Employment Court of New Zealand

Rawlings v Sanco NZ Limited CC2A/06 [2006] NZEmpC 56; [2006] ERNZ 566 (23 June 2006)

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IN THE EMPLOYMENT COURT CHRISTCHURCH

CC 2A/06

CRC 28/05

IN THE MATTER OF a challenge to detemination of Employment

Relations Authority

BETWEEN KENNETH BENJAMIN RAWLINGS Plaintiff

AND SANCO NZ LIMITED Defendant

Hearing: 15 June 2006

(By telephone conference call)

Appearances: Francis Wall, Agent for Plaintiff

Shauna McClelland, Counsel for Defendant

Judgment: 23 June 2006

Interlocutory Judgment No. 2 of Chief Judge G L Colgan

[1] A hearing de novo of his challenge to the determination of the Employment Relations Authority having been refused[1], I must now determine the nature and extent of the hearing pursuant to s182(3) of the Employment Relations Act 2000. This is not a simple matter.

[2] The background to the case is as follows. I have taken these details from the

Authority's determination.

[3] Mr Rawlings was employed by Sanco NZ Limited under an employment agreement that made provision for redundancy compensation but also provided that there would be no such compensation in the event that Sanco was sold as a going concern and that its employees were *"retained in their positiofns"*. In mid 2002

Sanco sold its business to Gabbett Machinery Ltd. Mr Rawlings continued to work

for Gabbett until late March 2005 when he was dismissed. Mr Rawlings asserted that his dismissal by Gabbett was unjustified and that he was entitled to redundancy compensation from that company calculated by reference to his service with both Gabbett and Sanco.

[4] Mr Rawlings brought separate personal grievance proceedings in the Employment Relations Authority against both companies. His claim against Sanco alleged that he had been unjustifiably disadvantaged in his employment with Sanco by having been given certain assurances by that employer as to his entitlement to redundancy compensation.

[5] Mr Wall tells me that the Employment Relations Authority deemed Mr Rawlings's proceedings against Gabbett to have been withdrawn or abandoned. Mr Rawlings has subsequently sought judicial review of the Authority's decision in that regard. The Authority has in turn applied to strike out Mr Rawlings's judicial review proceedings. The strike out application has been heard by another Judge in this Court but no decision has yet been given in that case. Mr Wall tells me that counsel for the Employment Relations Authority, that is the respondent in the Gabbett judicial review proceedings, has conceded that if the Authority's strike out claim is unsuccessful, the Authority will not oppose his application for judicial review and, in these circumstances, Mr Wall anticipates that his client's case against Gabbett will be able to continue in the Employment Relations Authority.

[6] The Authority determined Mr Rawlings's grievance claim against Sanco in circumstances set out in my February 2006 judgment that do not need to be repeated in this.

[7] Ms McClelland, who was counsel for Sanco present at the Authority's investigation meeting on 23 September 2005, advised me that the following took place on that occasion. The Authority had Mr Rawlings's statement of problem with some annexed documents and Sanco's statement in reply, together with further annexed documents that Ms McClelland says included an unsigned version of the employment agreement. Counsel advises me that after waiting for Mr Wall and Mr Rawlings to attend the investigation meeting, the Authority Member advised her that he would determine the case *"on the papers"*. No witnesses were examined (or indeed were present for examination), no submissions were invited from Sanco and

no further documents were provided to the Authority other than those that had been attached to the statements of problem and in reply.

[8] In its written determination issued three days later on 26 September, the Authority determined that Mr Rawlings had no personal grievance. It did so for three stated reasons. The first was that the plaintiff did not raise his grievance with Sanco

until May 2005 when he commenced his proceedings in the Authority, almost three years after he had ceased to be employed by Sanco. The Authority noted that the company had not agreed to Mr Rawlings's grievance being raised after the 90 days provided for this in the statute and that he had not applied for leave to do so. The Authority also concluded: *"... there do not appear to be any grounds for such an application."*

[9] Next, the Authority decided:

In any event, an action deriving solely from the application or operation of an employment agreement cannot be a personal grievance: see s103 (3) of the Employment Relations Act 2000. The real issue is simply whether Mr Rawlings was entitled to any redundancy compensation under the terms of his employment agreement with Sanco. That must be resolved by identifying the terms of the employment and deciding whether he is entitled to any redundancy compensation given the circumstances referred to above.

[10] The Authority concluded that if there was any contractual entitlement to redundancy compensation from Sanco, Mr Rawlings could recover such monies as arrears under s131 notwithstanding the passage of time.

[11] Finally, the Authority concluded that the terms of the written employment agreement between Sanco and Mr Rawlings precluded his claim. It said that the provision that *"where the company is sold as a going concern and the employees are retained in their positions then no redundancy payments shall be made"* precluded Mr Rawlings from succeeding because he *"retained his position with the new owner of the business".*

[12] Having determined that Mr Rawlings should not have his election to challenge the determination by a hearing de novo (that is by *"a full hearing of the entire matter"* that was before the Authority), I must determine the just nature and scope of the challenge. As to its nature, I have determined that the challenge should be akin to a conventional appeal. That is, there will be an onus on Mr Rawlings to persuade the Court that the Authority's determination on the information that was before it, was wrong. That is a narrower form of challenge than by hearing de novo in which the Court would begin with a clean slate and without any presumption of

correctness that the challenging party must dislodge: see the description by William Young J of the nature of a challenge by hearing de novo in *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315, para [2].

[13] As to the scope of the challenge, this is a matter of determining what issues may be put before the Court and the extent of evidence that may be permitted to be called about these issues.

[14] Each of the three issues on which the Authority relied to dismiss the grievance ought fairly to be within the scope of the challenge. These are the compliance with the 90-day issue, whether s103(3) precludes a grievance, and the interpretation of the employment agreement that all went against Mr Rawlings. He will be entitled to call relevant evidence and adduce relevant exhibits in respect of these three issues at the hearing of the challenge.

[15] I must also determine whether, as Mr Wall submits, these issues should be isolated and dealt with as preliminary ones or, if not, whether the other substantive claims made by Mr Rawlings against Sanco should be heard and determined at the same time.

[16] Ms McClelland submitted that in view of my having concluded that Mr Rawlings is not entitled to a hearing de novo, he should not now have another opportunity to call evidence as he had but rejected before the Authority. Counsel also submitted that any documents leading to the challenge should be confined to those that were before the Authority.

[17] I have already concluded that in respect of the three issues determined by the Authority and summarised above, Mr

Rawlings will bear an onus of persuading the Court that the Authority's determination was wrong.

[18] He must, in fairness, have an opportunity to do so by calling evidence including documentary exhibits. I also consider that the fairest course is for all other issues that were before the Authority on the parties' pleadings should be dealt with at the same hearing although, in respect of these, there will be no presumption of correctness of the Authority's determination because it did not decide to dismiss the grievance in reliance on any finding about them. So in these other respects, the usual personal grievance onuses and burdens will prevail: that is that Mr Rawlings will have to establish a prima facie case of personal grievance and, thereafter, the onus will shift to Sanco to justify its actions.

[19] Mr Rawlings will present his case first and Sanco will follow. The plaintiff must file and serve briefs of the evidence of any witnesses no later than 14 days before the hearing with the defendant doing likewise within 7 days. All relevant documents intended to be relied on by the parties must be bundled and given to the Court 3 clear days before the hearing.

[20] Finally, counsel for the defendant makes the valid point that the pleadings in this Court are not yet in order and, in particular, that the plaintiff's statement of claim is not in a form that can properly be responded to by Sanco. I agree and direct that, within 14 days of this judgment, Mr Rawlings must file and serve a statement of claim that meets the requirements of reg 11 of the Employment Court Regulations

2000. The defendant will thereafter have the period of 14 days within which to file and serve a statement of defence to that statement of claim. If, at the end of the following period of two weeks, neither party has notified the Registrar of any other interlocutory matters that either may wish the Court to determine, the Registrar should then set the case down for hearing in Christchurch on a date that will be convenient to the parties and their witnesses.

[21] Finally, I leave open the question of a possible amalgamation of these proceedings with Mr Rawlings's proceedings against Gabbett should the matter survive the judicial review application currently before the Court and not remain for hearing at first instance in the Authority. By this I certainly do not intend to indicate any view as to the venue for the Gabbett proceedings at first instance if they are reinstated as a result of the judicial review proceedings. That will be a matter for the parties and the Authority in the first instance. Because there are closely associated questions in each case, despite having different defendants who are separately represented, I raised this issue with Mr Wall and Ms McClelland for their consideration as part of a broader discussion about how Mr Rawlings's proceedings might be dealt with expeditiously as well as justly. There are, however, a number of steps to be taken before this is even a possibility and however desirable may be the expeditious disposal of both cases, Sanco is entitled to a prompt resolution of the case against it.

GL Colgan
Chief Judge

Judgment signed at 11.45 am on Friday 23 June 2006

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[1] *Rawlings v Sanco NZ Limited* unreported, 10 February 2006, CC 2/06
