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Warren Skerrett Investments Limited v Broad [2011] NZERA 291; [2011] NZERA Christchurch 64 (13 May 2011)

Last Updated: 23 May 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2011]NZERA Christchurch 64

5312456

BETWEEN

WARREN SKERRETT INVESTMENTS LIMITED Applicant

A N D

DONALD BROAD
Respondent

Member of Authority:

Helen Doyle

Representatives:

Rob Towner Counsel for applicant Peter Churchman, Counsel for Respondent

Memorandum of counsel for applicant in support of adjournment application:

6 May 2011

9 May 2011

Memorandum of counsel for respondent in opposition to adjournment application

Telephone conference: 11 May 2011

Date of Determination: 13 May 2011

DETERMINATION OF THE AUTHORITY ON ADJOURNMENT

APPLICATION

Application for an adjournment

[1] An investigation meeting for the above matter is to be held in Dunedin on 2 and 3 June 2011. The dates were set during a conference call with the Authority and counsel for the applicant and respondent in February 2011.

[2] The applicant now seeks an adjournment of the investigation and the adjournment is opposed by the respondent.

[3] The Authority held a telephone conference on 11 May 2011 to consider the application for adjournment. Often the Authority is able to indicate during such a conference whether an application for adjournment will be granted or not. In this case

I wanted some time to reflect on the submissions made in support of and against adjournment by Mr Towner and Mr Churchman.

The applicant's submissions

[4] Mr Towner states in his memorandum on behalf of the applicant that the matter is not ready to go to an investigation meeting for the following reasons:

- The applicants intends to apply for an order requiring various documents to be provided by the respondent's current employer under [s. 160\(1\)\(a\)](#) of the [Employment Relations Act 2000](#) relating to the issue of whether the respondent has been carrying on business with former clients of the applicant in breach of contract.
- The applicant's key witness has been unexpectedly unavailable to counsel since late March and will not return to the office until 12 May 2011 when the applicant's statements of evidence are due. The applicant will not therefore be in a position to lodge its statement until the week of 16 May 2011.
- The applicant intends to apply under [s. 221](#) of the [Employment Relations Act 2000](#) for joinder of Camelot NZ Limited Partnership as a second applicant. The applicant sold its business to the Partnership effective 20 September 2009 during the restraint period.
- The applicant intends to make further changes to the amended statement of problem including in relation to the damages claim.
- That the two days set down are insufficient and a further day is required.

The respondent's submission

[5] Mr Churchman opposes the application for an adjournment for the following reasons:

- The matter was set down in February 2011 and at a late point in time counsel for the respondent has sought an adjournment and intimated that a raft of interlocutory applications are intended to be made. This is an abuse of the Authority process and appears that until evidence was to be lodged the applicant or its advisors have done nothing and now realise they have problems.
- Counsel for the respondent has already made travel arrangement as have the witnesses and adjourning at late notice will cause serious inconvenience.
- The Authority should be slow to allow its processes to allow commercial entities to seek some commercial advantage over their competitors.
- The applicant has been dilatory in progressing this matter taking almost a year to lodge a statement of problem after the applicant resigned.
- The applicant made a deliberate decision to proceed with the former employer as applicant and a deliberate decision as to what causes of action and claims for damages would be pleaded. The time has passed for any further amendments.
- The applicant is obliged to proceed with the proceeding in a timely way and in accordance with the directions of the Authority and it is high handed and disrespectful towards the Authority and the respondent to within two weeks of a hearing date allocated since February 2010 seek an adjournment and be allowed to make fundamental changes to the statement of problem because of inadequate thought to the claim when initially filed and because the principal witness was inadequately briefed.

Determination

[6] Mr Towner accepts quite properly that the late application for an adjournment and the grounds advanced arose because of a recent reassessment of the claim against the respondent. He said that given that reassessment he felt it proper to apply for an adjournment because there were steps required before investigation.

[7] Mr Towner in addressing the lateness of this assessment of the claim referred to such matters as the initial statement from the applicant's key witness being prepared by another solicitor and needing significant amendment and difficulties in making contact with the key witness until very recently. He also spoke about concluding recently a different approach was required for the damages claim that could impact on the nature of the evidence required potentially increasing the time needed for investigation and turning his mind to the joining of the Partnership. Mr Towner said that if the matter proceeded and the joinder application was not disposed of there was the potential there could be further proceedings lodged involved the Partnership and the respondent.

[9] Mr Churchman submits that the application for adjournment has been requested within two weeks of the investigation meeting and no further amendments to the amended statement of problem should be permitted and Authority should simply proceed to investigate the amended claim as lodged and if it not well prepared then so be it. This is in circumstances where he submits the matters now put forward were known to the applicant months before the application for an adjournment was made.

[10] A late application for adjournment creates great inconvenience and difficulty and it is not satisfactory. I need to consider the most effective and efficient way to proceed with the claim. I cannot be certain that to simply proceed on the basis of the claim as lodged at this stage would result in less inconvenience and expense in other than the short term. I am further not satisfied that, although regrettable, the application was made for other than the reason there was a belated appreciation of

the case.

[11] I indicated to Mr Towner that I intended, if the matter was adjourned, to fix costs on the adjournment and that should assist somewhat with any financial difficulty that has been caused to the respondent by an adjournment.

[11] In the circumstances I am prepared to allow the adjournment. The investigation meeting set for 2 and 3 June 2011 is hereby adjourned

[12] The applicant is to proceed to advance this matter as quickly as possible as significant time has already been lost. To that end the applicant must therefore:

- a) Within 14 days lodge and serve an application for joinder of Camelot NZ Limited Partnership as second applicant;
- b) Within 14 days apply under [s. 160](#) (1) (a) of the [Employment Relations Act 2000](#) for the Authority to call for various documents by South Wealth Management Limited.

[13] The Authority will thereafter set a timeframe for a response from the respondent to both applications.

[14] The Authority will after it has determined both applications hold a further telephone conference to schedule an investigation meeting and timetable, if required for a further amended statement of problem, statements of evidence and any other matters it considers necessary.

Costs

[15] Mr Churchman has until 27 May 2011 to lodge and serve submissions as to costs in relation to the application for adjournment and Mr Towner has until 10 June 2011 to lodge and serve submissions in reply.

Helen Doyle

Member of the Employment Relations Authority

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