

**IN THE EMPLOYMENT COURT OF NEW ZEALAND  
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA  
TĀMAKI MAKĀURAU**

**[2025] NZEmpC 1  
EMPC 384/2023**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ANDREW BYRNE Plaintiff
AND	COVERSTAFF RECRUITMENT GROUP LIMITED Defendant

Hearing: On the papers

Appearances: Plaintiff in person  
D Brabant, counsel for defendant

Judgment: 15 January 2025

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**INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE KATHRYN BECK  
(Good Faith Report)**

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[1] On 25 September 2023, the Employment Relations Authority issued a determination in favour of the defendant, Coverstaff Recruitment Group Ltd.<sup>1</sup> The Authority ordered the plaintiff, Mr Byrne, to pay the defendant the sum of \$25,000.<sup>2</sup> He, along with another individual, was also ordered to pay costs of \$4,500.<sup>3</sup>

[2] The plaintiff filed a challenge to the Authority's determination on 24 October 2023.

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<sup>1</sup> *Byrne v Coverstaff Recruitment Group Ltd* [2023] NZERA 549 (Member Arthur).

<sup>2</sup> At [93].

<sup>3</sup> *Byrne v Coverstaff Recruitment Ltd* [2023] NZERA 623 (Member Arthur).

[3] In its judgment dated 2 August 2024, the Court requested a good faith report from the Authority under s 181 of the Employment Relations Act 2000 (the Act) outlining the extent to which the parties in the Authority facilitated rather than obstructed the Authority's investigation and whether they acted in good faith towards each other during the investigation.<sup>4</sup>

[4] The Court has now received a copy of that report along with submissions from the defendant. The report was not favourable to Mr Byrne. This judgment resolves the issue of whether, as a result of the report, directions should be made, pursuant to s 182 of the Act, as to the nature and extent of the hearing.

### **The Authority's determination ordered penalties against Mr Byrne**

[5] The Authority determined that Mr Byrne was unjustifiably dismissed as the defendant did not follow a fair process when it dismissed him.<sup>5</sup> However, it declined to award remedies because Mr Byrne did not attend the investigation meeting. His failure to attend meant that the Authority did not have any evidence of loss suffered as a result of his dismissal.<sup>6</sup> The Authority also noted that if remedies had been awarded, substantial reductions would have been appropriate for contribution.<sup>7</sup>

[6] The Authority rejected Mr Byrne's claims for pay withheld from his notice period and for a penalty as a result of \$200 being deducted from his final pay. As with the remedies for unjustified dismissal, those claims were unsuccessful because he did not appear before the Authority.<sup>8</sup>

[7] The Authority determined that Mr Byrne had breached his employment agreement.<sup>9</sup> It did not accept that proof of loss had been established by the defendant for the breaches.<sup>10</sup> However, it considered that penalties totalling \$25,000 were appropriate in relation to the following breaches:<sup>11</sup>

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<sup>4</sup> *Byrne v Coverstaff Recruitment Ltd* [2024] NZEmpC 141 at [24]–[26].

<sup>5</sup> *Byrne v Coverstaff Recruitment Group Ltd*, above n 1, at [19]–[42].

<sup>6</sup> At [43]–[45].

<sup>7</sup> At [46]–[49].

<sup>8</sup> At [50].

<sup>9</sup> At [51]–[66].

<sup>10</sup> At [67]–[69].

<sup>11</sup> At [70]–[78].

- (a) Mr Byrne failed to disclose that he had begun a business activity of his own in conflict with the defendant's business and failed to seek written consent to do so, breaching the terms on his responsibilities and avoiding conflicts of interest.
- (b) He failed to disclose the involvement of a friend and business associate in a competing business, breaching the term on his responsibilities.
- (c) He took for his own use business information sent to him in his capacity as an employee of the defendant, by emailing information about jobs at a client business to his personal email address, breaching the term on use of confidential information.
- (d) He sent templates of the defendant's work documents to his personal email address after having begun his own business and shortly before giving his notice, breaching the term on use of confidential information.
- (e) By arrangements made with at least two clients and at least one candidate or employee, he breached an enforceable restraint against dealing with any client or candidate of the defendant that he had dealt with during his employment.

### **Mr Byrne has challenged the Authority's determination**

[8] In his statement of claim, Mr Byrne outlines his version of what happened when he was dismissed. He says that he was unjustifiably dismissed.

[9] Mr Byrne further says that the restraint of trade in his employment agreement was not enforceable due to the manner in which he was let go by the company. Additionally, he states that the restraint of trade was invalid from the outset of the employment relationship. He also denies that he breached his employment agreement or any other obligations owed to the defendant.

[10] Mr Byrne states that the defendant unlawfully withheld payment for his notice period and unlawfully deducted \$200 from his final pay. He also refers to an incident

which occurred after the proceedings were initiated in the Authority, which he says was a breach of the Privacy Act 2020 and an attempt to harass him.

[11] In terms of remedies, Mr Byrne seeks \$50,000 compensation for humiliation, loss of dignity and injury to feelings. He also seeks reimbursement for his contractual notice period, reimbursement of \$200 for an unauthorised deduction, penalties under s 4A of the Act, and penalties under s 13 of the Wages Protection Act 1983. He also asks the Court to dismiss the penalties awarded against him in the Authority.

### **The Authority's good faith report details incidents of concern**

[12] In its good faith report, dated 1 October 2024, the Authority noted that its investigation meeting had been set down four times before the matter was heard on 28 June 2023. The first investigation meeting had to be vacated as neither party had lodged witness statements. Before the second meeting, Mr Byrne again failed to file witness statements until warned that his claim would not be heard, after which he lodged statements in the form of emails. The second meeting was also vacated as Mr Byrne failed to appear. The third meeting was vacated due to a medical situation with one of the defendant's witnesses; prior to the meeting being cancelled, Mr Byrne did attend the investigation meeting venue. When the Authority sought to confer with the parties concerning a fourth date for the investigation meeting, the defendant responded, but Mr Byrne did not. Finally, Mr Byrne did not appear at the fourth meeting, which proceeded without him. Mr Byrne did not provide an explanation for his absence.

[13] The Authority ultimately concluded that Mr Byrne had obstructed rather than facilitated its investigation and that he had failed to participate in a manner that was designed to resolve the issues. It stated that he had failed to lodge witness statements as directed, failed to respond to the Authority's messages about investigation meeting dates, and failed to attend its investigation meeting. The Authority also stated that he had misled it by indicating, prior to the investigation meeting being set down for the fourth time, that he wished to continue to pursue his application, while failing to subsequently engage with the Authority's processes.

[14] In its report, the Authority also considered whether the defendant had obstructed its investigation. It concluded that the defendant had participated in its investigation meeting in a manner designed to resolve the issues under consideration. In particular, it had lodged witness statements as directed, attended the investigation meeting, and responded to questions, including where answers given were not necessarily to its benefit or advantage.

[15] In preparing its report, the Authority sought written comments from both parties pursuant to s 181(3) of the Act. The defendant provided comments, but Mr Byrne did not avail himself of the opportunity.

### **The defendant seeks directions from the Court**

[16] After receiving the Authority's report, the Court sought submissions from the parties as to any directions that it should make on the nature and extent of the hearing. Both parties had until 29 October 2024 to file and serve submissions. The defendant filed submissions. No submissions were received from Mr Byrne.

[17] Ms Brabant, counsel for the defendant, submitted that the Court ought to strike out Mr Byrne's claim as a result of him not having taken steps to advance the proceedings in the Authority and not acting in good faith, as evidenced in the good faith report.

[18] In the alternative, it was submitted that the Court should limit the hearing to the issue of remedies in relation to the unjustified dismissal grievance and the issue of whether the penalties ordered against Mr Byrne were fair. Essentially, the defendant seeks to limit the challenge to a hearing on remedies.

[19] Further, the defendant submitted that if the challenge is not struck out, orders should be made requiring Mr Byrne to comply strictly with all orders and directions of the Court. It says that if those directions are not complied with, the challenge should be liable to strike-out. It also submitted that the Court should make orders about the impact that Mr Byrne's behaviour will have on costs.

[20] Finally, it was submitted that, when considering what directions to make, the Court should take into account Mr Byrne's failure to pay the sums ordered by the Authority and his failure to actively engage with the Court on interlocutory issues.

### **The Court may direct the nature and extent of the hearing**

[21] Section 182 of the Act deals with the effect of a good faith report. That provision allows the Court to make a direction limiting the nature and extent of the hearing of a challenge where it is satisfied that the person challenging the determination did not participate in the Authority's investigation of the matter in a manner that was designed to resolve the issues involved.

[22] This process aligns with one of the underlying objects of the Act, which is to build productive employment relationships, including by promoting good faith behaviour.<sup>12</sup> It provides a means to sanction parties who fail to properly take part in the Authority's investigation processes. However, the discretion conferred on the Court by s 182 must be exercised judicially and consistently with the interests of justice. This involves consideration not only of the blameworthy conduct of the party involved but also the overall interests of both parties.<sup>13</sup>

[23] In making directions, the Court can direct that a de novo challenge be heard on a non-de novo basis and limit the extent of the issues to be heard on a challenge. Further, it can limit the scope and extent of the evidence to be permitted. It can also give an indication that the party's behaviour will be addressed during any assessment by the Court of costs.<sup>14</sup> Finally, directions can also be made requiring a party to strictly comply with timetabling orders.<sup>15</sup>

### **It is appropriate to limit the nature and extent of the hearing**

[24] I am satisfied that Mr Byrne did not participate in the Authority's investigation of the matter in a manner that was designed to resolve the issues involved. Therefore, I now consider whether to make directions under s 182.

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<sup>12</sup> Employment Relations Act 2000, s 3(a)(i).

<sup>13</sup> *The Travel Practice Ltd v Owles* EmpC Christchurch CC15/09, 14 October 2009 at [20].

<sup>14</sup> *GEA Process Engineering Ltd v Schicker* [2018] NZEmpC 117 at [22].

<sup>15</sup> *Allen Chambers Ltd v Pelabon* [2018] NZEmpC 114 at [35].

[25] In its judgment of 2 August 2024, the Court declined to strike out the plaintiff's challenge.<sup>16</sup> For the reasons set out in that decision, I still consider that there is no sufficient basis to strike out Mr Byrne's challenge as a whole. However, I accept that his failure to engage with the Authority and the Court in relation to the good faith report continues to illustrate a disregard for the Court's processes.

[26] Turning to consider the other directions sought by the defendant, I observe that even though Mr Byrne failed to appear at the Authority's investigation meeting, the Authority still determined that he had been unjustifiably dismissed. As he was successful, it is not clear why Mr Byrne has challenged the Authority's determination on that issue. It is not clear whether he disagrees with the Authority's determination or wishes the Court to make more extensive findings in relation to the dismissal.

[27] The defendant proposes that the challenge be limited to the issue of remedies on this point. I agree that is appropriate. I consider that the only party who is likely to be prejudiced by such a direction is the defendant in that it will lose its ability to argue that the dismissal was justified. However, in hearing submissions on remedies, the Court will still need to receive evidence as to what occurred when Mr Byrne was dismissed, to enable it to assess the degree to which compensation (if any) is appropriate.

[28] For completeness, the Court will consider whether Mr Byrne is entitled to compensation for humiliation, loss of dignity and injury to feelings. It will also consider whether he was entitled to be paid for his contractual notice period. The Court will then assess whether any remedies awarded ought to be reduced under s 124 as a result of Mr Byrne contributing to the situation. It appears that his claim for penalties under s 4A relates to his claim for unjustified dismissal; if that is the case, he may also pursue the penalty claim alongside his other claims for remedies.

[29] The second main issue arising from Mr Byrne's challenge is whether the Authority was correct to issue penalties against him for the breaches of his employment agreement. The defendant proposes that the Court should only assess whether the Authority was correct to award \$25,000 in penalties. If the challenge is

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<sup>16</sup> *Byrne v Coverstaff Recruitment Ltd*, above n 4, at [12]–[16].

limited in that way, Mr Byrne would lose his ability to argue that he did not, in fact, breach his employment agreement. Likewise, the defendant will not be able to claim damages as a result of the breaches – a claim which was rejected by the Authority for lack of evidence.

[30] The penalties awarded by the Authority were high, particularly when considered on a global basis. Although I accept that Mr Byrne may have a reasonably arguable case in relation to whether he breached his employment obligations, his claim appears to be strongest insofar as it relates to the quantum of penalties awarded by the Authority. In any case, when considering whether to award penalties, the Court must consider the factors set out in s 133A of the Act, including the nature and extent of the breach and whether the breach was intentional, inadvertent or negligent. It will be necessary to receive evidence on the factors set out in that provision. Therefore, even if the challenge on this issue is limited to a hearing on penalties, Mr Byrne will be able to argue that any breaches were not sufficiently serious as to warrant a penalty, although he will not be able to argue that those breaches did not occur.

[31] I consider that restricting the scope of the hearing in the manner proposed by the defendant – that is, to the penalties awarded – is appropriate in the circumstances.

[32] Mr Byrne also claims that the defendant deducted \$200 from his final pay. While that sum is minimal in the scheme of the challenge, an unlawful pay deduction would constitute a breach of Mr Byrne's minimum entitlements as an employee. Breaches of the Wages Protection Act are treated seriously by the Court. Accordingly, I consider that Mr Byrne's challenge ought to be heard on that point.

[33] Finally, Mr Byrne's statement of claim refers to a situation where he says the defendant attempted to harass him and breached the Privacy Act after he initiated proceedings against it. The Court does not have jurisdiction over such a claim, so that matter will not be heard as part of the challenge.

## **Outcome**

[34] The Court will hear Mr Byrne's challenge on a non-de novo basis. The hearing will be limited to the following issues:

- (a) What remedies, if any, is Mr Byrne entitled to in relation to his unjustified dismissal?
- (b) Was the Authority correct to order Mr Byrne to pay \$25,000 in penalties to the defendant in relation to his breaches of the employment agreement?
- (c) Did the defendant breach the Wages Protection Act in relation to the alleged deduction of \$200 from Mr Byrne's final pay? If so, what remedies should be awarded?

[35] The rest of the issues raised in Mr Byrne's statement of claim will not be heard and are struck out.

[36] Mr Byrne is to comply strictly with all orders and directions of the Court made in the course of this proceeding and is to be communicative with the registry. If he files evidence, documents or submissions late, they will not be considered by the Court without leave first being obtained.<sup>17</sup> Any default may result in his challenge being liable to be struck out.

[37] Mr Byrne's conduct will also attract liability for costs. If the defendant is unsuccessful in its defence, it can expect that Mr Byrne's behaviour will limit the costs to which it is liable. Similarly, if it is successful, this may be an appropriate situation for the Court to consider whether it ought to order indemnity costs.

## **Costs**

[38] The defendant has been successful in this matter and is entitled to costs. It has incurred costs in sending written comments to the Authority and filing written submissions following receipt by the Court of the good faith report. It seeks costs of \$1,000 in relation to the good faith report process. I consider that sum to be reasonable and order that Mr Byrne pay the defendant \$1,000, as a contribution to its costs, within 28 days of the date of this judgment.

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<sup>17</sup> See Employment Relations Act, s 221(c); and High Court Rules 2016, r 1.19.

[39] The registry is to schedule a telephone directions conference with the parties to discuss the next steps in this proceeding.

Kathryn Beck  
Judge

Judgment signed at 2.20 pm on 15 January 2025