



Employment Court of New Zealand

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Johnstone v Kinetic Employment Limited [2018] NZEmpC 126 (26 October 2018)

Last Updated: 31 October 2018

IN THE EMPLOYMENT COURT
AUCKLAND

[\[2018\] NZEmpC 126](#)
EMPC 210/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an interlocutory application to set aside the defendant's appearance under protest to jurisdiction
BETWEEN	BRIDGETTE JOHNSTONE Plaintiff
AND	KINETIC EMPLOYMENT LIMITED Defendant

Hearing: 17 September 2018 (Heard at Auckland)
Appearances: P N White, counsel for plaintiff
P Skelton QC and B R Edwards, counsel for
defendant
Judgment: 26 October 2018

INTERLOCUTORY JUDGMENT OF JUDGE J C HOLDEN

(Application to set aside appearance)

[1] The plaintiff, Ms Johnstone, has filed a challenge to a determination of the Employment Relations Authority (the Authority) that found that the Authority had not acted outside its jurisdiction by issuing witness summonses requiring Ms Johnstone and other named witnesses to attend the Authority investigation meeting and to bring and produce at that time for forensic examination:1

(a) all computer system(s) in their possession and control;

1 *Johnstone v Kinetic Employment Ltd* [2018] NZERA Auckland 218.

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(b) all passwords and other information, tools or devices necessary to access and copy for the Authority and Kinetic Employment Ltd (KEL) in order to review the computer system(s); and

(c) documents (electronic and hard copy) containing any confidential information belonging to KEL in their control or possession.

[2] KEL has not filed a statement of defence but rather filed an appearance under protest to jurisdiction, saying that the Employment Court has no jurisdiction to determine this proceeding.

[3] Ms Johnstone now applies for orders setting aside the appearance and directing KEL to file a statement of defence. This judgment resolves that application.

The Court looks to the High Court Rules

[4] If any case arises in the Court for which no form of procedure has been provided by the [Employment Relations Act 2000](#) (the Act), or by the [Employment Court Regulations 2000](#) (the Regulations), or by any rules made under s 212(1) of the Act, the Court generally will dispose of the case as nearly as may be practicable in accordance with the provisions of the [High Court Rules 2016](#) affecting any similar case.²

[5] That is the situation here; there is nothing in the Act or Regulations and no rule that is applicable and therefore the Court must turn to the [High Court Rules](#).

[6] Rule 5.49 of the [High Court Rules](#) concerns appearances and objections to jurisdiction; r 5.49(3) allows a defendant who has filed an appearance to apply to dismiss the proceeding on the ground that the court has no jurisdiction to hear and determine it; r 5.49(5) allows the plaintiff to respond to such an appearance by applying to set aside the appearance. Here, Ms Johnstone applied to set aside the appearance, but, in any event, under r 5.49(6) the outcomes available are the same whether the application is made under sub-cl (3) or (5). On hearing the application,

² [Employment Court Regulations 2000](#), reg 6.

the Court must, if it is satisfied that it has no jurisdiction to hear and determine the proceeding, dismiss the proceeding; and if it does not dismiss the proceeding then it must set aside the appearance. Under r 5.49(8), if the Court sets aside the appearance it may extend the time within which the defendant may file and serve a statement of defence and may give any directions that appear necessary regarding any further steps in the proceeding.

The challenge is limited in scope

[7] Ms Johnstone and KEL have claims against each other before the Authority in relation to Ms Johnstone's employment as a consultant with KEL.³ Ms Johnstone is claiming unjustifiable disadvantage arising from the delay in payment of commission and holiday pay entitlements; KEL is claiming that Ms Johnstone has breached the express terms of her individual employment agreement, which restricted her post-employment activities. It further claims that Ms Johnstone breached an implied duty of fidelity, the express confidentiality terms of the employment agreement, and KEL's information technology policy by emailing, whilst still employed, KEL's confidential information to her personal email address and to another party.

[8] The Authority has exclusive jurisdiction to hear and determine both Ms Johnstone's claim and KEL's counter-claims pursuant to s 161(1) of the Act.

[9] The parties both accept that the Authority has jurisdiction to issue witness summonses and that it may require Ms Johnstone or any other witness to bring certain information to the Authority.

[10] What Ms Johnstone objects to is the Authority effectively ordering a forensic examination of the computers of Ms Johnstone and the summonsed witnesses.

[11] She says that the Authority is wrong to find that it had jurisdiction to issue the witness summonses in the terms set out.

³ *Johnstone*, above n 1, at [3]-[5].

The parties' opposing positions on the current application

[12] The primary grounds on which Ms Johnstone seeks an order setting aside the appearance are that she is challenging the Authority's determination that it has jurisdiction to make an order for forensic examination of Ms Johnstone's and the other witnesses' computers; the Court has exclusive jurisdiction to determine challenges to determinations of the Authority; Ms Johnstone is prevented from bringing a challenge by way of judicial review unless a challenge to the determination has first been brought; and that the Court is the only jurisdiction able to determine the challenge.

[13] In her submissions, Ms Johnstone contends that the issue is not a matter of the Authority's procedure but is a question of its jurisdiction, and that the Court has jurisdiction to consider whether the Authority has acted outside its jurisdiction.

[14] She also argues that the determination has a substantive effect because it invasively intrudes upon the rights of Ms Johnstone and her current business partner, effectively contravening their personal rights enshrined by s 21 in the NZ Bill of Rights Act 1990. She says the issue is fundamentally both substantive and jurisdictional, and therefore open to challenge under s 179(1) of the Act.

[15] KEL says that the essence of the challenge concerns the way in which the Authority is conducting its investigation, and that Ms Johnstone is seeking to prevent the Authority from accessing and reviewing evidence that she and others have been required to produce to the Authority.

[16] It opposes the application arguing that, by virtue of s 179(5) of the Act, the Court does not have jurisdiction to hear and determine Ms Johnstone's challenge. Section 179(5) prevents challenges to determinations about the procedure that the Authority has followed, is following, or is intending to follow, including determinations about whether the Authority may follow or adopt a particular procedure.

There are real arguments to be made by the parties

[17] At this stage, the issue before me is narrow. It is simply whether the Court has jurisdiction to hear Ms Johnstone's challenge to the finding by the Authority that it has jurisdiction to make the orders for forensic examination. If the Authority has jurisdiction to make the orders for examination, then that would be the end of the Court's inquiry.

[18] I am not persuaded that the orders are inherently more intrusive than some general orders for disclosure, which likewise may result in the examination of personal material. Nor do I consider that the absence of another body having jurisdiction over Ms Johnstone's complaint requires the Court to find it has jurisdiction. Section 179(5) envisages that some directions of the Authority cannot be challenged.

[19] On the substantive challenge Ms Johnstone wishes to argue that the Act, and in particular s160(4), precludes the Authority from making the orders for forensic examination. She argues that the orders for forensic examination amount to search orders and, relying on *Keys v Flight Centre (NZ) Ltd*, says that the question of jurisdiction to issue such orders is not a matter of procedure.⁴

[20] KEL argues, and if the case proceeds, presumably will continue to argue, that the issue is not jurisdictional but is a matter of procedure, which is for the Authority. It argues that the order for forensic examination is not a search order, s 160(4) has no application, and there is no other provision that prevents the Authority from making the order.

[21] Before I can dismiss the proceedings under r 5.49(6)(a) I must be satisfied that the Court has no jurisdiction. Here, Ms Johnstone's arguments that the issue is jurisdictional rather than procedural, and that the Court should find that the Authority has acted beyond its jurisdiction, are viable. At this stage, without full argument, I cannot be satisfied that the Court has no jurisdiction. That being the case, I cannot dismiss the proceedings.

⁴ *Keys v Flight Centre (NZ) Ltd* [2005] NZEmpC 59; [2005] ERNZ 471 at [55].

Appearance set aside; Ms Johnstone entitled to costs

[22] Accordingly, I set aside the appearance under protest to jurisdiction dated 3 August 2018 and order KEL to file a statement of defence to the challenge within 21 days of the date of this judgment.

[23] For the avoidance of doubt, KEL may, of course, maintain its arguments in the substantive challenge, and if it is successful, the Court's judgment could ultimately be that it has no jurisdiction.

[24] Ms Johnstone is entitled to costs on this application, based on a 2B categorisation. The parties ought to be able to resolve the amount of those costs between them, using the Court's guideline scale. If that is not possible, Ms Johnstone can apply to the Court by memorandum filed within 21 days of the date of this judgment. KEL then has 14 days within which to respond.

Judgment signed at 12 noon on 26 October 2018

J C Holden Judge