Employment Court of New Zealand

Rossiter v AFFCO New Zealand Limited [2016] NZEmpC 144 (8 November 2016)

Last Updated: 16 November 2016

IN THE EMPLOYMENT COURT WELLINGTON

[2016] NZEmpC 144

EMPC 233/2016

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	JOHN ONEPU ROSSITER Plaintiff
AND	AFFCO NEW ZEALAND LIMITED Defendant

Hearing: By memoranda of submissions filed on 17 October and 1, 4 and 7 November 2016

Appearances: SR Mitchell, counsel for plaintiff
G Malone, counsel for defendant

Judgment: 8 November 2016

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] A preliminary jurisdictional issue has arisen in this case in which John Rossiter wishes to challenge, by hearing de novo, a determination of the Employment Relations Authority staying its investigation of his personal grievance.1

The plaintiff says he was dismissed constructively and unjustifiably by AFFCO New Zealand Ltd (AFFCO). The stay is to operate until the Court of Appeal decides two proceedings. It has already decided one and is to hear an application for leave to appeal another judgment of this Court on 28 November 2016, so counsel for the plaintiff informs the Court.

[2] The timetabling direction made by the Court in its Minute of 29 September

2016 provided for the defendant to make written submissions to the Court on the s 179(5) issue with the plaintiff being able to respond likewise thereafter. There was

no provision for the defendant to file further written submissions. Nevertheless,

1 *Rossiter v AFFCO New Zealand Ltd* [2016] NZERA Wellington 108.

counsel for the defendant purported to do so on 4 November 2016. Because this was outside the terms of the timetable order, I required the defendant to have leave to do so. This was opposed by the plaintiff who said, through counsel that the defendant's second memorandum did not address matters strictly in reply but amounted, rather, to a reiteration of its earlier submissions and that "[t]he further submissions do not raise any new matter. The issues are now sufficiently before the Court for a decision to issue. The Court is not assisted by further submissions."

[3] In the circumstances, I have decided to allow, by granting it leave, the defendant to make those further submissions it filed on 7

November 2016. In my view they do, at least in significant part, reply to the plaintiff's submissions made on

1 November 2016 and the matters at issue, even on this preliminary question, are of such significance that the parties should be heard fully on them. That should not be taken as a licence to ignore timetabled directions and not to seek a variation to them where the interests of justice may so require.

[4] Mr Rossiter says that at the end of the off-season at AFFCO's Wairoa plant, he was offered work for the forthcoming 2015-2016 season on the terms of an individual employment agreement stipulated for by AFFCO. Mr Rossiter agreed initially to be employed on those terms and conditions. He subsequently reconsidered his commitment in light of the assertion of his union, the New Zealand Meat Workers & Associated Trades Union Inc (the Union), that such engagements should be on collective terms and conditions for which it was then bargaining with AFFCO. Mr Rossiter purported to repudiate his individual employment agreement and did not turn up for work on those individual terms and conditions. He claims he was then dismissed both constructively and unjustifiably by AFFCO when it refused to engage him on any but its individual terms and conditions.

[5] Mr Rossiter took his complaint to the Authority which, on 30 August 2016, stayed its investigation of his personal grievance on the basis of then ongoing litigation between the Union and AFFCO. At the point of staying its investigation on

30 August 2016, that litigation referred to was in two parts. It was the subject of a reserved judgment of the Court of Appeal in an appeal against the 18 November

2015 decision of a full Employment Court2 that union members such as Mr Rossiter were employees of AFFCO during the off-season and, separately, that AFFCO had unlawfully locked out such employees. That judgment of the Court of Appeal was issued on 6 October 2016.3

[6] There was a second judgment of the Employment Court issued on 11

February 2016, an appeal from which also formed the basis of the Authority's stay.4

This dealt with a claim to lost remuneration and other compensation for employees at AFFCO's Wairoa works which were awarded to the employees. They relied, significantly, on the full Court's judgment issued about three months previously and AFFCO has likewise sought the leave of the Court of Appeal to appeal against what I will call the "Wairoa remedies" judgment. As already noted, AFFCO's application for leave will apparently be heard by the Court of Appeal on 28 November 2016. In some respects, at least, that application for leave will no doubt stand or fall according to the Court of Appeal's judgment in the full Court appeal.

[7] If leave to appeal against the Wairoa remedies judgment is granted, I imagine that the hearing of that appeal will not take place, at the earliest, until the first or second quarter of 2017. Even if leave is refused by the Court of Appeal, it is likely that this will be the subject of a reasoned judgment to be issued after 28 November

2016. Either way, there will be some delay in determining the future of the Wairoa

remedies judgment and, therefore, the end point of the Authority's stay order.

[8] Mr Mitchell for the plaintiff submitted that the Authority's order for stay applies, even now, at least until the resolution of AFFCO's application to the Supreme Court for leave to appeal against the judgment of the Court of Appeal between these parties, delivered on 6 October 2016.5 I do not so read the Authority's determination. Although it does not set out formally at its conclusion the precise

terms of a stay order, the Authority's determination at [24] nevertheless refers

2. *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd* [2015] NZEmpC 204.
3. *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2016] NZCA 482.
4. *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd* [2016] NZEmpC 7.

5 *AFFCO*, above n 3.

specifically to "Mr Rossiter's proceedings being put on hold until such time as the Court of Appeal has determined the appeals pertinent to his claims." There is no reference to any subsequent appellate process and, indeed, if interpreted strictly, there is also no reference in the Authority's order to judicial review proceedings now before the Court of Appeal affecting the parties or to proceedings before this Court or the Authority. Those review proceedings were, however, issued after the stay was ordered, although they may be the grounds for a renewed or extended stay application by AFFCO.

[9] There have been three further relevant developments in the broader litigation. First, AFFCO has told the Court that leave will now be sought to appeal to the Supreme Court against the Court of Appeal's findings against it that it unlawfully locked out the employees. It is possible, also, that the Union may seek leave to cross-appeal to the Supreme Court on the question of discontinuous employment.

[10] The second development is (as already mentioned) that the judgment of the full Court of the Employment Court issued in November 2015 and which formed the basis of the appeal just referred to, may also be impugned by AFFCO's recent application to the Court of Appeal for judicial review of the full Employment Court in its procedure leading to that judgment.

[11] Those further actual or potential proceedings are, in my assessment, not covered by the stay, but it is logical that AFFCO might seek an extension of the stay, or a further stay, to cover them as well.

[12] So, it is likely that the stay will continue in place until at least early 2017 and perhaps even until towards mid-next year.

[13] The third recent development is that there has now been a direction (by consent) to settle collective bargaining and associated litigation by mediation.6

Proceedings between the parties under ss 50J and 50K of the Act affecting collective

bargaining have been adjourned until 13 March 2017 to give mediation a chance.

6. *AFFCO New Zealand Ltd v The New Zealand Meatworkers & Related Trades Union Inc* [2016] NZEmpC 138.

Irrespective of whether a collective agreement may eventually ensue, all current proceedings may still run to their conclusions, which, on past form, may well include appeals if not judicial review applications as well.

[14] So there is a possibility of a hearing of past contentious issues occurring in the Supreme Court at some time in 2017, together with a hearing, also next year, of the judicial review application in the Court of Appeal which may potentially affect the validity of the full Court's judgment. Therefore, it may be some considerable time before all of the current litigation between the Union and AFFCO is concluded.

[15] The terms of the Authority's current order for stay mean that it might expire in early 2017 or later in the year. However, other developments to which I have referred (an appeal and possible cross-appeal to the Supreme Court and the further challenge to the full Employment Court's judgment by an application for judicial review) mean that if the Authority continues to apply the same reasoning to a further application by AFFCO for stay of Mr Rossiter's proceedings and follows its earlier decision and reasoning, its investigation may be delayed at least until well into 2017, by which time Mr Rossiter may have been held out of work for AFFCO for two years.

[16] With that long-winded but necessarily essential background, I come now to the preliminary issue which must be decided in respect of Mr Rossiter's challenge to the Authority's stay determination. When the plaintiff's statement of claim was received by the Court, this raised a possible jurisdictional red flag under s 179(5) of the Employment Relations Act 2000 (the Act) which, relating to entitlements to challenge Authority determinations, provides:

(5) Subsection (1) does not apply—

(aa) to an oral determination or an oral indication of preliminary findings given by the Authority under section 174(a) or (b); and

(a) to a determination, or part of a determination, about the procedure that the Authority has followed, is following, or is

intending to follow; and

(b) without limiting paragraph (a), to a determination, or part of a determination, about whether the Authority may follow or

adopt a particular procedure.

[17] The Court invited written submissions from the parties on whether s 179(5) is engaged and these have now been received. On grounds that I will subsequently set out in more detail, AFFCO says that s 179(5) prohibits Mr Rossiter from bringing this challenge. Mr Rossiter says that this is not so and that the effect or consequence of the Authority's determination means that it is not on a matter of its procedure.

[18] Is the Authority's determination about the procedure that the Authority has followed, is following, or is intending to follow? To the extent that the consequence of its stay order is only to delay, and not to prevent, the Authority's investigation of Mr Rossiter's claims, it might be said that this is a matter of the Authority's procedure. When, however, one looks at the consequences of the order for stay that the Authority made, these potentially affect Mr Rossiter very significantly. He has been, is and may well remain unemployed in a town in which the major employer is AFFCO and in a field of work in which he is skilled and experienced, but without alternative meat works jobs being available.

[19] Next, as the full Court explained in *H v A Ltd*,7 the leading recent judgment in this Court about s 179(5), the parliamentary intention in enacting s 179(5) of the Act was to expedite Authority investigations and determinations and to prevent these from being delayed and frustrated by challenges to the Authority's procedures. The issue in that case was whether s 179(5) precluded a challenge to the Authority's determination refusing a non-publication order about H's identity during the investigation of his grievance. The unanimity of the full Court in *H v A Ltd* dealt with the interpretation and application of s 179(5) between [7] and [29] of the judgment of Judge Inglis. Pertinent, for the purpose of this case, was the acceptance by the full Court of the statement by the Court of Appeal in *Employment Relations Authority v Rawlings* that "We are satisfied that ss 179(5) and 184(1A) are intended to prevent challenge or review processes disrupting unfinished Authority

investigations."8

[20] Further, the full Court in *H v A Ltd* also endorsed the remarks of the earlier full Court in *Keys v Flight Centre (NZ) Ltd* that:9

... the notion of "procedure" is limited to the manner in which the Authority conducts its business and does not include outcomes, substantive or interim, and certainly not a determination of its jurisdiction.

[21] At [14] of its judgment in *H v A Ltd*, the Court said that:

... in assessing whether a decision of the Authority is procedural or not, it is more important to have regard to the effect of the decision rather than the nature of the power being exercised.

[22] Then, at [17] the full Court concluded:

The Authority's investigatory procedures and meetings should generally proceed uninterrupted by challenges. It would undermine the evident purposes of s 179(5) and the Act more generally to allow or encourage challenges at a pre-determination stage, thereby increasing costs, reliance on legalities and technicalities, and generating delays.

[23] Next, the full Court referred to the Explanatory Note to the Employment

Relations Law Reform Bill (No 2) which dealt with what is now s 179(5):10

... the Bill improves the ability of the Employment Relations Authority to deliver speedy, effective, and non-legalistic problem resolution services by restricting the ability of the Employment Court to intervene during Authority investigations. This will ensure that the focus remains on the immediate employment relationship problem itself, rather than on how the institutions deal with it.

[24] Next, at [20] the full Court in *H v A Ltd* referred to the objects of pt 10 of the Act into which s 179 falls. These are set out in s 143. The Court identified the statutory focus on the expeditious resolution of employment relationship problems and the relatively informal way in which the Authority is to operate, without undue regard to technicalities. Section 143(fa) provides that one of the objects of pt 10 of the Act is to "...ensure that investigations by the specialist decision-making body are, generally, concluded before any higher court exercises its jurisdiction in relation to the investigations...".

[25] As the full Court in *H v A Ltd* pointed out, this is reinforced by s 157(1), setting out the role of the Authority which provides:

The Authority is an investigative body that has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities.

[26] Section 160 is also relevant. It allows the Authority, in investigating any matter, to follow whatever procedure it considers appropriate.

[27] At [23]-[28] the full Court in *H v A Ltd* stated:

[23] It is clear that the policy intent underlying s 179(5) is to enable the Authority to settle matters coming before it at the appropriate level, with as little judicial intervention during the investigative process as possible. A balance is struck between the policy imperatives underlying the reforms and access to justice considerations in the retention of the right of challenge or review once the Authority has made a final determination on the matter before it.

[24] We do not, however, consider that s 179(5) is to be construed as wholly ousting access to the Court at an interlocutory stage. This would be the effect of adopting the defendant's approach in the present case. Instead, the Court must have regard to the effect of the Authority's determination in light of the policy objectives set out above.

[25] While not impacting on (and, in particular, delaying) the substantive outcome of a proceeding, a refusal to grant a non-publication order may well cause significant and irreversible damage – not only to the applicant but also affected non-parties. Although an ability to challenge the refusal of a non- publication order at an interlocutory stage may disrupt unfinished Authority business, in the sense identified by the Court of Appeal in Rawlings, its distinguishing characteristic is that it is not the sort of determination that can subsequently be remedied on a challenge or by way of review. The horse will have well and truly bolted by that stage.

[26] A refusal to make a non-publication order does not fall within s

179(5), not because such an order directly impacts on a party's rights or

obligations but rather because the denial of such an order has an irreversible

and substantive effect. It cannot have been Parliament's intention that a litigant in the plaintiff's shoes would have such an important issue (non- publication) determined at first and last instance by the Authority, with no recourse to the Court to review the Authority's refusal.

[27] In this regard, it is evident that the new sections introduced by the

2004 amendments are not intended to deny a party access to justice, but are rather intended to facilitate the resolution of employment relationship problems through providing a forum that is not unduly preoccupied with legal technicalities. Section 179(5) operates to defer, in order to give effect to the important policy imperatives underlying the provisions, but not deny

access to the Court. To apply subs (5) to the circumstances of this case would be to deny access to justice.

[28] Accordingly, a determination of the Authority will be amenable to challenge where it has a substantive effect, which cannot otherwise be remedied on a challenge or by way of review.

(citations omitted)

[28] Next, because both parties have referred to it, I address the judgment of this Court in *X v Bay of Plenty District Health Board* where the Judge decided that an Authority's determination to stay investigation of proceedings before it, pending the outcome of a

prosecution of the employer, was a matter of its procedure and thus

precluded by s 179(5).11 Judge Travis found that s 179(5) prohibited a challenge to

the Authority's determination to stay a personal grievance in that forum while associated quasi-criminal charges were before the District Court. What is significant about that case, however, is that the Judge conceded at [24] that a "long delay" during which the Authority's investigation was stayed, could mean that there was such a substantive effect that the stay was not simply a matter of the Authority's procedure, although that point had not then been reached in *X*'s case.

[29] Although counsel for the defendant argues that *X* is distinguishable because the reason for the stay in that case was an unconcluded prosecution, which is not the situation here, that is not, in my view, a valid distinguishing characteristic. Rather, the principle is whether a stay to allow the connected litigation to be concluded is a matter simply of the Authority's procedure when that stay could be of an inordinate length.

[30] I conclude that a stay of its investigation meeting by the Authority, in the circumstances of these parties and this case, is not precluded from challenge by s 179(5). Although the current stay has a limited duration, it is at least possible, if not probable, that another order for stay of its investigation to be sought by AFFCO and made by the Authority, will operate both indefinitely and for many months to come. That would be contrary to the parliamentary purposes outlined above of expeditious disposal of proceedings before the Authority.

[31] To adopt the language of the judgments of this Court and the Court of Appeal which have interpreted and applied s 179(5), to prohibit Mr Rossiter's challenge by categorising the Authority's order for stay as a matter of its procedure will not expedite its investigation and determination of his claims. The stay, and its potentially indefinite duration especially if renewed, is an outcome of the case in the Authority. It is in this case particularly important to have regard to the effect of the Authority's decision rather than the nature of the power being exercised. To prohibit a challenge to the Authority's stay order, and the real possibility of an extension of it, would be to remove the focus of the proceedings from the immediate employment relationship problem itself. To invoke s 179(5) in the circumstances of this case would be to put up a barrier to access to justice for a plaintiff such as Mr Rossiter. Prohibiting his challenge by invoking s 179(5) would have, if not an irreversible consequence, then a significant substantive effect. Dismissed employees cannot wait indefinitely in the hope that their proceedings will eventually be investigated and determined: the need for an income, not to mention the dignity of work to end the indignity of unemployment, should not mean that access to justice must be forgone because of interminable delay.

[32] Further, the Authority must apply the law as it stands and not as it might be depending on the outcome of an appellate process. At present, the law is as the Court of Appeal concluded in its 6 October 2016 judgment.12 The Authority will not be able to be criticised justly for applying that law, even if it is subsequently changed by an appeal to the Supreme Court or by the outcome of the judicial review proceedings currently before the Court of Appeal.

[33] Interminable delay in having the plaintiff's case determined is not simply a matter of the Authority's procedure that can be remedied eventually on a justiciable challenge. The potential delay is a substantive and substantial consequence that cannot be later corrected or ameliorated. Mr Rossiter has been out of work with his former employer, that offered him work and presumably wants him to work, for almost 18 months. It would engage serious access to justice questions if the Authority's stay orders were to be extended, as seems likely.

[34] Mr Rossiter's challenge is not, therefore, precluded by s 179(5).

[35] In relation to the challenge that may now proceed in the Court, I would simply note that the remaining condition upon which the Authority's stay was granted may have expired by the time that the Employment Court comes to consider the merits of Mr Rossiter's challenge to the Authority's stay determination. That is, the Court of Appeal may have decided not to grant leave to AFFCO to challenge the Wairoa remedies judgment of Judge Corkill. If leave is refused, then the Authority's stay lapses and it will be bound to proceed with its investigation of Mr Rossiter's claims. If AFFCO is granted leave by the Court of Appeal to appeal, then the stay granted by the Authority would appear to continue. That is because the terms of the stay at [24] of its determination are that it is to apply "... until such time as the Court of Appeal has determined the appeals pertinent to his claims." I have already referred to the realistic possibility of the Authority being asked by AFFCO to extend the stay until the Supreme Court concludes either or both of these cases, not to mention until the Court of Appeal determines the judicial review proceedings now before it.

[36] In these circumstances, the Registrar should arrange a telephone directions conference with counsel for the parties shortly after 28 November 2016, the date on which the Court of Appeal is to consider AFFCO's application for leave to appeal against the Wairoa remedies judgment. The statement of defence will also have been served by then. Leave is reserved for Mr Rossiter to apply on notice for an earlier directions conference if the circumstances change before then.

[37] Costs are reserved.

GL Colgan

Chief Judge

Judgment signed at 12.20 pm on 8 November 2016