Employment Court of New Zealand

The Travel Practice Limited v Owles CC15/09 [2009] NZEmpC 93 (14 October 2009)

Last Updated: 30 October 2009

IN THE EMPLOYMENT COURT

CHRISTCHURCHCC 15/09CRC 13/09

IN THE MATTER OF a challenge to a determination of the Employment Relations Authority

BETWEEN THE TRAVEL PRACTICE LIMITED
Plaintiff

AND JENNY OWLES
Defendant

Hearing: On the papers received 18 September and 2 October 2009

Judgment: 14 October 2009

INTERLOCUTORY JUDGMENT OF JUDGE A A COUCH

[1] This judgment concerns the effect on the proceedings of a report by the Employment Relations Authority about the manner in which the plaintiff participated in its investigation. I also deal with a joint application for stay of proceedings.
[2] The defendant commenced employment with the plaintiff on 7 March 2008. After a period of observation and training, she took up her duties on 17 March 2008. On 19 March 2008, the defendant left the plaintiff's employment. Subsequently, she pursued a claim that she had been unjustifiably constructively dismissed. That personal grievance was lodged with the Authority which duly investigated it.
[3] In its determination dated 26 June 2009 (CA 89/09), the Authority found for the defendant and ordered the plaintiff to pay her a total of $8,038.46. In an undated subsequent determination (CA 89A/09), the Authority ordered the plaintiff to pay the defendant a further $1,070.00 by way of costs and disbursements. The plaintiff challenged both of those determinations and sought a hearing *de novo*.
[4] There were indications in the Authority's determination which suggested that the plaintiff may not have participated in the investigation in a manner designed to resolve the issues involved. Accordingly, in a minute dated 27 July 2009, I called for a report from the Authority pursuant to s181(1) of the Employment Relations Act 2000. Section 181 provides:

181 Report in relation to good faith

(1) Where the election states that the person making the election is seeking a hearing de novo*, the Authority must, if the court so requests, as soon as practicable, submit to the court a written report giving the Authority's assessment of the extent to which the parties involved in the investigation have—*

(a) facilitated rather than obstructed the Authority's investigation; and

(b) acted in good faith towards each other during the investigation.

(2) The court may request a report under subsection (1) only where the court considers, on the basis of the determination made by the Authority under section 174, that any party may not have participated in the Authority's investigation of the matter in a

manner that was designed to resolve the issues involved.

(3) The Authority must, before submitting the report to the court, give each party to the proceedings a reasonable opportunity to supply to the Authority written comments on the draft report.

(4) A party who supplies written comments to the Authority under subsection (3) must, immediately after doing so, serve a copy of those comments on each other party to the proceedings.

(5) The Authority must, in submitting the final report to the court, submit with it any written comments received from any party.

[5] On 18 September 2009, the Court received from the Authority its draft report dated 24 August 2009, the comments of the parties on that draft and two affidavits provided on behalf of the plaintiff. In a covering letter, a support officer of the Authority referred to these documents and said *"The Authority's report remains unchanged to that which went to the parties for comment."* On this basis, I regard the Authority's draft report as also being its final report.
[6] In paragraph [4] of its report, the Authority says that the plaintiff obstructed its investigation in three respects:

> Failing to lodge and serve a statement in reply at any time before the investigation meeting notwithstanding an explicit direction from the Authority to do so.
> Not complying with a direction of the Authority to lodge and serve statements of evidence.
> Not attending the Authority's investigation meeting on the agreed date of 14 May 2009 and failing to provide any good reason for its absence.

[7] The Authority then notes an article in the Christchurch Press newspaper which reported that the plaintiff failed to participate in the investigation meeting because it was *"waiting to have the matter dealt with in the right forum."*
[8] Next, the Authority refers to a copy of a letter from the plaintiff to the Authority dated 30 April 2009 in which an adjournment of the investigation meeting on 14 May 2009 was sought. The Authority notes that *"There is no record on the Authority file of that letter having been received in April 2009."*
[9] Although the Authority records these two matters, they are not included in its assessment of the plaintiff's conduct for the purposes of the report to the Court under s181(1).
[10] During the Authority's investigation, the plaintiff was represented by its manager and director, Dennis Price. In the proceedings before the Court, however, the plaintiff has retained Mr Butler as its advocate. The defendant has been represented throughout by Mr Beck as counsel.
[11] In response to the Authority's draft report, Mr Beck and Mr Butler both provided comments. Two affidavits were also provided on behalf of the plaintiff. One was by Mr Price. The other was by Mr Albertson, an employee of the plaintiff. Mr Butler has also provided a memorandum to the Court in which he makes submissions.
[12] In his comment, Mr Beck endorses the Authority's view that the plaintiff obstructed the investigation. He also says that the plaintiff failed to attend mediation on three occasions and suggests that this supports the Authority's view.
[13] In essence, the comments, submissions and affidavits provided on behalf of the plaintiff offer a measure of explanation for two aspects of the plaintiff's conduct which were relied on by the Authority for its assessment. Mr Price deposes that he sent the letter dated 30 April 2009 referred to by the Authority. He says that, although he agreed to the date of 14 May 2009 for the investigation meeting, he later found out that he was required to be in the District Court that day. In the letter, Mr Price advances that as a reason for an adjournment and goes on to say *"I note we were originally to have statements of evidence lodged by next Thursday 7 May but presume that date will also extend."* In support of this evidence, there is also a letter from his counsel in the District Court matter referred to confirming that Mr Price appeared in the District Court for an hour on 14 May 2009 from 9.15am.
[14] In light of Mr Price's sworn statement that he sent the letter dated 30 April 2009 to the Authority, I must accept that he did so. That letter goes some way towards explaining the plaintiff's conduct in failing to attend the investigation meeting but does not fully excuse it. The Authority attached to its report a copy of the directions given to the parties following a telephone conference on 9 February 2009 in which Mr Price took part. Those directions conclude with a paragraph directing the parties to raise any issues by telephone or email. Mr Price failed to do either. He also offers no explanation why, having had no response to his letter dated 30 April 2009, he made no further attempts to communicate with the Authority.
[15] The evidence provides no acceptable explanation of the plaintiff's failure to provide statements of the evidence it intended to put before the Authority. Mr Price's assumption that the obligation to provide that information by 7 May 2009 would be postponed along with the investigation meeting was unwarranted.
[16] The plaintiff offers no explanation at all for the failure to lodge and serve a statement in reply.
[17] In his affidavit, Mr Albertson provides an explanation for the newspaper article. He says that the reporter spoke to him and that he was misreported. As this issue was not relied on by the Authority for its assessment, I simply note this evidence and take the matter no further.
[18] Turning to the issue raised by Mr Beck, the plaintiff accepts that three dates for mediation were arranged and

that it did not attend on any of those occasions. In his affidavit, Mr Price provides an explanation for two of those dates but, in respect of the third, says only that he was busy at work because other staff were away. I do not find that convincing.

[19] Overall, the effect of the plaintiff's conduct is that neither the defendant nor the Authority have been informed at all of the plaintiff's case. If the plaintiff is permitted to have a *de novo* hearing of its challenge, therefore, all of the evidence relied on by the plaintiff will be new to the defendant and to the Court. This would effectively frustrate an important principle of the Employment Relations Act 2000 that employment relationship problems should be dealt with in the first instance through mediation and investigation by the Authority.

[20] The purpose of s181 and s182(2) is to provide a means to sanction parties who fail to properly take part in the statutory mediation and investigation processes. The discretion conferred on the Court by s182(2), however, must be exercised judicially and consistent with the interests of justice. This involves consideration not only of the blameworthy conduct of the plaintiff but also the overall interests of both the plaintiff and the defendant.

[21] In some cases, a just result can be found by restricting the issues which may be the subject of challenge or allowing the plaintiff to adduce only the evidence put before the Authority. In a case such as this, however, where the plaintiff has effectively taken no part in the investigation, such options are not open. If I do not allow the plaintiff to proceed with a hearing *de novo*, there is realistically no other way in which a challenge can proceed at all. The challenge is based entirely on the facts. If the plaintiff cannot adduce evidence, its case must fail with a consequent risk of injustice.

[22] Allowing the plaintiff to proceed with a *de novo* challenge will obviously subject the defendant to additional stress and cause her to incur further cost. If her case is sound, however, she will not be deprived of the outcome she has achieved in the Authority. It also seems to me that the potential prejudice to the defendant of having to respond to evidence provided for the first time in the Court and the additional cost associated with that process can be dealt with effectively by directions and through orders for costs. The plaintiff's failure to attend mediation can also be remedied by a direction under s188(2).

[23] The plaintiff will be permitted to proceed with its challenge by way of a hearing *de novo* but only on strict conditions. I make the following orders:

> The plaintiff is to file and serve within 28 days after the date of this judgment affidavits of the evidence it relies on. Any documents relied on are to be annexed to those affidavits as exhibits.
> The plaintiff shall not be permitted to adduce any other evidence without leave of the Court.
> The plaintiff is to pay the defendant $500 as a contribution to the costs associated with the good faith report process. That sum is to be paid no later than 14 days after the date of this judgment.
> The parties are directed to mediation which is to take place as soon as possible after the expiry of the 28-day period specified above. Mr Butler is to promptly advise the Registrar in writing of the date set for mediation and of the outcome.
> The plaintiff is to strictly comply with all orders and directions of the Court made in the course of this proceeding. In default, the plaintiff's challenge is liable to be struck out.

[24] If the parties are unable to settle the matter in mediation, the Registrar will arrange a telephone conference with the parties' representatives to make arrangements for a hearing.

[25] The parties' representatives have filed a joint application to the Court seeking a stay of proceedings on terms. That is supported by a joint memorandum. The application is granted on the following terms:

a. The plaintiff is to pay the sum of $9,108.46 to the Registrar of the Court at Wellington no later than noon on Tuesday 27 October 2009.
b. That sum is to placed on interest bearing deposit pending the outcome of these proceedings or further order of the Court.
c. A stay of proceedings to enforce the orders made by the Authority will take effect on that payment being made but not otherwise.
d. If payment of that sum is not made by the specified time, there will be no stay of proceedings without further order of the Court.

[26] Except as ordered above, costs are reserved.

A A Couch

Judge

Judgment signed at 10.30 am on 14 October 2009