IN THE EMPLOYMENT COURT
AUCKLAND

[2018] NZEmpC 117
EMPC 186/2017
EMPC 195/2018

IN THE MATTER OF	challenges to determinations of the Employment Relations Authority
BETWEEN	GEA PROCESS ENGINEERING LIMITED Plaintiff
AND	TONY SCHICKER Defendant

EMPC 154/2017
EMPC 207/2017

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	KIERON CLARKE First Plaintiff
AND	SCOTT CLARKE Second Plaintiff
AND	GEA PROCESS ENGINEERING LIMITED Defendant

Hearing:	On the papers dated 22 August and 10 September 2018 (Heard at Auckland)
Appearances:	S Langton, counsel for GEA Process Engineering Limited D Grindle, counsel for T Schicker S Hornsby-Geluk and D Traylor, counsel for K and S Clarke
Judgment:	2 October 2018

INTERLOCUTORY JUDGMENT OF JUDGE M E PERKINS
(Good Faith Report)

Introduction

[1] These proceedings involve challenges to two determinations of the Employment Relations Authority (the Authority) and collateral proceedings in the Authority which have now been removed to the Court.

[2] As a result of the decision made in the first determination of the Authority, which is now the subject of a de novo challenge, the Court requested a good faith report from the Authority pursuant to s 181 of the Employment Relations Act 2000 (the Act).[1] The Court requested the good faith report on the basis of the first determination of the Authority, as it considered that the plaintiff, GEA Process Engineering Ltd (GEA), may not have participated in the Authority's investigation of the matter in a manner that was designed to resolve the issues involved.

[3] Prior to the good faith report being requested, GEA made a further application to the Authority for it to reopen its investigation into the substantive proceedings between GEA and the defendant, Mr Tony Schicker. That request to the Authority was also accompanied by a further request that the matter be considered by a different Authority Member from the Member who had made the decision contained in the first determination of the Authority.

[4] It was subsequently agreed that the provision of the good faith report to the Court could be deferred until the further applications had been determined.

[5] When the Authority issued two further determinations in respect of those further applications, the Court indicated that it still required the good faith report, and this was prepared and supplied to the Court.[2] GEA has filed a further challenge to the further determinations on a non-de novo basis.

[6] The collateral proceedings, now removed to the Court, are between Kieron and Scott Clarke and GEA. The proceedings relate to the costs incurred by the Clarkes in respect of witness summonses served on them. The witness summonses required them

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1 *GEA Process Engineering Ltd v Schicker* [2017] NZERA Auckland 183.

2 *GEA Process Engineering Ltd v Schicker* [2017] NZERA Auckland 380; *GEA Process Engineering Ltd v Schicker* [2018] NZERA Auckland 185.

to appear before the Authority in the substantive proceedings between GEA and Mr Schicker and to produce documents which were relevant in those proceedings. Substantial legal costs were incurred by the Clarkes in collating the documents. The process for disclosure and production of such documents, which was adopted by the Authority with the agreement of the parties, developed more into the form of a non-party disclosure process. The question of whether the legal costs incurred should be met by GEA is the subject of the proceedings removed.

[7] Originally, it was considered that the hearing of the collateral proceedings removed to the Court could await the outcome of the substantive proceedings between GEA and Mr Schicker. There was really no reason, however, why those proceedings should not be advanced. The outcome in respect of the costs issue involving the witnesses may become material later in assessing overall costs in the substantive proceedings between GEA and Mr Schicker. It is also important from the point of view of the Clarkes that it now be resolved. The collateral proceedings, therefore, are now being advanced to a hearing.

General factual background

[8] Mr Schicker was previously a long-term employee for GEA. He worked as a component sales manager from 7 December 2006 until 30 January 2015. After his employment with GEA ended, Mr Schicker commenced employment with Dynaflow Process Services Limited (Dynaflow). Dynaflow was a customer of GEA. The two companies also shared some customers in common. During Mr Schicker's employment with GEA, he had made various business-related contacts with Dynaflow. The Clarkes are directors of Dynaflow and Dynaflow New Zealand Limited.

[9] Following Mr Schicker taking up his new employment with Dynaflow, GEA alleged that while Mr Schicker was still its employee, he had revealed to Dynaflow plans which GEA had to develop a valve servicing business. It was also alleged that Mr Schicker took some of GEA's confidential information for use in his new job with Dynaflow. GEA commenced proceedings in the Authority for orders requiring Mr Schicker to comply with his confidentiality obligations under his former employment with GEA and not to assist Dynaflow's own valve servicing business. A

penalty was sought against Mr Schicker by GEA, and the Authority was asked to carry out an inquiry into damages caused by the alleged breaches by Mr Schicker of his contractual obligations. Mr Schicker denied he had breached duties owed to GEA both before and after termination of his employment with GEA or in his new role with Dynaflow.

[10] When the statement of problem was referred to the Authority, the parties were required to attend mediation. Mediation did not resolve the matter. In the Authority proceedings, Mr Schicker also sought but was denied leave to raise out of time a personal grievance against GEA. The denial was the subject of a determination of the Authority and has not been challenged.[3]

[11] As will be seen from the various determinations of the Authority involved in this matter and the challenges to the Court, these entire proceedings have become bogged down in procedural matters. The events which are the subject of the proceedings occurred some years ago. Insofar as the procedural mire is concerned, Mr Schicker, through his legal counsel, has indicated to the Court that at this stage he is prepared to simply abide the decisions of the Court. He wishes to conserve his finances to enable him to participate when and if the substantive proceedings against him are progressed.

[12] One issue which the Court needs to determine is whether the substantive proceedings continue as an investigation in the Authority or proceed in the Court. Presently, the two challenges filed in the Court conflict with each other. One requests the Court to direct the Authority to continue its investigation; the other is a de novo challenge requiring the Court to hear the substantive allegations.

The good faith report

[13] Prior to submitting the good faith report to the Court, the Authority Member took steps to ensure that each of the parties had an opportunity to comment on a draft report. This included the Clarkes, who are plaintiffs in the collateral proceedings. The

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3 *Schicker v GEA Process Engineering Ltd* [2015] NZERA Auckland 384.

final report submitted to the Court discloses that only GEA chose to comment on the draft report.

[14] The report sets out details of the interminable delays which occurred in the Authority proceedings and its inability to advance the proceedings to an investigation meeting. Attached to the report is a chronology showing the timeline between the statement of problem being lodged with the Authority on 16 June 2015 and the final act of the Authority in issuing its determination on 27 June 2017.[4] This was the first determination of the Authority in which it dismissed the proceedings without further investigation.

[15] The delay between 16 June 2015 and late February 2016, while a relatively lengthy period, is partly explained by the fact that the parties were, during that time, referred to mediation, which was unsuccessful. There were also preliminary discussions and resolution of the process for non-party disclosure. In addition, there was the need for the Authority to resolve Mr Schicker's application for leave to raise a personal grievance out of time.

[16] As the Authority Member states in the good faith report, the period of delay of particular concern was the period from 10 May 2016 to 6 March 2017. During this period, there was inadequate response from GEA to requests from the Authority as to progress. There were clearly difficulties occurring between GEA and Dynaflow over disclosure of documents. As the documents which GEA was seeking to have disclosed are clearly important to its case, the delays occurring would have been frustrating to counsel; however, through its counsel, GEA should have been more proactive in communicating with the Authority during this period. The way the matter was handled was inconsiderate. Timelines which had been predicted for referring disputes over documents back to the Authority were not adhered to. Difficulties raised by counsel in making himself available for conference dates proposed by the Authority to advance matters were not reasonable. While it is accepted that conflicts with other fixtures pose difficulties for busy counsel, in this case alternative counsel should have been arranged to deal with these conferences. In his good faith report, the Authority

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4 *GEA Process Engineering Ltd v Schicker*, above n 1.

Member refers to a Minute issued on 24 April 2017 in which he described the difficulty in arranging a conference at that time as "an increasingly ridiculous scenario". The Minute also expressed the view that the Authority should not need to engage in "an ongoing cat and mouse exercise" to be able to proceed with its investigation or talk with representatives about whether any further steps of investigation could reasonably be taken. In the same minute, the Authority Member gave warning of the Authority's preliminary view that the application of GEA should be dismissed for want of progress. That of course is eventually what happened.

[17] The frustration which the Authority Member clearly expressed during the proceedings was understandable. The Authority has no clearly defined procedures as to formal discovery of documents. The powers of the Authority to seek and admit documents during its investigation are wide. In this case, a process was adopted of dealing with the matter by issuing witness summonses duces tecum[5] against the Clarkes as a method of having documents brought before the Authority. It appears that later the procedure was converted into a non-party disclosure process. GEA clearly was not seeking that the witnesses give evidence but merely to disclose and, if necessary, produce the documents. The way the process then became bogged down and subject to the interminable delays was perhaps inevitable in view of the nature of the dispute. I infer from the circumstances, as did the Authority Member, that GEA may not only have been pursuing Mr Schicker but perhaps endeavouring to lay a basis for a claim against Dynaflow. Whatever the motivation, the way the matter unravelled, causing great frustration to the Authority Member, shows the unsuitability of the normal investigation processes of the Authority being used for this type of protracted commercial dispute. That is no criticism of the Authority Member.

[18] In the good faith report, the Authority Member refers to his passage in the first determination that in dismissing the application before the Authority, GEA could then pursue claims against Mr Schicker in the Court by way of a challenge. The collateral proceedings relating to witness costs could be dealt with by removing those proceedings commenced by the Dynaflow directors. Any costs issues could then be

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5 A summons for the Clarkes to appear and to produce relevant documents.

addressed by the Court. Of course, if there was a further intention to pursue Dynaflow, remedies in the courts of general civil jurisdiction would need to be sought.

[19] Subject to the outcome of the challenges against the second and third determinations of the Authority, the Authority's prediction as to what could become of the proceedings has transpired. GEA will now need to decide how it resolves the problem with two conflicting challenges before the Court. In view of the fact that there is a challenge filed seeking a de novo hearing of the substantive proceedings against Mr Schicker and the Court is now seized of the substantive issues, there would seem to be little point in pursuing the challenge against the Authority's determination dismissing the proceedings and the further determination directing that the same Authority Member deal with the matter. It is now an issue requiring resolution.

Legal principles applying

[20] A convenient summary of the effect of ss 181 and 182(2) of the Act is contained in *The Travel Practice Ltd v Owles*.[6] In that case, Judge Couch stated:

> [20] The purpose of s181 and s182(2) is to provide a means to sanction parties who fail to properly take part in the statutory mediation and investigation processes. The discretion conferred on the Court by s182(2), however, must be exercised judicially and consistent with the interests of justice. This involves consideration not only of the blameworthy conduct of the plaintiff but also the overall interests of both the plaintiff and the defendant.

[21] There are many permutations in the way that the Court needs to have regard to the application of ss 181 and 182(2) of the Act. The Court must achieve a balance between reducing the ambit of a de novo challenge as condemnation of the lack of co-operation with the Authority's investigation process and the overall interests of justice. One major concern is that if the ability of the Court to fully review the factual matrix is eliminated, the recalcitrant party in the Authority may lose its ability totally to have

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6 *The Travel Practice Ltd v Owles* EmpC Christchurch CC15/09, 14 October 2009.

the dispute determined. These reservations have been expressed in several decisions.[7] In *Owles*, Judge Couch went on to state as follows:[8]

> [21] In some cases, a just result can be found by restricting the issues which may be the subject of challenge or allowing the plaintiff to adduce only the evidence put before the Authority. In a case such as this, however, where the plaintiff has effectively taken no part in the investigation, such options are not open. If I do not allow the plaintiff to proceed with a hearing *de novo*, there is realistically no other way in which a challenge can proceed at all. The challenge is based entirely on the facts. If the plaintiff cannot adduce evidence, its case must fail with a consequent risk of injustice.
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> [22] Allowing the plaintiff to proceed with a *de novo* challenge will obviously subject the defendant to additional stress and cause her to incur further cost. If her case is sound, however, she will not be deprived of the outcome she has achieved in the Authority. It also seems to me that the potential prejudice to the defendant of having to respond to evidence provided for the first time in the Court and the additional cost associated with that process can be dealt with effectively by directions and through orders for costs. The plaintiff's failure to attend mediation can also be remedied by a direction under s188(2).

[22] In applying an appropriate balance to the matter, the Court has, on occasion, restricted both the nature of the challenge from a de novo to a non-de novo basis and the scope and extent of the evidence permitted.[9] One or both methods have been adopted as a means of providing a result in response to obstructive behaviour in the Authority's proceedings. An alternative response has been to give an indication that the behaviour will be appropriately met by a sanction in costs while allowing the matter to proceed on a de novo basis.[10] The way the matter has generally been approached by the Court is that there should be considerable hesitation in rejecting the Authority's view that the plaintiff failed to facilitate the investigation to a significant extent. However, the consequences of restricting the nature of the challenge and the extent of the evidence entitled to be led in some cases would nevertheless lead to an unacceptable miscarriage of justice.

[23] That is effectively the position in the present case. While there was a lack of consideration towards the Authority, the need to resolve what were substantial matters

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7 *Pacific Palms International Resort & Golf Club Ltd v Smith* [2008] ERNZ 295 (EmpC); *Real Cool Ltd v Gunfield* EmpC Auckland AC53/08, 23 December 2008; *South Pacific Ltd v Tian* [2013] NZEmpC 44.

8 *The Travel Practice Ltd v Owles*, above n 6.

9 See for example *Rawlings v Sanco NZ Ltd* [2006] ERNZ 29 (EmpC).

10 See for example *Pacific Palms International Resort & Golf Club Ltd v Smith,* above n 7.

and difficulties relating to disclosure of documents inevitably led to the delays which occurred. This in turn no doubt would have been frustrating for counsel for GEA in advancing the proceedings. What should have happened, however, was more timely reporting to the Authority and, if necessary, applications being made to the Authority so that it could resolve the difficulties and ensure that the investigation proceeded in an efficient fashion. While the inaction led to the Authority dismissing the proceedings in frustration, I am not sure that attempting now in some way to limit the extent of the de novo challenge before the Court would, in the end, be regarded as justifiable. While the Authority Member indicates in the good faith report that GEA's behaviour when objectively assessed, amounted to passive obstruction of the investigation, the Member fairly indicates that he would not reach any conclusion that the parties had failed to act in good faith towards each other. The fact that the Authority Member refers to the circumstances as "passive obstruction" is also an indication perhaps that the difficulties counsel faced were recognised.

[24] Caught up in all of this of course is Mr Schicker, who has indicated that he does not wish to waste financial resources participating in the good faith report process or GEA's attempts to have the Authority re-open its investigation. With the delays being occasioned by the difficulties over disclosure of documents, Mr Schicker has clearly been caught in the cross-fire between GEA and Dynaflow, his former and new employer respectively. I am of the view that a proper resolution of the matter is that, regardless of the outcome of the substantive proceedings, Mr Schicker's costs to this point should be met by GEA. The quantum of such costs will be decided on a party-to-party basis once the proceedings in their entirety have been determined on their merits. Costs on an overall basis will then be considered. If any reimbursement of costs is awarded to the Clarkes in the collateral proceedings, the responsibility for covering those costs as between GEA and Mr Schicker remains open.

Disposition

[25] As indicated earlier, a decision needs to be made by GEA as to how the two conflicting challenges are to be dealt with. While a referral back to the Authority is not precluded in this case, whether that should be done obviously needs to be properly heard and resolved in the second challenge. Conceptually, there seems to be a

difficulty in referring the matter back to the Authority when a challenge on the substantive disputes has also been filed in the Court. Nevertheless, it is for GEA to decide how it wishes to proceed with the challenges from this point. In view of the decision in this judgment, if the first filed challenge is to proceed, it will be by way of a de novo challenge with all outstanding issues to be heard.

[26] To progress matters one way or the other, a directions conference is to be convened with counsel for both GEA and Mr Schicker.

M E Perkins
Judge

Judgment signed at 11.30 am on 2 October 2018