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Jerard v Wildbore [2013] NZEmpC 144 (31 July 2013)

Last Updated: 9 August 2013

IN THE EMPLOYMENT COURT CHRISTCHURCH REGISTRY

[\[2013\] NZEmpC 144](#)

CRC 50/12

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN RACHEL JERARD Plaintiff

AND MICHAEL WILDBORE Defendant

Judgment: 31 July 2013

JUDGMENT OF JUDGE A A COUCH

[1] The plaintiff, Ms Jerard, operated a café in Christchurch. The defendant, Mr Wildbore, was employed by the plaintiff to work in that café. The employment relationship began in March 2011. In March 2012, it came to an end.

[2] Mr Wildbore alleged that he had been unjustifiably dismissed and lodged a claim to that effect with the Employment Relations Authority (the Authority). He also made a claim for arrears of wages and holiday pay. The Authority sustained those claims and awarded him remedies totalling about \$11,500. Ms Jerard challenged the whole of that determination in a statement of claim filed on her behalf by counsel, Ms Coulston, who had then been recently instructed.

[3] It was clearly signalled in the Authority's determination that Ms Jerard had not participated to any extent in the investigation. Accordingly, the Chief Judge issued a minute on 13 December 2012 requesting a report from the Authority under [s 181](#) of the [Employment Relations Act 2000](#) (the Act). That report was to set out the Authority's view of the extent to which Ms Jerard facilitated, rather than obstructed, the investigation and whether Ms Jerard acted in good faith towards Mr

Wildbore during the investigation.

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[4] The Authority duly provided that report, compiled in accordance with the provisions of [s 181\(3\)](#) and (5) of the Act. A draft report was prepared and sent to the parties for comment. The Authority's final report was then sent to the Court with the comments received from the parties. In this case, both parties provided written comments through counsel.

[5] The Authority's good faith report was clear and conclusive. It found that Ms Jerard failed to file a statement in reply, that she failed to respond to telephone messages left for her by Authority support staff, that she failed to take part in a pre-arranged telephone conference although initially joined to it and that she failed to attend the investigation meeting without giving any reason.

[6] In the written comments to the Authority made by Ms Coulston in response to its draft report, she conceded that Ms Jerard had entirely failed to participate in the Authority's investigation but said that there were exceptional circumstances which made this explicable. Those circumstances were said to relate to Ms Jerard's health and family circumstances. Ms Coulston suggested that, coupled with her family and business responsibilities, these events left Ms Jerard unable to participate in the investigation or to instruct a representative.

[7] In his written comments on behalf of Mr Wildbore, Mr Pullar said that Ms Jerard had entirely failed to communicate with him or Mr Wildbore from the time the personal grievance was raised in March 2012 until the statement of claim in this

proceeding was served. This included a failure to respond to requests for wage and time records which Ms Jerard had a statutory obligation to provide. Mr Pullar also said that Mr Jerard had twice failed to attend mediation arranged through the Department of Labour.

[8] In addition to requesting the good faith report, the Chief Judge directed that the parties have an opportunity to make submissions to the Court in light of the report. The report was received from the Authority on 7 February 2012 and copies sent to the parties. When no submissions were received, the parties were told on 14

March 2013 that their submissions and evidence of any facts relied on should be

filed by 28 March 2013. On 2 April 2013, submissions were received from Mr

Pullar. Nothing was provided on behalf of Ms Jerard.

[9] On 18 April 2013, Ms Coulston filed a document entitled “Notice of withdrawal of counsel” in which she sought leave to withdraw as counsel on the grounds that Ms Jerard had failed to communicate with her and provide instructions. Ms Coulston was made aware of her obligation to serve a copy of that request on Ms Jerard and I understand through the Registrar that Ms Coulston did so. The Registrar then made repeated efforts to contact Ms Jerard to ascertain her response to Ms Coulston’s application and her intentions regarding the proceeding. Emails were sent to Ms Jerard on 23 April, 29 May and 4 June 2013. The Registrar eventually spoke with Ms Jerard by telephone on 4 June 2103 and sent the email again to an alternative address provided by her. When there was no response to the email, the Registrar tried again to telephone her on 20 June 2013 but there was no answer.

[10] At that point, I issued a minute setting out the background recorded above and said:

[9] Against that background, my current view of this matter is:

(a) What counsel said to the Authority in response to the draft good faith report were simply comments. I cannot act on those comments without evidence establishing the facts relied on in them. To date, no evidence has been provided.

(b) Ms Jerard’s apparent failure to communicate with her counsel and her failure to respond to multiple messages from the Registrar are unexplained. It may be that there are good reasons for her silence but, unless and until those reasons are provided and any facts relied on established by evidence, Ms Jerard’s conduct cannot be excused.

(c) In the absence of explanation and evidence, Ms Jerard’s behaviour in the proceedings before both the Authority and the Court has the appearance of avoidance rather than a genuine dispute about Mr Wildbore’s claims.

[10] I am prepared to give Ms Jerard one final opportunity to explain her behaviour. She has until **4pm on Friday 12 July 2013** to file and serve any submissions she wishes to make regarding the Authority’s good faith report and to provide evidence in affidavit form of the facts she relies on in those submissions. If she fails to do so, the current proceeding may be regarded as either abandoned or vexatious and struck out.

[11] I direct that this minute be sent to Mr Pullar, to Ms Coulston and to

Ms Jerard. As regards Ms Jerard, the Registrar should send a copy to every

known address for Ms Jerard. The Registrar should also make a further attempt to contact Ms Jerard by telephone to verify her current address.

[11] No response was received from Ms Jerard within the time limit allowed but, on 16 July 2013, she sent an email to the Registrar. This email was specifically in response to the Registrar’s email of 20 June 2013 to which a copy of my minute had been attached. I am therefore satisfied that Ms Jerard received that minute promptly. The text of Ms Jerard’s email was:

Dear joseph, i wish this matter to proceed in the employment court, i will advise new representation tomorrow, thankyou and regards rachel jerard

[12] A further two weeks has passed without any further communication from Ms Jerard.

[13] The Court is generally reluctant to dismiss a proceeding without any consideration of the merits. Where a plaintiff repeatedly fails to prosecute the claim made, however, there comes a time when the interests of justice require the Court to bring the proceeding to an end. In this case, that time is now. Ms Jerard’s extended and repeated failure to communicate with counsel and with the Court leads me to the conclusion that this proceeding was initiated principally as a delaying tactic. On that basis, the proceeding is struck out as vexatious.

[14] The defendant is entitled to a contribution to the costs he has incurred in responding to this proceeding. Mr Pullar should file a memorandum within 15

working days after the date of this decision.

Signed at 12.30 pm on 31 July 2013.

A A Couch
Judge

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