



Employment Court of New Zealand

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Impulse Fishing Co Limited v Smith [2017] NZEmpC 142 (10 November 2017)

Last Updated: 13 November 2017

IN THE EMPLOYMENT COURT CHRISTCHURCH

[\[2017\] NZEmpC 142](#)

EMPC 83/2017

IN THE MATTER OF a challenge to a determination
 of the
 Employment Relations
 Authority

AND IN THE MATTER of an application for a stay

BETWEEN IMPULSE FISHING CO LIMITED
 Plaintiff

AND VINCENT SMITH Defendant

Hearing: 25 October 2017

Appearances: T Jeffcott, counsel for plaintiff
 A Sharma, counsel for
 defendant

Judgment: 10 November 2017

INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH APPLICATION FOR STAY

[1] On 22 March 2017 the Employment Relations Authority issued an interim determination in proceedings in which Mr Vincent Smith and Impulse Fishing Co Ltd had brought claims against each other.¹

[2] Mr Smith worked for the plaintiff as a skipper on a vessel called Impulse II from July 2011 until either he abandoned his employment or was dismissed.² While Mr Smith was employed as a skipper he occasionally worked as a crew member on some voyages depending on the season and anticipated catch.

1. *Robson Fishing Partnership and/or Impulse Fishing Co Ltd v Smith* [2017] NZERA Christchurch 40.

[3] In the Authority Mr Smith alleged that:

- (a) he was unjustifiably dismissed and disadvantaged; (b) he was underpaid;
- (c) that Impulse had breached its obligations in relation to his annual holidays and public holidays; and
- (d) penalties should be imposed. 3

[4] Impulse's response, aside from disputing that it was in breach of any duty owed to Mr Smith, was that he had abandoned his employment. As an alternative, it submitted that it was justified in dismissing him:

- (a) for leaving work to attend a course at Nelson Marlborough Institute of

Technology (NMIT); and

(b) because, it is alleged, he failed to stop cruelty towards, and abuse of, seabirds while he was in command of Impulse II.4

[5] Impulse claimed Mr Smith had breached his duty of good faith by misleading it and had caused it to lose income.

[6] The Authority's determination was confined to liability.⁵ It concluded that Mr Smith did not abandon his employment and he had a personal grievance for unjustified dismissal arising from the way Impulse dealt with the matters referred to at [4](a) and (b).

[7] All of Impulse's claims against Mr Smith were dismissed.

3 At [23] to [25] and [39].

4 At [40].

[8] Having reached those conclusions, the Authority addressed the future steps required to complete the investigation.⁶ Those steps are to:

(a) determine any remedies due to Mr Smith including to address a submission made by Impulse that his contributory behaviour needs to be taken into account. The determination records a submission for Impulse that Mr Smith's contribution should reduce his remedies completely (that is by 100 per cent). The Authority also drew the parties' attention to the decision in *Xtreme Dining Ltd t/a Think Steel v Dewar*;⁷

(b) determine if Mr Smith was appropriately paid under his individual employment agreement. There is some complexity to determining Mr Smith's pay and the amount he has claimed because his remuneration included a percentage of the value of the relevant catch. It is reasonable to assume the Authority will need to hear detailed evidence about this part of the claim possibly including expert evidence; and

(c) determine whether any penalty might be imposed for breaching s 130 of the Employment Relations Act (that is, failing to keep time and wage records).

The Challenge

[9] In an amended statement of claim filed on 30 May 2017 Impulse challenged all the findings made by the Authority which are adverse to it. The challenge is comprehensive. The relief sought is that the determination be set aside and replaced with a judgment that Mr Smith abandoned his employment, or resigned, or was justifiably dismissed. Mr Smith has defended the proceeding.

[10] On 13 June 2017 the parties were directed to attend mediation. Through a combination of circumstances mediation was only able to be concluded on 20

October 2017. It was unsuccessful.

[11] There are now practical issues to consider in deciding how best to conclude this litigation given that the investigation meeting has, so far, only addressed liability. At a telephone conference on 25 October 2017, I raised with the parties the desirability of conducting only one trial of all outstanding issues with obvious efficiencies for the Court and potential cost savings for both parties. That prompted a combined request for this challenge to be stayed while the investigation before the Authority, as to quantum, is concluded.

[12] In *Transpacific All Brite v Sanko*⁸ the Court recognised that it has the power to order a stay of proceedings before it. *Sanko* drew on *MacKay Refined Sugars (NZ) Ltd v New Zealand Sugar Co Ltd*⁹ and *Rooney Earthmoving Ltd v McTague*¹⁰ for the principles which guide such a decision. The overriding issue is the interests of justice.

[13] It is in the interests of justice to grant a stay and, in so doing, to ensure the efficient use of Court resources and to provide the parties with an opportunity to attempt to contain their costs.

Outcome

[14] A stay is granted subject to the following conditions:

(a) the parties are to expeditiously prosecute the investigation meeting in the Authority of the remaining unresolved matters between them;

(b) the parties are to provide a report to the Court, by joint memorandum, no later than **2 March 2018** as to progress in the completion of the

investigation meeting;

8 *Transpacific All Brite v Sanko* [2012] NZEmpC 7.

9 *MacKay Refined Sugars (NZ) Ltd v New Zealand Sugar Co Ltd* [1997] NZHC 1852; [1997] 3 NZLR 476 (HC).

(c) leave is reserved to either party to apply to review the order for a stay, or to seek further orders, on reasonable notice; and

(d) costs are reserved.

K G Smith

Judge

Judgment signed at 3.00 pm on Friday 10 November 2017

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