IN THE EMPLOYMENT COURT
AUCKLAND

[2018] NZEmpC 121
EMPC 221/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for stay of execution
BETWEEN	SOLID ROOFING LIMITED Plaintiff
AND	SAMUEL NEWMAN Defendant

Hearing: On the papers

Appearances: P Vandenberg, agent for plaintiff
R Tomkinson, counsel for defendant

Judgment: 15 October 2018

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

Introduction

[1] These proceedings involve a challenge on a de novo basis against a determination of the Employment Relations Authority (the Authority) dated 12 July 2018.[1] The determination found that the defendant had been issued with written warnings and suspended without justification, was unjustifiably dismissed and that he was entitled to remedies arising from these actions on the part of the plaintiff. In addition to the plaintiff being ordered to pay the defendant compensation and lost remuneration, a penalty was ordered against it for failure to provide the defendant with his wage and time records as requested. Costs were reserved. In a subsequent

1 *Newman v Solid Roofing Ltd* [2018] NZERA Auckland 214.

determination dated 15 August 2018, the plaintiff was ordered to pay costs to the defendant in the sum of $5,000.[2]

[2] In addition to commencing the challenge by filing a statement of claim, the plaintiff has also filed an application for stay of proceedings. In effect, this is an application for an order staying enforcement of the monetary awards, although the application does not include the subsequent determination as to costs. No challenge has been filed to the costs determination.

[3] As a result of the decisions made in the first determination of the Authority, which is now the subject of the 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). The Court requested the good faith report as it considered that the plaintiff may not have participated in the Authority's investigation of the matter in a manner that was designed to resolve the issues involved and may not have acted in good faith towards the defendant during the investigation. In addition, the plaintiff refused to attend mediation when directed to do so by the Authority.

[4] The final good faith report pursuant to s 181 of the Act was provided to the Court on 30 August 2018. The report disclosed that the parties had been given the opportunity to comment on a draft good faith report dated 15 August 2018 prior to the final report being prepared for the Court. The defendant replied to the Authority, indicating that he had no comments to make. The plaintiff did not respond at all to the Authority's invitation to comment on the draft report.

[5] While it is not a specific requirement in the process, the parties have been given the opportunity to make further comment on the good faith report before the Court decides, pursuant to the provisions of s 182 of the Act, whether or not to limit the nature of the challenge or the extent of the evidence to be permitted. Both parties have filed submissions with the Court commenting on the good faith report.

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[2] *Newman v Solid Roofing Ltd* [2018] NZERA Auckland 254.

The good faith report

[6] The Authority Member concluded in her good faith report that the plaintiff (the respondent before the Authority) did not facilitate the Authority's investigation. Attached to her report was an appendix setting out a chronology of pertinent facts. She concluded in her report that the plaintiff failed to file a statement in reply within the required timeframe and only did so following a direction of the Authority. The plaintiff was also directed to attend a mediation, but the day before the mediation, Mr Vandenberg, a director of the plaintiff, cancelled the mediation. The plaintiff, in preparation for the investigation meeting, filed two witness statements, but on the date of the investigation meeting, it only called one of the witnesses with the other not attending. The final conclusion is that the plaintiff did not constructively assist and resolve the employment relationship problem in a timely, economic and efficient manner. As a result, resources of the defendant (the applicant before the Authority) and the Authority were wasted.

[7] The statement in reply was required to be filed by the plaintiff in the Authority within 14 days of service of the statement of problem upon it. When the plaintiff failed to file a statement in reply within the time prescribed, the Authority contacted Mr Vandenberg on 17 May 2018 to enquire whether the statement in reply was going to be filed. Mr Vandenberg responded that it was being worked on and that it would be filed and served as soon as possible. When the statement in reply was still not filed by 22 May 2018, a further reminder was sent by the Authority to Mr Vandenberg, indicating that the statement in reply was to be filed by 5 pm on 23 May 2018. The plaintiff did not file the statement in reply until 18 June 2018. This followed a case management telephone call on 11 June 2018 when the Authority had to direct Mr Vandenberg to file a statement in reply. At that case management call, the investigation meeting was set for 3 July 2018. It was also on 11 June 2018 that Mr Vandenberg cancelled the mediation which had been scheduled for the following day.

[8] At the case management call on 11 June 2018, the plaintiff was also directed to provide to the defendant his wage and time records. This was to be provided by 25 June 2018. In compliance with this direction, the plaintiff supplied the wage and time records on 19 June 2018.

[9] In the defendant's submissions on the good faith report, Ms Tomkinson, counsel for the defendant, points to the failures of the plaintiff in complying with the requirements of the Authority. She submits that the challenge by the plaintiff should only be allowed to proceed on a non-de novo basis.

[10] The submissions from the plaintiff on the good faith report contain an unwarranted and unacceptable criticism of the Authority Member. I have to presume from the format of the plaintiff's submissions that the plaintiff totally misunderstands the purpose of the Court in obtaining a good faith report pursuant to s 181 of the Act. The submissions also display a complete misunderstanding of the procedures of the Authority in conducting an investigation meeting. The submissions of the plaintiff are not in any way directed to the matters which have been raised in the good faith report as to its failings before the Authority.

[11] The plaintiff seems to be under a misunderstanding as to the Authority's investigation. The Authority is not a Court of record. No official recording of the investigation meeting takes place, and accordingly, there will be no transcript. The plaintiff makes the submission that an alternative Authority Member to the Member who conducted the investigation meeting should have prepared the good faith report. It is extremely difficult to understand this submission in view of the fact that the only Authority Member who would be able to report on the plaintiff's performance before the Authority would be the Member who actually conducted the proceedings there. I can only read the plaintiff's submissions as a deliberate attempt to obfuscate the real issue, which is its own failings in its participation in the proceedings before the Authority and its obligation to act in good faith towards the defendant.

Conclusions in respect of good faith report

[12] The failures of the plaintiff to properly comply in a timely manner in the filing of its statement in reply, its delay in providing wage and time records until directed to do so, its failure to attend a mediation and its failure to provide a witness who had been indicated to appear, must lead to the conclusion that the plaintiff obstructed rather than facilitated the Authority's investigation and failed to act in good faith towards the defendant and the Authority. As I have also indicated, the plaintiff's submissions,

which do not deal with its own deficiencies but rather contain unwarranted, uninformed criticism of the Authority Member, are unacceptable.

[13] In considering whether the Court should limit the challenge so that it proceeds only on a non-de novo basis, with limits placed on the extent of the evidence, there is a difficulty in this case. The statement of claim which has been filed by the plaintiff is convoluted. The statement of claim raises matters which would normally only be included as issues in a non-de novo challenge or some form of judicial review. When conducting a de novo challenge, the Court re-hears the entire matter and makes its own decisions on the claims being made by the defendant arising from the employment relationship problem. Issues such as bias and premeditation on the Authority Member's part, as alleged by the plaintiff in the statement of claim, will not need to be considered by the Court in the hearing of a de novo challenge. In the present case, a decision based on the primary pleadings of the plaintiff will not necessarily lead to a satisfactory conclusion of a de novo challenge. While the plaintiff will need to accept the consequences of the inadequate way in which the challenge has been pleaded in the statement of claim, in a de novo challenge, the Court would need to conduct a wider ranging hearing on the evidence. It cannot leave the matter to a hearing limited to the primary grounds pleaded.

[14] These types of difficulties flowing from good faith reports have been well traversed in previous decisions of the Court.[3] As stated in *The Travel Practice Ltd v Owles*, the Court needs to consider not only the blameworthy conduct of the plaintiff, but the overall interests of both the plaintiff and the defendant so that the discretion conferred on the Court by s 182(2) of the Act is exercised judicially and consistently with the interests of justice.[4]

[15] In the present case, despite the inadequacy of the pleadings, the matter should proceed on a de novo basis out of fairness, not only to the defendant but also the plaintiff. The plaintiff representing itself through its director has attempted to limit the ambit of the issues to be heard on a misguided basis and without a proper

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3 *The Travel Practice Ltd v Owles* EMPC Christchurch CC 15/09, 14 October 2009; *Pacific Palms International Resort & Golf Club Ltd v Smith* [2008] ERNZ 295 (EmpC); *Real Cool Ltd v Gunfield* EmpC Auckland AC 53/08, 23 December 2008; *South Pacific Ltd v Tian* [2018] NZEmpC 44.

4 *The Travel Practice Ltd v Owles*, above n 3, at [20].

understanding of how the matter would proceed de novo. In all the circumstances, therefore, I do not propose to limit the ambit of the challenge or the evidence, and the matter will proceed on a de novo basis.

[16] Some amelioration of the defendant's position will be considered when the issue of costs is being determined.[5] The issue as to costs against the plaintiff which might arise out of the good faith report is reserved at this stage, but ultimately will be determined once the outcome of the challenge on its merits is decided.

The application for stay of execution and the pleadings

[17] At this stage, the defendant has not been called upon to file a statement of defence. In addition to that, the plaintiff, having filed the application for stay of execution has not had the opportunity to file submissions in response to those which have been filed by the defendant. While the statement of claim is amateurish, for a challenge which is being made on a de novo basis it is probably sufficient as it presently stands for the matter to proceed without further amendment. Nevertheless, leave is reserved to the defendant to seek an order for further particulars if he considers that is required. If further particulars are not required, the defendant is to file and serve a statement of defence on or before 4 pm on 26 October 2018. In addition, if the plaintiff wishes to file submissions in support of its application for stay of execution, then such submissions are to be filed and served on or before 4 pm on 19 October 2018. The defendant will then have seven days to file any further submissions in reply. Once the submissions are received, the application for stay of execution will be considered by the Court on the papers and a judgment issued accordingly. The plaintiff should be aware that the usual course followed is to require the party seeking a stay to pay the Authority's monetary awards to the Registrar of the Court to be held on interest bearing deposit pending the outcome of the challenge.

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5 *Pacific Palms International Resort & Golf Club Ltd v Smith*, above n 3, at [28].

Disposition of proceedings

[18] Once the statement of defence is filed, the substantive proceedings will need to be advanced. At that point, the Registrar will allocate a telephone directions conference date so that future progress of the proceedings can then be directed.

[19] Subject to comments concerning costs arising from the failures of the plaintiff in the Authority proceedings, costs are, at this stage, reserved.

M E Perkins
Judge

Judgment signed at 12 pm on 15 October 2018