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Randwick Meat Co Limited v Burns [2015] NZEmpC 188 (21 October 2015)

Last Updated: 27 October 2015

IN THE EMPLOYMENT COURT WELLINGTON

[\[2015\] NZEmpC 188](#)

EMPC 174/2015

IN THE MATTER OF an application for orders

BETWEEN RANDWICK MEAT CO LIMITED Plaintiff

AND DALE BURNS Defendant

Hearing: (on the papers by submissions filed on 4 August, 4 and 18 September 2015)

Counsel: S Waring, counsel for the plaintiff

B Buckett, counsel for the defendant

Judgment: 21 October 2015

INTERLOCUTORY JUDGMENT OF JUDGE A D FORD

Introduction

[1] On 19 December 2014 the defendant, Mr Dale Burns, was dismissed from his employment with the plaintiff company. He issued proceedings in the Employment Relations Authority (the Authority) claiming that the dismissal was unjustified because his conduct was not serious enough to warrant dismissal and the disciplinary process was conducted in an unfair and unreasonable manner. The plaintiff, Randwick Meat Co Limited (Randwick), filed a statement in reply in the Authority claiming that Mr Burns had been justifiably terminated from his employment following a procedurally fair and substantively justified disciplinary process.

[2] Mr Burns also made application to the Authority to remove his claim to this

Court to hear and determine, pursuant to s 178 of the Employment Relations Act

2000 (the Act), without the Authority investigating it. In a determination dated

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1 July 2015, the Authority granted the removal application.¹ On 28 July 2015, Randwick made application to this Court, pursuant to s 178(5) of the Act, for an order that the Authority investigate the matter on the basis that it was not properly removed. The application, which has generated a considerable amount of documentation, is vigorously opposed.

Background

[3] The following background summary is compiled from two determinations of the Authority which are already before this Court² and other documentation which was before the Authority when it issued the determination of 1 July 2015.

[4] Randwick has operated as a meat company in Lower Hutt for a number of years. At the time of his dismissal, Mr Burns

had been employed by the company for approximately 23 years. No written employment agreement had ever been signed between the parties. Initially, Mr Burns worked as a butcher but left after an argument with the owners and returned to the business in 1991 in a role that required him to visit customers and create new business. In his statement of problem, he described himself as a "Manager" but in its statement in reply, Randwick alleges that his role was primarily to attract business including sales and only to manage when the owners were on leave. The co-owners of Randwick are Louise and Raymond Fleetwood.

[5] Towards the end of 2013, Mr and Mrs Fleetwood became concerned about anecdotal evidence from customers that Mr Burns had not been seen by them for quite some time. As a result they decided to install a Global Positioning System (GPS) in Mr Burns' work vehicle. During the 2013 – 2014 Christmas/New Year period Mr Burns sustained a personal injury and was off work for approximately three months. Upon his return he was required to attend a meeting on

28 March 2014 which was arranged to discuss a variety of work-related matters including informing Mr Burns about the GPS device that had been fitted to his vehicle. At the meeting, Mr Burns was handed a draft employment agreement to

consider and told to return it with any comments. Discussions were held on other

¹ *Burns v Randwick Meats Company Ltd* [2015] NZERA Wellington 64.

² *Burns v Randwick Meats Company Ltd* [2014] NZERA Wellington 111; *Burns v Randwick Meats Company Ltd* [2015] NZERA Wellington 11.

matters including Mr Burns' hours of work and role. Mr and Mrs Fleetwood requested Mr Burns fill in a daily call cycle report on customers he had seen. Mr Burns did not sign the employment agreement.

[6] After the meeting on 28 March, Mr and Mrs Fleetwood began to investigate fresh concerns that Mr Burns was not properly attending to his duties; that he was leaving work early and that he was not completing the daily call cycle reports. An investigation meeting was held on 27 May 2014 at which the parties were represented by their legal advisors but the outcome of that meeting (which was recorded) does not appear to have been particularly successful. It was described in

one of the Authority's determination in these terms:³

[23] ... The meeting deteriorated and primarily became a meeting between the parties' representatives making their issues and taking set positions on the law and inviting various responses from each other, with the parties involved only incidentally. This distracted the parties' attention from the underlying issues that the Fleetwoods requested explanations from Mr Burns about.

[7] Nevertheless, Mr Burns' lawyer, in letters dated 28 May and 3 June 2014 respectively, did present submissions on his behalf addressing the various allegations.

[8] On 5 June 2014, Randwick wrote to Mr Burns confirming the findings resulting from its investigation. In short, it found that a number of the allegations relating to Mr Burns' unauthorised absences from work and failure to carry out instructions had been substantiated, including the request to complete the call cycle reports. The letter of 5 June 2014 concluded that Mr Burns' conduct had amounted to misconduct and it stated that the letter was to be regarded as notice of "final warning". On 2 July 2014, Mr Burns raised a personal grievance challenging the final warning. The final warning grievance was eventually investigated by the Authority on 1 and 17 September 2014. In its determination dated 30 October 2014, the Authority dismissed Mr Burns' claim that his final warning had been unjustified.

It also strongly recommended further mediation.⁴

³ *Burns v Randwick Meats Company Ltd* [2014] NZERA Wellington 111.

⁴ *Burns v Randwick Meats Company Ltd*, above n 3, at [42]-[43].

[9] After the letter of 5 June 2014 (the final warning letter), matters remained unresolved. On 15 July 2014, Randwick sent another letter to Mr Burns stating that since the warning had been issued, further concerns had come to their attention. Mr Burns was requested to attend another investigation meeting at the office of Randwick's solicitors on 17 July 2014 and it was proposed that he be suspended in the meantime, pending completion of the investigation. In addition to fresh allegations of misconduct, along the lines of the conduct complained about in the final warning letter, the letter of 15 July 2014 referred to other allegations of serious misconduct including, the falsification of company records; the failure or refusal to perform assigned work and copying, removal or unauthorised disclosure of confidential or classified company information.

[10] These allegations were vigorously denied and contested by Mr Burns through his lawyer, Ms Buckett. The proposed suspension and investigation both had to be deferred because of Mr Burns' ill-health. A succession of email exchanges then passed between the lawyers for the two parties relating to Mr Burns' medical condition, the adequacy of the medical reports provided and the unfinished investigation. Mr Burns' sick leave expired on 22 July 2014 but he remained on sick leave

without pay after that date. Attempts by Mr Burns to return to work at the end of August 2014 were unsuccessful. Randwick required a medical report confirming that he was well enough to return to work but Mr Burns' doctor considered that he should not be put in a stressful situation by returning to work at that time.

[11] The impasse remained. Following the Authority's investigation of the final warning grievance in early September 2014, Ms Buckett endeavoured to arrange mediation, as had been recommended by the Authority Member, but Randwick declined the opportunity, pointing out that there had already been two unsuccessful mediations. In a medical certificate dated 18 November 2014, Mr Burns' doctor pointedly stated, "He is fit for work in a supportive non toxic work environment."

[12] Matters came to a head towards the end of November 2014. On

21 November 2014, Randwick's lawyer sent an email to Ms Buckett's firm advising that Randwick had considered the submissions Ms Buckett had provided alleging that it had no right to suspend Mr Burns but it had decided to proceed with his suspension as from Monday, 24 November 2014. The suspension duly took effect

and Ms Buckett issued proceedings in the Authority claiming that Mr Burns had, thereby, been unjustifiably disadvantaged. That claim was investigated by the Authority on 16 December 2014. In a determination dated 9 February 2015, the Authority dismissed Mr Burns' claim.⁵

[13] Another meeting between the parties and their lawyers was held on

26 November 2014, ostensibly to give Mr Burns an opportunity to provide further explanation regarding the allegations contained in Randwick's disciplinary letter of

15 July 2014. The meeting, to put it mildly, does not appear to have been particularly successful. In a follow-up email, Ms Buckett referred to the "ugly" behaviour of counsel for Randwick which often descended into "frightening uncontrolled rage". Randwick in response, described Mr Burns' lawyer as having adopted "a hostile approach towards us at the meeting" and being "rude and interruptive".

[14] It is clear from the rest of the correspondence before the Court, which was also before the Authority, that the employment relationship had reached its nadir. In a letter dated 17 December 2014, Randwick advised Mr Burns of its tentative decision that he should be summarily dismissed and that was confirmed in another letter dated 19 December 2014. The dismissal letter made reference to the findings set out in the letter of 17 December 2014 which included reference back to the alleged misconduct described in the original warning letter of 5 June 2014.

[15] On 13 February 2015, Ms Buckett raised a personal grievance on Mr Burns' behalf alleging that he had been unjustifiably dismissed. That was then followed up by the issuance of proceedings in the Authority on 16 April 2015 and the request for the matter to be removed to this Court.

The removal

[16] The order for removal was made pursuant to s 178(2)(c) of the Act. For completeness, I set out the whole of s 178(2):

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5 Burns v Randwick Meat Company Ltd [2015] NZERA Wellington 11 at [36].

...

(2) The Authority may order the removal of the matter, or any part of it, to the court if—

(a) an important question of law is likely to arise in the matter other than incidentally; or

(b) the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the court; or

(c) the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or

(d) the Authority is of the opinion that in all the circumstances the court should determine the matter.

[17] The Authority Member who issued the determination of 1 July 2015⁶ ordering the removal of Mr Burns' dismissal claim to this Court was not the Member who had been involved in the two previous determinations.⁷ In a well-reasoned determination, the Authority noted the opposing views of the parties which, to a large extent, have been repeated in this Court. On behalf of Mr Burns it was submitted that the issues to be determined in the unjustified final warning and suspension challenges are "an intrinsic part of the factual matrix pertinent to the dismissal claim".⁸ For Randwick it was submitted that the dismissal grievance was the most significant of the issues arising from the employment relationship and, as such, removal of that matter to the Court would preclude the company from the benefits of having the matter investigated

by the Authority with full process.

[18] After considering the submissions advanced on behalf of the respective parties, the Authority concluded:⁹

[14] The issue here is the fact there are proceedings between the same parties already before the Court. Having considered the submissions, the previous decisions, the current Statement of Problem and Statement in Reply along with [the] attached documents I consider they are proceedings which involve the *same, similar or related issues*.

[15] In particular I note Randwick Meats' letter of 17 December in which it advises Mr Burns of its *Tentative findings* and the fact it was considering dismissal. The letter confirms some of the matters concerning Randwick

⁶ *Burns v Randwick Meats Company Ltd*, above n 1.

⁷ *Burns v Randwick Meats Company Ltd*, above n 2.

⁸ *Burns v Randwick Meats Company Ltd*, above n 1 at [8].

⁹ *Burns v Randwick Meats Company Ltd*, above n 1.

Meats with the same, or at least very similar, to those which lead to the warning now being considered by the Court. The letter also advises the existence of the warning was a factor in reaching a tentative decision to dismiss and that notwithstanding other factors this could, *in isolation, justify summary dismissal*.

[16] As already said the dismissal was, in essence, the continuation of a process which is, at least in part, already before the Court. Central to both is the question of what duties could reasonably be required of Mr Burns. There is no sense in litigating the same facts in multiple forums. It does nothing more than increase costs.

[17] For the above reasons I conclude the dismissal claim should be removed to the Court pursuant to s.178(2)(c).

The application

[19] Randwick now seeks an order from this Court that the Authority be directed to investigate the matter on the basis that it was not properly removed. The application is made pursuant to section 178(5) of the Act which provides:

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...

(5) Where the Authority, acting under subsection (2), orders the removal of any matter, or a part of it, to the court, the court may, if it considers that the matter or part was not properly so removed, order that the Authority investigate the matter.

[20] On behalf of Randwick, Ms Waring submitted, citing the authority of *Department for Courts v Crofts*,¹⁰ the correct focus in determining whether or not to order the matter to be investigated by the Authority or dealt with in this Court should be on how much overlap there is between the proceedings already before the Court and the unjustified dismissal proceedings. Ms Waring submitted that even if there was some overlap, it was insufficient to justify removal to the Court.

[21] In reference to the final warning proceedings, Ms Waring noted that the Authority did not specify which matters it considered overlapped with the dismissal proceedings and she submitted that there could be no overlap "in relation to the important matters of falsification of company records, use of company information and lying" and in those respects the parties "should have the benefit of the

Authority's investigation process in the first instance."

¹⁰ *Department for Courts v Crofts* ERA Auckland AA113/01, 14 August 2001.

[22] In relation to the unjustified suspension proceedings, Ms Waring submitted:

39. In determining whether or not the suspension was justified the Court will need to determine whether or not the nature of the disciplinary allegations (together or separately) was serious enough to warrant the proposal to suspend, which is a different issue to whether or not the allegations were factually substantiated, with different legal principles to be applied. The Court will also need to determine whether the employment relationship could effectively function during the course of the investigation, and whether or not a fair process was carried out (in particular whether the Defendant had the opportunity to respond to the proposal to suspend).

[23] Ms Waring invited the Court to conclude that its decision on the unjustified suspension proceeding would have no bearing on the Authority's decision as to whether or not the dismissal was justified and there would, therefore, be "no dual litigation if the matter were not removed". In another submission, which was repeated in her submissions in reply, Ms Waring stated:

22. It is submitted that if this proceeding is not removed to the Court, the Court will determine the question of "what duties could reasonably be required of Mr Burns" and the Authority will then be able to determine the dismissal proceeding based on the Courts decision. On that basis matters could be dealt with quite separately and there would be no dual litigation if the matter were not removed.

[24] In response, Ms Buckett, on behalf of Mr Burns, submitted:

23. The current proceedings which were removed are part of the *res gestae* of the matters already before the Employment Court and are a continuation of the same process, involving the same process, involving the same parties and the same employment agreement, including its interpretation, operation and implementation.

24. Central to all matters is the employment agreement and what that constituted, including what duties the defendant could reasonably be expected to do. The same thread runs through all proceedings. The matters are inseparable, beginning with a dispute as to the terms and conditions of employment in the absence of a written employment contract and ending in dismissal.

...

26. In determining each of the claims before it the Court will first have to establish what the terms and conditions of the defendant's employment were. Once this primary consideration has been determined the Court will be able to determine each of the defendant's claims.

[25] Both counsel cited various authorities, some of which were of only marginal relevance to the issues involved in this case. Both also sought to rely on the Court's residual discretion. Ms Waring submitted that even if a ground for removal under s 178(2) was established, the Court, in the exercise of its residual discretion, should not order the removal primarily because the intention of the legislature was that questions of disputed facts should be dealt with at first instance by the Authority and that investigation process should not be denied to the parties. Ms Waring also stressed that there would be "further opportunities for mediation" if the matter proceeded through the Authority and she made the point that an applicant should not be able to use the removal procedure "as a means to bypass the normal process on the most significant issue between the parties".

[26] Ms Buckett submitted that even if the Court were to conclude that the matter was not properly removed by the Authority it should, in the exercise of its discretion, decline to refer the matter back to the Authority because both parties had indicated that any determination of the Authority on the unjustified dismissal claim would inevitably be appealed to the Court. Ms Buckett made the observation that the parties had attended "multiple mediations" as well as a judicial settlement conference, all to no avail.

Discussion

[27] I have given careful consideration to the submissions advanced by counsel but I have not been persuaded that the unjustified dismissal proceeding was not properly removed to this Court by the Authority. The test for removal under s 178(2) (c) is whether the Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues. This does not necessarily involve an issue by issue analysis as to what evidentiary matters in the respective proceedings may or may not overlap or whether certain matters can be dealt with separately. That type of exercise is always a difficult undertaking at the interlocutory stage of a proceeding where, as in the present case, the facts are very much in dispute. It appears to me that, once it is established that the proceedings are between the same parties, the test envisages a more holistic consideration of the relevant issues. In this regard, I agree with the approach adopted by the Authority

when it stated that the issues to be determined in the matters already before the Court are "an intrinsic part of the factual matrix pertinent to the dismissal claim".¹¹ In other words, although the relevant issues in the three sets of proceedings are not identical, they are between the same parties and they are sufficiently similar or related to justify removal.

[28] Nor have I been persuaded that I should refer the matter back to the Authority for investigation in the exercise of my residual discretion. The case is complicated by the fact that Mr Burns was a long serving employee of Randwick but he had never signed an employment agreement. It is clear from the documentation before the Court that, in the absence of a signed employment agreement, an issue in each of the proceedings is going to relate to the terms and conditions of Mr Burns' employment and the precise nature of his duties and responsibilities. Ms Buckett, fairly accurately in my view, referred to these matters as a "common thread" running through all the proceedings.

[29] I accept the submission made by Ms Waring that an applicant should not be able to manipulate the system by using the removal procedure to bypass the normal Authority investigation process. This was a point noted in *Flight Attendants and Related Services (NZ) Association Inc v Air New Zealand Limited*, where Chief Judge Colgan referred to a possible tactic by applicants to file proceedings in order

to bolster their chances of removing other proceedings in the Authority.¹² Chief

Judge Colgan did not, however, find that to be the position in the case before him and nor do I in the present case. It is, nevertheless, a factor which the Court needs to be alert to.

[30] I also accept that the Court should not lightly take a step which, as Ms Waring put it, would deprive a party of its important right to challenge or appeal an Authority's determination in this Court. However, as Chief Judge Colgan noted in the *Flight Attendants* case, the statutory purpose of s 178(2)(c) is that issues affecting

the same parties, and which are the same or similar or related, "should be dealt

¹¹ *Burns v Randwick Meats Company Ltd*, above n 1 at [8].

12. *Flight Attendants and Related Services (NZ) Association Inc v Air New Zealand Ltd* [2013] NZEmpC 125 at [45].

with expeditiously in one venue and at one time".¹³

[31] Finally, I do not accept Ms Waring's submission that removal will deprive the parties of mediation opportunities. There have already been several unsuccessful mediations and the Court has a statutory obligation under s 188 of the Act to direct further mediation before it hears a matter unless it considers mediation inappropriate for one or other of the reasons stated in s 188(2)(b). However, I do make the observation, given the nature and extent of their personal involvement in the factual narrative (see [13] above, for example) that counsel for both parties will need to give careful consideration to the warning of Wilson J in *Vector Gas Limited v Bay of Plenty Energy Limited*, about the risk of practitioners being so personally involved in

the matters which are being litigated that they lose their objectivity.¹⁴ In this regard,

for the reasons touched upon by Justice Wilson, counsel will need to consider whether it is appropriate for them to continue acting in that capacity.

Conclusion

[32] For the reasons explained above, I consider that the dismissal proceeding was properly removed to this Court by the Authority and the application for an order under s 178(5) referring the matter back to the Authority for investigation is dismissed.

[33] The substantive dismissal proceeding is to be consolidated with the final warning and suspension challenges. As soon as the proceedings are in order, the Registrar is to arrange a directions conference where a decision will be made regarding the need for further reference to mediation and, if appropriate, a timetabling order will be decided upon leading up to the substantive hearing.

[34] Costs are reserved.

Judgment signed at 10.00 am on 21 October 2015

A D Ford

Judge

¹³ *Flight Attendants and Related Services (NZ) Association Inc v Air New Zealand*, above n 8 at

[42].

¹⁴ *Vector Gas Limited v Bay of Plenty Energy Ltd* [2010] NZSC 5, at [147-148].