

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2018] NZEmpC 17
EMPC 299/2017**

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

BETWEEN GOLDSTONE ALUMINIUM LIMITED
 Plaintiff

AND VAIPOULI JEREMIAH EDMOND
 Defendant

Hearing: On the papers filed on 13 and 16 February 2018

Representation: R Wang, agent for plaintiff
 V Edmond, in person

Judgment: 13 March 2018

**INTERLOCUTORY JUDGMENT OF JUDGE J C HOLDEN
IN RELATION TO EFFECT OF GOOD FAITH REPORT**

Introduction and outcome

[1] This interlocutory judgment concerns the effect on these proceedings of the good faith report provided by the Employment Relations Authority (the Authority) about the way Goldstone Aluminium Ltd (Goldstone), the plaintiff in these proceedings, participated in the Authority's investigation.

[2] Goldstone has filed a statement of claim in the Court challenging a substantive determination of the Authority dated 13 September 2017.¹ In its determination the Authority found that the defendant in these proceedings, Mr Edmond, had been unjustifiably dismissed. In relation to the unjustifiable dismissal, Goldstone was ordered to pay Mr Edmond \$6,100 gross reimbursement of lost income and \$10,000 compensation under s 123(1)(c)(i) of the Employment Relations

¹ *Edmond v Goldstone Aluminium Ltd* [2017] NZERA Auckland 278.

Act 2000 (the Act). In addition, Goldstone was found to have short-paid Mr Edmond wages and holiday pay totalling \$3,394.72. The Authority also held that Mr Edmond was entitled to reimbursement of the filing fee of \$71.56.

[3] In its de novo challenge Goldstone seeks orders reversing the decision of the Authority, except to the extent of \$1,564.72 for annual leave.

[4] The determination of the Authority noted that Goldstone failed to file a statement in reply or to engage with the Authority and failed to attend the investigation meeting.

[5] Based on the Authority's determination, I directed that the Authority was to provide a good faith report under s 181 of the Act.

[6] The Authority's good faith report was provided to the Court on 20 December 2017. Prior to finalising the report, the Authority Member provided a draft to the parties and received their comments, which she considered.

Good faith report identifies attempts at contact

[7] The good faith report identifies the numerous occasions on which the Authority endeavoured to communicate with Goldstone. The Authority forwarded documents by email to the email address provided by Mr Edmond and also sent documents by signature-required courier to Goldstone's registered office, where they were received and signed for by the receptionist. Those documents included the statement of problem, the amended statement of problem, and the notice of investigation meeting.

[8] In addition to failing to participate in the Authority's investigation process, Goldstone failed to respond to requests to attend mediation.

[9] It was only after the Authority determination was issued that Mr Wang, the sole director of Goldstone, emailed the Authority advising that he did not attend the investigation meeting because he was unaware of it. He said he was not in the

factory every day and therefore did not see the correspondence.² He also said that the company's email address had changed. The Authority noted that the email from Mr Wang came from the same domain name as was in the email address to which the Authority had been sending documents.

[10] In relation to the hard copies delivered by courier, he said that they were not brought to his attention by the company's "new receptionist".

[11] The Authority Member concluded her report:

[18] [Goldstone] did not constructively assist in resolving the employment relationship problem in a timely, economic and efficient way. Resources of [Mr Edmond] and the Authority were wasted as a result of the conduct of [Goldstone] noted in the Appendix to this report.

Parties' comments to Court

[12] A copy of the good faith report was provided to the parties, who were offered the opportunity to make submissions to the Court.

[13] Mr Wang's comments to the Court essentially mirror those he made to the Authority. In summary, he says that he believes that he (and therefore Goldstone), acted in good faith and only failed to attend meetings and assist the Authority because he had no knowledge of the investigation taking place. He says he did not attempt to avoid correspondence and that his non-participation in the Authority's investigation was not deliberate.

[14] Mr Edmond responded to the Court supporting the Authority's good faith report. He says he does not believe that Goldstone acted in good faith in regards to his employment or the investigation.

² He says in the statement of claim that he misunderstood the communication he did receive because of his poor English and so "did not respond to contact from the Employment Relations Authority". This suggests he did receive notification of the action being taken, but claims he did not understand what he needed to do in response.

The Act provides a discretion to limit challenge where there is a lack of good faith

[15] Section 181 of the Act makes provision for the Authority to provide a good faith report:

- (1) Where the election states that the person making the election is seeking a hearing *de novo*, the Authority must, if the court so requests, as soon as practicable, submit to the court a written report giving the Authority's assessment of the extent to which the parties involved in the investigation have—
 - (a) facilitated rather than obstructed the Authority's investigation; and
 - (b) acted in good faith towards each other during the investigation.
- (2) The court may request a report under subsection (1) only where the court considers, on the basis of the determination made by the Authority ... that any party may not have participated in the Authority's investigation of the matter in a manner that was designed to resolve the issues involved.

...

[16] Section 182 deals with the effect of a good faith report. Section 182(2) allows the Court to make a direction that the hearing is to be other than a *de novo* hearing only if:

- (a) it has requested a report under section 181(1); and
- (b) it is satisfied,—
 - (i) on the basis of that report; and
 - (ii) after having had regard to any comments submitted under section 181(5),—

that the person making the election did not participate in the Authority's investigation of the matter in a manner that was designed to resolve the issues involved.

Balancing considerations in this case

[17] In making a direction the Court must direct the nature and extent of the hearing.³

³ Employment Relations Act 2000, s 182(3).

[18] I note that Mr Wang suggests that he did not pick up mail from at least 13 July until 22 September 2017. That is about six weeks and not explained by his excuse of having a “new receptionist” (who would not be “new” towards the end of that period in any event) and because he was not in the business premises often.

[19] There is no evidence of the date on which the email address changed or when Goldstone stopped checking the old address, which had remained active.

[20] The evidence that Goldstone wishes to produce for the Court is new evidence that was not before the Authority, with the result that Mr Edmond will be dealing with this evidence for the first time, when he should have had the opportunity to have the evidence presented using the more informal procedures of the Authority.

[21] The Court has previously faced similar situations; in *The Travel Practice Ltd v Owles*, Judge Couch noted that:⁴

[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] 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.

[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).

⁴ *The Travel Practice Ltd v Owles* CC15/09, 14 October 2009 (EmpC).

[22] These observations apply in the present case also. The challenge is essentially to the factual findings of the Authority.

[23] While the situation is unsatisfactory, and causes inconvenience to Mr Edmond, in the circumstances I have determined that Goldstone may proceed with its challenge as pleaded on the following conditions:

- (a) Within 28 days after the date of this judgment, Mr Edmond is to file and serve his statement of defence.
- (b) Within a further 14 days following receipt of the statement of defence, Goldstone is to file and serve affidavits of the evidence it relies on. Any documents relied on are to be annexed to those affidavits as exhibits.
- (c) Goldstone shall not be permitted to adduce any other evidence without the leave of the Court.
- (d) The parties are directed to mediation. This should be arranged expeditiously to take place as soon as possible after the expiration of the period specified in paragraph (b).
- (e) Goldstone is to advise the Registrar of the Court in writing of the date set for mediation. Following mediation, it is to advise the Registrar of the outcome.
- (f) Goldstone is to strictly comply with all orders and directions of the Court made in the course of this proceeding. If Goldstone does not comply, its challenge is liable to be struck out.

[24] If the proceedings are not resolved at mediation a telephone conference will be convened to enable further directions to be made to progress the challenge to a hearing.

[25] Costs are reserved.

J C Holden
Judge

Judgment signed at 11.30 am on 13 March 2018