Employment Court of New Zealand

George v Auckland Regional Council [2011] NZEmpC 25 (24 March 2011)

Last Updated: 31 March 2011

IN THE EMPLOYMENT COURT AUCKLAND

[2011] NZEMPC 25
ARC 91/10

IN THE MATTER OF special leave to remove proceedings

AND IN THE MATTER OF an application for proceedings to be tried at the same time or one immediately after the other

BETWEEN LAURA JANE GEORGE Plaintiff

AND AUCKLAND REGIONAL COUNCIL Defendant

ARC 124/10

AND IN THE MATTER OF proceedings removed

AND IN THE MATTER OF application for proceedings to be tried at the same time or one immediately after the other

BETWEEN AUCKLAND REGIONAL COUNCIL Plaintiff

AND LAURA JANE GEORGE Defendant

Hearing: 21 March 2011 (Heard at Auckland)

Counsel: Tony Drake, counsel for Ms George

Tim Clarke, counsel for Auckland Regional Council

Judgment: 24 March 2011

INTERLOCUTORY JUDGMENT OF JUDGE B S TRAVIS

LAURA JANE GEORGE V AUCKLAND REGIONAL COUNCIL NZEmpC AK 24 March 2011

[1] The Auckland Regional Council (the Council) has applied to the Court for an order that the proceedings in ARC 91/10 and ARC 124/10 be tried at the same time or one immediately after the other.

[2] The grounds for the application are that the proceedings in ARC 91/10 which involve a claim by Ms George that she was unjustifiably disadvantaged and unjustifiably dismissed and the claim by the Council in ARC 124/10 for damages for breach of contract and for penalties against Ms George, arise out of the same employment relationship. It is common ground that there is no express power in the Employment Court Regulations 2000 for either the consolidation of two or more proceedings or for the making of orders that they be heard together. The Council relies on regs 4 and 6(2)(a)(ii) and r 10.12 of the High Court Rules. Regulation 4 provides:

Determination of proceedings

These regulations must be construed in a manner that best secures the speedy, fair, and just determination of proceedings before the court.

[3] Regulation 6 provides:

6 Procedure

(1) Every matter that comes before the court must be disposed of as nearly as may be in accordance with these regulations.

(2) If any case arises for which no form of procedure has been provided by the Act or these regulations or any rules made under section 212(1) of the Act, the court must, subject to section 212(2) of the Act, dispose of the case—

(a) as nearly as may be practicable in accordance with—

(i) the provisions of the Act or the regulations or rules affecting any similar case; or

(ii) the provisions of the High Court Rules affecting any similar case; or

(b) if there are no such provisions, then in such manner as the court considers will best promote the object of the Act and the ends of justice.

[4] Rule 10.12 of the High Court Rules provides:

10.12 When order may be made

The court may order that 2 or more proceedings be consolidated on terms it thinks just, or may order them to be tried at the same time or one immediately after another, or may order any of them to be stayed until after the determination of any other of them, if the court is satisfied—

(a) that some common question of law or fact arises in both or all of them; or

(b) that the rights to relief claimed therein are in respect of or arise

out of—

(i) the same event; or

(ii) the same transaction; or

(iii) the same event and the same transaction; or

(iv) the same series of events; or

(v) the same series of transactions; or

(vi) the same series of events and the same series of transactions; or

(c) that for some other reason it is desirable to make an order

under this rule.

[5] Mr Drake strongly opposed the Council's application and submitted that an order under r 10.12 could not be made because the Council could not satisfy the Court that one or more of the following three factors existed:

(a) There was a common question of law or fact in the two sets of proceedings; or

(b) The rights of relief claimed in each of the two proceedings arose out of the same events or transactions; or

(c) There was another reason why it was desirable to make an order under the rule.

[6] Authorities under that rule have observed that a broad discretion is conferred to do what is in the interests of justice and that r 10.12(c) is something of a "catch all" conferring a separate and very wide jurisdiction.[1] Those factors can include savings in time and cost to the parties and to judicial resources, removing the risk of inconsistent decisions and convenience and expedition. However, care must be taken to avoid confusion, prejudice or oppression to one party from the size and

complexity of a consolidated proceeding, especially where the evidence admissible in one proceeding will not be admissible in another.[2] The latter considerations do not appear to apply to these sets of proceedings.

[7] I do not accept Mr Drake's submission that no common question of law or of fact arises in both sets of proceedings. I accept Mr Clarke's submission that the facts which gave rise to the damages claim may amount to "subsequently discovered misconduct" on the part of Ms George which may affect the remedies that would otherwise have been awarded to her, should she be successful in her personal grievance claims. The Council has expressly pleaded in its statement of defence to the personal grievance claims that, if the defendant is liable to the plaintiff, it will seek to reduce the remedies to be provided to

Ms George by reason of her subsequently discovered conduct in breaching her employment agreement, as a result of which the Council claims that it has suffered loss and damage. That subsequently discovered conduct can be so used has been authoritatively determined by the Court of Appeal in *Salt v Richard Fell, Governor for Pitcairn, Henderson, Ducie and Oeno*

Islands.[3]

[8] There may be issues touched upon in the affidavits and in opposition to the application as to the degree of the Council's knowledge of Ms George's alleged failures at the time of the dismissal, and whether any proved failures in relation to the damages proceedings were sufficiently serious to justify a reduction in remedies that would otherwise have been ordered. I note, however, that the Court of Appeal in *Salt* referred to the Court's wide equity and good conscience jurisdiction in making assessments under s 123 of the Employment Relations Act 2000 as to the provision

of remedies to settle a grievance[4]. These are all matters for the trial Judge, but I am

satisfied that they do raise common questions of mixed law and fact in respect of both proceedings.

[9] I also accept Mr Clarke's submission that Ms George's credibility may be an issue in both proceedings and, if they are separated, this could lead to inconsistent decisions. It may be, as Mr Drake submitted, that after disclosure of documents and when the final pleadings before trial are in, Ms George's present denials in her statement of defence to the Council's negligence claim, may be modified. At present

her statement of defence puts in issue the extent of her duties and responsibilities and these are matters which may also be relevant to her personal grievance claims.

[10] In any event, I consider that the risk of inconsistent judgments on issues of credibility, dispute over the extent of Ms George's duties and responsibilities in the employment relationship and the issue of remedies, not only satisfy factors (a) and (b) in r 10.12 but also provide compelling reasons why it is desirable to make an appropriate order for both matters to be tried at the same time or one immediately after the other.

[11] Further, as r 10.12 contemplates, there may be an order staying any remedies that might be awarded in favour of Ms George in her grievance proceedings until the determination of what, if any, liability she has to the Council in the negligence proceedings. This factor alone meets Mr Drake's objection to the proceedings being heard together on the basis that it would unduly prejudice Ms George by delaying the expeditious disposition of her more straight forward grievance claims as she would have to wait until the more complex negligence claims are brought on for hearing in any case. This consideration would also satisfy factor (c) in r 10.12.

[12] Even if I am wrong in my conclusion that r 10.12 applies I consider regs 4 and 6(2)(b) would support the making of the orders the Council seeks.

[13] I am also satisfied that appropriate directions may, in the long term, save the parties both time and cost and reduce the duplication of judicial resources.

[14] The Council has the onus of proof in both proceedings, there being no issue that Ms George was dismissed. It has the burden of justification in the grievance proceedings and the burden of establishing negligence and loss in the negligence proceedings. Directions requiring the Council to go first in both proceedings and to provide Ms George with full briefs of evidence may obviate the need for any interrogatories, an application which Mr Drake indicated Ms George might seek as being necessary in the negligence proceedings. It would also enable witnesses common to both sets of proceedings to be subjected to one set of cross-examination

rather than two. In this respect I note that there are least three witnesses who may be called in both sets of proceedings. There may well be others.

[15] By having both sets of proceedings heard at the same time, it will enable the Court to determine such common matters as the precise nature of Ms George's duties and responsibilities, her level of management authority and the seniority of her role, which are in issue in the damages claim and may also be relevant, although I accept to a lesser degree, in the grievance proceedings.

[16] For all these reasons I allow the Council's application and direct that both sets of proceedings be heard at the same time with the Council proceeding first.

[17] There will need to be a directions conference as I consider it is an appropriate condition of the grant of the Council's application that it expeditiously resolve any outstanding interlocutory matters, including disclosure in both the grievance and the negligence proceedings so that there is no unnecessary delay in having both matters set down at the same time. Counsel should contact the Registry to arrange such a directions conference with the counsel for the plaintiff filing, two working days before the conference, a memorandum showing the directions Ms George is seeking. Counsel for the Council is to respond by way of memorandum by 1pm on the working day prior to the directions conference.

[18] The Council has been successful in this application but did not seek costs. Mr Drake sought costs on behalf of Ms George but in view of the success of the Council there will be no order for costs.

B S Travis
Judge

Judgment signed at 5pm on 24 March 2011

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[1] See *Morris v AEL Bloodstock Ltd HC* Hamilton CIV-2010-419-205, 22 September 2010 at [18] and

Medlab Hamilton Ltd v Waikato District Health Board [2007] NZHC 1780; (2007) 18 PRNZ 517 (HC) at [8].
[2] See *CallPlus Ltd v Telecom New Zealand Ltd* (2000) 15 PRNZ 14 (HC) at [41]-[45].

[3] [2008] NZCA 128; [2008] ERNZ 155 (CA) at [82], [90], [96] and [104].
[4] At [83].
