Employment Court of New Zealand

Keighran v Kensington Tavern Limited [2023] NZEmpC 196 (9 November 2023)

Last Updated: 16 November 2023

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 196
EMPC 398/2022

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application to adduce further evidence
BETWEEN	GLEN KEIGHRAN Plaintiff
AND	KENSINGTON TAVERN LIMITED Defendant

Hearing:	On the papers
Appearances:	A Fechney, advocate for plaintiff D Reeves, counsel for defendant
Judgment:	9 November 2023

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

(Application to adduce further evidence)

[1] An application has been advanced by the defendant company to admit further evidence in these proceedings. The application was filed after the close of the case but prior to judgment being delivered. The plaintiff opposes the application.

[2] Both parties agree that the Court has jurisdiction to make the orders sought. Where they part company is the way in which the Court's discretion ought to be exercised.

[3] The starting point for determining issues relating to the admission of evidence, including after the hearing but prior to judgment, is s 189 of the Employment Relations Act 2000. It provides:

189 Equity and good conscience

(1) In all matters before it, the court has, for the purpose of supporting successful employment relationships and promoting good faith behaviour, jurisdiction to determine them in such manner and to make such decisions or orders, not inconsistent with this or any other Act or with any applicable collective agreement or the particular individual employment agreement, as in equity and good conscience it thinks fit.
(2) The court may accept, admit, and call for such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.

[4] It is well established that evidence can be admitted at any time up to judgment being delivered. Section 98 of the Evidence Act 2006 reflects the position:

98 Further evidence after closure of case

(1) In any proceeding, a party may not offer further evidence after closing that party's case, except with the permission of the Judge.
(2) In a civil proceeding, the Judge may not grant permission under subsection (1) if any unfairness caused to any other party by the granting of permission cannot be remedied by an adjournment or an award of costs, or both.

...

(5) The Judge may grant permission under subsection (1),—

(a) ...
(b) in any other proceeding, at any time until judgment is delivered.

[5] While s 98 and the cases decided under it are helpful in considering the approach that might usefully be adopted, consideration of whether or not evidence and/or information should be "admitted", "accepted" or "called for" in this Court will be informed by a broader inquiry than simply whether the proposed evidence and/or information would be admissible in the High Court. It is the twin principles of equity and good conscience which must be looked to for guidance in exercising the Court's discretion.

[6] Bearing those points in mind, I approach the application on the following basis. It is for an applicant to satisfy the Court that documentation not produced at a hearing

ought to be admitted after their case has closed. While the discretion to admit further evidence is broad,1 the power is used sparingly for obvious policy reasons.2 Those policy concerns, which include fairness, the interests of justice and avoiding unnecessary delay in bringing proceedings to a conclusion, apply with equal force in this Court.

[7] The evidence that the defendant wishes to adduce at this late stage is a full copy of a roster. The roster was before the Court and omitted reference to the plaintiff. Ms McLean-Woods, who gave evidence for the defendant at the hearing and who was questioned on the omission (as was the plaintiff), has sworn an affidavit in support of the application. She says that she found the full document while cleaning out her garage and regrets that it was not able to be produced earlier. She deposes that the full roster is relevant because it supports her evidence that Mr Keighran's name was never removed from the roster.

[8] As I say, the plaintiff opposes the application. In this regard, Ms Fechney, advocate for the plaintiff, submits that the failure to produce the full roster at the relevant time has not been adequately explained. It is further said that admission of the evidence would unfairly prejudice the plaintiff, as he would lose his right to provide evidence in reply and cross examine the defendant's witnesses on the basis of the document.

[9] I agree with Ms Fechney's principal point that the company has failed to adequately explain why what is said to be a full copy of the roster could not have been located at an earlier stage. Ms McLean-Woods is clear in her affidavit that she always understood the plaintiff's name to be on the roster but does not explain why, if that was so, the roster appears in the form that it does in the bundle and was not an issue that was addressed at a much earlier stage. I agree too with Ms Fechney's concerns about the potential impact of admitting the evidence at this late stage. Those issues could, of course, be addressed by reconvening the hearing and providing an opportunity for Mr Keighran to give evidence and for Ms McLean-Woods to similarly

1 See, for example, the discussion in *Montego Motors Ltd v Horn* [1974] 2 NZLR 21 (HC) at 25.

2. See, for example, *Equiticorp Industries Group Ltd (in stat man) v Hawkins* [1995] NZHC 1024; [1996] 2 NZLR 82 (HC) at 85, helpfully summarised in *Jackson v Te Rangi* [2014] NZHC 2918; [2015] 2 NZLR 351 (HC) at [113].

give evidence in respect of the document and be cross examined on it. There is, however, a need to weigh issues of use of Court time and the administration of justice more generally in to the mix.

[10] While I accept that the document is relevant to the matters at issue, that is not the determining factor on applications of this sort. I am not satisfied that a sufficient basis has been made out for the exercise of the Court's discretion in the applicant's favour; it would not be consistent with the guiding principles of equity and good conscience to admit the document in the particular circumstances and at this late stage; and I decline to do so.

[11] The plaintiff is entitled to costs on this application which are reserved.

Christina Inglis Chief Judge

Judgment signed at 2.45 pm on 9 November 2023