Employment Court of New Zealand

Allen Chambers Limited v Pelabon [2018] NZEmpC 114 (27 September 2018)

Last Updated: 3 October 2018

IN THE EMPLOYMENT COURT
WELLINGTON

[2018] NZEmpC 114
EMPC 176/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ALLEN CHAMBERS LIMITED First Plaintiff
AND	GEORGE ALLEN CHAMBERS Second Plaintiff
AND	FLORIAN PELABON Defendant

Hearing:	(by submissions filed on 3 and 10 September 2018)
Appearances:	G A Chambers, as representative for Allen Chambers Ltd, and in person B Laracy, advocate for defendant
Judgment:	27 September 2018

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL: DIRECTIONS UNDER S 182

OF THE EMPLOYMENT RELATIONS ACT 2000

Introduction

[1] The plaintiffs filed a de novo challenge to a determination of the Employment Relations Authority (the Authority), in which compliance orders were granted.1 Issues now arise as to whether the plaintiffs participated in the Authority's investigation meeting in a manner that was designed to resolve the issues involved, whether the hearing of the challenge should proceed on a de novo basis, and if not, what directions should be made under s 182(3) of the Employment Relations Act 2000 (the Act).

1 *Pelabon v Zumo Retail Nelson Ltd* [2018] NZERA Wellington 44.

[2] In the Authority's first determination of 6 October 2017, Zumo Retail Nelson Ltd (ZRNL) was ordered to pay Mr Pelabon $10,824.07 in wages, holiday pay and compensation.2 In a subsequent determination dated 2 February 2018, the Authority ordered ZRNL to contribute $2,250 towards costs associated with Mr Pelabon's substantive claim.3 Neither determination was challenged.

[3] ZRNL did not pay these amounts; accordingly, Mr Pelabon sought compliance orders in respect of those determinations against not only ZRNL, but also Allen Chambers Ltd (ACL) and Mr Chambers.

[4] ZRNL had been Mr Pelabon's employer, but ACL was the holding company for that entity, with Mr Chambers owning 100

per cent of ACL's shares. He is also the sole director of both companies.4

[5] In the determination which is challenged, the Authority considered that compliance orders should be made against the two companies and Mr Chambers, on the strength of a judgment of the Labour Court, *Northern Clerical Workers Union v Lawrence Publishers Co of New Zealand Ltd*.5 The Authority held that it was appropriate to order all three respondents to ensure ZRNL makes the payments ordered. Its orders reflect those made in *Lawrence Publishers*. Pursuant to s 137 of the Act, and within 14 days of the determination:

a. ZRNL was to comply with the orders contained in the earlier determinations of 6 October 2017 and 2 February 2018, and to pay Mr Pelabon the sum of $13,074.07.
b. Mr Chambers was ordered to make the payment referred to above, as agent of ZRNL.

2 *Pelabon v Zumo Retail Nelson Ltd* [2017] NZERA Wellington 101.

3 *Pelabon v Zumo Retail Nelson Ltd* [2018] NZERA Wellington 10.

4 *Pelabon v Zumo Retail Nelson Ltd*, above n 1, at [5] and [6].

5. *Northern Clerical IUOW v Lawrence Publishers Co of New Zealand Ltd* [1990] 1 NZILR 717 (LC).

c. ACL was ordered to advance to ZRNL whatever funds would be necessary, if any, to enable Mr Chambers and ZRNL to comply with the compliance orders which had been made.6

[6] ZRNL was also ordered to pay Mr Pelabon interest in the sum of $249.67, with Mr Chambers and ACL being ordered to take whatever action was necessary to ensure that payment was made. Interest was to accrue until the date of payment.7

[7] Costs associated with the application were awarded at $500 plus a filing fee of

$71.56.8

[8] Although Mr Chambers participated in a case management conference call at which the date for the investigation meeting was agreed, he did not attend the meeting. Nor was there any representation for him or either company. Moreover, limited financial information concerning ZRNL was provided to the Authority. In light of these factors, the Court upon receiving the challenge, requested a good faith report under s 181 of the Act.

[9] The Authority prepared a draft good faith report on 25 July 2018, sought and obtained comments from the parties on that document, and then finalised it on 17 August 2018.

The good faith report

[10] In that report, the Authority recorded the steps which had been taken prior to the investigation meeting. Mr Chambers had sent certain emails to the Authority, one of which concerned ZRNL, stating that "ZRNL is essentially wound up".

[11] At the subsequent case management conference on 19 December 2017, it was established that the company had not been, nor was it in the process of being, liquidated. The Authority recorded that Mr Chambers had, however, said the structure

6 *Pelabon v Zumo Retail Nelson Ltd*, above n 1, at [24].

7 At [25].

8 At [26].

regarding the Zumo group of companies had been altered, and that ZRNL had no funds to pay the sums for which it was liable.9

[12] The Authority directed that an affidavit be filed and served, setting out the timing and detail of the restructuring of the companies. Moreover, if it was to be argued that the company could not meet its liability to Mr Pelabon, "it must provide certified copies of relevant bank statements and provide information as to the value of any asset, plant and chattels it owns on the same date".

[13] No affidavit was filed. Mr Chambers sent an email to the Authority on 24 January 2018, attaching a screenshot of what the Authority later said was the Zumo group of companies' bank and general ledger account numbers. No balances in respect of those accounts were provided. Also attached was a letter which the Authority said was purportedly sent to the New Zealand Police on 3 March 2017, making certain allegations as to the nature of the evidence Mr Pelabon had given to the Authority previously.10

[14] The Authority considered this material to be meaningless for the purposes of its investigation. Not only was there no affidavit, there were no certified bank accounts or other information which the Authority had directed should be produced.

[15] In its good faith report, the Authority also commented on the issue of attendances at its investigation meetings. There had been a delayed attendance at an investigation meeting which occurred on 11 April 2017, which gave rise to the determination of 6 October 2017. As already noted, there was no representation for the respondents at all at the investigation meeting which resulted in the final determination of 18 May 2018.

[16] Then the Authority stated:11

In the statement of reply concerning Mr Pelabon's initial claims, Mr Chambers accused Mr Pelabon of illegal conduct, including (but not limited to) allegations that statements in the original statement of problem amounted to criminal action under the Crimes Act. In almost every interaction (written and

9 Good Faith Report at [5].

10 Good Faith Report at [8].

11 Good Faith Report at [17].

oral) with the Authority during that investigation and subsequently, Mr Chambers in various ways reiterated the charges and alleged the Authority, endorsed by the State, provided an avenue for and assisted criminal conduct.

[17] The Authority concluded that the respondents did not facilitate the Authority's investigation, but obstructed it, and did not act in good faith towards the other party during the investigation.

The parties' submissions

[18] Mr Laracy, advocate for Mr Pelabon, filed his submissions first. In summary, he submitted:

a. If the challenge were to proceed on a de novo basis, then ZRNL ought to be joined as a party; the Court should also order security for costs.
b. However, the Court could also direct that the hearing not proceed on a de novo basis, with the scope of the challenge being limited to the following questions:
    i. Did the Authority correctly interpret Mr Chambers' email of 24 January 2018?
    ii. Having regard to the provisions of the Personal Properties Security Act 1999 and the Companies Act 1993, was it lawful for the Authority to order ACL to advance ZRNL funds which it had previously seized?
c. If these questions were answered in the affirmative, then the challenge would be dismissed.

[19] Mr Chambers, acting in person and as representative of ACL, submitted:

a. The Authority had ignored or lacked the relevant competence to consider meaningful submissions.
b. The Authority had relied on a case decided under repealed legislation.
c. The Authority had ignored relevant evidence, and had not taken into account the good faith provisions of s 4 of the Act; nor had it complied with its statutory obligations under s 157 of the Act which describes the role of the Authority; or s 174C of the Act, which specifies the time frames within which a written determination may be made.
d. Attached to these submissions were comments which had been made to the Authority in response to the draft good faith report of 25 July 2018, essentially disagreeing with the proposed contents of that report.

Relevant principles

[20] As already recorded, the plaintiffs seek a hearing de novo in this Court. The provisions relating to the question as to whether they are entitled to such a hearing are found in ss 181 and 182, which relevantly provide:

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.

...

(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.

...

(5) The Authority must, in submitting the final report to the court, submit with it any written comments received from any party.

182 Hearings

(1) Where the election states that the person making the election is seeking a hearing *de novo*, the hearing held pursuant to that election is to be a hearing *de novo* unless the parties agree otherwise or the court otherwise directs.
(2) The court may give a direction under subsection (1) only if—

(a) it has requested a report under section 181(1); and

(b) it is satisfied,—
(i) on the basis of that report; and
(ii) after having had regard to any comments submitted under section 181(5),—

that the person making the election did not participate in the Authority's investigation of the matter in a manner that was designed to resolve the issues involved.

(3) Where—

(a) the court gives a direction under subsection (1); or
(b) the election states that the person seeking the election is not seeking a hearing *de novo*,—

the court must direct, in relation to the issues involved in the matter, the nature and extent of the hearing.

[21] A convenient summary as to the effect of these provisions is found in the judgment of Judge Couch, in *The Travel Practice Ltd v Owles*.12 He said:

[20] The purpose of s 181 and s 182(2) is to provide a means to sanction parties who fail to properly take part in the statutory mediation and investigation processes. The discretion conferred on the Court by s 182(2), however, must be exercised judicially and consistent with the interests of justice. This involves consideration not only of the blameworthy conduct of the plaintiff but also the overall interests of both the plaintiff and the defendant.

[22] I respectfully agree with these observations.

The issues

[23] The Court having received a good faith report must now consider these issues:

a. Did the persons making the election participate in the Authority's investigation of the matter in a manner that was designed to resolve the issues involved?
b. Should the Court direct that there not be a hearing de novo?
c. If so, what directions should be made as to the nature and extent of the hearing in this Court?

12 *The Travel Practice Ltd v Owles* EmpC Auckland CC 15/09, 14 October 2009.

Analysis

[24] First, I am satisfied that a good faith report has been prepared by the Authority in accordance with the provisions of s 181. It gave each party a reasonable opportunity to supply written comments, and the Authority has expressed an opinion which is within the confines of s 181(1).

[25] Neither in the responses given by Mr Chambers to the Authority's draft report, or in his supplementary submission to this Court, has any adequate explanation been given to any of the concerns raised by the Authority. As already noted, no affidavit was filed; the limited information provided to the Authority in Mr Chambers' email of 24 January 2018, and its attachment, were not of material assistance. Nor did Mr Chambers, or any representative for the respondents, attend the investigation meeting to explain the issues, as needed to occur. Mr Chambers said he had provided sufficient information to the Authority, and that had he attended he would simply have reiterated what he had said previously at the case management meeting and in his email. I do not accept this submission. I agree with the Authority that the information that was provided was not sufficient to provide a sound basis on which to assess issues as to ZRNL's alleged inability to pay. At

the very least, good faith participation by the respondents at the investigation meeting would have contributed to a constructive resolution of the issues.

[26] Further, the tenor of the remarks made in Mr Chambers' email were disrespectful and unhelpful. They clearly demonstrated an absence of good faith towards Mr Pelabon. I also find that their contemptuous nature was apparently intended to have the effect of undermining the earlier determination of the Authority, which had not been challenged, and the Authority's approach to the compliance issues.

[27] I am also concerned at the Authority's conclusion that the respondents' actions in providing limited financial information to it, and not attending the investigation meeting, were steps taken consciously, deliberately, and which amounted to obstruction of the Authority's investigation.

[28] In all the circumstances, I am satisfied that none of the respondents participated in a manner that was designed to resolve the issues involved.

[29] The conclusions I have reached point strongly to the need to make a direction that the challenge not proceed on a de novo basis, and that it should be limited to particular issues as to whether the conclusions of the Authority were in error, whether in fact or in law.

[30] There are two further factors which require discussion.

[31] First, it has previously been recognised that difficulties can arise in making a direction which restricts the scope of the hearing of a challenge, where a plaintiff has effectively taken no part in an investigation.13 The problem which can arise in such a situation is that if the plaintiff is not permitted to adduce evidence, the case could fail with a consequent risk of injustice.14

[32] That said, this is not a case where the respondents had tendered no information at all to the Authority; rather, the problem is that the information which was provided was wholly incomplete. Further, the absence of the respondents at the investigation meeting meant that the necessary clarification of ZRNL's position was unable to be obtained. In my view, it would be in the interests of justice to permit limited evidence to be provided by the plaintiffs, under specific directions which should be given.

[33] Second, there is the potential complication which could arise from the fact that ZRNL is not a party to the challenge. Arguably, a hearing de novo would mean that the question of the making of a compliance order against that entity would have to be reheard. This is a further factor which persuades me the hearing should not proceed on a de novo basis, so that the compliance order against ZRNL, which has not been challenged, will stand.

13 *The Travel Practice Ltd v Owles*, above n 12, at [21].

14 At [21]. See also *South Pacific Ltd v Tian* [2013] NZEmpC 44 at [17].

Disposition

[34] I am satisfied that in the circumstances of this case a just result can be achieved by imposing strict conditions on the challenge.

[35] The plaintiffs may proceed with their challenge on a non-de novo basis, where the nature and extent of the hearing will be as follows:

a. The hearing will be limited to the following questions:
    i. Was the Authority correct in concluding that *Lawrence Publishers* provides an appropriate precedent with regard to the obligations of the plaintiffs?
    ii. Was the Authority correct in concluding that the plaintiffs exercised some degree of control over ZRNL, so that it was appropriate to order that they should ensure ZRNL make the necessary payments to Mr Pelabon, as well as ZRNL itself?
    iii. If the Authority was incorrect in concluding that *Lawrence Publishers* provides an appropriate precedent with regard to the obligations of the plaintiffs, did the Authority err in making the orders it did under s 137 of the Act?
    iv. What orders, if any, should it have made in respect of the plaintiffs?
b. The hearing is to proceed, as far as the plaintiffs' case is concerned, on the basis of Mr Chambers' email of 24 January 2018; and on affidavit evidence which the plaintiffs are to file and serve within 28 days of this judgment. That evidence is to comply with the intent of the direction made by the Authority on 22 December 2017. It is to describe fully, supported by necessary documentation, the timing and detail of ZRNL's restructuring. If the plaintiffs propose to argue that the company cannot meet the monetary awards which have been made by the Authority in favour of Mr Pelabon, it is to provide certified copies of relevant bank

statements, and documentation establishing the value of ZRNL's assets and liabilities as at the date of the affidavit.

c. If any issues of commercial sensitivity arise with regard to the evidence filed and served for the plaintiffs, an application for non-publication orders may be brought. If so, I will timetable the application for urgent consideration according to the relevant principles which apply to such an application.

d. The defendant is to file and serve a statement of defence 28 days after the filing and service of the affidavit referred to in sub-para (b).

c. After the directions described in sub-paras (b) and (d) have been complied with, the Registrar is to schedule a telephone directions conference to discuss further directions for the substantive hearing. This will include a consideration of whether cross-examination of the deponents of the affidavit(s) filed for the plaintiffs should take place, and what evidence the defendant may call and if so on what basis. Whether the defendant proposes to bring an application for security for costs can be dealt with on that occasion.

d. The plaintiffs are to comply strictly with all orders and directions of the Court made in the course of this proceeding. Any default may result in the plaintiffs' challenge being liable to be struck out.
e. When considering costs with regard to the challenge, the Court will have regard to any additional costs that the defendant may incur because the plaintiffs did not participate in the Authority's investigation in a manner designed to resolve the issues.

[36] The defendant is entitled to a contribution to his costs in relation to the good faith process, which I set at $750. This sum is to be paid within 14 days of the date of this judgment.

B A Corkill Judge

Judgment signed at 3.55 pm on 27 September 2018
