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McKean v Haven Falls Funeral Home Limited (Auckland) [2018] NZERA 299; [2018] NZERA Auckland 299 (24 September 2018)

Last Updated: 28 September 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2018] NZERA Auckland 299
3024374

BETWEEN GRANT MCKEAN Applicant

AND HAVEN FALLS FUNERAL HOME LIMITED Respondent

Member of Authority: Nicola Craig

Representatives: No appearance for the Applicant

James Duckworth for the Respondent

Investigation Meeting:

Date of determination:

26 July and 20 September 2018

24 September 2018

DETERMINATION OF THE AUTHORITY

The Authority's process

[1] In February 2018 Grant McKean's then advocate filed an application on his behalf against his former employer Haven Falls Funeral Home Ltd (Haven Falls or the company). The claim was for arrears of wages, including unpaid on-call and phone allowances, as well as deductions from his pay. Mr McKean's employment had finished in October 2017. There were indications in the statement of problem of a possible constructive dismissal claim but Mr McKean's advocate informed the Authority that no such claim was being pursued.

[2] Haven Falls said that it had paid Mr McKean all his entitlements; both in terms of hours worked and allowances. Its position was that Mr McKean had abandoned his employment. Haven Falls also counterclaimed for money owed to the company by Mr McKean for a car which the company helped him purchase and

money repaid on Mr McKean's behalf to a third party. Haven Falls filed extensive documentary and photographic evidence in support of its position.

[3] At a case management conference held by telephone in May 2018 a timetable was set. Mr McKean's advocate subsequently withdrew from his representation. The Authority, through its officer, made several attempts to contact Mr McKean to ensure that he was aware of the timetable and his obligation under it to file witness statements. Although contact was made, Mr McKean failed to file any documents. Haven Falls indicated that it would apply to have Mr McKean's case dismissed if he took no steps before the investigation meeting.

[4] At the investigation meeting on 26 July 2018 Mr McKean attended, saying that he wished to instruct a lawyer. The

Authority explained that Mr McKean did not require a lawyer or advocate to pursue his claim as he could represent himself. However, he maintained that he wished to instruct a lawyer.

[5] On 26 July 2018 no evidence was heard regarding Mr McKean's claims but a timetable was set for the filing of witness statements. Another investigation meeting date of 20 September 2018 was agreed by the parties and the Authority. Mr McKean said that he would prepare a written statement and get it to the Authority.

[6] Mr McKean again did not comply with the timetable and no witness statements were received. The Authority received no contact from any representative on Mr McKean's behalf. The Authority officer telephoned Mr McKean who said that he had a witness statement in draft and would submit it by 10 September 2018. No statement was received. Haven Falls applied to have Mr McKean's claim struck out.

[7] On 20 September 2018 Mr McKean failed to attend the investigation meeting. The Authority officer contacted him by telephone. Mr McKean said that he had been in contact with an employment advocacy service who told him that the case had settled and the investigation meeting date was cancelled. Mr McKean also said, seemingly contradictorily, that he thought the investigation meeting was in October rather than September.

[8] Haven Fall's manager Michele Pukepuke attended the investigation meeting, along with the company's lawyer and another Haven Falls employee. Haven Falls sought to have the claim struck out or dismissed. Ms Pukepuke gave evidence that

she and her husband¹ had attended a family funeral the previous week on a marae. Mr McKean was present and told a group of people, including the chairperson of the marae, that he was taking Haven Falls to court (the Authority) and was due back there next week.

[9] The Authority officer obtained Mr McKean's consent to check with the advocacy service regarding their involvement. The service informed the Authority that it was possible that Mr McKean phoned with a general inquiry, but no one in their office had a file on Mr McKean and he did not engage their service.

[10] Mr McKean had referred on the phone to believing that he had received an email from the advocacy service. He was given time to provide this to the Authority but has failed to do so. Neither Haven Fall's lawyer nor Ms Pukepuke were aware of any involvement of that advocacy service or of any recent settlement discussions.

[11] Haven Falls informed the Authority that it would withdraw its counterclaims if the Authority dismissed Mr McKean's claims.

Dismissal

[12] The Notice of Investigation Meeting sent to Mr McKean states that if the applicant does not attend the investigation meeting, the matter may be dismissed and costs may be awarded against the applicant.

[13] I look now at the reasons given by Mr McKean for non-attendance. I do not accept that Mr McKean was unaware of or confused about the date of the investigation meeting on 20 September 2018. Not only was he present at the first investigation meeting and agreed to the later date, but the Notice of Investigation Meeting for 20 September 2018 were sent to him by post and email. He informed people the week before that he was to be at the Authority last week.

[14] Mr McKean is not a client of the advocacy service which he referred to and I do not accept that he was told by that service that his claim was settled. That suggestion was also inconsistent with his statement that he thought the investigation meeting was in October 2018.

1 Haven Fall's director

[15] Ms Pukepuke gave evidence regarding the prejudice which Haven Falls suffered by the continuance of this claim. She is concerned about Haven Fall's reputation within the community when Mr McKean was having open discussions about his case. She and her husband find the case a heavy weight on them. Financially the continuing costs incurred in legal fees are a strain on the business. Ms Pukepuke is concerned that Mr McKean may be trying to punish the company by continuing to string the process out. In addition, it is stressful for staff to have the prospect of giving evidence hanging over them in the lead up to the investigation meetings.

[16] It is now almost a year since these issues were first raised by Mr McKean's advocate. Mr McKean has twice failed to comply with his timetabled obligations to produce evidence. The Authority has taken steps to ensure that Mr McKean was aware of the obligations on him and the possible consequences of non-compliance. He has now failed to attend an investigation meeting without reasonable excuse. His claim is dismissed.

Costs

[17] Haven Falls is entitled to apply for costs. If it wishes to do so, it should file and serve submissions in support within seven days of the date of this determination. Mr McKean will then have seven days to file and serve any submissions in reply.

Nicola Craig

Member of the Employment Relations Authority

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