



Employment Court of New Zealand

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ACF v IEN [2023] NZEmpC 187 (3 November 2023)

Last Updated: 8 November 2023

ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE PARTIES AND WITNESSES IN THE EMPLOYMENT COURT OF NEW ZEALAND WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA TE WHANGANUI-A-TARA

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EMPC 157/2023

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for unless orders
BETWEEN	ACF Plaintiff
AND	IEN Defendant

Hearing: On the papers
Appearances: P Mani, counsel for plaintiff
A Hall, counsel for defendant
Judgment: 3 November 2023

INTERLOCUTORY JUDGMENT (NO 2) OF CHIEF JUDGE CHRISTINA INGLIS

(Application for unless orders)

[1] The defendant has sought unless orders from the Court, consequent on a series of failures by the plaintiff to comply with timetabling orders. I provided the plaintiff with the opportunity to be heard, directing that any response was to be filed and served by 4.00 pm yesterday, 2 November 2023. No response has been forthcoming.

[2] The plaintiff's challenge was filed some time ago and timetabling orders were made following a case management conference that counsel for both parties attended. Those orders required the plaintiff to file and serve briefs of evidence by

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4.00 pm, Friday 27 October 2023 and to engage with counsel for the defendant in respect of documentation for the bundle of documents, due to be filed with the Court on the same date. Neither of these steps were taken, no explanation was provided, and no extension of time was sought.

[3] Counsel for the defendant raised concerns about the failure to file on time and the prejudicial position this placed the defendant in. An unless order was sought, together with a truncation of the timetabling orders previously made. I issued a minute on 30 October 2023, referring to the plaintiff's failure to comply with timetabling orders I had made; noting that the hearing was less than eight working days away; directing counsel for the plaintiff to advise the Court by midday 31 October 2023 what the position was, including in respect of the truncation request and the proposal that an unless order be made. No advice was provided within that timeframe and the file was referred to me for further directions.

[4] I issued a further minute on the afternoon of 1 November 2023 varying the earlier timetabling directions at paragraph 3,

requiring that:

...Any briefs of evidence of the plaintiff are to be filed and served no later than 4.00 pm Wednesday, 1 November 2023. The defendant will then have five working days to file briefs of evidence. The plaintiff must file any briefs of evidence in reply within one working day of service of the defendant's evidence. Counsel for the plaintiff is to forward to counsel for the defendant a draft index to the bundle of documents no later than 4.00 pm Wednesday, 1 November 2023. Mr Hall, counsel for the defendant, is then to provide any additions to the index to Mr Mani within five working days. Mr Mani is to collate the bundle of documents, file and serve the bundle no less than two working days before the hearing.

[5] I stated clearly in the minute that a continued failure to comply with timetabling orders would likely lead to the conclusion that the plaintiff has effectively abandoned its challenge and would almost certainly result in adverse costs consequences for the plaintiff. I reiterated the need to comply with timetabling orders, noted that there will be occasions where that does not prove possible but stating that, in such circumstances, counsel are expected to take prompt steps to seek an extension of time, with an adequate explanation as to why an extension was required. Leave was reserved for the defendant to apply, on short notice, for further directions and/or orders.

[6] The plaintiff did not comply with the varied timetable. Rather, at 5.18 pm on 1 November 2023, counsel for the plaintiff sent informal advice to the Court Registry that his client had returned from overseas and "I will respond with a bundle of documents with the brief of evidence in the coming days." It was this that led to the further minute issued yesterday, allowing the plaintiff until 4.00 pm to advise any response to the unless order sought by the defendant. As I have said, no response has been provided.

[7] The approach to unless orders was set out by the Court of Appeal in *SM v LFDM*.¹ There the Court stated:

[31] The principles are these:

- (a) As an unless order is an order of last resort, it is properly made only where there is a history of failure to comply with earlier orders.
- (b) An unless order should be clear as to its terms. That is, it should specify clearly what is to be done, by when and what is the sanction for non-compliance. That sanction should be proportionate to the default.
- (c) The sanction will apply without further order if the party in default does not comply with the order by the time specified. However, the party in default may seek relief by application to the Court.
- (d) Justice may require that the party in default be relieved of the consequences of the unless order where the Court is satisfied that the breach resulted from something for which that party should not be held responsible. The party should not assume that belated compliance will suffice.
- (e) Where the unless order has been deliberately breached — that is, flouted

— it is difficult to conceive of any situation where the interests of justice would require granting the flouter relief from the sanction imposed, notwithstanding belated compliance with the order.

(f) In deciding whether or not to excuse breach of an unless order the question for the Judge is: what does justice demand in the circumstances of this case? Considerations in answering that question include:

- (i) The public interest in ensuring that justice is administered without unnecessary delays and costs.
- (ii) The interests of the injured party, in particular in terms of delay and wasted cost.
- (iii) Any injustice to the defaulting party, although that consideration is likely to carry much less weight in the circumstances than considerations (i) and (ii).

¹ *SM v LFDB* [2014] NZCA 326, [2014] 3 NZLR 494.

[8] There is an established history of failure to comply with timetabling orders. The ongoing failures are prejudicing the defendant and putting the rapidly approaching fixture at risk. The failures have not been adequately explained. It is appropriate that an unless order is made.

[9] The plaintiff is to serve the briefs of evidence they wish to rely on at hearing no later than 4.00 pm 3 November 2023. Time is strictly of the essence. Unless the plaintiff files and serves the briefs of evidence on that time and date, their challenge will be struck out. The Court will then receive any relevant application as to costs.

[10] Costs are reserved.

Christina Inglis Chief Judge

Judgment signed at 7.50 am on 3 November 2023