New Zealand Employment Relations Authority Decisions

Adams v McDouall Stuart Securities Limited (Wellington) [2017] NZERA 2072; [2017] NZERA Wellington 72 (7 August 2017)

Last Updated: 17 August 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2017] NZERA Wellington 72
5417206

BETWEEN TONY ADAMS & ORS Applicant

AND McDOUALL STUART SECURITIES LIMITED Respondent

Member of Authority: James Crichton

Representatives: Jonathan Haig, Counsel for Applicants

Michael Leggat, Counsel for Respondent

Investigation Meeting: On the papers

Determination: 7 August 2017

DETERMINATION OF THE AUTHORITY

History

[1] By determination issued as [2013] NZERA Wellington 107 and dated

4 September 2013, a consent determination dealt with the employment relationship between these parties. The following day, the Authority granted an interim prohibition on the publication of the names of the parties which was essentially put in place by the Authority to assist the parties to make arrangements for the payment of significant agreed arrears of wages.

[2] By memorandum dated 13 February 2017, the applicants seek a decision from this Authority to lift the interim non-publication order. In addition, the applicants also seek to recover the outstanding wages (the bulk of which remain unpaid) from the respondent's managing director. Both those claims are resisted by the respondent (McDouall Stuart).

Issues

[3] It will be convenient to deal with each of those issues in turn. Accordingly, I will first consider whether the interim non-publication order ought to be lifted and then consider whether any other relief ought to be provided.

Should the non-publication order be lifted?

[4] I am satisfied the non-publication order ought to be lifted. This is essentially because it has served the purpose that the Authority originally intended for it and it no longer serves that purpose. Moreover, as a matter of law, the agreement between the parties which effectively sought the non-publication order is, I am satisfied, now at an end.

[5] The first question to determine is whether the agreement between these parties is now at an end. While that point is hotly contested by McDouall Stuart, I am satisfied on the material before me (the helpful submissions of counsel and affidavit evidence in support), that the agreement is at an end. It was a term of the agreement that the parties (and specifically the applicants who did not seek the non-publication order), would support the continuation of the non-publication order.

[6] I am satisfied the agreement is at an end because it was breached by the managing director of McDouall Stuart, Mr McDouall, when he commenced working for a third party. While he seeks in his affidavit evidence to minimise that change, I do not accept his argument on that point at all. It may be true, as Mr McDouall maintains, that by working for the third party he is effectively generating revenue which may ultimately be payable to the applicants in part settlement of the indebtedness. Nonetheless, the agreement the parties entered into identifies this kind of action as central and a breach of the obligation a fundamental one, allowing the aggrieved party to cancel. I also accept that Mr McDouall could have allowed the entities he controlled to slide into liquidation but he chose to continue trading which had the effect of allowing the applicants' claims to survive in practical terms.

[7] Despite all that, it seems to me quite plain that Mr McDouall's action, however motivated, is a breach of the settlement agreement, and in the absence of persuading the applicants to accept that breach, the risk is that the agreement can be cancelled by the applicants, which it was. The respondent tried to deal with this by offering the applicants a significant sum in part reduction of the arrears of wages

indebtedness in order for the applicants to overlook the fundamental breach and a draft agreement was prepared to effect this.

[8] However, neither the agreement was executed nor the sum accepted by the applicants who, I am satisfied, declined to waive the respondent's fundamental breach. As I have already noted, the applicants subsequently cancelled the agreement because of that fundamental breach, as the agreement itself specifically provided for. This happened by letter dated 1 February 2017.

[9] It follows from that analysis that it is available to the applicants to no longer support the continuation of the non-publication order because that non-publication order was a term of the agreement as was the applicants' support for such an order.

[10] The respondent, McDouall Stuart, seeks to interest me in the applicants' motivation for making their application to the Authority now. In effect, McDouall Stuart says that the applicants do not come to the Authority with clean hands and that they are seeking to place public pressure on Mr McDouall in particular in order to improve their negotiating position and potentially get some of the significant arrears they are still owed, paid.

[11] Any question of the applicants' motivation is overtaken by the fact there was an agreement between the parties, the terms of which included joint support for a non- publication order and that agreement has now come to an end as a consequence of a fundamental breach by the respondent party and the applicants have chosen to exercise their rights by cancelling the understandings between the parties.

[12] The effect of that decision is to remove the obligation on the applicants to support the continuation of the non-publication order but of course it also has the effect of removing the terms of the agreements as to payment between the parties and that second aspect is considered in the next section of this determination.

[13] By agreeing to allow the cancellation of the non publication order I am doing no more than giving effect to the principle of open justice which underpins our jurisprudence. It is a truism that in democratic societies informed by the rule of law, justice is typically conducted in open court unless there are compelling reasons not to do so. Whether those reasons exist or not is a matter for the party seeking non publication to persuade the tribunal or court of.

[14] I observe also that Member Stapp, when he dealt with this matter at first instance, described his non publication order as an interim one, made to facilitate the negotiations between the parties aimed at securing payment. That interim order was made some four years ago and nothing before me suggests there is any compelling reason for it to not be lifted. To the contrary, failure to secure an operative agreement suggests otherwise.

Are the applicants entitled to any other relief?

[15] As previously noted, the applicants maintain that they are entitled to an order under s.142Y of the Employment Relations Act 2000 (the Act). Put shortly, s.142Y would entitle the applicants to proceed against Mr McDouall personally for the arrears of wages rather than placing their reliance exclusively on the respondent employer.

[16] The amendments to the Act on which the applicants rely were inserted into the Act by either the Employment Relations Amendment Act 2016 or the Regulatory Systems (Workplace Relations) Amendment Act 2017. The relevant provision came into force on 1 April 2016.

[17] It is said for the applicants that because the default by McDouall Stuart has continued through time and presumably across the boundary established by the implementation date of s.142Y, there is a current default, that is a default since

1 April 2016 and that being the position, s.142Y can have application.

[18] I do not accept that argument. It seems to me the position is quite clear. While it may be true to say that the debt remains

unpaid post 1 April 2016, the fact is that the debt was incurred years before, in fact in the period 2010 to 2012 and I am satisfied that the operative date that I must consider is the date the debt crystallised not some date in the future which reflects a subsequent failure to pay.

[19] On that footing, the position could not be clearer. As McDouall Stuart makes clear in its submissions, the Interpretation Act 1999 repeats the longstanding common law prohibition about rules of law not having retrospective effect: s.7 of the Interpretation Act.

[20] As if that is not enough, there is an explicit provision in Schedule 1AA of the Act which is entitled *"Application, savings, and transitional provisions relating to amendments made to this Act after 1 January 2013"*.

[21] By clause 3(1) of that Schedule, a quite explicit provision makes clear that amendments made by the 2016 Act (the relevant Act in this case), *"do not apply to conduct that occurred before the commencement of that Act"*.

[22] I am satisfied that the conduct complained of is the failure to pay wages when they were due and owing and not subsequently. Certainly there has been a continuing failure to pay wages but the crystallising point, as I have already observed, must be at the time and date when the wages were first due and owing.

[23] The ordinary usages relating to the payment of wages or salary is that they are earned by the provision of work by an employee and the payment for that work becomes due and owing on the first regular pay period after the provision of the work in question. In my opinion, that means that the prohibited conduct (failure to pay wages) first became prohibited conduct in the pay period immediately after the work was provided and as I am told that the payments related to work performed between

2010 and 2012, I must conclude that the prohibited conduct first occurred during those years and therefore clause 3(1) applies to preclude any reliance on the effect of s.142Y of the Act.

[24] Further and finally on this point, I would observe that in order to seek a right of action against Mr McDouall personally, one would have thought it necessary to seek to add him as a party. No such proposal was advanced.

[25] I turn now to consider interest which is also sought by the applicants and I accept McDouall Stuart's submission that interest can only be due and owing for the period from 1 February 2017 onwards because that is the date that the applicants cancelled the agreement between the parties. That agreement precludes the applicants from claiming interest during its currency.

[26] It follows therefore that the only interest that can be contemplated is the interest from 1 February 2017 and that interest, I am satisfied, must be calculated in respect of each individual applicant depending on what each applicant has received by way of reduction of the arrears in wages they are owed.

[27] I intend to direct counsel to engage and provide me with a quantification of those 13 amounts.

[28] Once those calculations are provided, interest in terms of the Judicature Act

1908 will run at the rate of 5 per centum per annum from 1 February 2017 down to the date of payment of each sum.

Determination

[29] The Authority directs that the interim non-publication order made in this matter on 5 September 2013 is hereby lifted and the effect of that is to allow publication of the names of the parties in the determination issued the previous day by the Authority as [2013] NZERA Wellington 107. The Authority Officer will attend to a reissue of the original determination with the names of the parties now included and in accordance with the Authority's usual practice, the newly released modified determination will be published on our website in due course.

[30] I make no order in respect of the application under s.142Y of the Act as I have not been persuaded that that section can have retrospective effect to the point at which the entitlement to wages or salary first accrued.

[31] However, the cancellation of the various agreements between the parties effective 1 February 2017 has the effect of creating an entitlement to interest on and from that date down to the date on which the remaining arrears of wages are paid and I order that interest at 5 per centum per annum pursuant to the Judicature Act be paid by McDouall Stuart to the applicants pursuant to their individual entitlements.

[32] To facilitate the calculation of interest, I direct that counsel are to engage with a view to calculating the arrears of wages due and owing in respect of each of the 13 applicants.

Costs

[33] Each party seeks costs. Applying the Authority's normal rules, it is fair to observe that both parties have had a measure

of success. This particular matter has not been unduly time consuming and was, by sensible agreement of counsel, dealt with on the papers.

[34] In the particular circumstances of this case, I think the proper view is that costs should lie where they fall and I direct that that is the position.

James Crichton

Chief of the Employment Relations Authority
