Employment Court of New Zealand

Edminstin v Sanford Limited [2016] NZEmpC 164 (12 December 2016)

Last Updated: 16 December 2016

IN THE EMPLOYMENT COURT CHRISTCHURCH

[2016] NZEmpC 164
EMPC 80/2016

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application by defendant for an order excluding evidence
AND IN THE MATTER	of an application by plaintiff for an order excluding evidence
BETWEEN	JOHN EDMINSTIN Plaintiff
AND	SANFORD LIMITED Defendant

Hearing:	12 December 2016 (Heard at Invercargill)
Appearances:	J Katz QC, counsel for plaintiff P Wicks QC and K Dunn, counsel for defendant
Judgment:	12 December 2016

ORAL INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] There are two interlocutory applications filed late last week that need to be decided as preliminary matters. Another interlocutory application calling for the production to the Court of a device known as a Koden GPS plotter (together with associated ancillary hardware or software), has now been resolved between the parties and these will now be produced. Very recently, also, the scope of the two remaining applications to the Court has been reduced so that the admissibility of the intended evidence of the plaintiff's expert witness, Peter Knight, is no longer

challenged. That leaves two matters for preliminary decision.

JOHN EDMINSTIN v SANFORD LIMITED NZEmpC CHRISTCHURCH [2016] NZEmpC 164 [12 December

2016]

[2] The first in time is an application to exclude the evidence of the plaintiff's intended expert witness, Keith Ingram. The second is an application challenging the admissibility of some of the evidence intended to be led by some of the defendant's witnesses, also on grounds of admissibility.

[3] Whether evidence is relevant and, even potentially if not, whether it should be excluded, is judged by reference to the pleadings. These may be summarised briefly as follows.

[4] John Edminstin seeks a compliance order requiring Sanford Ltd (Sanford) to comply with the terms of an accord and satisfaction or other settlement agreement reached between the parties with the assistance of, and certified by, a mediator under s 149 of the

Employment Relations Act 2000 (the Act). This agreement required Sanford to provide Mr Edminstin with his "marks" held on the Bluff oyster vessel *Toiler* of which Mr Edminstin was the former skipper. Marks are information about the location of fishing grounds previously dredged by the master of a vessel. There are disputes between the parties, first, about whether those marks have or have not been provided to Mr Edminstin and, second, whether the parties' agreement for the provision of those marks means that Sanford can retain and use them, even if copies of these electronic marks are provided to Mr Edminstin by Sanford. Sanford says that it has complied with the parties' agreement by providing electronic and paper copies of Mr Edminstin's marks but denies that he is entitled to the exclusive possession and use of them.

[5] Questions of evidence admissibility in the Employment Court are governed by s 189(2) of the Act. This provides materially that the Court may accept or admit such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not. As has often been said, however, the Court will be influenced by what the statute describes as "strictly legal evidence" considerations in cases such as this of expert evidence and what qualifies as expert evidence. The question is dealt with expressly in s 25(1) of the Evidence Act 2006, which provides:

25 Admissibility of expert opinion evidence

(1) An opinion by an expert that is part of expert evidence offered in a

proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in

the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.

[6] Under that provision, a court must be satisfied that it will be likely to obtain substantial help from the opinion evidence in either understanding other evidence in the proceeding or ascertaining any fact that is of consequence to the determination of the proceeding.

[7] The common law 'ultimate issue' and 'common knowledge' rules were not carried over into the Evidence Act. In its report preceding the Act, the Law Commission expressed the view that the substantial helpfulness test would be able to more consistently and predictably fulfil the function performed by these former rules

- that is to prevent evidence that usurped the function of the fact-finder or resulted in time being wasted. The test for the admissibility of expert opinion evidence is higher than that of mere relevance. Nor will it be sufficient that the expert opinion evidence might possibly be helpful to the decision-maker. The threshold test in s 25 is that the fact-finder is "likely to obtain substantial help" from the proposed expert opinion evidence.

[8] One issue that the Court in this case has to determine is the interpretation of a phrase in one clause of the settlement agreement: the words "his marks". On one interpretation of this phrase, it may mean the marks which are Mr Edminstin's exclusive property. On another interpretation, it may mean the marks that he lodged on the electronic devices but which are not his exclusive property, so that the best that he may obtain is a copy of those marks. The proprietorship of marks, as a matter of custom and practice in the Bluff oyster fishing industry will be one of the important considerations in determining what the parties meant by that phrase. So it is a question whether the Court will obtain substantial help from witnesses' opinions in understanding other evidence in the proceeding or will obtain substantial help in ascertaining any fact that is of consequence to the determination of the proceeding. Opinion evidence as to the proprietorship of marks goes to the matter of the objective consideration of the parties' intentions when they used the phrase "his marks" in their settlement agreement.

[9] This is the primary issue of law in this case and, notwithstanding s 25(1) of the Evidence Act, is a matter for the final determination of the Court and not the opinion of an expert.

[10] I deal first with the defendant's application to exclude the proposed evidence of Mr Ingram.

[11] In Mr Ingram's proposed evidence, he states that he is now the editor and publisher of a specialist magazine known as "Professional Skipper" which he describes as the leading marine trade publication in Australasia and a magazine in its

20th year of publication. Mr Ingram will depose to being the holder of a number of

seagoing licences, both as a master and a marine engineer. He has had a career that began at the age of 16 years as a deck hand on fishing vessels before he joined the Royal New Zealand Navy in 1966. Mr Ingram subsequently worked in the commercial fishing industry from 1975 until 1985, including the ownership and operation of fishing vessels and wholesale and retail vending operations. He has subsequently worked in the coastal shipping industry, owning and operating a number of workboats and ferries.

[12] Mr Ingram currently owns two vessels, being a workboat and a tug, and is the patron and senior master of the heritage steam tug *William C Daldy* on Waitemata Harbour. He is also a marine assessor for the Transport Accident Investigation Commission and has experience as an independent professional witness in courts and as an independent adviser to the Coroners Court in determining circumstances surrounding marine losses or tragedies.

[13] Mr Ingram is a past vice president of the Auckland Inshore Commercial Fishermen's Association, a past president and life member of the New Zealand Marine Transport Association, a past president and life member of the New Zealand Recreational Fishing Council, and a past commodore and current vice patron of the Bucklands Beach Yacht Club in Auckland.

[14] As paragraph 14 of Mr Ingram's brief of evidence summarises it, he says that he has been asked "to give my opinion on one matter in issue before this Court, namely the status of Skippers' Marks as that is understood in the fishing industry".

[15] Where, as here, an issue arises as to custom and practice in an industry and, in particular, affecting questions of employment, the

dividing line between expert and non-expert evidence is not as easily discernible as in other cases and may also be set elsewhere than in other litigation. Whilst non-expert witnesses can give evidence of, or leading to, a conclusion of a custom and practice, that is not the same thing as expressing an opinion on the ultimate issue for decision by the Court. In this case, the existence of custom and practice and, if so, what it is, is an issue that I consider should not involve opinion evidence on what is a final and ultimate issue for the Court to decide.

[16] Although several of the later paragraphs in Mr Ingram's brief impress me more as being in the nature of submission and, from time to time, rhetorical submission at that, it is really only his proposed paragraph 29 and the last sentence of paragraph 32 which, in my view, engage seriously at this point the question of admissibility. These passages express or tend to express Mr Ingram's opinion that skippers' marks are skippers' property.

[17] I consider that the proper course at this point is to delete paragraph 29 and the last sentence of paragraph 32 of Mr Ingram's evidence-in-chief contained in his brief, but otherwise to allow the brief to be read. In this regard, and in the other questions that I have to decide at this point, the Court cannot be too precious about fine questions of admissibility. This is not a jury trial and Judges in cases like this are able to filter, discern and reject evidence, and more commonly to allocate appropriate weight to it even if it is admissible.

[18] Turning to the impugned evidence-in-chief intended to be called by the defendant, these are parts of the briefs of Claire Walker and Thomas Foggo.

[19] Paragraph 14 of Ms Walker's evidence has been amended by consent by counsel and I consider that the balance of her paragraph 14 is admissible and may be read.

[20] There is no agreement on the contents of paragraphs 6-7 of Ms Walker's brief of evidence which sets out the relevant confidentiality clause of Mr Edminstin's former employment agreements. It is simply premature to determine the role, if any, that the previous employment agreements have, as Mr Katz invites me to do. I am not satisfied that paragraphs 6-7 of Ms Walker's brief are so clearly inadmissible that they should be removed from her evidence-in-chief. Subject to submissions made later about the effect of the settlement agreement on the former employment agreement, those paragraphs may be allocated weight, including no weight at all if Mr Katz is correct, but in the meantime it would be wrong to exclude them.

[21] Next at issue in Ms Walker's evidence are paragraphs 9-10 which relate briefly the history of how the settlement agreement came to be reached between the parties on 24 February 2015. Whilst the nature and detail of the personal grievances that Mr Edminstin raised, and for which mediation was held, are not relevant to this proceeding, I consider that the current contents of paragraphs 9-10 are admissible as providing background to the circumstances in which the settlement agreement was reached. They may, therefore, remain to be read in evidence.

[22] Next is paragraph 19 of Ms Walker's intended evidence. This deals with some interchanges between Mr Edminstin and Sanford (in the person of Ms Walker) after the mediation. It is not possible at this stage to conclude that they are of no weight, although they will no doubt be the subject of submissions from Mr Katz in that regard. Those statements in paragraph 19, too, are not inadmissible and may stay.

[23] Next there is belated agreement from the defendant that what were the impugned contents of paragraphs 26, 28, 29, 30(d) and (e) and 31 are not now objected to and they may, of course, in those circumstances remain to be given in evidence.

[24] Finally is the intended evidence of Mr Foggo and, in particular, paragraphs

21-24 (inclusive) of his brief.

[25] These relate to discussions between Mr Edminstin and Mr Foggo on a date or dates in February 2015 but which Mr Foggo says took place before the mediation concluded on 24 February 2015. They provide, arguably, background to the interpretation of the settlement agreement and may assist the Court in deciding the parties' mutual intentions.1 It is too early to say in this case, and without argument, whether those paragraphs 21-24 are inadmissible. In these circumstances, they will be able to be read, subject however, to any subsequent admissibility argument that may be raised and/or particularly to submissions on the weight that should be given

to them.

GL Colgan

Chief Judge

Judgment delivered orally at 11.30 am on 12 December 2016

1 This sentence follows the spirit, but not the exact words, of [25] read out in court.