Employment Court of New Zealand

Evolution E-Business Limited v Smith [2010] NZEmpC 97 (26 July 2010)

Last Updated: 10 August 2010

IN THE EMPLOYMENT COURT AUCKLAND

[2010] NZEMPC 97

ARC 15/10

IN THE MATTER OF interlocutory applications

BETWEEN EVOLUTION E-BUISNESS LTD Plaintiff

AND BENJAMIN ROBERT SMITH Defendant

Hearing: 26 July 2010

(Heard at Auckland)

Appearances: Michael McFadden and Dean Organ, Advocates for Plaintiff

Michael O'Brien and Nura Taefi, Counsel for Defendant

Judgment: 26 July 2010

ORAL INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] There are two preliminary issues to be resolved before this case can go to hearing. The first is whether Evolution E-Business Ltd (Evolution) should be able to defend Benjamin Smith's counterclaim because the time for filing a statement of defence to that has expired. The second issue is whether the company should give security for costs on its claims.

[2] Should the plaintiff have leave to file out of time a statement of defence to the defendant's counterclaim in these proceedings? That statement of defence should have been filed within 30 days after service on the plaintiff of the defendant's statement of defence and counterclaim on 11 May 2010.

[3] The plaintiff's representative accepts responsibility for not filing and serving its statement of defence in time. Dean Organ, the plaintiff's advocate, says that in

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the two weeks before 11 June 2010, which was the last date for filing within time, two children in his care were ill requiring domestic attendances and a consequent loss of time at the office. Mr Organ also says that he was unwell during the last week before time expired and, in the last days of that period, there was another crisis within his extended family, bringing obligations of further child care. To add to Mr Organ's misfortunes, he explains that he suffered a leg injury in late June which affected his mobility and ability to drive. Added to this, Mr Organ explains that his company had then recently experienced sharp increases in workload. He says that the combination of these events meant that he did not comply with reg 19(2) of the Employment Court Regulations 2000 and in these circumstances, on behalf of his client, seeks leave to file a statement of defence out of time. The draft statement of defence was filed together with the application for leave on 14 June 2010, a few days late.

[4] The defendant opposes the application for leave. He says that Mr Organ has failed to provide any evidence of his ill-health such as medical certificates and has not explained why someone else in his office could not have sought an extension of time when these difficulties came upon him. Mr Smith says that during the time when Mr Organ says he was unable to respond, he

nevertheless corresponded with the defendant's solicitors on other matters.

[5] This is a statement of defence to a counterclaim. It was only a few days late and Mr Organ's explanations for the delay have not really been contradicted. Rather, they have been the subject of criticism for their adequacy or lack of corroboration.

[6] This is a proper case for the exercise of the Court's discretion under s 221(c) of the Employment Relations Act 2000 (the Act) to extend the time within which the plaintiff has to file and serve a statement of defence to the defendant's counterclaim. The statutory test is that such an order is necessary to enable the Court more effectually to dispose of a matter before it according to the substantial merits and equities of the case. I am satisfied that this test is met.

[7] Although jurisdiction is not a matter of pleading, there is a significant jurisdictional issue that is raised by the intended statement of defence. Two of the causes of action in Mr Smith's counterclaim allege personal grievances which the plaintiff says were not raised within the statutory 90 days of their occurrence or his awareness, and no application has been made for leave to extend that period under s 115 of the Act. That is disputed by the plaintiff but the propriety of the two causes of action will be an important preliminary and perhaps substantive matter in the proceeding that I am satisfied the defendant should have an opportunity to defend.

[8] Mr Smith then says that he has reason to believe that if the company is unsuccessful in the proceedings, it will be unable to pay his costs as may be awarded by the Court. He says the company does not have a strong case. Mr Smith relies significantly on the content of proceedings in the High Court up to and including May 2010 in which ICONZ Ltd sought to liquidate the plaintiff. The petitioning creditor, however, discontinued its application for a liquidation order and from the High Court's record it appears that as early as the first call of that application the Court was told that the parties were in negotiations for a settlement. The alleged debt the subject of the proceeding was for a total of $17,836.67 including collection and court costs.

[9] As to the strength or its absence of the plaintiff's claim, counsel for Mr Smith has referred me to the application for special leave to remove the matter to the Court made in February 2010, the memorandum of counsel in support of that, the affidavit of Christine Gordon also in support of that application, a minute of the Court dated

15 February 2010, and the oral judgment[1] of Judge BS Travis delivered on the

following day.

[10] The plaintiff alleges that Mr Smith breached his obligations of confidentiality to it. Mr Smith appears to agree that whilst still employed by the plaintiff he provided one of Evolution's competitors with an affidavit to be used in the High Court proceedings but he says there were lawful grounds for doing so. Mr Smith alleges that these included that he became aware that Evolution was asking him to

perform work in contravention of an order in the High Court against the company and other legal obligations, and in which proceedings the High Court granted a search (Anton Piller) order against it on 22 January 2009. Mr Smith says that his obligation of confidentiality did not extend to information about wrongdoing and that the public interest necessitated the disclosure of information that might otherwise have been confidential.

[11] Orders for security for costs of current litigation (as opposed to how costs ordered by the Employment Relations Authority but not paid are to be dealt with) are made only rarely in this Court. There is, as Mr O'Brien points out, the derivative power to do so by reference to the High Court Rules. But the ability to make such orders and the Court's practice in doing so are of course distinct considerations.

[12] Barring cases of parties domiciled beyond the jurisdiction (of which this is not one), the Court's prevailing philosophy illustrated by the cases is that parties should be able to present their cases on their merits and not be hindered in that by having to pay sometimes not insignificant sums or provide some other form of security before the case is allowed to proceed. Although usually such applications are made against individual persons whose alleged impecuniosity may have been caused or at least contributed to by their dismissals, the principle should apply equally to any party. Indeed here the plaintiff says that any impecuniosity that it may have suffered was a consequence of Mr Smith's conduct towards it as an employee. It is of course not possible to determine that which will be one of the central issues in the proceeding but it is an assessment not unlike that of the impecunious dismissed employee just referred to.

[13] The plaintiff is in a stronger position in this case because, this proceeding having been removed by the Authority for hearing in this Court at first instance, there has not yet been any determination of its merits.

[14] The defendant's application focuses principally on the strength of his defence to the proceedings and his contention that the plaintiff's case is weak. Although that is a relevant consideration, it is secondary to a necessarily established doubt about the plaintiff's inability to meet costs.

[15] I am not satisfied that the defendant has established either a propensity by the plaintiff to avoid its financial obligations or an inability to meet an award of costs of the level likely to be ordered by this Court if the defendant is successful at trial.

[16] The defendant's application for security for costs is not allowed.

[17] It is appropriate now to deal with other interlocutory issues including timetabling the case to a fixture.

[18] The plaintiff's claim is for breach of employment agreement and the remedies sought by the plaintiff include a compliance order, penalties for breaches, and compensatory damages including in particular the plaintiff's legal costs in the High Court said to be in the sum of about $60,000. The defendant's counterclaim is also for breach of his employment agreement that seeks compensatory damages of

$50,000 and special damages being legal costs of $36,221. However, Mr O'Brien concedes I think it is fair to say, the inevitability of the current claim for "at least

$30,000" in exemplary damages as being unavailable. The statement of counterclaim will be amended accordingly.

[19] As already noted, Mr Smith has raised two additional causes of action in his counterclaim. They are both personal grievances, one for unjustified disadvantage in employment, the other for unjustified constructive dismissal, and compensatory payments are sought in both.

[20] There have been two attempts to resolve these issues in mediation between the parties. Neither has been successful. Counsel and representative are not optimistic that either further mediation or a judicial settlement conference will be sufficiently likely to bring about a resolution of this case and I make no direction for either of those.

[21] On the personal grievance claims, the plaintiff will apply in writing within the next 14 days to strike out Mr Smith's claims on the basis that these were not raised with the plaintiff within the statutory period provided for in s 114 of the Act. The defendant may have the following 14 days within which to file and serve notice

of, and any evidence in opposition to, the application, with the plaintiff having a further period of 14 days within which to file any affidavit evidence in support of its position. That application will be heard in the Employment Court at Auckland at

9.30 am on Friday 15 October 2010.

[22] Both parties are currently working through document disclosure issues following the statutory process. If there are disputed matters of document discovery or indeed in relation to anything else preparatory to the hearing, these should be the subject of formal application to the Court which can also be heard at the same hearing on 15 October 2010.

[23] Each party anticipates having four witnesses. The defendant may call one expert information technology witness and in those circumstances, although Mr Organ has no current plans to call an expert, he wishes to reserve the right to do so depending on what Mr O'Brien's expert may say. Any expert's report should be filed and served no later than 1 December 2010. Any expert witness or witnesses must comply with the obligations in the High Court Rules for such witnesses and if there are experts for both sides, those experts must confer well before the trial with a view to narrowing or eliminating the differences between them in their evidence.

[24] The order of the hearing will be that the plaintiff will present its case first followed by the defendant. The parties agree that up to seven sitting days may be required.

[25] The plaintiff is to file and serve briefs of evidence of its intended witnesses no later than six weeks before the start of the trial with the defendant doing likewise no later than three weeks before the start of the trial. The briefs of evidence should be in the form of Microsoft Word documents clear of any tracked changes and other similar particulars and made available to the Court so that a transcript can be based on those electronic briefs. Both parties are expected to put all of the relevant evidence of their witnesses in those briefs exchanged in advance.

[26] Mr O'Brien has signalled that the defendant may have one or two witnesses who are based overseas. If there is to be any application to have evidence taken by

video conference call, a request to the Registrar should be made in plenty of time to arrange that.

[27] The preparation of a common bundle of documents is to be the joint responsibility of both representatives and this is to be filed no later than one week before the start of the trial. The documents in the common bundle should be documents that are both relevant to the case and will be referred to by witnesses. No documents should be in the common bundle on a "just in case" basis.

[28] The case will have a fixture for the seven consecutive sitting days beginning at 9.30 am on Monday 14 March 2011 in the Employment Court at Auckland.

[29] I reserve leave for either party to make any further applications on reasonable notice or other directions or orders.

[30] I reserve costs on today's interlocutory applications.

GL Colgan
Chief Judge

Judgment delivered orally at 3.56 pm on Monday 26 July 2010.

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[1] [2010] NZEmpC 9.
