Employment Court of New Zealand

Ports of Auckland Limited v Findlay [2017] NZEmpC 45 (5 May 2017)

Last Updated: 11 May 2017

IN THE EMPLOYMENT COURT AUCKLAND

[2017] NZEmpC 45

EMPC 67/2017

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	PORTS OF AUCKLAND LTD Plaintiff
AND	CARL FINDLAY Defendant

Hearing:	1 May 2017 (Heard at Auckland)
Appearances:	M Heron QC and J Mills, counsel for the plaintiff S Mitchell and J Lynch, counsel for the defendant
Judgment:	5 May 2017

JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] Mr Findlay is a stevedore at the Auckland Port. He is also President of the Maritime Union of New Zealand (MUNZ). An incident arose on 30 July 2016 involving Mr Findlay and another stevedore, Mr Rua. Mr Rua is the President of the Port Pro Union. Mr Rua made a complaint to management following the incident. Mr Findlay also made a complaint. An investigation was subsequently undertaken by an external investigator into both complaints.

[2] The independent investigator prepared a report (the McKone report), which set out a number of factual findings in relation to the complaints. A copy of the draft report was provided to Mr Findlay for comment. A final report was subsequently

produced and provided to Mr Gibson, the Chief Executive of the company.

[3] Following receipt of the McKone report, Mr Gibson decided to initiate a disciplinary inquiry. He advised Mr Findlay of this by way of letter dated 12

December 2016. A copy of the final version of the McKone report was annexed to the letter. The letter advised that the allegations were serious and, if established, could lead to disciplinary action. Mr Gibson subsequently met with Mr Findlay, his representative, and support persons.

[4] The way in which the discussion unfolded at the meeting, the contents of Mr Gibson's 12 December letter, and the McKone report raised a number of issues from Mr Findlay's perspective.

[5] The company's inquiry has progressed no further and no finding, adverse or otherwise, has been made against Mr Findlay by Mr Gibson. Rather, things are at a standstill. That is because Mr Findlay filed a statement of problem in the Employment Relations

Authority contending that the company's actions in continuing its investigation were unjustified. A permanent order that the company not continue with its investigation was sought, together with an interim order preserving the position pending determination of the application for permanent orders.

[6] The Authority granted interim orders on 23 March 2017.1 The period between the filing of the application (23 December 2016) and the Authority's determination was consumed with attendance by the parties at mediation, the Christmas vacation, and the unavailability of the company to accept an earlier date for the investigation meeting. The Authority has scheduled a substantive hearing of the application for injunctive relief on 24 and 25 May 2017.

[7] The company filed a challenge to the Authority's interim orders determination on 31 March 2017. In its statement of claim the company contended that the Authority had no jurisdiction to order the relief sought and, even if it did, interim orders ought not to have been made in the particular circumstances of the case. Urgency was granted, agreed timetabling orders were made, and the challenge

came before the Court for hearing on 1 May 2017. The challenge was pursued on a de novo basis.

[8] This judgment does not decide whether permanent orders should be made restraining the company from taking any further steps on its inquiry. It does not decide whether the inquiry to date has been conducted in an appropriate manner or whether the concerns identified on behalf of Mr Findlay are well founded. Nor does it decide whether Mr Findlay has committed misconduct. The sole focus at this stage is whether the Court should exercise its discretion to grant interim orders restraining the company from continuing with its inquiry pending determination of the substantive application in the Authority. The evidence before the Court at this stage is untested, as is usual on applications of this sort.

Legal framework: interim orders

[9] The basis upon which applications for interim orders are to be decided can be summarised as follows:2

Step 1 - An applicant must establish that there is a serious question to be tried. In a case such as this, the issue is whether there is a serious question to be tried in relation to the claim for permanent orders restraining the company from proceeding further with its disciplinary process.

Step 2 - Consideration must then be given to the balance of convenience, and the impact on the parties of the granting of, and refusal to grant, an order. The impact on third parties will also be relevant to the weighting exercise.

Step 3 - Finally the overall interests of justice are to be considered, standing back from the detail required by the earlier steps.

[10] While the Court has a discretion whether or not to grant interim relief, the

first step in the Court's inquiry (namely whether there is a serious question to be

tried, in that the claim is not frivolous or vexatious)3 requires judicial evaluation. The merits of the case, insofar as they can be discerned at an interim stage, may also be relevant in assessing the balance of convenience in the overall interests of justice.

[11] Before addressing the factors to be considered it is convenient to set out a slightly more detailed summary of the background to the matter.

Background

[12] There is a degree of unease between members of MUNZ and Port Pro, such that they generally prefer to sit at different tables in the company mess room. It is also apparent that over time there have been concerns raised about shift work and the potential impact of it in terms of health and safety.

[13] On Saturday 30 July 2016 Mr Rua and Mr Findlay were in the mess room. Mr Rua was sitting at a table normally occupied by MUNZ members. An incident occurred between Mr Rua and Mr Findlay. On 1 August 2016 Mr Rua sent a formal complaint to management about comments that Mr Findlay was alleged to have said during the course of the interchange. The letter of complaint alleged "intimidation, hatred and bullying" by Mr Findlay and referred to a comment that it was because of Mr Rua that two colleagues had died. The complaint also refers to an alleged comment by Mr Findlay that he liked the fact that Mr Rua rode a motorbike because it meant that sooner or later he would "be the next one in a box".

[14] Mr Rua identified a number of people who had witnessed the exchange and asked that the company deal with his complaint, and the "hatred and bullying" he said he was receiving on a day-to-day basis. Mr Findlay also made a complaint against Mr Rua.

[15] Unsurprisingly the company decided to investigate the complaints. It would have been problematic if it had not. An independent investigator was brought in to carry out the investigation and provide a report. The McKone report is a relatively lengthy document. It includes reference to various interviews with witnesses who

were present at the time the incident occurred, and a series of findings. It set out two factual findings adverse to Mr Findlay – first, that he had accused Mr Rua of being partly responsible for recent deaths of two Ports of Auckland workers; second, that Mr Findlay had implied that because Mr Rua rides a motorbike, he would "be the next one in the box".

[16] As I have said, the report was provided to Mr Findlay with Mr Gibson's 12

December letter. His letter was a lengthy one. The McKone report was referred to and Mr Gibson expressed the preliminary view that

there were aspects of it which he did not intend to have regard to (such as whether CCTV footage could be relied on to corroborate what had been said during the incident). He also noted variations in some of the witness statements which had been provided. Mr Gibson recorded the points that had been made on Mr Findlay's behalf challenging the McKone findings but concluded by reiterating that the inquiry was at a preliminary stage, that his (Mr Gibson's) comments were preliminary and could change, and that he was not bound to adopt Mr McKone's assessment. Mr Gibson advised that he considered that a disciplinary inquiry was warranted and required Mr Findlay to attend a meeting to provide him with an explanation as to what had occurred.

[17] The meeting foreshadowed in Mr Gibson's 12 December letter took place on

20 December. Mr Findlay provided an 11-page written response at the meeting, and verbal submissions were made by and on his behalf. The written response included detailed reference to the background context to the incident; concerns about disparity of treatment based on union membership; and concerns about credibility. It was said that the investigation was "entirely flawed" and that it was "not possible to further investigate the matter without entirely reassessing all of the evidence." The meeting was adjourned. Mr Gibson considered that there was general agreement that not much could be done by way of progressing matters until the New Year, given the proximity to the Christmas break.

[18] However, on 21 December a further letter was sent to the company. It referred to a number of matters, including reference to a comment that Mr Gibson was said to have made during the course of the 20 December meeting, namely that he considered that Mr Findlay had made a death threat to Mr Rua (the "death threat"

allegation). Such a comment was said to be contrary to all of the available evidence and raised serious concerns as to the fairness of the inquiry. I pause to note that Mr Gibson disputes having elevated the original complaint to a "death threat". Nor is his original letter setting out the allegations crafted in this way.

[19] I return to the "death threat" allegation below, as it formed a significant part of the case before the Authority and the company's position in respect of it developed before this Court; and because it is relevant to an assessment of the application on the de novo challenge.

[20] The 21 December letter stated that any steps to invite witnesses to comment further and "improve the evidence" would be inconsistent with a fair process. It was also said that the company was clearly looking for evidence to establish the allegations. The company was advised that unless it agreed to halt the investigation, urgent orders would be sought from the Authority.

[21] Counsel for the company replied, advising that Mr Gibson intended to continue with the disciplinary inquiry, and that he intended to undertake further interviews from 7 February 2017. The statement of problem, seeking the orders I have already referred to, followed shortly thereafter. No further steps to progress the inquiry have been taken since the company's 22 December letter.

Serious question to be tried

[22] The plaintiff did not pursue an argument that the Authority, and this Court on a challenge, lacked jurisdiction to grant the order sought. Mr Heron QC acknowledged that the full Court's judgment in *Credit Consultants Debt NZ Ltd v Wilson* would have presented a hurdle for the plaintiff in this regard.4 The plaintiff decided not to tackle that hurdle, and rather concentrated its arguments on the usual factors applying to an application for interim orders. That means that the interesting

issues that might otherwise have arisen as to the scope of the Authority's powers, in light of the relevant statutory provisions conferring jurisdiction, do not need to be dealt with.

[23] It appeared to be common ground between the parties that orders restraining an employer from proceeding with an investigative/disciplinary process into concerns about employee conduct will be rare.5 That will be even more so where, as here, permanent orders are sought restraining an employer from taking any further steps at all, effectively halting an employer's processes in their tracks. The reasons for this are clear. The first point is that such an approach runs the risk of putting the cart before the horse, and pre-judging the end-point that an employer might (but might not) get to. It also runs the risk of cutting across an employer's obligation to

investigate concerns, including health and safety concerns impacting on other employees. Also relevant is the interest, both to the individuals concerned and more generally, in allowing such processes to run their course without undue interruption and delay. A stop-start approach to an investigative and disciplinary process which invites intervention along the way from the Authority; the Employment Court on a challenge; and potentially the Court of Appeal and Supreme Court by way of further appeal; is plainly undesirable for public policy reasons.

[24] In the present case, a number of concerns have been raised as to the propriety of aspects of the employer's process, some of which found favour with the Authority and which are said to support an argument as to the strength of the defendant's case. It is of course difficult, based on untested affidavit evidence, to assess the relative strengths of each party's case, particularly where (for example) allegations of bias are raised.

[25] Much was made of Mr Gibson's intention to carry out additional inquiries, which the defendant says is a waste of time given that Mr Findlay has accepted that he said the words uttered. That overlooks the nature of the decision-making role and the matters which a decision-maker may reasonably wish to satisfy himself/herself of prior to making a decision, including as to relevant context and credibility. In the present case concerns about favouring what had been said by witnesses supportive of Mr Rua's version of events over Mr Findlay's had been raised with Mr Gibson. Further, and as Mr Heron pointed out, while the words uttered appear to be accepted, there are issues of context and tone which may inform an ultimate decision as to whether or not they constituted a threat. It

is also notable that at the 20 December

meeting Mr Findlay provided Mr Gibson with a further (unsigned) witness statement. An additional statement, by way of email, was sent to Mr Gibson the next day. Both statements were favourable to Mr Findlay and Mr Gibson has said that he considers that they may warrant further inquiry, including because neither witness appears to have been interviewed by Mr McKone.

[26] Reference has been made to two prior warnings. The defendant says that this supports an inference of bias and undermines the fairness of the process which the employer wishes to follow. Mr Gibson says that the warnings are relevant background context and may be relevant to assessing credibility. One of the warnings (dated 2010 and now expired) related to intimidatory conduct by Mr Findlay against members of another union, which was found to have been established. While the use to which any prior warning may be put may become a live issue in the context of any final decisions, an argument that they are fatal to the integrity of the process at this stage seems premature. Nor do I think that the warnings, and the way in which they have been considered to date, provide a firm basis for advancing an argument of bias or predisposition against Mr Findlay.

[27] Reference is made to prior comments Mr Gibson is said to have made to Port Pro members, encouraging them to complain about MUNZ members, and his involvement in collective negotiations, which included discussions and the expression of strong views by Mr Findlay relating to the safety of the roster system. It is submitted that such alleged action supports a claim of bias and a process which is fundamentally unfair. If it transpires that the complaint against Mr Findlay was manufactured, or provoked by the company in some way, that is likely to be relevant to issues relating to justification and relief. However, the fact is that Mr Findlay accepts that he uttered words to the effect complained about, although he does not accept that they were threatening. Mr Gibson's untested evidence is that he attended a meeting in his role as Chief Executive some time prior to the incident and was advised of concerns about various alleged actions of MUNZ members. Mr Rua was involved in these discussions. Mr Gibson says that his response was that he could not act on unsubstantiated complaints but that if an incident occurred it should be formally drawn to his attention to enable it to be dealt with. On the face of it such a response seems unremarkable and consistent with his role as Chief Executive. An

argument that such a comment (as yet untested or fully explored) gives rise to a reasonable apprehension of bias appears to be a stretch.

[28] The defendant placed heavy emphasis on delay as a factor which weighs firmly in favour of the merits of the claim. I disagree. In the scheme of things the delay has not been significant (particularly having regard to the chain of events which have occurred) and, although it appears that some witnesses may have issues with recollection, Mr Gibson has already indicated that that is an issue that he is aware of and intends to have regard to in reaching any final decision. While some of the witness statements refer to difficulties of recollection, the most recent statements provided in support of Mr Findlay some six months after the event (in December 2016) do not appear to be impacted by the passage of time. These statements form part of the additional inquiries which Mr Gibson is wishing to make.

[29] I return at this point to the issue of the "death threat" allegation, which played a central role before the Authority and appears to have been a significant prompt for the original application for interim orders. The company has confirmed, through Mr Gibson, that there will be no investigation into such an allegation. That assurance (which has only recently been made and which was not before the Authority) dilutes the strength of the concerns identified on behalf of the defendant in support of the application.

[30] The defendant seeks permanent orders restraining the plaintiff from taking any further steps in relation to the investigation. That would mean that Mr Rua's complaint would remain unresolved. While I cannot conclude that the claim is frivolous or vexatious, my assessment, based on the untested evidence before the Court, is that the prospect of obtaining such relief is remote.

Balance of convenience

[31] Mr Mitchell submitted that the balance of convenience weighs in favour of the defendant. I understood this argument to be based on three particular points: namely the absence of an adequate alternative remedy; the relative proximity of the Authority's substantive investigation; and the stigma that will likely attach to Mr

Findlay in the absence of interim orders staying the employer's disciplinary inquiry. Mr Mitchell also submitted that the merits of the case were relevant. I have already dealt with this point. The company argued that the balance of convenience favoured it.

[32] I accept that if the process is allowed to continue in the interim it will cause Mr Findlay some anxiety and stress. It may also, as Mr Mitchell submits, cause a degree of stigmatisation and impact on his mana, including as president of MUNZ.

[33] If the defendant can establish that the company has taken unjustified action which has caused him disadvantage, he can seek relief in that regard, including compensation under s 123(1)(c)(i) of the Act for any humiliation, loss of dignity and injury to feelings which have been occasioned by the company's breach. I do not accept the proposition that compensation under the Act would be an inadequate remedy in such circumstances.

[34] Mr Findlay is still employed by the company and remains at work. No disciplinary action has been taken against him at this stage.

[35] If interim orders of the scope sought by the defendant were made, the company would be prevented from continuing **any** aspect of its inquiry pending the outcome of the Authority's substantive investigation. This is despite the seriousness of the concerns that have been raised and the interests of others, including the complainant, in having matters progressed in a timely manner.

[36] The plaintiff has indicated that it wishes to carry out further interviews. I infer that any final conclusions are some way off. Accordingly it seems unlikely that any conclusions (adverse or otherwise) will be reached prior to the Authority's substantive investigation. If that is so, it is hard to identify any significant harm that would be suffered by Mr Findlay if interim orders were not

made, other than the fact that an allegedly deficient process would continue in the meantime. As I have said, those deficiencies can be the subject of a later claim (and the award of relief), as appropriate.

[37] It seems to me to be premature to halt the process at this interim stage. If some further (appropriate) steps are able to be taken to progress the investigation in the interim, that may well end up being to the benefit of both parties - namely shortening the length of time required to complete it (if it proceeds). In this regard I note the defendant's strongly voiced concern that delays have and are impacting on the fairness of the process. At this stage it is the defendant's application for injunctive relief which is causing the delay. As counsel acknowledged in argument, but for these steps the process could well have been concluded by now.

[38] While the Authority's substantive investigation is currently scheduled for a two-day investigation meeting on 24 and 25 May 2017, and it is conceivable that the Authority will issue an oral determination, it may well be that a determination will take some additional time to emerge, given the nature and scope of the issues which both parties appear to be interested in pursuing.

[39] The reality is that if the inquiry is as deficient as Mr Findlay contends it is, and any procedural defects are not minor and do impact unfairly on him, he retains the ability to pursue an action and seek appropriate relief.

[40] I conclude that the balance of convenience weighs against the grant of interim orders.

Overall justice

[41] I consider that the overall interests of justice also weigh against the grant of the orders sought. There is an interest in progressing employment processes in a timely manner without unnecessary interruption and legal wrangling, until final decisions and outcomes with substantive impact are known. Halting the employer's inquiry at this stage, to carry out a warrant of fitness check in respect of various aspects of it which may or may not be remedied prior to any decision ultimately being made, is a significant step which should not be lightly taken. It runs the risk of derailing a process which an employer is obliged to undertake, and of fixing a problem that may not exist, or which may not ultimately need fixing, or which may have no substantive impact.

[42] While I do not discount the possibility that there may be cases in which an order permanently restraining an employer from taking any further steps in a disciplinary inquiry may appropriately be made, the likelihood of obtaining the relief sought in the present case, based on the untested evidence before the Court and having regard to the company's assurance as to the scope of its inquiry (namely exclusion of any investigation into a possible "death threat"), is not strong.

[43] Finally, Mr Mitchell pointed out that the company could have applied for a variation of the Authority's interim orders based on its change in stance on two key issues. The first is its assurance that the "death threat" allegation will not be investigated; the second is its indication that it would consider accommodating a change in decision-maker, while not accepting the basis for the concerns raised on behalf of the defendant in respect of either point.

[44] It is well established that a party may seek a rescission or variation of an order where there has been a change in circumstances and where rescission or variation is just.6 I agree with Mr Mitchell's observation that the developments in the company's stance may have formed the basis for such an application in the Authority. However, the company is entitled to exercise its right of challenge and to have it determined on its merits. In doing so the Court stands in the shoes of the Authority and may make such orders as it considers appropriate in the exercise of its discretion.

[45] I do not consider that the overall justice of the case favours the grant of interim orders and I decline to exercise my discretion to make the orders sought by the defendant.

Outcome

[46] The challenge succeeds. The Authority's determination is set aside.

6 See commentary in M Casey "New Zealand Procedure Manual: High Court" (3rd ed, LexisNexis

NZ Ltd, Wellington, 2015) at HCR7.53.14(a).

Costs

[47] Costs are reserved. It may be that, while the company succeeded on its challenge, it does not pursue a contribution to its costs, including having regard to the fact that a major plank of its challenge (as to jurisdiction) fell away at a belated stage. If it does consider it appropriate in the circumstances to seek costs, and costs cannot otherwise be agreed, it may file and serve any application together with supporting material within 20 working days of the date of this judgment; the respondent to file and serve any memorandum and supporting material within a further 15 working days; and anything strictly in reply within a further five working days.

Christina Inglis

Judge

Judgment signed at 2.15 pm on 5 May 2017