Employment Court of New Zealand

Denyer v Les Griffen Limited AC43A/08 [2008] NZEmpC 106 (14 November 2008)

Last Updated: 22 November 2008

IN THE EMPLOYMENT COURT

AUCKLANDAC43A/08ARC 68/08

IN THE MATTER OF an application for compliance order

BETWEEN JAMES ARTHUR DENYER
Plaintiff

AND LES GRIFFEN LIMITED
Defendant

Hearing: 13 November 2008

(Heard at Auckland)

Appearances: Sarah Blick, counsel for the plaintiff
No appearance for the defendant

Judgment: 14 November 2008

SECOND ORAL JUDGMENT OF JUDGE B S TRAVIS

[1] This matter was heard by me on 13 October 2008. In my oral judgment I adjourned the proceedings until 2.30pm on Thursday 13 November 2008 and stated that if at that point in time I was advised there had been no payment in full of the amount outstanding I would impose the fine I have indicated and order the sequestration of the defendant's property. I expressed this as the final opportunity for the defendant to meet its statutory obligations.
[2] On Tuesday 11 November 2008, a little before 4pm, the Court received a request for an adjournment of the hearing scheduled for 2.30pm this afternoon. The application was made by Mr Les Griffen on the basis that he had been waiting 9 months for major surgery and was to go into hospital on Thursday 13 or Friday 14 November. He stated that he was not sure how long his recovery will take but hoped to have an opportunity to state his case. He supplied a copy of a blood test request form for tests which are apparently to be taken on 13 November and an admission letter, dated 30 October 2008, stating that the hospital appointment had been made for 8.05am on Friday 14 November 2008.
[3] On the basis of the material provided to the Court I found there appeared to be no reason why Mr Griffen could not have attended at 2.30pm this afternoon. I also noted that no appearance was provided on behalf of the defendant when the case was called on 13 October 2008. I observed that when the plaintiff's application was first

served upon the defendant it contained a notice advising the defendant that if it failed to file a statement of defence, the defendant could only defend the claim with the leave of the Court. The notice of hearing that was served on the defendant also made it clear that if the defendant did not attend the hearing the Court might, without hearing evidence, give judgment for the plaintiff.

[4] In paragraph 8 of my judgment of 13 October 2008, after observing that there had been no appearance on behalf of the defendant company, I stated this was a proper case for the making of appropriate orders under s140(6) of the Employment Relations Act 2000 and the only matter preventing me from issuing the sequestration order on that day was that the Department of Labour would take some time to arrange a sequestrator and to ascertain the costs. All the defendant had to do to dispose of the matter at that stage was to pay $1,049. In the absence of an application for leave to defend, the matters Mr Griffen apparently raised with Mr Denyer which are reported in Mr Denyer's latest affidavit, cannot be taken into account by the Court. In his letter requesting an adjournment Mr Griffen had said that he hoped to have the opportunity to state his case. I concluded that the defendant had had ample opportunity to do that both at the Authority and at the Court but that the defendant had failed to attend on more than one occasion. For these reasons I declined the adjournment application and the hearing at 2.30pm today proceeded.

[5] I was satisfied at the present hearing that no payment has been made on behalf of the defendant. The plaintiff has proven service of my judgment which included the time and date of today's hearing. Accordingly, as I indicated on 13 October 2008, I will now make orders for sequestration of the defendant's property.

[6] The following summary is not in substitution for, but sets out in a way that might be more easily understood, the content of the orders that I now make in terms of the draft order filed today by the plaintiff and the draft writ of sequestration.

[7] The sequestrator who has consented to act is Jeffrey Stuart Hatton of Auckland, chartered accountant. Mr Hatton has filed a consent to carry out this task. I therefore authorise and command him to enter upon and take possession of all the real and personal property of the defendant and to take possession of all rents and profits from the defendant's real and personal property. Mr Hatton is to keep these under sequestration in his hands until the defendant pays the total sum of $3,849.00, which is made up as I shall shortly state. Mr Hatton is also to apply the funds to the payment of his reasonable fees and disbursements of the sequestration and is to report to the Court, once the property has been sequestered, as to its nature and worth, his proposals for the realisation of the property to satisfy the Court's orders and his estimate of accumulated and likely future costs and disbursement.

[8] The sum of $3,849.00 is made up, first of costs and disbursements totalling $1,300. The plaintiff sought additional costs in relation to today's hearing of $500.00 making total costs for the two hearings of $1,000, together with the filing fee of $300.00.

[9] Second, the plaintiff sought a penalty in terms of s140(6)(d) of the Act against the defendant. Under that section a person in default can be fined a sum not exceeding $40,000.00. The plaintiff's counsel, Ms Blick, has provided helpful submissions on the level of penalty which would be appropriate.

[10] Based on prior cases where the maximum fine was only $10,000 under the Employment Contracts Act 1991, fines of $1,000 were imposed. The amount of penalty has been increased four fold, as observed by Judge Colgan, as he then was, in *Finlayson v Kumar t/a Gerald's Cleaning Services* AC44/03, 3 July 2003. On this basis a fine of at least $4,000.00 would appear to be appropriate. The plaintiff, after developing the respective circumstances of the defendant and the former employee, submitted that the sum of $5,000.00 could be ordered.

[11] I was inclined to agree with that submission but, because this will be the first case under the new section which allows for a penalty of $40,000, I did not wish to take the opportunity to fine at a level which might otherwise have been appropriate in terms of the statute. In reaching that conclusion I observe that the amount that the defendant could have paid to avoid these penalties and additional costs was only $1,049.00. To keep the penalty in proportion to that amount and having been satisfied that the defendant failed to comply with compliance orders made by the Employment Relations Authority that was in default, and not having paid the original amount in spite of being given adequate opportunity to do so, I fine the defendant the sum of $1,500.00.

[12] I direct pursuant, to s140(6) that the penalty be paid into Court and by the Court into the Crown Bank Account. I also direct that half of the penalty recovered be paid to the original claimant Rosemary Davison.

[13] The remaining component of the $3,849.00 is the original sum of $1,049 ordered by the Authority.

[14] In order to give the defendant one final opportunity to perform its statutory obligations and pay the amounts I have ordered I direct the plaintiff to serve a copy of this judgment on the defendant within 7 days from the date of this order. The implementation of the order for sequestration that I have made will be stayed for 21 days from today's date to give the defendant the final opportunity to avoid the consequence of that order. If the defendant does not so pay within that period the order for sequestration will be put into effect by the sequestrator.

B S Travis

Judge

Oral Judgment delivered at 3pm on Thursday 13 November 2008