

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2018] NZEmpC 57
EMPC 82/2018**

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

AND IN THE MATTER of an application for a s 181 report

BETWEEN ALLAN DANIEL NICHOLSON
 Plaintiff

AND MATTHEW FORD
 Defendant

Hearing: On the papers filed on 10, 17 and 21 May 2018

Representatives: D Hayes, counsel for plaintiff
 RA Hill, counsel for defendant

Judgment: 30 May 2018

**INTERLOCUTORY JUDGMENT (NO 2)
OF CHIEF JUDGE CHRISTINA INGLIS
APPLICATION FOR A SECTION 181 REPORT**

[1] The plaintiff has challenged a determination of the Employment Relations Authority finding that the plaintiff instigated and abetted breaches of the defendant's employment agreement with the New Zealand Dental Partners Ltd Partnership (in liq) t/a Clinico Denture and Hearing (the first respondent in the Authority). The Authority awarded a penalty of \$10,000 to be paid directly to the defendant, together with costs of \$4,000.¹ The challenge is pursued on a de novo basis.

[2] The defendant filed a memorandum of counsel for the initial directions conference including an application that the Court request a good faith report from the

¹ *Ford v New Zealand Dental Partners Ltd Partnership (in liq) t/a Clinico Denture and Hearing* [2018] NZERA Auckland 68.

Authority under s 181 of the Employment Relations Act 2000. Issues then arose as to the basis on which such a report might be ordered. The sole issue presently before the Court is whether a good faith report can and should be requested in the circumstances of this case and in light of the applicable statutory provision.

[3] One of the underlying objectives of the Act is to build productive employment relationships, including by promoting good faith behaviour. Section 181 deals with good faith reports and provides that:

181 Report in relation to good faith

- (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 under section 174A(2), 174B(2), 174C(3), or 174D(2), 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.
- (3) The Authority must, before submitting the report to the court, give each party to the proceedings a reasonable opportunity to supply to the Authority written comments on the draft report.
- (4) A party who supplies written comments to the Authority under subsection (3) must, immediately after doing so, serve a copy of those comments on each other party to the proceedings.
- (5) The Authority must, in submitting the final report to the court, submit with it any written comments received from any party.

[4] The potential consequences of a negative report include a direction by the Court that the hearing will not proceed on a *de novo* basis (s 182(1)), placing a constraint on the nature and extent of the hearing.²

[5] The Court has a limited discretion to request a good faith report. As s 181 makes clear, there are two key prerequisites that must be met. This is underscored by use of the word “only” in s 181(2). The two prerequisites are:

² See, for example, *Piefection Foods Ltd v Hume* [2013] NZEmpC 32 at [8].

- There must be grounds for considering that the party may not have participated in the Authority’s investigation of the matter in a manner that was designed to resolve the issues involved; and
- those grounds must emerge from the Authority’s determination, not from other extrinsic sources.

[6] The difficulty I perceive in this case is that there is an absence of sufficient information in the Authority’s determination to provide a launching pad for a request. The Authority reached a number of adverse conclusions about Mr Nicholson’s conduct during the redundancy process, which led to the findings against him. These are not relevant to the inquiry under s 181, because they arose during the employment process, not during the Authority’s investigation.

[7] As the defendant notes, the Authority’s determination refers to the fact that the employing company (first respondent in the Authority, which is not a party to the challenge) and its partner (second respondent in the Authority, which is not a party to the challenge) were placed in liquidation 21-22 working days before the investigation meeting, and that the Authority was not notified of the liquidations until 19 February 2018 (eight days prior to the investigation meeting).³ The liquidations impacted on the proceedings before the Authority. That is because, by operation of s 92 of the Limited Partnerships Act 2008 and s 248(1)(c) of the Companies Act 1993, the defendant’s proceedings in the Authority against the company and the partnership could not continue unless Mr Ford got an order from the High Court overruling the liquidator’s decision declining to consent to the continuation of the proceedings. The defendant elected, in these circumstances, to proceed against the plaintiff (Mr Nicholson) only.

[8] It is Mr Nicholson who is the “party” for the purposes of s 181 in the present case, and there must be grounds for considering that he (not the first and second respondents in the Authority) may not have participated in the Authority’s investigation in a manner that was designed to resolve the issues involved.

³ *Ford*, above n 1, at [3]-[4].

[9] It may be arguable that the act of voluntary liquidation itself provides a ground for concluding that a party may not have participated appropriately. Such an argument would likely raise issues as to whether, in the particular circumstances, the liquidation was sufficiently linked to the Authority's investigation for the purposes of s 181; and the extent to which a party acting lawfully (by exercising legal rights available to them under the Companies Act and the Limited Partnerships Act) may nevertheless be found to have breached their obligations of good faith in the context of the employment relationship. Or, to put it another way, whether a company can voluntarily place itself in liquidation to avoid potential liabilities to its employees without exposing itself to a finding of breach of good faith on the basis of doing so.

[10] The point does not arise in the present case. While it can be inferred that Mr Nicholson had a role in the decision to liquidate, and that this may have been (at least in part) because of threats of legal action,⁴ the link between the liquidation and its impact on the Authority's investigative process (as opposed to potential liability) is unclear, and there is a paucity of information to support an assertion that Mr Nicholson himself may not have participated appropriately in the Authority's investigation.⁵ What does emerge from the determination is that he gave evidence and provided information in that forum.

[11] Counsel for the defendant drew my attention to a minute issued by the Authority member on 20 February 2018. The minute refers to delays in responding to the Authority, and the impact of the delays on the Authority's investigation. The minute is not a determination for the purposes of s 181(2) and must be put to one side. The same point can be made in relation to the Authority's previous minute of 11 December 2017 (which directed, amongst other things, the provision of a witness statement).

[12] I am not satisfied, based on the Authority's determination, that there are adequate grounds for concluding that the plaintiff may not have participated in the

⁴ At [3]. See too references to Mr Nicholson's role as chief executive at [20].

⁵ Neither party addressed the issue as to when (for the purposes of s 181(1)) the Authority's investigation commences. While the term "investigation" is not defined in s 5, it appears from other provisions (such as s 160 "Powers of Authority") to have a broad meaning, beyond the investigation meeting itself.

Authority's investigation of the matter in a manner that was designed to resolve the issues involved and I accordingly decline to request the Authority to provide the Court with a good faith report under s 181.

[13] Costs are reserved.

Christina Inglis
Chief Judge

Judgment signed at 2.35 pm on 30 May 2018