Employment Court of New Zealand

Yang v L E Builders Limited [2011] NZEmpC 131 (18 October 2011)

Last Updated: 4 November 2011

IN THE EMPLOYMENT COURT AUCKLAND

[2011] NZEmpC 131

ARC 90/09

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

AND IN THE MATTER OF an application to join second defendant

BETWEEN ZHANPING YANG Plaintiff

AND L E BUILDERS LIMITED Defendant

Hearing: 7 October 2011 (Heard at Auckland)

Counsel: Danisha Lang Siu, counsel for the plaintiff

Rebecca Teirney, counsel for Lawrence Leong Eng Loo

No appearance for L E Builders Limited

Judgment: 18 October 2011

REASONS FOR JUDGMENT OF JUDGE B S TRAVIS

[1] After hearing a full and excellent argument from both counsel, in support of and in opposition to the plaintiff's application to join the former sole director of the defendant company Lawrence Leong Eng Loo as a party, I determined that the most appropriate course was to adjourn the application until the substantive challenge has been disposed of. The following are my reasons for so doing.

[2] The plaintiff is challenging a determination of the Authority, which found that he was a labour-only worker who was not an employee. Part of that conclusion was based on the finding that the plaintiff, Mr Yang, signed a tax code declaration showing WT (Withholding Tax) and on which the withholding payment activity was

listed as "Contracts wholly or substantially for labour only in the building industry".

[3] The plaintiff's challenge was set down for hearing on 16 May 2011. On 11

May counsel for the plaintiff filed a memorandum advising that they had searched the Companies Office website and had found that Mr Loo had applied, allegedly at a time that he had full knowledge of these proceedings, to have the defendant company removed from the Register of Companies. The memorandum complains that they had not been notified by the solicitors for the company that it had been struck off the register on 26 April 2011. That advice was received by the plaintiff's solicitors the following day. Ms Lang Siu, counsel for the plaintiff, submitted that this was the first communication from the defendant's solicitors which put the imminent hearing in doubt. There was, however, no affidavit evidence to that effect.

[4] On 4 July, on the application of the plaintiff, the defendant company was restored to the register. This application was filed on 12 July 2011. Because of difficulties of locating Mr Loo, substituted service was sought and this successfully brought the matter to Mr Loo's attention. Mr Loo has now filed an affidavit going to the merits of the case, referring to a costs order obtained against the plaintiff which has not been paid, and stating that the reason for the resolution voluntarily winding up

the defendant company was because it had been running at a loss. Further, Mr Loo's health was poor and he was advised there was to be a change in legislation which would require building companies to be run by licensed builders, and although he was experienced, he was not licensed and could not have continued to operate the company. Since the company stopped operating Mr Loo deposes that he has not worked and is currently in receipt of a benefit. He, like the plaintiff is in receipt of legal aid.

[5] The plaintiff seeks, in addition to an order joining Mr Loo, an order for costs relating to both this application, the application for substituted service, and all the costs associated with the restoration of the defendant company to the register. The initial grounds for the application for joinder had been because Mr Loo always had full control of the proceedings, was the real party, and had aided and abetted the purported breaches of the plaintiff's employment agreement.

[6] Ms Lang Siu advised that the claim that Mr Loo had aided and abetted a breach of the employment agreement was abandoned because a claim for penalty

could not be brought against the director due to the expiry of the 12 month limitation period in s 135(5) of the Employment Relations Act 2000 (the Act).

[7] The application for joinder was made under s 221 of the Act and Rule 4.56 in Part 4 Subpart 9 of the High Court Rules. Section 221 of the Act, in so far as it is relevant provides:

221 Joinder, waiver and extension of time

In order to enable the Court or the Authority, as the case may be, to more effectually dispose of any matter before it according to the substantial merits and equities of the case, it may, at any stage of the proceedings, of its own motion or on the application of any of the parties, and upon such terms as it thinks fit, by order,—

(a) direct parties to be joined or struck out; and

...

(d) generally give such directions as are necessary or expedient in the circumstances.

[8] Both counsel referred to the Court of Appeal decision in *Kidd v Equity*

Realty,[1] where, after referring to this section the Court of Appeal stated:

12. We accept that the authorities as to High Court awards of non-party costs are not directly applicable because the Employment Court does not have a direct jurisdiction to award costs against a non-party. This is why the respondents sought to have Mr Kidd made a party. But given the broad and untechnical language of s 221, we consider that if an award of costs against Mr Kidd was appropriate, it was within the jurisdiction of the Employment Court to join him as a party for the purpose of making such an award. And of course, fixing costs in these circumstances is necessarily retrospective in character.

13. In short, we are satisfied that there was jurisdiction to join Equity Realty and Mr Kidd as parties. That, however, leaves open the question of whether the joinder was appropriate, which in turn depends on whether orders for costs ought to have been made.

[9] The Court of Appeal determined that this was not an appropriate case for awarding costs against Mr Kidd and also set aside the joinder order for this purpose as not being appropriate. Counsel in the present case, confronted with this

requirement, argued whether or not a costs order at this stage would be appropriate

because if it was, on the reasoning of the Court of Appeal in *Kidd*, Mr Loo could then be joined as a party. In effect this made the application for joinder an application for an award of costs against a non-party.

[10] However a non-party cannot have an award made against it by this Court because of the effect of cl 19 in Schedule 3 to the Act which provides:

19 Power to award costs

(1) The Court in any proceedings may order any party to pay to any other party such costs and expenses (including expenses of witnesses) as the Court thinks reasonable.

(2) The Court may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[11] Thus Mr Loo has to be a party before costs can be awarded against him. On the reasoning of the Court of Appeal he can only be joined as a party if it is appropriate for such a costs order to be made. At the point when he is joined he would, of course, cease to be a non-party.

[12] The difficulty that counsel faced in applying this proposition to the present circumstances, became clear during the course of argument. The Authority's determination only dealt with the status of the plaintiff, finding that he was not an employee and therefore not covered by the Act. That threshold issue needs to be determined on the challenge. It is only if the plaintiff is successful in establishing that he was a party to a contract of service that he can then have his claim that he was unjustifiably dismissed dealt with.

[13] It is in the context of the threshold issue apparently that the plaintiff will wish to argue that it was the actions of Mr Loo in allegedly misrepresenting the situation to the plaintiff and then being party to the alleged alteration of the tax code declaration which may form the basis of an application for costs against Mr Loo. This is in addition to the matters which the plaintiff complains have occurred since the determination of the Authority in relation to the removal of the defendant from the Companies Register. I say apparently, because although the amended statement

of claim alleges that the secretary who witnessed the execution of the IRD form refused to give the plaintiff a copy, it goes on to allege:

Without knowledge or consent of the Plaintiff, the tax declaration was later altered to show a tax code of "WT" (withholding tax) before it was submitted to the Inland Revenue Department.

[14] It is not expressly alleged that Mr Loo was party to or responsible for the alteration of the tax form without the plaintiff's consent after the plaintiff had already signed it.

[15] The affidavit in support of the application to join Mr Loo as second defendant, sworn by the plaintiff, does not deal with the allegations of the alteration of the tax forms.

[16] I considered that the present application lacked the necessary evidentiary support. Some of the matters alleged in relation to the events subsequent to the determination could sound in costs if a director on behalf of his company had taken steps to remove it from the register without advising the plaintiff, thereby causing the plaintiff lost legal costs in preparation for the hearing and, arguably, for the costs of reinstating the company to the register.

[17] The major difficulty for the plaintiff was that until the threshold of jurisdiction is established by a successful challenge this Court would not have jurisdiction to make the award of costs sought at this stage of the proceedings.

[18] Ms Teirney, for Mr Loo argued strenuously against joinder on the basis of Mr Loo's health and submitted that he would be involved in further costs, some of which may turn out to be unnecessary.

[19] I had sympathy with the position of the plaintiff and Mr Loo and considered the matter finely balanced. I concluded that it was not appropriate at this stage to join Mr Loo as a party because of the reservations expressed by the Court of Appeal in *Kidd*. I considered the appropriate course was to adjourn the application until the outcome of the substantive challenge, at least as to the threshold issue, was known. This would save the parties having to go to further expense relating to the service of

a new joinder application, notice of opposition and the comprehensive written submissions that had been prepared by both counsel. I also took into account the fact that both the plaintiff and the director were legally aided and the advice of Ms Lang Siu that she would be considering whether the plaintiff should proceed when there was little evidence of means to satisfy any order the plaintiff might be successful in obtaining. There are also implications under the Legal Services Act

2011 which the parties will need to consider.

[20] With the consent of Ms Tierney, I determined that Mr Loo was a person who was interested in these proceedings and was justly entitled to be heard, and granted him leave under cl 2(2) of Schedule 3 of the Act to appear and be represented. I direct that he be informed by the plaintiff, the defendant and the registry if any steps are taken in relation to the plaintiff's challenge.

[21] Costs in relation to the present application are reserved.

B S Travis

Judge

Judgment signed at 11am on 18 October 2011

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[1] [2010] NZCA 452 (CA).
