Employment Court of New Zealand

Premier Events Group Limited v Beattie [2012] NZEmpC 50 (23 March 2012)

Last Updated: 4 April 2012

IN THE EMPLOYMENT COURT AUCKLAND

[2012] NZEmpC 50

ARC 22/11

IN THE MATTER OF proceedings removed from the

Employment Relations Authority

AND IN THE MATTER OF interlocutory applications

BETWEEN PREMIER EVENTS GROUP LIMITED

First Plaintiff

AND BA PARTNERS LIMITED (IN LIQUIDATION)

Second Plaintiff

AND MALCOLM JAMES BEATTIE First Defendant

AND ANTHONY JOSEPH REGAN Second Defendant

AND PATRICIA PANAPA Third Defendant

Hearing: 23 March 2012 (in Chambers) (Heard at Auckland)

Counsel: Aaron Lloyd and Vonda Hodgson, counsel for plaintiffs

John Eichelbaum, counsel for defendants

Judgment: 23 March 2012

INTERLOCUTORY JUDGMENT NO 2 OF CHIEF JUDGE GL COLGAN

[1] There are two matters for decision today in respect of the trial of liability (but

not damages) issues between the parties, set to commence about seven weeks hence.

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[2] The first is whether the defendants are entitled to have disclosed to them and to inspect records relating to the mobile telephones of two persons associated with the first plaintiff.

[3] The second, and not unassociated issue, is whether three witness summonses served by the defendants on persons associated with the first plaintiff should be set aside.

[4] The following is the common relevant background.

[5] During interlocutory aspects of High Court litigation between these (and other) parties, there have appeared articles about those proceedings in the National Business Review and Sydney Morning Herald newspapers. The defendants suspect that

some of the information contained in these articles has come, and in some instances could only have come, from either or both of Premier Events Group Limited's Robert Gill and/or its counsel in the High Court proceedings who is a partner in the legal practice known as Minter Ellison. The defendants say that the tenor of these publications is unduly favourable to Premier Events Group Limited and, correspondingly, unfairly critical of them. They suspect that they have lost business as a consequence of the publication of those articles.

[6] In order to establish an evidential foundation for those submissions, the defendants say that they should have access to the mobile telephone records of Mr Gill and of counsel (Zane Kennedy). They anticipate that these records will disclose what they describe as "a flurry" of calls between Mr Kennedy and the National Business Review journalist, Matt Nippert, (and vice versa) which may support their contention of a conduit of information.

[7] The relevance of this evidence is that it is said to affect, in a way that is favourable to the corporate entities, their obligation to mitigate their losses which they claim against the individual defendants in these proceedings.

[8] Although I heard Mr Eichelbaum's submissions about the relevance and other

discoverability of such records if they exist, I did not need to call on Mr Lloyd to

respond because I concluded that the application for the disclosure and inspection of these records is, at best, premature.

[9] That is for the following reason. By consent on 29 February 2012 the parties agreed that the forthcoming trial will deal with issues of liability only. Damages and, in particular, unliquidated damages, will be the subject of a subsequent separate hearing if liability for these is established.

[10] I note that the first plaintiff's current operative statement of claim seeks, among the remedies sought against the individual parties:

A. An enquiry as to the damages for losses directly sustained by the first plaintiff as a result of the first and third defendants' breaches, and an order that the first and third defendants be liable to payment of those damage;.

B. In the alternative, an account of the profits earned by the defendants as a consequence of the first and third defendants' breach of their restraint of trade obligations and an order by the Court that such profits be paid to the first plaintiff, by the first and third defendants;

...

[11] Any relevance of these telephone records relates at best to questions of remedy that are not for immediate hearing. There will be a further opportunity for disclosure and inspection of documents relating to loss if liability is established. There are risks that if the defendants' applications had been allowed, the parties and the Court would be distracted from the now impending fixture on liability and preparation for it. There is also the risk that this might be a wasted exercise if there is no liability.

[12] Although, as will have been apparent to counsel during Mr Eichelbaum's submissions, I have reservations about the relevance of such records (if they exist) to the individual parties' defences, it is unnecessary to, and therefore I do not, decide the issue at this point.

[13] Nevertheless, because this application for disclosure and inspection of documents, at best from the defendants' point of view, addresses questions of remedy which are not for decision in the forthcoming trial, their application is premature and, although it may subsequently revived if necessary, is now dismissed.

Witness summonses

[14] After discussion with counsel and by agreement, I make the following orders. [15] In consideration of Mr Lloyd's undertaking to the Court that he will call Mr

Gill to give evidence at the trial for Premier Events Group Limited on issues of liability, the witness summons for Mr Gill is set aside.

[16] Because the issues for which Lynden Glass has been summonsed will not be before the Court at the forthcoming liability trial, the witness summons requiring his attendance is set aside.

[17] The witness summons requiring Stewart Kearney's attendance at the liability hearing will be set aside if and when Mr Lloyd undertakes to the Court that he will call Mr Kearney to give evidence-in-chief on behalf of Premier Events Group Limited. Unless and until such an undertaking is given, this summons in respect of Mr Kearney is still in effect.

[18] As with all witnesses summonsed to hearings on the opening day and until released by the Court, counsel have agreed that they will liaise (including with the Court) about when such witnesses will be required to attend and for how long. In such

circumstances witnesses, particularly those who are neither parties nor employed by them, can be both assured of the times that they will need to be at court and, as importantly, when they are not required to be present. So although, for example, Mr Kearney's witness summons requires him to attend at 9.30 am on the first day of the hearing and until he is released by the Court from further attendance, in practice Mr Lloyd ought to be able to indicate now to Mr Kearney when he is likely to be required and, closer to the time, both more precisely and for how long approximately, so that Mr Kearney and his current employer can minimise the inevitable disruption and inconvenience that attendance at court will cause.

Costs

[19] All parties having been successful in part at today's hearing, I confirm my indication that costs in respect of these applications are to lie where they fall, that is that neither party may have any orders for costs in respect of this hearing.

The future

[20] Counsel have signalled the possibility of other interlocutory applications that may arise out of the filing and service of briefs of evidence and any such applications should, preferably, be dealt with before the start of the hearing rather than then or later. Any such interlocutory applications should be dealt with on notice and, if possible, combined in a single Chambers hearing.

GL Colgan
Chief Judge

Judgment signed at 3.30 pm on Friday 23 March 2012
