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Baker v Hauraki Rail Trail Limited (Auckland) [2018] NZERA 266; [2018] NZERA Auckland 266 (22 August 2018)

Last Updated: 19 September 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2018] NZERA Auckland 266
3017635

BETWEEN CAROL SUSANNE BAKER Applicant

A N D HAURAKI RAIL TRAIL LIMITED First Respondent

AND MAURICE BARNETT Second Respondent

AND PETER MAYNARD Third Respondent

Member of Authority: James Crichton

Representatives: Allan Halse, advocate for Applicant No appearance for First Respondent Second Respondent in person

Third Respondent in person

Investigation Meeting: On the papers

Date of Determination: 22 August 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Employment Relationship Problem

[1]

This is an application to reopen an investigation concluded initially in the

Authority by my determination issued on 26 August 2015 as [2015] NZERA Auckland 259 and to join two named individuals to the proceeding. In that initial determination, I made findings against the respondent Hauraki Rail Trail Limited in

favour of the applicant Ms Baker, found that she has a personal grievance against her

respondent employer and awarded her significant compensation.

[2]

Put shortly, that compensation and the other disbursements awarded in favour

of Ms Baker have never been paid and the fundamental purpose of this application is to progress the satisfaction of that judgment debt.

[3]

Ms Baker seeks a reopening of the matter just referred to and the joinder of

two named individuals Messrs Barnett and Maynard.

[4]

The usual rule is that an Authority investigation can be reopened in

circumstances where it is considered that such a reopening will avoid a possible miscarriage of justice. Typically, successful reopening applications are supported by fresh evidence which is not reasonably available to the parties in time for the

Authority to receive and consider it, in the initial determination of the matter.

[5]

Ms Baker has caused submissions to be filed by her new advocate, Mr Allan

Halse. Those submissions helpfully summarise the issues from Ms Baker's perspective and identify the significant issues on which she seeks to rely.

[6]

One such issue is that during the course of the original Authority investigation,

Mr Peter Maynard who appeared for Hauraki Rail Trail Limited and who represented that he had authority so to do, gave false testimony about the ability of the employer (Hauraki) to pay a settlement sum to Ms Baker (whether by agreement or by direction

of the Authority).

[7]

In that particular regard, Mr Halse correctly identifies the relevant passage in

my original determination which records my understanding of Mr Maynard's evidence that Hauraki had limited financial resources and that he was proposing to

settle with Ms Baker using funds from "another company which he is involved with".

[8]

Mr Halse points out in his submissions that at the time I was dealing with this

matter at first instance (August 2015) Hauraki had been sold and the proceeds of sale (some \$360,000) had been paid over during the period between the mediation, conducted by the Mediation Service of the Ministry of Business Innovation and Employment, which took place on 20 October 2014, and the Authority's investigation in August of the following year.

[9]

No doubt it is conceivable that those funds had been dispersed by the time of

the Authority's investigation; what is clear is that within a month of the mediation date referred to, those funds were paid out. It follows that if there had been a genuine good faith willingness to settle matters (as there ought to have been) then Hauraki was in a position to make a proper settlement with Ms Baker immediately those funds

were received and yet it took no steps.

[10]

So while the point quite properly made by Mr Halse in his submissions is that

there was an availability of funds sufficient to meet the needs of a settlement with Ms Baker at the time the initial mediation took place, it may be that the same point can not be made so strongly in respect to the position by the time the Authority conducted its investigation. As I have just mentioned, it is conceivable that the funds had been dispersed by then for other purposes and so it may not be accurate to surmise that Mr Maynard was telling untruths when he maintained in my 26 August

2015 investigation meeting that there were no funds available to settle with Ms Baker

from Hauraki.

[11]

The agreement for sale and purchase of Hauraki contains a provision requiring

the vendor (Hauraki) to notify the purchaser of "any law suits, claims, proceedings... which may occur, be threatened, brought, asserted, or commenced against it or its directors of employees, involving in any way any of the operating assets and business".

[12]

Understandably, Mr Halse, for Ms Baker, makes the point that at the date the

agreement for sale and purchase was executed, Hauraki knew that they were facing a claim from Ms Baker and therefore, Mr Halse asserts, Hauraki ought to have advised

the purchaser.

[13]

Conversely, while not stated explicitly in the very sketchy submissions that

have been provided by the second and third respondents, it might well be argued for Hauraki that the claim by Ms Baker did not “involve... in any way any of the operating assets and business” of Hauraki. This view of matters could perhaps be advanced because of the conviction ostensibly held by at least Mr Barnett that the nexus of Ms Baker’s claim was the assault perpetrated on her by Mr Maynard, that it was essentially a function of the relationship between those two individuals and arguably not a matter which impacted on Hauraki.

[14]

That argument has limited appeal for a number of reasons. The first, and most

significant is that I found as a fact that Ms Baker was assaulted in the work place in pursuing her duties and it was therefore the employer’s responsibility because every

employer has an obligation to provide every worker with a safe workplace.

[15]

But there is another reason the argument has limited appeal; the Hauraki

District Council who, with other local authorities appears to have effectively created the need for the company Hauraki Rail Trail Limited by developing the rail trail proposal for Hauraki, and being responsible for the wider marketing ambit of the rail trail, took it upon themselves to seek to remove Mr Maynard from having any further involvement in the operation of the rail trail. They did this by literally promoting the sale of Hauraki Rail Trail Limited and it is that sale which is central to this present

matter.

[16]

The evidence before me discloses that once the Thames Coromandel District

Council had constructed the cycle trail, it tendered out the operation of that cycle trail and the successful tenderer was a company incorporated as Great Cycle Rides NZ Limited, the Governing Director of which was Maurice Barnett. Great Cycle Rides New Zealand Limited subcontracted the day to day operation of the cycle trail to Hauraki Rail Trail Limited. Mr Barnett and Mr Peter Maynard were directors of

Hauraki Rail Trail Limited.

[17]

However, the Thames Coromandel District Council became concerned about

the way in which Mr Maynard treated clients and the possibility that was causing reputational damage to the cycle trail project. Accordingly, it is said Great Cycle Rides NZ Limited decided to purchase Hauraki Rail Trail Limited to effectively

exclude Mr Maynard from further involvement in the project.

[18]

Mr Barnett in his statement in reply claims the purchaser has an indemnity

from the vendor in respect to any claims, damages, losses and the like. The reference would appear to be to clause 33.1 of the agreement for sale and purchase which is in the following terms: “*the vendor indemnifies the purchaser in respect of any breach of default under this agreement and against all claims, damages, losses, costs and expenses for which the purchaser is liable or in respect of which it suffers any loss or damage in respect of, or arising from, any breach of contract, or other act or omission of the vendor in respect of the business on or prior to the possession date*”.

[19]

The effect of this provision is plain enough. If the purchasers are to be held

liable for any debt which originates prior to settlement then the vendor must indemnify them.

[20]

The difficulty with much of this tendered information is that it is inconsistent

with the Companies Office record and that calls into question the whole process. That fact, coupled with the statement made by Mr Maynard at my original investigation, which is itself inconsistent with other events, further emphasises the need for more enquiry.

Issues

[21]

There are two issues which the Authority is asked to determine:

(a) ought the Authority's investigation be reopened; and

(b) ought Mr Peter Maynard and Mr Maurice William Barnett be joined to the proceeding?

[22]

For reasons which will become clear, I am not persuaded I need to join Mr

Maynard or Mr Barnett to this proceeding although I shall certainly want to talk with each of them.

Should the Authority's investigation be reopened?

[23]

As I have already noted, the usual basis on which a reopening application is

proposed is that new information by way of evidence has become available and the failure to consider such new evidence in terms of the eventual result might cause a

miscarriage of justice.

[24]

While the present proceeding is really a kind of compliance order application

because what Ms Baker is seeking to do is to have her entitlement to the benefit of her judgment enforced, she is doing that by the entirely conventional device of providing

evidence that was not available to the Authority's original investigation.

[25]

Of course, the original determination of the Authority made awards in

Ms Baker's favour against her employer Hauraki Rail Trail Limited. That decision issued on 26 August 2015. The agreement for sale and purchase of Hauraki Rail Trail Limited is dated 26 November 2014. Settlement of that agreement for sale and

purchase appears to have been set for 8 December 2014. As I have already alluded to,

that evidence is inconsistent with the Companies Office record.

[26]

As I have already noted, Mr Peter Maynard attended my original investigation

meeting on behalf of Hauraki Rail Trail Limited and represented that Hauraki Rail

Trail Limited could not fund any settlement and that he was endeavouring to fund a settlement from alternative sources.

[27]

Those observations of his must be regarded now with some suspicion as the

evidence before me suggests that the totality of the settlement proceeds for the sale and purchase of Hauraki Rail Trail Limited was paid to Mr Peter Maynard personally and presumably that happened on or about 8 December 2014. So, by the time my investigation was on foot, it would seem that he had been paid the total amount of

\$386,000 to his personal bank account.

[28]

The apparent basis for this payment is the contention that the plant of Hauraki

Rail Trail Limited was owned by Mr Peter Maynard and therefore sale proceeds ought properly to have been paid to him. In his statement to the Authority in anticipation of this further proceeding brought by Ms Baker, Mr Peter Maynard says: "*the*

plant of Hauraki Rail Trail Limited was owned by Peter Maynard, hence the sale of plant was paid to Peter Maynard”.

[29]

Because the information helpfully identified by Ms Baker and put before me

now, is at variance to the official record, I am bound to make further enquiries if only to ensure that the basis of my understanding of the factual matrix stands up to

scrutiny.

[30]

To put the same point another way, it is conceivable that in the original

hearing, I was misled into a false sense of security by the evidence given by Mr Maynard that he was finding alternative sources of funds to meet the company’s obligations to its former employee. Had I known then what I have now been told, I should have proceeded differently, although the Authority’s decision would not have

changed fundamentally.

[31]

Accordingly, I am satisfied the interests of justice require me to reopen this

investigation. I shall require to speak with both Mr Maynard and Mr Barnett so that I

understand the factual matrix correctly and in particular, why what appears to be cogent evidence before me is not supported by the official record.

Determination

[32]

Ms Baker has satisfied me that she is entitled to have my investigation

reopened and I now make that order.

[33]

I have not thought it necessary to join either Mr Maynard or Mr Barnett to this

proceeding but I reserve the right to reconsider that in the future.

[34]

My Authority officer will contact the parties after the challenge period has

expired, to progress this matter.

Costs

[35]

Costs are reserved.

James Crichton

Chief of the Employment Relations Authority

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