# Employment Court of New Zealand



## Air New Zealand Limited v Kerr [2013] NZEmpC 126 (9 July 2013)

Last Updated: 26 July 2013

**IN THE EMPLOYMENT COURT AUCKLAND**

**[2013] NZEmpC 126**

**ARC 38/13**

IN THE MATTER OF proceedings removed from the

Employment Relations Authority

BETWEEN AIR NEW ZEALAND LIMITED Plaintiff

AND GRANT KERR Defendant

Hearing: By way of consent memoranda dated 2 July 2013 and telephone directions conference held on 8 June 2013 at 11.00 am

Appearances: Jennifer Mills and Christie Hall, counsel for the plaintiff

Peter Chemis and Jennifer Howes, counsel for the defendant

Judgment: 9 July 2013

**INTERLOCUTORY JUDGMENT OF JUDGE A D FORD**

[1] On 25 June 2013,[1] I made certain nondisclosure and timetabling orders in this case which is set down for an urgent three-day hearing commencing on Wednesday,

31 July 2013. Since then an issue has arisen in relation to the provisions of s 219(1) of the Employment Relations Act 2000 (the Act). The plaintiff has also applied for a variation of the timetabling order, which was opposed, and the defendant seeks orders for better disclosure.

[2] The parties seek an order under s 219(1) of the Act validating certain informal steps they have already taken in relation to this proceeding.

**219 Validation of informal proceedings, etc**

(1) If anything which is required or authorised to be done by this Act is not done within the time allowed, or is done informally, the Court, or

the Authority, as the case may be, may in its discretion, on the application of any person interested, make an order extending the time within which the things may be done, or validating the thing so informally done.

[3] The relevant background is that the plaintiff filed proceedings in the Employment Relations Authority (the Authority) on 17 May 2013 to enforce, inter alia, the provisions of a post-termination restraint of trade clause in the employment agreement between the plaintiff and the defendant. Included in the relief sought by the plaintiff is an application for an order that the Court modify the restraint of trade provision, if necessary, pursuant to s 8 of the Illegal Contracts Act

1970 so as to make its provisions reasonable.

[4] The Authority,[2] acting pursuant to s 178(2) of the Act, subsequently removed the proceeding to this Court for hearing at first instance. On 28 May 2013, the parties attempted in good faith to resolve their employment problem by reference to

mediation but, unfortunately, despite the use of mediation, the problem has not been resolved.

[5] Section 162 of the Act (which applies to the Court by virtue of s 190 of the Act) provides that, in any matter related to an employment agreement, the Court may make any order that the High Court or District Court may make relating to contracts. Section 162 of the Act is subject to s 164 of the Act which also applies to the Court by virtue of s 190 of the Act. Relevantly, s 164 provides that the Court may only make an order cancelling or varying an individual employment agreement if:

...

(a) [The Court] (whether or not it gave any direction under section

159(1)(b) in relation to the matter)–

(i) has identified the problem in relation to the agreement; and

(ii) has directed the parties to attempt in good faith to resolve that problem; and

(b) the parties have attempted in good faith to resolve the problem relating to the agreement by using mediation; and

(c) despite the use of mediation, the problem has not been resolved; ...

[6] The grounds for the application pursuant to s 219 of the Act to validate the informal action taken by the parties are stated as follows:

(a) The purpose of section 164 of the Act is to ensure that, before the Court makes an order cancelling or varying the terms of an individual employment agreement, the parties have attempted in good faith to resolve the problem relating to the agreement by using mediation. The purpose of section 164 has been met, the parties having already identified the problem in relation to the agreement and attended mediation in an attempt, in good faith, to resolve the problem.

(b) Requiring the parties to attend mediation again would be unlikely to resolve the problem and would only expose the parties to extra cost(s).

(c) Section 219(1) of the Act enables the Court, in its discretion, to make an order validating anything required to be done by the Act, which is done informally.

(d) Making an order under section 219(1) of the Act would not prejudice either party and it is in the interests of both parties that they are not required to incur the expense of attending a further mediation.

[7] I find the grounds advanced by the parties (both of whom are represented by senior counsel) to be quite compelling. I am satisfied that it is appropriate for the Court in all the circumstances to validate, pursuant to s 219(1) of the Act, the informal steps the parties have already taken in good faith to attempt to resolve their employment problem through mediation. The action so validated satisfies the requirements of s 164 (a) - (c). Accordingly, I give no directions for the parties to engage in further mediation.

[8] Following discussion and submissions in the course of the telephone directions conference, the timetabling order of 25 June 2013 is amended as follows:

1. The parties are to cooperate and take all reasonable steps to ensure that full disclosure of relevant documentation, including the provision of copies, as provided no later than 5.00 pm on Thursday, 11 July 2013.

2. The plaintiff is to file and serve copies of its briefs of evidence by no later than 5.00 pm on Thursday, 11 July 2013

3. The defendant is to file and serve his briefs of evidence at 5.00 pm on

Wednesday, 17 July 2013.

4. The plaintiff is to file and serve any briefs of evidence in reply by

5.00 pm on Monday, 22 July 2013.

[9] A further telephone directions conference is fixed for 12.30 pm on Thursday,

11 July 2013 to deal with any unresolved matters relating to disclosure. The parties are reminded that, given the urgent nature of the proceeding, the Court expects that they will make every effort to comply with the scheduled timetable.

A D Ford

Judge

Judgment signed at 9.30 am on 9 July 2013

---

[1] [2013] NZEmpC 116.

[2] [2013] NZERA Auckland 241.

---