filed and served by **4pm on Friday 25 January 2013.** I will then decide the application on the papers.

[13] On 18 December 2012, Mr McEwan filed a notice of opposition said to be based on the following grounds:

> I HAVE COMPLIED WITH MY REQUIREMENTS BY - FILED 2ND STATEMENT OF CLAIM AS PREPARED BY PRO BONO ADLS
>
> I HAVE FILED STAY OF PROCEEDINGS
>
> I HAVE ADVISED AM AVAILABLE FOR MEDIATION
>
> I HAVE SERIOUS CONCERNS ABOUT THE JUDICIAL PROCESS IN THIS MATTER WHEREBY FORM IS BEING FAVOURED OVER SUBSTANCE.

> SUBSTANCE OF THIS CASE IS CLEARLY VEXATIOUS. FRIVOLOUS AND TIME WASTING BY THE DEFENDANT YET FORM IS BEING CONSIDERED SOLELY BY THE EMPLOYMENT COURT.
>
> IN THE INTERESTS OF JUSTICE I REQUIRE THE LEGAL PROCESS TO REFOCUS ON THE FACTS AND SUBSTANCE OVER FORM SO THAT THE ERA RULING CAN BE THROWN OUT IN ACCORDANCE WITH THE LAW AND A FAIR AND JUST SOCIETY

[14] I note that this document was filed in an unusual way. The notice of opposition, in an appropriate form, was annexed as an exhibit to an otherwise blank affidavit sworn by Mr McEwan. No other affidavits were filed on behalf of the plaintiff.

[15] Mr Thompson and Mr McEwan both filed written submissions which I have taken into account.

Application for stay of proceedings

[16] The Court has a discretion to stay proceedings for enforcement of orders made in a determination which is subject to challenge[2]. That discretion is unqualified by statute but, like all discretions, must be exercised judicially and in accordance with established principles.

[17] A fundamental principle is that, in order to justify making any discretionary order, there must be some material before the Court on which the discretion can be exercised.[3] In this case, there is no evidence whatsoever before the Court which supports the making of an order for stay of proceedings. This is something I drew to Mr McEwan's attention in paragraph [6] of my minute of 24 October 2012 in which I then gave the plaintiff a further opportunity to provide evidence. Mr McEwan elected not to take advantage of that opportunity.

[18] The application for stay of proceedings is dismissed.

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[2] Section 180 of the Employment Relations Act 2000.

[3] See, for example, *Ratnam v Cumarasamy* [1964] 3 All ER 933 (PC) at 935.

Application to strike out proceeding

[19] Given that the plaintiff complied with my revised direction to file an amended statement of claim and that I have dismissed the application for stay of proceedings, the only ground for the application to strike out which remains to be considered is the plaintiff's failure to attend mediation.

[20] There is no doubt that Mr McEwan was aware of my direction that he attend mediation in Christchurch on 29 November 2012. It is equally clear that he failed to comply with that direction. No explanation for his default has been offered. It must, therefore, be regarded as a wilful breach of a court order.

[21] My direction to mediation was given pursuant to s 188 of the Employment Relations Act 2000 which provides:

> **188 Role in relation to jurisdiction**
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> (1) The general role of the court in relation to its jurisdiction is to hear and determine matters within its jurisdiction and to exercise its powers.
>
> (2) Where any matter comes before the court for decision, the court—
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> (a) must, whether through a Judge or through an officer of the court, first consider whether an attempt has been made to resolve the matter by the use of mediation; and
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> (b) must direct that mediation or further mediation, as the case may require, be used before the court hears the matter, unless the court considers that the use of mediation or further mediation—
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> (i) will not contribute constructively to resolving the matter; or
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> (ii) will not, in all the circumstances, be in the public interest; or
>
> (iii) will undermine the urgent or interim nature of the proceedings; and
>
> (c) must, in the course of hearing and determining any matter, consider from time to time, as the court thinks fit, whether to direct the parties to use mediation.
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> (3) Where the court gives a direction under subsection (2)(b) or (c), the parties must comply with the direction and attempt in good faith to reach an agreed settlement of their differences; and proceedings in relation to the request before the court are suspended until the parties have done so or the court otherwise directs (whichever first occurs).

[22] Two important points emerge from s 188. Firstly, the direction to mediation was not simply a matter of judicial discretion. It was a requirement of the statute.

Secondly, subs (3) provides that parties subject to a direction to mediation "must comply with the direction". It follows that the plaintiff's failure to attend mediation was a breach of the Act as well as a breach of a court order. These factors suggest that the plaintiff's disobedience should be regarded as serious.

[23] In deciding whether to strike out the proceeding on this ground, the overriding consideration must be the interests of justice. To determine where that lies, I must have regard to all the circumstances of the case.

[24] A consideration which concerns me is that, if the proceedings are struck out, the merits of the plaintiff's case will not be decided. That must be given weight because the grounds on which the challenge has been permitted to proceed concern the jurisdiction of the Authority to make the orders it did.

[25] I must also consider the consequences of the plaintiff's disobedience. Although Mr McEwan told me during the directions conference on 6 August 2012 that he was willing to attend mediation and to participate in good faith, his subsequent actions show that he is no longer willing to do so. That must call into question whether mediation would now, to use the words of s 188(2)(b), "contribute constructively to resolving the matter". I think the point has been reached where, as a result of the plaintiff's intransigence, it would not. Mr Thompson recognised this some time ago when, in a memorandum to the Court dated 11 October 2012 , he said:

> 4. The parties are unable to conclude a suitable time and date for mediation. Therefore, the defendant is unable to comply with the Direction from the Court. We have concluded that mediation is no longer practical and will not assist in the resolution of the defendants claim. We request that Judge Couch undertake a further telephone direction to arrange a date and time to hear the claim.

[26] On balance, I find that the interests of justice are best served by doing as Mr Thompson suggested in this memorandum. The direction to mediation is cancelled. A further directions conference will now be held to make arrangements for a hearing and to set a timetable for steps which must be taken prior to hearing. The application to strike out is dismissed.

Costs

[27] Costs in respect of both applications are reserved. I note my view now, however, that the application to strike out was properly made on the basis of the plaintiff's misconduct. The costs incurred by the defendant in pursuing it will be taken into account when costs in the proceeding generally are decided. Similarly, the costs associated with the defendant's opposition to the application for stay will be taken into account at that stage.

A A Couch
Judge

Signed at 2.30 pm on 13 March 2013.