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Barrera v Callcom Limited (Wellington) [2017] NZERA 2059; [2017] NZERA Wellington 59 (14 July 2017)

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Barrera v Callcom Limited (Wellington) [2017] NZERA 2059 (14 July 2017); [2017] NZERA Wellington 59

Last Updated: 23 July 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2017] NZERA Wellington 59
5597655

BETWEEN SERGIO ARISTO CARRENO BARRERA

Applicant

AND CALLCOM LIMITED Respondent

Member of Authority: Michele Ryan

Representatives: Applicant in person

Elwira Nandy, for Respondent

Determination: 14 July 2017

DETERMINATION OF THE AUTHORITY

A. The application of Sergio Barrera in this matter is dismissed without further investigation. Mr Barrera failed to properly participate in the procedure set for the Authority investigation so it could not reasonably progress. He may now elect to challenge this determination and ask the Employment Court to hear and decide his personal grievance claim.

B. Costs are reserved.

[1] This determination explains why a personal grievance application has been dismissed without the Authority completing an investigation of the applicant's claim and how that situation came to be.

[2] Mr Sergio Barrera filed his claim in the Auckland Registry of the Authority on

24 November 2015. A statement in reply was subsequently filed and served by

Callcom Ltd (Callcom) on 30 November 2015.

[3] Mr Barrera's application was later transferred to the Wellington Registry.¹

Before the matter could proceed to investigation by the Authority, Mr Barrera left New Zealand and returned to Bogota, Columbia. Since then Mr Barrera's communication with the Authority has been intermittent.

[4] In October 2016 a case management call was held between the parties. Mr Barrera indicated he was reluctant to travel to New Zealand and hoped to have the matter determined over the phone or alternatively via "internet" (by way of Skype or similar service). I considered neither proposal would be adequate given the factual matrix of Mr Barrera's claim, which is strongly contested, and the need to assess credibility on a range of issues.

[5] The matter was scheduled for investigation on 23 February 2017. It was agreed that in the absence of Mr Barrera's return to New Zealand, a video conference link would provide the most suitable means to convey his evidence, respond to my questions and questions from Callcom (if any). Mr Barrera was directed to make the arrangements needed to conduct a video conference and to confirm those matters with the Authority on or by 30 November 2016.

[6] Mr Barrera did not comply with that instruction.

[7] Between December 2016 and early February 2017 the Authority sent several emails providing information to assist Mr Barrera, and seeking a response.

[8] By mid-February the Authority had not received confirmation from Mr

Barrera that a video conferencing link had been arranged as scheduled.

[9] A further case management call was held between the parties on 15 February

2017. The investigation meeting set down for 23 February 2017 was adjourned and Mr Barrera was granted time to consider whether he wished to pursue his claim. It was agreed he would inform the Authority of his decision on or by 28 February 2017 including that if he wished to have his claims investigated he would make the arrangements needed for video

conferencing so that he could give evidence, and

provide the Authority with a timetable on those matters.

1 On the basis that the events leading to his claim arose in Napier.

[10] On 22 February 2017 Mr Barrera advised he was seeking information from Immigration New Zealand which he considered would assist him to decide if he wished to progress this matter.

[11] Having not heard from Mr Barrera the Authority sent an email on 5 March

2017 and extended the timeframe to 17 March 2017 for Mr Barrera to advise the

Authority of the matters referred to at [9].

[12] On or about 8 and again on 16 March 2017 Mr Barrera emailed the Authority on immigration and mediation matters respectively. On each occasion the Authority advised it cannot be involved with those issues.

[13] No further communication from Mr Barrera has been received.

[14] Despite my best endeavours to have Mr Barrera comply with my directions he has not made the necessary arrangements to allow him to provide testimony.

[15] The Authority's role is to resolve matters by establishing facts and making a determination on the substantive merits of the case, without regard to technicalities: [s.157](#) of the [Employment Relations Act 2000](#) (the Act). The Authority's powers in carrying out its investigation include the calling for evidence and the following of whatever procedure the Authority considers appropriate: [s.160\(1\)\(a\)](#) and (f) of the Act. While the legal position is that the Authority will generally complete its investigation before any higher Court becomes involved ([s.143\(fa\)](#) of the Act), the Act also recognises that some cases will require judicial intervention ([s.143\(e\)](#) of the Act) and access to the Employment Court's traditional adversarial process either by removal or by challenge is preserved.

[16] The procedure that I have decided upon in this case is one that I think is demonstrably consistent with the principles of natural justice, the requirement that the Authority act reasonably and the requirement that the Authority behave equitably and in good conscience.

[17] Mr Barrera has been given clear instructions about what is required of him and I am satisfied he has understood these. He has consistently failed to comply with my directions to confirm his claim and availability to provide oral evidence. I have been unable to progress my investigation in these circumstances. I consider it would be unreasonable of me to leave the file open indefinitely because that prejudices

Callcom. Accordingly I have reluctantly concluded that I must dismiss the application, without further investigation. The effect of this determination does not extinguish Mr Barrera's right to elect to have his case heard and decided by the Employment Court if he so chooses.

[18] Equally, if Mr Barrera chooses not to proceed in this way, then his case against Callcom is at an end and neither party need take any further steps.

Determination

[19] Mr Barrera's application to this Authority is therefore dismissed without further investigation because Mr Barrera has failed to participate in the procedure that the Authority set out and as a consequence the Authority could not reasonably progress its investigation.

[20] If Mr Barrera elects to challenge this determination and ask the Employment

Court to hear and decide his personal grievance claim, that is his right.

Costs

[21] Costs are reserved.

Michele Ryan

Member of the Employment Relations Authority

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