

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 315
3145101

BETWEEN JAMES SMALLEY
Applicant

AND HAMILTON HINDIN GREEN LIMITED
Respondent

Member of Authority: David G Beck

Representatives: Shaun Brookes, counsel for the Applicant
Tim McKenzie, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 9 May 2024 from the Applicant
2 May 2024 from the Respondent

Date of Determination: 28 May 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The issue in dispute is whether this matter should be removed by the Authority to the Employment Court pursuant to s 178 of the Employment Relations Act 2000 (the Act) to resolve an impasse in the disclosure of documentation.

[2] This matter has a significant history stretching back to 2017. James Smalley was employed by Hamilton Hindin Greene Limited (“HHG”) from 8 January 2001 until 23 March 2018, latterly as a financial adviser pursuant to an individual employment agreement. Mr Smalley has worked in various capacities for HHG including being a director, employee, and a contractor.

[3] The genesis of this current dispute is Mr Smalley's initial application to the Authority of 6 July 2021 claiming that HHG incorrectly calculated his accumulated holiday pay entitlements upon the ending of his employment.

[4] However, since then, the parties have been engaged in continuous disputation. This has included a direction to an unsuccessful mediation and preliminary determination of the Authority issued in October 2022 that held that Mr Smalley was not prevented from pursuing his claims by dint of him signing a settlement agreement in mid-2017 pursuant to s 149 of the Act.¹

[5] HHG then challenged the Authority determination but discontinued the challenge on 23 May 2023, despite the proceedings being set down for a hearing of the Employment Court. In a subsequent judgment of the court, Mr Smalley obtained an award of costs against HHG.²

[6] Thereafter after a teleconference, the Authority in a directions notice of 8 June 2023, directed the parties back to mediation and dealt with the matter of disclosure of various documents sought by Mr Smalley's counsel in a memorandum of 8 June 2023. On the latter issue, the Authority broadly directed HHG to "disclose to the applicant all relevant documentation they hold pertaining to the matters in dispute." In anticipation of the matter not being resolved at what was a second mediation, a timeline for the exchange of briefs of evidence was detailed and an investigation meeting was scheduled for 21 and 22 November 2023. This proved prescient as the matter subsequently did not resolve by mediation.

[7] On 21 July 2023, HHG's counsel filed a memorandum "regarding disclosure" issues in dispute. The memorandum identified from HHG's perspective, a suggestion that Mr Smalley was unnecessarily litigious by citing parallel civil court actions concerning disputed share transfers up to Court of Appeal level and, then questioned the scope, extent and relevance of documentation Mr Smalley was seeking to pursue the matter in the Authority. The memorandum detailed documentation already disclosed (including various payslips, email traffic on submitted leave requests and brokerage information relevant to

¹ *Smalley v Hamilton Hinden Green(e)* [2022] NZERA 525.

² *Hamilton Hindin Greene Ltd v Smalley* [2023] NZEmpC 110.

bonus calculations). Mr Smalley's counsel also filed a memorandum identifying unresolved disclosure issues.

[8] On 21 July 2023, Mr Smalley filed an amended statement of problem and then a further comprehensive memorandum identifying disclosure items sought. The Authority subsequently on 8 August 2023, by way of a memorandum, directed HHG to revisit requested disclosure items and set a new timetable for briefs of evidence exchanges and provision of an updated statement in reply.

[9] By memorandum of 25 August HHG's counsel provided further disclosure but disputed the scope of the Authority's previous direction (seeking to have it recalled). A memorandum of 28 August from HHG's counsel set out their defence to Mr Smalley's amended claims. A further memorandum from Mr Smalley's counsel of 1 September, opposed the recall request. An application was then made by Mr Smally on 6 September, for a compliance order pursuant to s 137(1)(b) and s 137(2) of the Act seeking that HHG comply with the Authority's direction notice of 16 August 2023.

[10] A teleconference on 25 September led to the issuing of a directions notice vacating the 21-22 November Investigation meeting in favour of a 21 November further preliminary investigation meeting to deal with the compliance request associated with unresolved disclosure issues. The investigation of Mr Smalley's substantive claims was deferred till early 2024 and the parties were asked to signal their availability for a range of offered dates.

[11] The outcome of the 21 November investigation meeting was by agreement, an adjournment, and an oral direction to each party to deal with respective disclosure items. After some difficulty in establishing a date for the substantive investigation meeting, 22-23 April 2024 was confirmed.

[12] In the interim, the disclosure issues remained unresolved into early 2024, further memoranda from the parties were provided to the Authority on 8, 15 and 19 March.

[13] Given the unresolved disclosure matters were preventing Mr Smalley from filing an evidential brief in a timely manner it necessitated, on Mr Smalley's counsel's request, a

postponement of the substantive April investigation meeting. In the interim, I directed HHG to provide specific information within 20 days and thereafter timetabled exchanges of evidential briefs in anticipation of a rescheduled investigation meeting in mid-July.

[14] However, further disputation over disclosure ensued with HHG's counsel filing memoranda of 17 and 18 April and an affidavit from a HHG director suggesting Mr Smalley had widened the scope of documentation sought, questioned relevance of documents sought and noted that some information needed to be redacted to avoid legal jeopardy in other proceedings. HHG also suggested they had been given insufficient time to respond to my earlier direction.

Removal to the Employment Court

[15] I then received submissions on 2 and 9 May 2024 in relation to the issue of whether the matter should generally in "all the circumstances" of the impasse over disclosure matters, be referred to the Employment Court pursuant to s 178(2)(d) of the Act by the Authority.³

[16] HHG's counsel's submission acknowledged that none of the specific factors in s178(2), (a) – (c) of the Act prevail. However, the Employment Court, Chief Judge's decision of *Johnston v The Fletcher Construction Company Limited* was cited in support of s 178(2)(d) being a legitimate 'stand-alone' general ground for removal depending upon the specific circumstances.⁴ The grounds advanced by HHG's counsel seeking removal of the entire proceedings to the court are that:

- (i) The more formal pleadings requirements will ensure that the applicant is required to fully and fairly set out his claim, in turn assisting with the applicant's discovery concerns and any response to them.
- (ii) The formal discovery regime in the Court will assist in distilling what is actually relevant and required.
- (iii) The requirement for sworn evidence, and any evidence being given in a court of record, is important where allegations of creating false records have been made and need to be determined.

³ Section 178(2)(d) Employment Relations Act 2000, states "the Authority is of the opinion that in all the circumstances the court should determine the matter".

⁴ *Johnston v The Fletcher Construction Company Limited* [2017] NZEmpC 157 at [39].

- (iv) The regime of predictable interlocutory costs awards may encourage the applicant's disclosure applications to be more considered.
- (v) The respondent is confident that the applicant will challenge the ultimate decision of the Authority, regardless of result.
- (vi) A Judicial Settlement Conference may be convened, after a particular claim is directed and produced, which in combination may have more chances of resolving the matter than previously attempted mediation.⁵

[17] In general, HHG's counsel then made an objectively salient point that costs already expended in the Authority proceedings were disproportionate and likely to result in significant duplication in the court if not removed before the Authority proceeds with a substantive investigation. Counsel also cited the Authority's application of *Johnston in Smith's City (Southern) Limited v Claxton* as being analogous, which opined in the circumstances prevailing, the court's "structured process" of document disclosure would better serve the parties and that it was more suited to a purely adversarial process.⁶

[18] In contrast Mr Smalley's counsel suggested the disclosure matter was settled as the Authority direction of 18 March 2024 had not been challenged by the respondent pursuant to s 179(1) of the Act.

[19] Further, removal of the entire matter to the Employment Court was opposed on the basis that the Authority was best placed to determine the matter and removal would increase Mr Smalley's costs and further delay would ensue. Counsel suggested removal would be contrary to the objectives of the Act, inconsistent with case law and rightly alluded to the premise it would prevent Mr Smalley from challenging any findings of fact.

Assessment

[20] Removal applications are governed by s 178 of the Act, the Authority in exercising its discretion and applying s 178 (2) factors, the Authority must also consider that Section 3 of the Act setting out the Act's scheme or objects, at 3(a) (vi), identifies the reduction of the need for judicial intervention to be a key part of the Act's purpose.

⁵ Respondent counsel's submission of 2 May 2024.

⁶ *Smith's City (Southern) Limited v Claxton* [2019] NZERA 647.

[21] The Act's objects are explicitly reinforced by s 143, that deals with establishing procedures and institutions. Section 143(e) of the Act recognises that while employment relationships are ideally best resolved promptly by the parties, there will "always be some cases that require judicial intervention".

[22] The Authority's 'first stop' role as an adjudicative body and exclusive jurisdiction for employment relationship disputes has also been affirmed by the Supreme Court in both *Gill Pizza Ltd v Labour Inspector Ministry of Business, Innovation and Employment* and *FMV v TZB*.⁷

[23] In addition, as cited by counsel for Mr Smalley, I do recognise that the Court of Appeal in *Labour Inspector v Gill Pizza Limited and Ors* has suggested removal to the Employment Court before investigation should be "contemplated in relatively limited circumstances".⁸

[24] In applying the Authority's essentially residual discretion under s 178(d) of the Act, I consider the lengthy attempts by the parties to resolve disclosure matters and the contextual factors I have identified in the history of this employment relationship problem make it objectively reasonable to find intractable and unique features in this matter. While the Authority has made several attempts to encourage agreement on the disclosure of documentation and I acknowledge that our directions have not been formally challenged, it has proven so far impossible to get agreement on a way forward in a timely manner. Mr Smalley perceives HHG is being tactically obstructive and HHG perceive Mr Smalley is unnecessarily pursuing irrelevant disclosure items to put them to cost in furtherance of a bitter employment relationship breakup.

[25] Although the central feature of this matter is Mr Smalley seeking to recover statutory holiday entitlements, the context of his employment with HHG and how he was remunerated and had holidays allocated was not straightforward but he could not be described as someone

⁷ *Gill Pizza Ltd v Labour Inspector Ministry of Business, Innovation and Employment* [2021] NZSC 184 and *FMV v TZB* [2021] 1 NZLR 466.

⁸ *A Labour Inspector (Ministry of Business, Innovation and Employment) v Gill Pizza Ltd and Ors* [2020] NZCA 192 at [48].

being in a vulnerable position. Unfortunately, I observe that the obdurate stance of both parties to this matter has prolonged any chance of what should have been, and could still be, resolved easily by compromise and agreement.

[26] In such unique circumstances, I find that an exception has been made out to remove the whole matter to the Employment Court so that discovery issues can be resolved and the substantive matter consequently dealt with.

[27] I have had regard to timing issues and further delay but nothing pertaining to Mr Smalley's personal circumstances has been identified that would persuade me that removing this matter would not best serve Mr Smalley's apparent desire to litigate this matter further and HHG's view that disclosure be dealt with by the court.

Conclusion - should the removal be granted?

[28] I find that exceptional grounds exist for removing this entire matter to the Employment Court exist and the matter is removed and the Authority investigation meeting scheduled for 23-24 July 2024 is vacated. .

Costs

[29] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves in these unique circumstances; it is my view that consideration should be given to costs lying where they fall. However, If the parties are unable to resolve costs, and an Authority determination on costs is needed, the party that considers costs should be awarded in their favour may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum the other party will then have 14 days to lodge a reply memorandum. Upon request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[30] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate basis unless circumstances or factors, require an adjustment upwards or downwards.⁹

David G Beck
Member of the Employment Relations Authority

⁹ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.