Employment Court of New Zealand

Williams v Chesterton Group Ltd (in liq) [2010] NZEmpC 150 (8 November 2010)

Last Updated: 16 November 2010

IN THE EMPLOYMENT COURT AUCKLAND

[2010] NZEMPC 150

ARC 100/09

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN LEE WILLIAMS Plaintiff

AND CHESTERTON GROUP LTD (IN LIQUIDATION)

Defendant

Hearing: 8 November 2010 (Heard at Auckland)

Appearances: Timothy Oldfield, Counsel for Plaintiff

No appearance for Defendant

Judgment: 8 November 2010

ORAL JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] The question for decision is whether the defendant should be penalised for breach of s 63A of the Employment Relations Act 2000 (the Act) that relates to the recording in writing of individual employment agreements. The Employment Relations Authority declined to award a penalty against the defendant and this case

is a challenge to its determination.[1]

[2] The defendant company is now in liquidation and the liquidator has both declined to agree to the continuation of the balance of the proceedings brought against the company in the Authority, and to appear on the defendant's behalf. The only cause of action that the law permits the plaintiff to maintain against the

defendant in these circumstances is a claim to a penalty payable to the Crown and a

claim for costs in respect of those proceedings under ss 308(b) and 308(c) of the

Companies Act 1993.

[3] Section 63A of the Act provides materially as follows (with my emphasis on the clauses particularly in issue in this case):

63A Bargaining for individual employment agreement or individual terms and conditions in employment agreement

(1) This section applies when bargaining for terms and conditions of employment in the following situations:

(a) under section 61(1), in relation to additional terms and conditions to the applicable collective agreement:

(b) under section 61(2), in relation to—

(i) additional terms and conditions to the collective agreement on which the individual employment agreement is based; and

(ii) variations to the individual employment agreement in subparagraph (i):

(c) under section 63(2), in relation to additional terms and conditions for the first 30 days of an individual employment agreement:

(d) under section 63(5), in relation to variations to terms and conditions of an individual employment agreement after the 30-day period:

(e) in relation to terms and conditions of an individual employment agreement for an employee if no collective agreement covers the work done, or to be done, by the employee:

(f) where a fixed term of employment, or probationary or trial period of employment, is proposed:

(g) under section 69M or section 69N in relation to employee protection provisions in individual employment agreements:

(h) under section 69I in relation to redundancy entitlements with a new employer.

(2) The employer must do at least the following things:

(a) provide to the employee a copy of the intended agreement, or the part of the intended agreement, under discussion; and

(b) advise the employee that he or she is entitled to seek independent advice about the intended agreement or any part of the intended agreement; and

(c) give the employee a reasonable opportunity to seek that advice; and

(d) consider any issues that the employee raises and respond to them.

(3) Every employer who fails to comply with this section is liable to a penalty imposed by the Authority.

(4) Failure to comply with this section does not affect the validity of the employment agreement between the employee and the employer.

(emphasis added)

[4] Also relevant is s 60 which sets out the object of Part 6 of the Act within which s 63A is contained. It provides (again with relevant emphasis):

60 Object of this Part

The object of this Part is—

(a) to specify the rules for determining the terms and conditions of an employee's employment; and

(b) to require new employees, whose terms and conditions of employment are not determined with reference to a collective agreement, to be given sufficient information and an adequate opportunity to seek advice before entering into an individual employment agreement; and

(c) to recognise that, in relation to individual employees and their employers, good faith behaviour is—

(i) promoted by providing protection against unfair bargaining;

and

(ia) required when entering into and varying individual employment agreements; and

(ii) consistent with, but not limited to, the implied term of mutual trust and confidence in the relationship between

employee and employer.

[5] Section 65 is also relevant. It provides:

65 Terms and conditions of employment where no collective agreement applies

(1) The individual employment agreement of an employee whose work is not covered by a collective agreement that binds his or her employer—

(a) must be in writing; and

(b) may contain such terms and conditions as the employee and employer think fit.

(2) However, the individual employment agreement— (a) must include—

(i) the names of the employee and employer concerned;

and

(ii) a description of the work to be performed by the employee; and

(iii) an indication of where the employee is to perform the work; and

(iv) an indication of the arrangements relating to the

times the employee is to work; and

(v) the wages or salary payable to the employee; and

(vi) a plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days in section 114 within which a personal grievance must be raised; and

[6] The following are the relevant facts. In November 2008 the plaintiff, Lee

Williams, answered a newspaper advertisement for a cleaner at the Unicorn Motel.

Ms Williams spoke to the manager and had an interview for the position on 12

November 2008. Ms Williams and the manager agreed that the plaintiff would work from Mondays to Fridays of each week and on every second Saturday. The hours of work were between 9 am and about 1 pm and the agreed hourly rate of pay was $16. No written employment agreement was provided by the employer, either before Ms Williams began work on the next day or for some considerable time thereafter. The motel was managed by a couple but owned, through their company, by Mr Bryan Storey and his daughter Rachael. Mr Storey was the director of the defendant company. About a month after she started work, Ms Williams made inquiries of another employee about a written employment agreement. She was told that this had been promised to the other employee by one of the managers but had not materialised.

[7] In early 2009 Ms Williams's previously agreed working patterns began to change. Sometimes she would be sent home early. On other occasions she would receive a text message late on the previous evening advising her that there would be no work on the following day. Ms Williams was unhappy about these changes because she depended upon the income and its regularity that her agreed working hours provided. It appears that the owners and/or managers of the motel may have taken over more of the cleaning and laundry work themselves due to a downturn in bookings and occupancy. When Ms Williams complained about the reductions in her working hours and income she was told by one of the managers that if she did not like it she could leave.

[8] Ms Williams asked for a written employment agreement in early 2009 and was told that it was "coming". One of the reasons for her request was that it appeared to her that she was being paid in cash without reference to a pay slip or other time records and there were no references to holiday pay or sick leave. Repeated requests for an employment agreement were met with the same response that it was "coming". Eventually, in March 2009, Ms Williams joined the Service and Food Workers Union Nga Ringa Tota Inc and met with an organiser, Lynette Slade.

[9] On 2 April 2009, after Ms Slade's intervention on behalf of Ms Williams, she was provided by her employer with a draft form of employment agreement. This appears to have been a standard and unmodified form of draft agreement prepared by the Motel Association of New Zealand. Although it did contain the particular address of the motel at which the work was to be performed, this draft agreement did not include the names of the parties, the hours of work, the remuneration, and other similar fundamental terms and conditions of employment. The form of draft agreement was clearly not appropriate to the work of a motel cleaner or laundry employee. For example, the draft provided that the work to be performed by the employee was that of "Membership Executive". The provision for remuneration contemplated a gross annual salary rather than the hourly rate of pay that had been agreed.

[10] Ms Slade from the union took the initiative and prepared a bespoke form of individual employment agreement for employees who were union members at the motel. This draft was sufficiently particularised that it recorded the essential elements that had been agreed to by Ms Williams at the start of her employment and as had been performed by the company. Ms Slade's draft was sent to Mr Storey of the defendant company on 6 May 2009 and his response was invited. No reply was received from Mr Storey nor even an acknowledgement that the form of agreement had been received by him. When Ms Slade spoke to Mr Storey he said he was represented by the Employers and Manufacturers Association (EMA) and was awaiting advice by its representative. In the absence of any further response from Mr Storey or his representative, Ms Slade suggested to him that she contact his EMA representative directly but there was still no response from Mr Storey. The matter was then referred to the union's legal officer, along with other issues including late payments of wages, a failure to pay sufficiently for work on public holidays and unilateral reductions in hours of work. In response, the defendant alleged that the plaintiff was a casual employee.

[11] Things deteriorated further in the workplace. There were additional reductions in Ms Williams's hours of work after the union became involved. Although wages were usually paid in cash on Tuesdays, this became increasingly erratic. Eventually Ms Williams spoke with Rachael Storey who came to the motel

and met with her. Ms Williams asked if her money could be paid directly to her bank account and told Ms Storey that after having made inquiries with the Inland Revenue Department about her Kiwisaver contributions, she had been told that there were no tax records of her working for the defendant.

[12] From April 2009 Ms Williams's hours of work became more irregular again and her own budgeting difficulties greater. She had to resort to borrowing money from her mother to pay for things, even including her bus fares to work. Eventually Mr Storey agreed to a meeting with the employees but when they insisted upon having a union representative at the meeting, this did not eventuate. One day, however, Bryan and Rachael Storey appeared unannounced at the motel and wanted to speak with the employees, including Ms Williams, about their issues. When they said that they did not wish to meet without a union representative present, Mr Storey became abusive and intimidating about the union's involvement and said that it was he, rather than the union, who called the shots. Eventually, Ms Williams gave notice of her intention to resign and finished work on 17 June 2009. She was not paid holiday pay or public holiday allowances until the Employment Relations Authority ordered the defendant to do so.

[13] On the claim for penalties, the Authority in its determination, said:

[17] Ms Williams asks that a penalty be awarded in regard to the failure of the respondent to provide wage and time records and an employment agreement pursuant to s.130(4) and s.63A respectively of the Employment Relations Act 2000. In regard to providing an employment agreement, while the evidence is that the respondent was extremely tardy in regard to engaging in the process of completing an employment agreement for Ms Williams, I find that there was a reasonable attempt to at least provide a draft employment agreement hence a penalty is not appropriate in all the circumstances. In regard to the failure to provide wage and time records and the consequent disadvantage to Ms Williams pertaining to calculating her entitlements, a penalty is appropriate. ...

[14] This was set in the sum of $500 and was directed to be paid to Ms Williams.

[15] I respectfully disagree with the Authority's conclusion on the question of whether a penalty was warranted for breach of s 63A. The defendant was more than just "extremely tardy" in its engagement in the process of settling the terms in writing of the parties' individual employment agreement. It failed or refused to

consider the statutory requirement for an employment agreement and its contents. But more than that, the provision of a draft by the defendant when it finally acknowledged the legal requirement to do something after the union became involved, can really only be regarded as cynical lip service. The form of agreement tendered bore no resemblance to the issue the defendant was required to address. It was, in my view, simply a further delaying tactic.

[16] The Authority's determination did not address this aspect of the defendant's conduct. Nor did it deal with what I am satisfied was the defendant's subsequent refusal to engage with Ms Williams and her union in negotiation and settlement of the content of an agreement and especially after she had, through her union, provided a reasonable draft agreement that reflected the actual terms and conditions to which the parties had agreed.

[17] Section 63A(2)(a) required the defendant to provide Ms Williams with a copy of "the intended agreement" under discussion. I consider that what it very belatedly provided her with could not be said to have met that obligation. More significantly, for breach and penalty purposes, I am also satisfied that the defendant failed to comply with s 63A(2)(d) in that it failed or refused to consider issues that Ms Williams raised by her submission of a draft alternative employment agreement and the defendant failed to respond to those issues.

[18] The clear impression I have obtained from the evidence is that the defendant did not wish to be bothered to have written employment agreements with its employees. When Ms Williams and her colleagues sought to involve their union, the employer became antagonistic by ignoring the union's approaches and by engaging in intimidatory and abusive tactics

towards the employees (including Ms Williams) at meetings from which it had sidelined the union.

[19] Although it is not for review on this challenge, I regard the penalty of $500 imposed by the Authority for the defendant's failures or refusals to provide time and wage records as a token. The defendant's breaches were repeated and a serious instance of a well-known and long-established fundamental rule of business practice

as an employer. A penalty of five per cent of the maximum specified by Parliament strikes me as inadequate.

[20] The defendant's conduct was the antithesis of good faith behaviour required of it. The disputes between Ms Williams and the defendant about her hours of work could have been avoided or at least resolved promptly if these had been recorded in a written agreement prepared by the defendant at about the time Ms Williams began work.

[21] The defendant's breaches of s 63A(2)(a) and (d) warrant a penalty. The maximum penalty for such conduct by a corporation as the defendant is, is a fine of

$10,000. There is no evidence of the defendant having behaved towards employees similarly in the past and in these circumstances I treat it as a first offender.

[22] Mr Oldfield has referred me to the liquidator's first report prepared last May. The company's financial circumstances appear from that to be particularly grave. The other element I should mention is that Mr Oldfield has advised me that when lodging a proof of debt on behalf of Ms Williams, the union drew to the liquidator's attention the maximum potential penalty of $10,000 and also provided an indication or estimate of what it assessed might be the penalty. This was the figure of $1,000 which, as will be apparent, is in my view an under-estimate. I do not consider, however, that the liquidator could have been misled by such a prediction. The maximum penalty available to the Court was pointed out and the liquidator appears to have taken advice about his and the company's position and elected not to participate in the proceedings as a result of that. I also take into account the separate penalty already imposed by the Authority just discussed.

[23] The Authority's determination in respect of s 63A is set aside. The defendant is to pay a penalty of $4,500 to the Crown. For the purposes of enforcement, if necessary, I direct that a copy of this judgment be sent to the Department of Labour's District Solicitor in Auckland.

[24] The Authority reserved costs in the case before it and provided a timetable. Mr Oldfield advises me that his client has not pursued her claim for costs in the

Authority. The plaintiff is entitled to an award of costs in this Court and in the

Authority which I fix in the sum of $1,500.

GL Colgan
Chief Judge

Judgment delivered orally at 11.03 am on Monday 8 November 2010

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[1] AA400/09, 12 November 2009.
