Employment Court of New Zealand

Auckland Council v George [2013] NZEmpC 79 (10 May 2013)

Last Updated: 23 May 2013

IN THE EMPLOYMENT COURT AUCKLAND

[2013] NZEmpC 79

ARC 124/10

IN THE MATTER OF proceedings removed

BETWEEN AUCKLAND COUNCIL Plaintiff

AND LAURA JANE GEORGE Defendant

Hearing: By memoranda of the parties dated 9 May 2013 and urgent telephone conference on 10 May 2013

Counsel: Tim Clarke, counsel for plaintiff representing Mr Eaton

Tony Drake, counsel for defendant

Judgment: 10 May 2013

INTERLOCUTORY JUDGMENT OF JUDGE CHRISTINA INGLIS [APPLICATION TO SET ASIDE WITNESS SUMMONS]

[1] There are two related proceedings set down for a two week fixture commencing on Monday 13 May 2013, less than one working day away. On 8 May

2013 one of the proposed witnesses for the Auckland Council (Mr Eaton) was served with a summons to attend before the Court on Monday 13 May, to remain at the Court until discharged from attendance, and to bring with him and produce the following documentation:

...the Toovey Eaton and MacDonald Ltd file (or files if more than one) of documents, including documents held in electronic form, relating to correspondence and communications between, and services provided to, Auckland Regional Council, for the period between 1 June 2007 and 31

March 2008.

[2] Mr Eaton applies to have the summons set aside. The application was dealt with on an urgent basis, and is opposed by Ms George.

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[3] The application is advanced on a number of grounds, which can be summarised as follows. It is submitted that the witness summons constitutes an abuse of process and is being used for an improper purpose as the Court has already dealt with, and declined, an application for disclosure of all relevant documents contained on the files held by Toovey, Eaton and MacDonald Ltd (TEAM).

[4] It is further said that the witness summons is oppressive and will cause undue hardship to Mr Eaton, by reason of both distance and short notice. An affidavit has been filed in support of the application. Mr Eaton says that attending Court on 13

May will cause him significant inconvenience, especially as he has recently returned from five weeks overseas and has several important client commitments and meetings to attend, and has business commitments in Hawkes Bay on Monday 13

May (which are detailed in his affidavit). Mr Eaton also makes the point that, following discussion at a directions conference

on 19 April 2013, an indicative witness timetable had been agreed with counsel for both parties, with Mr Eaton giving evidence on Wednesday 15 May. He has made travel and other arrangements in reliance on that timetable.

[5] It is clear, based on the affidavit evidence before the Court, that requiring Mr Eaton to attend at Court on Monday 13 May would present difficulties for him. The difficulties extend more broadly, to locating and collating the documentation referred to in the witness summons. As Mr Eaton observes, the scope of the summons (in terms of the documentation sought) is broad. He anticipates that there will be numerous emails which have not been printed and which are accordingly not stored in the company's hard copy file, and that an external, independent IT expert would be required to conduct the necessary searches required to comply with the request (although it is not explained why an independent expert would be required to undertake this task). Further, care would need to be taken to ensure that documentation relating to other clients was not inadvertently included in the material produced. Mr Eaton concludes that it would be difficult and time-consuming for him to organise the documents prior to 13 May.

[6] The Court may set aside a witness summons if the Court considers that the summons is oppressive or causes, by reason of distance or short notice, undue

hardship to that person.1 The power is discretionary, and must be exercised consistently with the overall interests of justice.

[7] In *NZ Medical Laboratory Workers Union Inc v Capital Coast Health Ltd*,2 the Court set aside two witness summonses on the basis that it was oppressive to require the witnesses to appear and produce documents at short notice, being two days before the hearing commenced.3 The application to set aside pursued in *Medical Laboratory Workers* fell for consideration under previous reg 39, which provided that a prospective witness who was served with a summons within three days of the hearing could apply to have it discharged. The position is somewhat different under reg 34(3), as the applicant must show undue hardship caused by

distance or short notice. Short notice is not defined.

[8] In the present case the fixture date was confirmed on 29 November 2012, some six months ago. The summons was not served on Mr Eaton until 8 May 2013. In her affidavit Ms George explains that an earlier summons had been obtained in relation to one of Mr Eaton's colleagues, Mr Fisher, however it was discovered that he was overseas and would not be available until the date scheduled for him to appear at hearing. A summons was then served on Mr Eaton. The fact however remains that Mr Eaton has been served with a summons shortly before the hearing.

[9] I am satisfied that the summons has been served on short notice for the purposes of reg 34(3), having regard to the constrained timeframe before hearing (two working days from the date of service) and the material he is being required to locate and collate within that limited timeframe.

[10] Mr Drake made it clear that there was no intention to inconvenience Mr Eaton, and submitted that the difficulties identified by him could be adequately ameliorated by amending the summons to require his attendance on 15 May (the date on which he was otherwise due to attend Court), and allowing previous witnesses to

be recalled if necessary. Mr Clarke conceded that this arrangement would go some

1 Employment Court Regulations 2000, reg 34(3).

2 [1997] NZEmpC 291; [1998] 2 ERNZ 107.

3 At 115, 116.

way to addressing the concerns identified in Mr Eaton's affidavit, and I accept that that is so. But for more fundamental issues, which I will turn to shortly, I would not have set aside the witness summons on the basis of hardship caused by distance or short time if amended in the way proposed by Mr Drake. While complying with the witness summons within the extended timeframes proposed may have presented Mr Eaton with difficulties I would not have been satisfied that it would have resulted in undue hardship.

[11] The summons is broadly worded, and is directed at ensuring that documentation from TEAM files for work undertaken for the Auckland Regional Council (ARC) is before the Court. However, as Mr Drake confirmed, the documentation that Ms George wishes Mr Eaton to produce and bring to Court is more limited, and relates to purchase orders from ARC to TEAM which she says (for reasons set out in her affidavit) ought to be held by TEAM.

[12] Issues relating to the discoverability of the documentation referred to in the summons have already been traversed by the Court. Judge Travis dealt with these issues in an interlocutory judgment dated 29 August 2012, on Ms George's application for further and better discovery.4 As Judge Travis noted:

[5] In broad terms, Ms George seeks disclosure of all relevant documents on the Team file, including the quote for the particular work done in late 2007, the documentation scoping the work required to be done by Team, the documents

requesting Team to supply a tax compliance review, the emails and other documentation Team sent to employees of the ARC relating to tax matters around December 2007 and early 2008.

[6] Ms George also seeks all correspondence and other documents from

Team's files for the work that firm carried out for the ARC from 1 January

2005 until 30 September 2010, relating to any of the issues in the damages proceedings.

...

[10] ... However, in reliance on the matters deposed to by Ms George, he [Mr Drake] and Ms George were seeking the opportunity to personally examine Team's files in relation to the relevant matters to ensure that there had been full disclosure.

[13] His Honour accepted that, on its face, Ms George's contention that there appeared to be documentation relating to purchase orders that had not been disclosed may have substance, and recorded Mr Clarke's undertaking to make enquiries as to whether there were documents comprising the purchase orders that had not been disclosed; that if such documents existed they would be disclosed to Ms George; and

reserving leave to bring any unresolved issues back before the Court.5 In relation to

the remaining TEAM documents sought on disclosure Judge Travis observed that:

[23] ... Mr Clarke's submissions annexed a table showing the documents requested by Ms George, where they have either been disclosed already or where they do not exist, and the evidence in support of those propositions.

[24] I accept those submissions. Ms George clearly believes that in accordance with the ARC's usual practice scoping documents should have been brought into existence but I have affidavit evidence from Mr Eaton that there were no such documents. I am unable to go beyond Mr Eaton's affidavit and direct the disclosure of documents which are sworn on behalf of the AC do not exist.

[25] The exercise Ms George and Mr Drake wish to undertake of examining Team's files for relevant documents has been undertaken by AC and it has not been established that the exercise was undertaken on any false or mistaken basis. What Ms George wishes to undertake is a fishing expedition and the authorities in this area do not permit that approach.

[26] With the exception of the purchase orders and account numbers and the newly requested BNZ documents, which counsel have agreed will be dealt with between them, Ms George has failed to establish that there are grounds for believing that the AC has not discovered documents that should have been discovered in terms of the High Court Rules. Except in respect of the two matters I have referred to, the application for further and better disclosure is dismissed and costs are reserved.

[14] Issues relating to the purchase order documentation came back before Judge Travis on 14 November 2012. He directed that if the documents were not able to be provided to Mr Drake within two weeks then the Council was to file affidavits explaining what steps had been taken to locate the documents and why they could not be found by 7 December 2012. In the event an affidavit was not filed within that timeframe. The matter came before me on 19 March 2013. In my minute of that date I referred to Mr Clarke's written confirmation to Mr Drake that the Council had been unable to locate documentation relating to the purchase orders sought by Ms

George, that it had been agreed (following discussion with counsel) that an affidavit would be filed by 22 March 2013 in relation to any documentation that could not be located, and that "if disclosure issues remain outstanding and Mr Drake wishes to pursue an application on behalf of Ms George that will need to be dealt with as soon as practicable given the impending trial." An affidavit was subsequently filed, in which Ms Naidoo (Manager Finance Systems and Processes for the Council) confirmed that apart from certain information that had been disclosed, she had not been able to locate any other purchase order information.

[15] Mr Eaton has now filed three affidavits (dated 22 November 2011, 2

February 2012, and his most recent affidavit of 9 May 2013). Mr Eaton's affidavits make it clear that TEAM has taken diligent and exhaustive steps to provide copies of any documents on its files relevant to the categories of documentation sought by Ms George and that any existing documentation has been provided.

[16] Mr Drake submitted that the rules of discovery do not restrict a party's ability to summons witnesses for the purpose of producing documentation in Court, although no authority was cited for this proposition. He also submitted that the Court and opposing counsel was advised that a witness summons may be sought at hearing, and that Judge Travis accepted that this would be a course that was open to Ms George. Mr Clarke could not recall any such discussion. Ms George refers to this matter in her affidavit but she can, of course, give no direct evidence of it as she was not present. The issue cannot be taken

further.

[17] Ms George could have pursued an application against TEAM, but did not do so. Her application for further disclosure was declined, and the residual issues were dealt with in the manner directed by Judge Travis. The evidence before the Court makes it plain that the documentation she seeks from TEAM's files has already been provided, does not exist or cannot be located. The summons is effectively an attempt to revisit Judge Travis' earlier ruling. Allowing it to stand would facilitate an unwarranted fishing expedition, a perusal of TEAM's files for the purpose of locating documentation that the affidavits confirm do not exist. If the Court

considers that a summons constitutes fishing, is speculative, or is oppressive it ought to be set aside.6

[18] It is well established that the Employment Court has an implied power to prevent abuse of its processes. It is an abuse of process for Ms George to seek to circumvent the particular rules of discovery that apply in this jurisdiction, and rulings of this Court, by way of the summons process in the circumstances of this case and having regard to the affidavit evidence filed in these proceedings.7

[19] For the foregoing reasons the application to set aside the witness summons is granted. The witness summons is set aside.

[20] Costs are reserved.

Christina Inglis

Judge

Judgment signed at 3.00 pm on 10 May 2013

6 *Senior v Holdsworth, Ex parte Independent Television News Ltd* [1975] 2 All ER 1009 (CA) at 35.

7 See *Southland Area Health Board v NZ Nurses Association Inc* [1990] 3 NZILR 361 at 390, 393. See also *New Zealand Railways Corporation v Goston* [1994] NZEmpC 26; [1994] 1 ERNZ 237 at 239, where Chief Judge Goddard expressed the need for caution in circumstances where a witness summons was an attempt to obtain discovery from someone who is not a party to the proceedings.
