Employment Court of New Zealand

Y v Kevin Hyde Engineering Limited [2013] NZEmpC 129 (11 July 2013)

Last Updated: 26 July 2013

TN THE EMPLOYMENT COURT CHRISTCHURCH REGISTRY

[2013] NZEmpC 129

CRC 35/13

IN THE MATTER OF an application for a freezing order

BETWEEN Mr Y Applicant

AND KEVIN HYDE ENGINEERING LIMITED

Respondent

Hearing: on the papers - documents received 2 and 8 July 2010

Appearances: Peter Moore, advocate for the applicant

Judgment: 11 July 2013

JUDGMENT OF JUDGE AA COUCH

[1] The applicant is anonymised in the intituling as Mr Y in deference to the non- publication order made by the Employment Relations Authority (the Authority) in proceedings before it between the same parties.

[2] The applicant has placed before the Court an application without notice for a freezing order affecting all of the assets of the respondent. In order to pursue that application, the applicant also seeks a waiver of the filing fee normally payable and a waiver of the obligation to provide an undertaking as to damages. This decision addresses those issues.

[3] The application was first received by the Court on 2 July 2013 when it was accompanied by a number of other documents but no evidence or filing fee. On 8

July 2013, three affidavits were provided in support of the application but no undertaking as to damages has been provided and the filing fee remains unpaid.

[4] The application is made without notice. In such cases, an applicant has an obligation to make full and frank disclosure of all relevant information. The applicant in this case has been specifically made aware of that obligation by the Court and, in deciding the matter, I assume that obligation has been discharged. Even so, it must be borne in mind that all references to facts in this decision are based on untested evidence provided solely by the applicant.

Background

[5] The respondent operated an engineering business in Leeston. The sole shareholder and director of the respondent is Kevin Hyde. He managed the company's business.

[6] The applicant is a young man now aged 18. In February 2011, when he was

16 years old, he left school to work for the respondent. The employment relationship was intermittent but finally ended in May 2012.

[7] The applicant pursued a number of claims against the respondent. These included two personal grievances and a claim for arrears of wages. The parties attended mediation but were unable to resolve their differences.

[8] In September 2012, the applicant lodged a statement of problem with the Authority. That included the claims previously made and also sought several penalties for alleged breaches of the Employment Relations Act 2000 (the Act). On behalf of the respondent, Kevin Hyde provided a statement in reply in which he disagreed with many of the allegations made by the applicant. In particular, the allegations on which the personal grievances were based were vehemently denied.

[9] The Authority directed the parties to attend an investigation meeting on 29

May 2013 and to provide statements of evidence prior to that date. At that stage, the respondent was represented by counsel, John Angland. The applicant complied with the Authority's directions. The respondent provided no evidence and did not attend the meeting. Mr Angland sought, and was granted, leave to withdraw on the grounds that he could not obtain instructions. The Authority member proceeded in the

respondent's absence. She heard the applicant's evidence and subsequently received submissions on his behalf. In its determination given two days ago, the Authority has upheld most of the applicant's claims and ordered the respondent to pay him sums of money totalling nearly $37,000.

[10] Mr Hyde telephoned the advocate for the applicant, Mr Moore, on 2 July

2013. In the course of their brief conversation, Mr Hyde said that he had been "back and forth to Australia" and was "going to work out of Australia". Referring to the respondent, Mr Hyde said that he was "shutting the company down" that week. He also said that "the family trust owns all the buildings".

[11] Mr Angland has told Mr Moore that the respondent's business ceased trading several months ago. The applicant's mother says that, in March or April 2013, a friend of hers spoke to Mr Hyde who expressed interest in employing him but this apparently came to nothing. She also says that, two months or so ago, she went to the respondent's workshop to find the gates closed and no cars there but the doors were open.

[121 The filing fee on the application is $306.67. The applicant says that he is unemployed and that, other than *$53* in the bank and an unusable car, he has no assets of any value. He says that he lives with his parents and is receiving a sickness benefit of $153 per week. The applicant's mother says that she and her husband are willing to pay the filing fee for the applicant but that they do not have the necessary money and do not know how to borrow it.

Issues

[13] The issues to be decided are:

(a) Whether the Court has jurisdiction to waive the filing fee. (b) If so, whether it should be waived in this case.

(c) Whether the application can be considered without an undertaking as to damages.

(d) If so, whether a freezing order should be made.

Filing fee

[14] This application is subject to regulation 8 of the Employment Court

Regulations 2000 (the Regulations). Paragraph (4) of that regulation provides:

(4) The prescribed fee, or the reduced prescribed fee,' must be paid at or before the time at which the statement of claim is filed.

[15] The logical effect of this regulation is that the application cannot be accepted for filing unless and until the filing fee is paid. The applicant seeks a waiver of that requirement so that his application can be decided without payment of a filing fee.

[16] There is no specific provision in the Act or the Regulations authorising the waiver of a filing fee. The question must therefore be whether there is any general provision conferring jurisdiction on the Court to do so.

[17] In the application for waiver, Mr Moore relies broadly on the Court's jurisdiction in equity and good conscience. This is presumably a reference to s 189 of the Act but, while this section guides the manner in which the Court should exercise its jurisdiction, it does not, of itself, confer jurisdiction. Mr Moore also urges the Court to grant a waiver as "a matter of public policy". Public policy may aid the Court in the interpretation and application of legislation conferring jurisdiction on it but, again, does not confer jurisdiction.

[18] Somewhat surprisingly, it does not appear to have been conclusively decided before whether the Court has power to waive the payment of a filing fee. The only specific reference to it seems to have been in *Arkompat v Thai Chilli Co Ltd trading as Thai Chilli,2* where the Chief Judge said:

Although rarely if ever sought, the legislation does not necessarily prohibit an application to the Court to waive or delay payment of a filing fee, or to file a proceeding and apply contemporaneously or subsequently to formalise its filing under s 219 of the Employment Relations Act 2000. Meritorious challenges should not fail simply for want temporarily of a filing fee. It would be a shameful day when the door of the Court were to remain closed

to a litigant because of temporary impecuniosity and although Parliament

The reference to "reduced filing fee" applies only where leave has been granted to serve a proceeding on an overseas party and has no application here.

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and the Executive (by regulations) have not (yet) provided expressly for a fee waiver/postponement regime, it should not be beyond the wit of the Judges to so dispense justice in what will be rare but deserving cases.

[19] While I agree with the expression of principle underlying this statement, I must be satisfied that the jurisdiction is properly conferred by the statute before it can be positively exercised. As has often been said, the Employment Court is a creature of statute and has no inherent jurisdiction. It has only the jurisdiction conferred on it by statute and the implied powers necessary to give effect to that jurisdiction.

[20] As indicated by the Chief Judge in the passage above, the most likely source ofapowerto waive fees is s219 of the Act:

219 Validation of informal proceedings, etc

(1) If anything which is required or authorised to be done by this Act is not done within the time allowed, or is done informally, the court, or the Authority, as the case may be, may in its discretion, on the application of any person interested, make an order extending the time within which the thing may be done, or validating the thing so informally done.

(2) Nothing in this section authorises the court to make any such order in respect of judicial proceedings then already instituted in any court other than the court.

[21] Section 219 is most commonly called in aid by parties who have not done something in time and who wish their doing it subsequently to be validated. An obvious example is the plaintiff who fails to challenge a determination of the Authority within the 28 day period allowed by s 179(2) of the Act and seeks an extension of time within which to do so.

[22] What is sought here is something different. The applicant seeks to be relieved entirely of the obligation to do something which the Regulations require. In terms of the ordinary meaning of the words used, that is outside the scope of what the section allows. The power conferred on the Court is to make an order "extending the time within which the thing may be done, or validating the thing so informally done". Both parts of this expression contemplate that the statutory requirement in question will actually be done, albeit late or imperfectly. The only way in which it might be said that s 219 conferred a power to waive compliance entirely would be if

a failure to do something could properly be regarded as doing that thing

"informally".

[23] While such a power might be desirable as a matter of policy, this interpretation of s 219 stretches the meaning of the words used in the statute beyond their elastic limit. It would also amount to a licence for the Court or the Authority to override the will of parliament expressed in the many mandatory provisions of the Act. In my view, s 219 permits the Court to extend the time for payment of a filing fee but does not authorise a complete waiver of payment. In other courts, the power to waive payment of filing fees is expressly provided by legislation. It ought not to be assumed by inference in this court.

[24] The application for waiver of the filing fee is not granted. In this case, however, it is open to me on the evidence to extend time for payment of the filing fee so that the application for a freezing order can be properly before the Court for decision. I will consider the other aspects of the application on that basis. I proceed in this contingent way because the issue of waiver of fees was effectively undecided and can only be resolved in the context of a matter properly before the Court. While there may in future be other litigants in a similar position to the applicant here, such cases will be rare. This decision should not be regarded by other applicants or plaintiffs as a general invitation to apply for postponement of the payment of filing fees. Nor, in any case, should a lengthy postponement be sought, amounting in practical terms to a waiver.

Undertaking

[25] The Court's jurisdiction to make freezing orders is conferred by s 190 of the

Act, the relevant part of which is:

190 Application of other provisions

(1) The court has, in relation to matters within its jurisdiction, and in

addition to the powers specifically conferred on it by this Act or any

other Act, the powers conferred on the Authority by sections 162 and 164.

(3) In addition to the powers described in subsection (1), the court has the same powers of the High Court to make a freezing order and a search order as provided for in the High Court Rules.

[26] The specific reference to the powers of the High Court and to the High Court Rules obliges this Court to follow closely the practice and procedure of the High Court when considering applications under s 190(3). While there may be some room to exercise the Court's jurisdiction in equity and good conscience as required by s 189(1), that will be very limited.

[27) The rules governing the practice of the High Court in relation to freezing orders are in rule 32 of the High Court Rules. The key provisions are:

32.2 Freezing order

(1) The court may make an order (a freezing order), on or without notice

to a respondent in accordance with this Part.

(2) A freezing order may restrain a respondent from removing any assets located in or outside New Zealand or from disposing of, dealing with, or diminishing the value of, those assets.

(3) An applicant for a freezing order without notice to a respondent must fully and frankly disclose to the court all material facts, including—

(a) any possible defences known to the applicant; and

(b) information casting doubt on the applicant's ability to discharge the obligation created by the undertaking as to damages.

(4) An application for a freezing order must be made by interlocutory application under Part 7 or originating application under Part 19, which Parts apply subject to this Part.

(5) An applicant for a freezing order must file a signed undertaking that the applicant will comply with any order for the payment of damages to compensate the respondent for any damage sustained in consequence of the freezing order.

32.6 Form and further terms of freezing order

(1) A freezing order must be issued in form G 38.

(2) If the likely maximum amount of the applicant's claim is known, the value of the assets covered by the freezing order must not exceed that amount together with interest on that amount and costs.

(3) The freezing order must not prohibit the respondent from dealing with the assets covered by the order for the purpose of —

(a) paying ordinary living expenses; or

(b) paying legal expenses related to the freezing order; or

(c) disposing of assets, or making payments, in the ordinary course of the respondent's business, including business expenses incurred in good faith.

(4) Unless there are special circumstances, the court must require the applicant for a freezing order to give appropriate undertakings, including an undertaking as to damages.

(5) If the applicant has, or may later have, insufficient assets within New Zealand to discharge the obligation created by an undertaking as to damages, the court may require the applicant to provide security for that obligation in a form and in an amount fixed by a Judge or, if the Judge so directs, the Registrar.

[28] As can be seen, rule *34.2(5)* imposes an absolute obligation on applicants to file a signed undertaking as to damages. Viewed in isolation, that would seem to preclude any application for waiver of this requirement. As Mr Moore correctly

submits, however, this is apparently at odds with rule 32.6(4) which makes an exception for "special circumstances".

[29] At first sight, these two provisions are inconsistent. Consideration of other aspects of the High Court Rules, however, enables them to be reconciled. The general provisions regarding applications to the High Court for interlocutory injunctions are contained in rule 7. Rule 7.54(1) is a re-enactment of a longstanding rule and contains an unqualified requirement for an undertaking in terms nearly identical those in rule 34.2(5). The decided cases regarding that rule, however, identify exceptions to the absolute nature of it. Those exceptions include applications made by officers of the Crown3 and in some public law cases.4 These must be some of the "special circumstances" allowed for in rule 32.6(4). They are based on legal grounds. A statutory officer of the Crown cannot bind the Crown and therefore cannot give an undertaking on its behalf. Where important public law issues are involved, it can be contrary to the public interest for undertakings to be required.

[30] The question then must be whether the meaning of "special circumstances" in this context is to be extended to include the personal circumstances of the applicant.

I think not, particularly where the application is made without notice. In seeking an interlocutory injunction, an applicant is asking the Court to impose a constraint or obligation on the other party without full consideration of the merits. In such

circumstances, the Court may be led into making an order which is not ultimately

See for example *Registrar of Companies v Nearzero Inc* (HC, Nelson, CIV 2007-442-220). See *Te Runanga 0 Ngai Tahu Ltd v Attorney-General* (1996) 9 PRNZ 321.

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justified and the respondent may suffer damage as a result. The purpose of an undertaking is to ensure that, in such cases, justice is finally done by compensating the party upon whom an injunction is unjustly imposed.

[31] It must also be recognised that an undertaking as to damages has two components. The first is the procedural requirement to give the undertaking. The second is the ability of the applicant to discharge the obligation imposed by the undertaking, should it be called upon. The two components ought not to be confused with each other. The means to discharge an undertaking is a matter to be taken into account in the balance of convenience and in exercising the overall discretion whether to make the order sought. A lack of means is not fatal to an application where an undertaking is required and is no reason for an undertaking not to be given.

[32] I conclude that an undertaking must be given in support of every application for a freezing order unless it falls into one of the established narrow categories where an undertaking is not required. In this jurisdiction it may be that, as a statutory officer, a Labour Inspector is not required to give an undertaking should he or she seek a freezing order. Where an application is made by a person in a private capacity, however, it will be required in every case. This is consistent with the Practice Direction regarding search and freezing orders issued by the Chief Judge in April 2012 which provides:

5. An applicant for a search or freezing order must give a written and signed undertaking as to damages and must give evidence of the applicant's financial ability to meet an order for damages pursuant to the undertaking.

6. An applicant for a search or freezing order must file a form of draft order that includes reference to the undertaking as to damages.

[33] The application for waiver of the requirement to provide an undertaking as to damages is not granted. I nonetheless go on to consider the merits of the application for a freezing order. I do so on the basis that, if I concluded that it ought to be granted, it could be made subject to an undertaking being filed.

Freezing order

[34] **A** freezing order will only be appropriate where:

•there is a real risk that the defendant will dissipate or dispose of assets so as to render himself "judgment proof'.5

[35] That succinct dictum may be divided into two issues. The first is whether the respondent has assets which may be dealt with in a manner which puts them out of the reach of execution processes. The second issue is whether there is a real risk that the respondent will deal with those assets in that way.

[36] In addition to those factors, the Court will have regard to the surrounding circumstances including the likelihood that the applicant will obtain judgment, the ability of the applicant to meet the undertaking as to damages and any other factors affecting the balance of convenience. In exercising an overall discretion whether to grant the application, the overriding consideration will be the interests of justice.

[37] In this case, there is no evidence that the respondent has any assets which might be affected by a freezing order. On the contrary, the evidence suggests that major assets of the respondent's business, in the form of the land and buildings from

which that business was conducted, are owned by a family trust and not by the respondent. It also appears from the evidence that the respondent has ceased trading and is in the process of winding up its business. There is no evidence that the business was profitable. It is therefore not possible to infer that the remaining assets of the business are likely to exceed its normal commercial liabilities. As rule

32.6(3)(c) makes it clear that a freezing order may not prevent a party from making

payments or disposing of assets in the normal course of business, this would seem to leave very little if any scope for a freezing order to take effect.

[38] There is some evidence to suggest that, if there are surplus funds in the respondent company after its existing debts have been met, Mr Hyde may take those funds to Australia. Any such conclusion can only be reached by inference, however, as there is no direct evidence of such an intention.

[39] The applicant is currently unable to discharge the undertaking as to damages he would be required to give if a freezing order was made but the significance of that

Bank ofNew Zealandv Hawkins [1989] NZHC 198; (1989) 1 PRNZ *451* at 452 per Gault J.

must be tempered by the fact that he has obtained orders in his favour from the

Authority for the payment of a substantial sum.

[40] Standing back from these specific considerations and looking at the matter as a whole, I find it is not in the interests of justice to grant the application and it is dismissed. The principal reason for this decision is that I have no reason to believe that there are assets of the respondent to which an order could apply.

Summary

[41] In summary, my judgment is:

(a) The application for waiver of the filing fee is dismissed.

(b) I make an order postponing the obligation to pay the filing fee until the day after this judgment is issued.

(c) The application for waiver of the requirement to file an undertaking as to damages is dismissed.

(d) The application for a freezing order is dismissed. Costs

[42] As the respondent has taken no part in the proceeding no issue as to costs

arises.

Signed at 2.00 pm on 11 July2013.

AA Couch
Judge