



Employment Court of New Zealand

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Industrial Services Limited v Koning [2010] NZEmpC 92 (21 July 2010)

Last Updated: 23 July 2010

IN THE EMPLOYMENT COURT AUCKLAND

[\[2010\] NZEMPC 92](#)

ARC 8/10

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

AND IN THE MATTER OF a good faith report

BETWEEN INDUSTRIAL SERVICES LTD Plaintiff

AND JOHN KONING Defendant

Hearing: By memorandum of submissions received from the defendant on 30

June 2010

Judgment: 21 July 2010

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] The Employment Relations Authority's determination on challenge indicated that the plaintiff, Industrial Services Limited (ISL), may not have participated in the Authority's investigation of the matter in a manner that was designed to resolve the issues involved.

[2] This interlocutory judgment decides whether the plaintiff should be entitled to proceed with its challenge by hearing de novo, that is of the entire matter that was determined by the Authority.

[3] The determination recorded that ISL failed to lodge a statement in reply to Mr Koning's personal grievance application that he was unjustifiably constructively dismissed. This was despite the Authority twice extending the time for ISL to do so.

Neither did ISL seek leave to defend the application out of time.

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[4] I therefore requested a report from the Authority, under [s 181\(2\)](#) of the [Employment Relations Act 2000](#) (the Act). That request required the Authority, under [s 181\(1\)\(a\)-\(b\)](#), to submit to the Court a written report giving the Authority's assessment of the extent to which the parties involved in the investigation facilitated rather than obstructed the Authority's investigation and acted in good faith towards each other during the investigation.

Good faith report

[5] The Authority issued a draft good faith report on 24 May 2010 and then its final report on 4 June 2010. In its report the Authority stated that while ISL's failure to lodge a statement in reply and failure to attend the investigation meeting initially impeded the Authority's investigation, ISL did assist the Authority in arranging an interview with a witness, Byron Hill. The Authority concluded in its report that ISL was eventually facilitative rather than obstructive. In terms of [s 181](#), the Authority therefore assessed ISL to a significant extent as having facilitated the Authority's investigation and to have acted in good faith towards Mr Koning.

[6] In accordance with [s 181\(3\)](#) of the Act each party was served with a copy of the draft good faith report to enable them to make comments. No comments from either party were annexed to the final good faith report.

[7] In accordance with this Court's practice I gave the parties the opportunity to make submissions on the application of the relevant statutory provision of the Authority's final report and, in particular about the nature and extent of the hearing of the challenge. Mr Koning submitted that the significant delays between responses by ISL and the adjournments requested or required were to the financial and emotional detriment of Mr Koning. It is his submission that the delays by ISL, which meant that the matter did not come to a speedy resolution, were deliberate acts to exploit Mr Koning's weaker position and therefore ISL did not act throughout the process in good faith. ISL advised that it would not be filing submissions in relation to the Authority's good faith report.

Decision

[8] I must decide, on the basis of the report and the comments of the parties, whether ISL did not participate in the Authority's investigation of the matter in a manner that was designed to resolve the issues involved.

[9] I accept that the failure of ISL to respond to Mr Koning's personal grievance application and its initial failure to attend the Authority's investigation meeting has caused Mr Koning emotional distress and frustration.

[10] However ISL did eventually assist the Authority in arranging an interview with Mr Hill and the Authority, in its good faith report, both assessed ISL to a significant extent as having facilitated its investigation and having acted in good faith towards Mr Koning.

[11] In these circumstances I have concluded that it would be inappropriate for the Court to now constrain the nature and extent of the hearing under [s 182](#) of the Act. Any detrimental consequences to Mr Koning can be dealt with in costs.

[12] The defendant must file and serve its statement of defence to the amended statement of claim within 21 days of the date of this interlocutory judgment and the Registrar should then arrange for the challenge to be called over in the usual way.

GL Colgan
Chief Judge

Judgment signed at 9.30 am on Wednesday 21 July 2010