Employment Court of New Zealand

CBA v ONM [2019] NZEmpC 53 (7 May 2019)

Last Updated: 14 May 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA TE WHANGANUI-A-TARA

[2019] NZEmpC 53
EMPC 70/2019

IN THE MATTER OF	proceedings removed in full from the Employment Relations Authority
AND IN THE MATTER	of an application for adjournment of urgent fixture
BETWEEN	CBA Plaintiff
AND	ONM Defendant

Hearing:	7 May 2019 (heard at Wellington)
Appearances:	S Henderson, counsel for plaintiff D Dyhrberg and A Clarke, counsel for defendant
Judgment:	7 May 2019

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL:

(Application for adjournment of urgent fixture)

Introduction

[1] This judgment deals with an application for adjournment of an urgent fixture, set down for hearing today.

[2] The issue which was to have been considered by the Court relates to return-to-work arrangements for the plaintiff. Despite the fixture having been set down on a priority basis, last Thursday and for the second time, the defendant

requested an adjournment on the basis that significant unforeseen difficulties had arisen.

[3] The Court was advised that the plaintiff's return to work had very significant implications for another employee; and further, the responsible manager would be unable to attend the fixture because she is on medical leave for several weeks.

[4] The defendant in these circumstances proposed that the fixture be adjourned for a period of two months which would enable return-to-work arrangements to be completed and consulted on; it proposed that the plaintiff would, however, continue to be paid at a rate which it is currently paying her, equivalent to 15 hours per week. On 1 May 2019, it commenced payment at this level with effect from 29 November 2018, saying it did so as a gesture of good faith.

[5] The plaintiff conditionally consents to the two-month adjournment, on the basis that the wages she is receiving in the meantime should not be limited to 15 hours per week. She says that as a matter of contract, she is entitled to be paid on a 40-

hour basis from the date when the parties agreed she could return to work, 29 November 2018.

[6] At a telephone directions conference held yesterday, counsel confirmed that it was now common ground the fixture would have to adjourn having regard to all the circumstances, but there would be an issue as to the rate of payment in the meantime.

[7] On the material before the Court, an adjournment must be granted. However, the Court must resolve the dispute as to payment in the interim.

Applicable principles

[8] On the general topic of adjournments, reference is often made to the dicta of Tipping J in *O'Malley v Southern Lakes Helicopters Ltd,* who said:1

1. *O'Malley v Southern Lakes Helicopters Ltd* HC Christchurch CP 513/89, 4 December 1990 at 1 – 2.

... The essential question which the court always has to consider when asked for an adjournment is whether or not that is necessary in order to do justice between the parties. One must not overlook that not only is it necessary to do justice to the party who is seeking the adjournment but also justice to the party who wishes to retain the benefit of the fixture. It is essentially a balancing exercise.

[9] The assessment of appropriate conditions for an adjournment must also be measured against the necessity of doing justice between the parties. In the case of this Court, that imperative is to be understood in light of the statutory statement in s 189 of the Employment Relations Act 2000 (the Act), that the Court, for the purpose of supporting successful employment relationships and promoting good faith behaviour, has the jurisdiction to determine issues before it as in equity and good conscience it thinks fit.

[10] It is also the case that the Court is dealing with an adjournment issue on the basis of submissions only. Reference has been made by counsel to untested, possibly incomplete, evidence.

Counsel's submissions

[11] Mr Henderson's submissions in summary were:

a. There is debate between the parties as to which rate of remuneration under the applicable collective employment agreement should apply. Counsel accepted the Court could not resolve that issue on the basis of the evidence currently before the Court. Purely for the purposes of the adjournment argument, the rate of $43,350 per annum was accepted.
b. Mr Henderson strongly disputed that the defendant was or is entitled to apportion the plaintiff's contractual entitlement, so that she would receive payment for less than 40 hours per week. As a good employer, the defendant was obliged to pay the full entitlement even if the plaintiff would return to work on a graduated basis as had been recommended by the relevant medical practitioners.
c. The defendant had prevaricated and had created totally unacceptable delay in the return-to-work process, trying to place some of the blame for this on the plaintiff. She, however, was always intent only on getting back to work; that is why she issued a statement of problem in the Employment Relations Authority in an attempt to expedite this process.
d. The medical practitioners had explored the question of whether there were other employees with whom she might not work. That had become more significant than was justified, especially given an absence of direct discussion between the parties on the point.
e. The plaintiff was and is entitled to respect and trust as an employee in accordance with her contractual and statutory rights; on the issue of payment, the employment agreement provides the fall-back position.
f. The Court should accordingly rule that the plaintiff be fully paid, as a condition of any order of adjournment.

[12] For the defendant, Ms Dyhrberg submitted in summary:

a. The defendant's position of paying at the rate of 15 hours per week was fair and reasonable. This is because the medical practitioners have advised that the plaintiff cannot initially return to work on a full-time basis.
b. Dr Ryder-Lewis' report was not received until 11 February 2019. It would be a breach of duty to provide a healthy and safe workplace to implement the plaintiff's return to work without obtaining necessary information such as was contained in the report. Following receipt of that report, exploratory action was taken to identify teams to which the plaintiff could return, consistent with the recommendations of the medical professionals.
c. An attempt to communicate with counsel for the plaintiff on the question of what employees the plaintiff would not be prepared to work with, resulted in a response that no further information was needed for the defendant to return the plaintiff to her position.
d. The process is not straightforward. It requires time to ensure that all issues are carefully considered and evaluated. The

earliest time when a proposal could have been put to the plaintiff, would have been in early to mid-April. A return to work could have been implemented within a further two or three weeks, after finalising communications with applicable team leaders and managers. A return to work at 15 hours per week would therefore have commenced from early to mid-May. The best-case scenario would have resulted in an increase to six hours from early June, and to full-time hours by early August.

e. Between 29 March and 4 April 2019, it had been necessary to consider whether payment of any wages would affect the plaintiff's WINZ benefit. Ultimately, on 1 May 2019, the defendant determined it would pay wages on a pro-rata basis, backdated to 29 November 2018.
f. The backdated payment was made in good faith, recognising that any delay after 2 April 2019 when the circumstances of a co-worker were considered, was beyond the plaintiff's control.
g. It was emphasised that this is not a remedies hearing, but one relating only to the terms of an adjournment.

What is the correct rate of wages?

[13] Mr Henderson advanced submissions as to the contractual circumstances which would require considerably more evidence than is currently before the Court, and considerably more legal analysis than has been advanced. A key issue may relate to the basis on which the parties agreed the plaintiff would return to work. The detailed arguments advanced today will inevitably fall for careful consideration at the substantive hearing. On this adjournment application, and having regard to the

principles outlined earlier, the Court must proceed on a fair and reasonable basis in light of such evidence as it can regard as reliable.

[14] For today's purposes, I begin by considering the steps taken over the return-to- work issue since 29 November 2018.

[15] The first step which the parties ultimately agreed should be taken related to the obtaining of a medical report from Dr Ryder-Lewis. The necessary consent was given on 21 December 2018, with the consultation taking place on 16 January 2019. Because a statement of problem was issued in the Employment Relations Authority on 17 January 2019 (subsequently removed), it was agreed that this statement should be provided to Dr Ryder-Lewis. His report was ultimately finalised on 10 February 2019 and provided to the defendant the next day.

[16] Once the proceeding was removed to the Court, Mr Henderson sought an urgent fixture, seeking rulings on return-to-work issues.

[17] On 22 March 2019, Ms Dyhrberg advised in a memorandum to the Court that the matter was, in the view of the defendant, not urgent in the sense that a priority fixture should be granted; and it was anticipated there would be a consultation between the parties on its return-to-work issues within the following two weeks.

[18] At the first telephone directions conference held on 27 March 2019, the Court determined the matter should be the subject of an early fixture. The Court also raised the possibility on that occasion of mediation being undertaken between the parties. Such an event has not yet taken place.

[19] It was not until 2 April 2019 that the defendant discussed with another employee her particular circumstances were the plaintiff to return to work. Following discussion, the defendant decided that a medical report should be obtained in respect of that employee; the necessary consultation did not take place until 27 April 2019, with a report being presented to the defendant the next day. The backdated payment did not commence until 1 May 2019.

[20] In my view the untested material placed before the Court to this point suggests that the return-to-work arrangements could have been dealt with more efficiently than occurred. There was delay in obtaining an appointment with Dr Ryder-Lewis – indeed the appointment for 16 January 2019 was available only because the plaintiff's mother arranged it in December 2018. Given the receipt of Dr Ryder-Lewis' report on 11 February 2019, I remain surprised that it took until 22 March for the defendant to reach the point where it said it would be in a position of consulting with the plaintiff as to return-to-work arrangements in a yet further two weeks. Then there was further delay occasioned by the fact that the co-worker was not spoken to until nine days later.

[21] Dr Ryder-Lewis proposed an incremental return-to-work process over a three or four-month period. I am satisfied that had that process been undertaken in a timely way, the process of return could have commenced by the start of March 2019, even allowing for the fact Dr Ryder-Lewis' advice was not received until mid-February. Focusing only on his recommendations, had the plaintiff returned to work at that point, payment of wages would have been made based on 15 hours work per week in March, 30 hours per week in April, and taking the conservative option he mentioned, 30 hours per week in May, with payment being made on a full-time basis, 40 hours per week, from the start of June. These timelines assume that the plaintiff would have received the medical clearances for these hours according to the process which Dr Ryder-Lewis proposed.

[22] As it is a condition of the order of adjournment, I direct that the defendant is to pay to the plaintiff weekly wages at the rates and for the periods just described, based on a salary of $43,350. Since the payments made from 30 November 2018

were made as a gesture of good faith, the defendant should not deduct from the amount to be calculated and paid, payments between 30 November 2018 and 28 February 2019. It may take into account the payments made for March, but will need to increase the payments made between 1 April and 7 May 2019; and pay at the rates set out above thereafter.

[23] I emphasise that this conclusion is necessarily a provisional one, in order to fix a fair sum for the two-month adjournment. It may well be necessary to review this

topic in more depth and to revise what are inevitably provisional findings, if more detailed evidence is led, and full submissions are advanced, at the substantive fixture.

Other matters

[24] The other matters that were traversed in the course of the application for adjournment can be dealt with more shortly.

[25] First, the parties agreed that the interim order of non-publication of the name and details of the parties, made at an earlier stage of this proceeding, should continue.2 I am persuaded that there are significant health issues on both sides which justify the continuation of the current interim order. However, whether that order should be made permanent, and if so its scope, are issues which will have to be reviewed at a later stage of the proceeding.

[26] Secondly, I discussed ADR options with counsel. In my view, it is essential that such an initiative be implemented, given the absence of direct dialogue between the parties so far, except via lawyers. I discussed two possibilities with counsel. The first is that the Court makes a direction as to mediation under the Act, a possibility I have already raised with counsel several times. The alternative is that the parties agree to attend private mediation with a person very experienced in employment relationships, such as a retired Employment Court Judge. As I indicated at the hearing, such a possibility would have the advantage of being an enhanced process, including the possibility of flexibility which would enable the parties to meet on more than one occasion at times agreed by them, if necessary.

[27] Mr Henderson told the Court the plaintiff would welcome such an option. Ms Dyhrberg said that the defendant would be prepared also to engage in such a process, if it becomes appropriate. If so, she envisaged there would be no difficulty with the defendant meeting the cost of that exercise.

[28] At this stage, I say no more as to ADR options, but reserve leave to both parties to return to Court if need be, on reasonable notice, as below.

2 On 28 March 2019.

[29] Finally, Mr Henderson sought indemnity costs in respect of the adjournment. He said that actual costs in respect of the adjournment were 11.4 hours preparation, together with time involved in travelling to Wellington for the adjournment application and his appearance at it. As best I can discern on the basis of the information provided, this amounted to six hours' travel time, and three hours for the appearance, a total of

20.4 hours. He also referred to the scale of costs under the High Court Rules, suggesting that with reference to relevant assessments of time, costs should be fixed on the basis of four days of attendances, with counsel's travel time added.3 There was also a disbursement for air travel, the details of which were not available at the hearing.

[30] Ms Dyhrberg submitted that costs should lie where they fall. She said she had initially raised concerns about the tight timeframe set for the hearing; and that Mr Henderson now wished to cross-examine one of her witnesses who could not have appeared today in any event, because she was on medical leave. Thus, both parties needed the adjournment. She stated the defendant had genuinely tried to comply with the timeframe set, but factors beyond its control had prevented it from doing so. Accordingly, costs should lie where they fall. She also said that costs on an adjournment application seldom reflect costs at the level sought. They should be comparatively modest.

[31] In my view, the plaintiff's position as to the application for an adjournment was reasonable. She gave a conditional consent, with the sole issue relating to quantum of her wages. She successfully argued that she should be paid at a higher rate of wages than at present. The Court accepted her submission, although not to the extent argued for by Mr Henderson. I am persuaded that in all the circumstances, a contribution should be made to the plaintiff's costs. Costs should follow that particular event.

[32] I do not agree that indemnity costs should be paid, given the somewhat complex circumstances.

3. The applicable scale in this Court is found in the Court's Guideline as to Costs, published on the Employment Court website; Employment Court Practice Directions at 18 www.employmentcourt.govt.nz/legislation-and-rules.

[33] The quantum of the actual costs incurred are unsurprising. I find there should be a reasonable contribution in respect of those costs. A fair figure is $6,500, as well as the travel disbursement which I anticipate the parties will be able to agree

following production of the relevant invoice.

[34] I reserve leave to either party to apply for further directions on reasonable notice. I direct that the Registrar is, in four weeks' time, to seek the views of counsel as to suitable dates for the rescheduling of a substantive fixture of one day. On the basis of the information currently before the Court, I expect that fixture to be scheduled for early July. A timetable for the filing of updating evidence will need to be agreed or fixed. The Registrar should refer any issues to a Judge.

B A Corkill Judge

Judgment signed at 4.30 pm on 7 May 2019
