Employment Court of New Zealand

C v Turuki Healthcare Services Charitable Trust [2018] NZEmpC 115 (1 October 2018)

Last Updated: 16 October 2021

IN THE EMPLOYMENT COURT
AUCKLAND

[2018] NZEmpC 115
EMPC 152/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for a stay
BETWEEN	[C] First Plaintiff
AND	[H] Second Plaintiff
AND	TRACEY SIMPSON Third Plaintiff
AND	TURUKI HEALTHCARE SERVICES CHARITABLE TRUST Defendant

Hearing:	On the papers
Appearances:	T Braun, counsel for plaintiffs A F Drake and Dylan Pine, counsel for defendant
Judgment:	1 October 2018

INTERLOCUTORY JUDGMENT OF JUDGE M E PERKINS

(Good Faith Report and Application for Stay)

Introduction

[1] These proceedings involve a challenge to a determination of the Employment Relations Authority (the Authority) dated 1 May 2018.1 The plaintiffs have filed a statement of claim electing a de novo challenge to the determination. There is an indication in the statement of claim that the plaintiffs are intending to file an

1 *Turuki Healthcare Services v Makea-Ruawhare (No 2)* [2018] NZERA Auckland 136.

application for leave to challenge an interim determination of the Authority dated 23 March 2018.2 This earlier determination was dealt with by the Authority on an urgent ex parte basis. Interim compliance orders then made against the plaintiffs (respondents before the Authority), were then confirmed in the second determination, which is the subject now of the challenge to the Court. The proceedings related to alleged breaches by the plaintiffs of the terms of a mediated settlement between the defendant and its former employee, which incorporated confidentiality and non- disparagement conditions. The plaintiffs were advocates for the employee. The settlement agreement had been procured using the Mediation Services, pursuant to s 149 of the Employment Relations Act 2000 (the Act). The non-disparagement and confidentiality clause is quite specific and states:

Neither party, including [C], shall make derogatory remarks or disparaging comments about the other. Further, [C] shall not make any reference whatsoever to this employment relationship problem in any publication, including social media.

[2] In respect of the first determination, the time has expired for the filing of any challenge. Accordingly, if the plaintiffs still intend to challenge it, they will need to seek leave to file a challenge out of time.

[3] As indicated the defendant (the applicant before the Authority), in the face of what it considered were breaches by the plaintiffs of the settlement agreement, applied to the Authority on an urgent ex parte basis for interim compliance orders and penalties. The interim compliance orders were made as a result of that application. The substantive application for permanent orders was then set down for a hearing on notice to give the plaintiffs the opportunity to participate in the Authority's investigation and be heard on the applications. Following the hearing, the second determination was issued by which the interim orders were made permanent compliance orders. The plaintiffs were ordered to pay penalties totalling $30,000 on a joint and several basis for their breach of the mediated settlement. In addition, and on the same basis, there was an order that the plaintiffs pay general damages of $3,000.

2 *Turuki Healthcare Services v Makea-Ruawhare* [2018] NZERA Auckland 95.

[4] The plaintiffs have now applied to the Court for a stay of enforcement of the penalties and the damages. The defendant opposes the stay.

[5] The second determination of the Authority dated 1 May 2018 indicated that the plaintiffs did not take steps in the defendant's proceedings before the Authority and did not participate in its investigation meeting.3 There was also an indication that the plaintiffs were continuing to breach the confidentiality and non-disparagement clauses in the settlement agreement. The plaintiffs, as advocates for the employee, who obtained the benefit from the mediated settlement, had chosen to be parties to the settlement by being specifically bound by the confidentiality and non-disparagement provisions in the settlement. In any event, as advocates, they were agents for the employee and had an obligation to her not to put her at risk by breaching the settlement terms.

[6] As the second determination dated 1 May 2018 records, the plaintiffs did not co-operate with the Authority in a timely manner, or at all, in its investigation. The Authority was, therefore, left with having to deal with the defendant's substantive applications on a default basis. In the Authority proceedings, the employee concerned was named as a party to the proceedings. No penalties or damages were awarded against her. She is not named as a plaintiff in the challenge which is now filed in the Court.

[7] On the basis of the determination, I considered that pursuant to s 181 of the Act, the plaintiffs may not have participated in the Authority's investigation of the matter in a manner which was designed to resolve the issues involved. In addition, it appeared that in view of the circumstances, where the plaintiffs appeared to be continuing to disparage the defendant and breach confidentiality, they may not have acted in good faith towards the defendant during the investigation. Accordingly, I requested a good faith report pursuant to s 181 of the Act, and this has now been received. While it is not a specific requirement in the process, the parties have been given the opportunity to make further comment on the good faith report before the Court decides whether or not to limit the nature of the challenge or the extent of the

3 Above n 1.

evidence to be permitted pursuant to the provisions of s 182 of the Act. Counsel for both parties have filed submissions on the good faith report.

[8] The parties have agreed that matters now outstanding for decision, including the application for stay of enforcement, may be dealt with by the Court on the papers.

The good faith report

[9] The good faith report outlines the factual circumstances leading to the proceedings being filed with the Authority. In the first determination which made interim compliance orders the Authority Member, pointed out to the plaintiffs, and particularly [C], what their obligations were and how they ought to proceed in a more appropriate fashion. As the first determination was dealt with ex parte, the report sets out the steps taken to allow the plaintiffs to be heard on notice. The report confirms the failure of the plaintiffs to co-operate with the investigation. It states that the only reply being received from the plaintiffs was a copy of a letter from [C] to the Minister of Workplace Relations and Safety seeking the Authority Member's dismissal from office. The report refers to subsequent statements by [C] and Mr [H], endeavouring to link the Authority Member to counsel for the defendant. The Member inferred from this a suggestion was being made by the plaintiffs of bias, apparently for the purposes of founding an allegation of corrupt behaviour, on his part. The conclusions

of the good faith report are that the plaintiffs did not facilitate and indeed obstructed the Authority's investigation and did not act in good faith towards the defendant or its legal counsel. It concluded also that the plaintiffs' failure to participate in the Authority's proceedings was deliberate.

[10] I have considered the submissions of counsel for the parties as to how the Court should respond. Predictably, counsel for the plaintiffs seeks that no limitation be imposed on the nature of the challenge or extent of evidence. Counsel for the defendant submits to the opposite effect. It is clear that the plaintiffs did not co-operate as described in the good faith report. In submissions, their counsel, who has recently been instructed, does not dispute that the plaintiffs did not act appropriately. He points out that the plaintiffs' view of the interim orders made ex parte was that they were flawed and that had an effect on the balance of the proceedings. They decided to then

place their emphasis on seeking ministerial assistance. Counsel concedes this was not the appropriate way to deal with the matter, but he submitted that the plaintiffs had sincerely held beliefs. He further submitted there was no lack of good faith on their part.

[11] I accept Mr Drake's submissions that the behaviour towards the Authority in its efforts to conduct an investigation was obstructive. Clearly, the constant disparagement of the defendant, legal counsel and the Authority was not in keeping with the duty of good faith, which the plaintiffs, as employment advocates in the proceedings, are bound to observe, not only in the interests of their client who they represent, but also with regard to their own position as parties now in these proceedings which are properly before the Court. I accept that the plaintiffs have genuinely held beliefs about the prevalence of bullying behaviour in the workplace in New Zealand. Representing employees where such bullying has occurred is commendable. However, as their own counsel has submitted, their behaviour in the present case has not always been appropriate.

[12] In considering whether the Court should only allow the plaintiffs to proceed with their challenge on a non-de novo basis and with limits placed on the extent of the evidence, there is a difficulty in this case. While the statement of claim which has been filed by the plaintiffs is convoluted and raises causes which may not be relevant or alternatively are outside the jurisdiction of the Court to determine, there are issues which emerge which should be properly canvassed at a hearing even if the matter proceeded on a non-de novo basis. These issues are the question of whether the Authority had jurisdiction to make interim compliance orders, whether penalties can be globalised and then be ordered to be paid on a joint and several basis, whether this was an appropriate case to impose maximum penalties and whether there is jurisdiction to award the general damages and even whether that was appropriate. While there is no challenge to the earlier determination in which the interim compliance orders were made, that decision will need to be considered, as it had consequences in the second determination, which is the subject of the challenge where the interim orders were simply made permanent. These issues could be confined within a non de-novo challenge. However, the Court, in endeavouring to resolve the issues, would probably not wish to limit the scope of the evidence.

[13] These kinds of issues flowing from good faith reports have been well traversed in previous decisions of the Court.4 As stated in *The Travel Practice Ltd v Owles*, the Court needs to consider not only the blameworthy conduct of the plaintiffs, but the overall interests of both the plaintiffs and the defendant, so that the discretion conferred on the Court by s 182(2) of the Act is exercised judicially and consistent with the interests of justice.5

[14] In the present case, the issues to be decided involve some important points of principle. In addition, there are other causes pleaded, which I consider as a matter of fairness the plaintiffs should be entitled to argue. In all the circumstances, therefore, I do not propose to limit the ambit of the challenge or the evidence, and the matter will proceed on a de novo basis.

[15] Some amelioration of the defendant's position may be considered when the issue of costs is being determined.6 The issue as to costs which might arise out of the good faith report is reserved at this stage but ultimately may be determined upon the outcome of the challenge on its merits.

The application for stay of execution

[16] The plaintiffs have made an application for stay of the proceedings. The application is made pursuant to reg 65 of the Employment Court Regulations 2000. The application is effectively an application to stay enforcement by the defendant of the Authority's award of penalties and damages pending the outcome of the challenge. Filing a challenge does not operate as a stay of a determination.7 The grounds which the plaintiffs in this case have set out for the stay are effectively the categories which were laid down by the Court in *Assured Financial Peace Ltd v Pais*.8 In exercising its broad discretion in considering an application for stay, the Court takes account of the interests of justice.9 It exercises the discretion judicially and in accordance with

4. *The Travel Practice Ltd v Owles* EmpC Christchurch CC 15/09, 14 October 2009; *Pacific Palms International Resort & Golf Club Ltd v Smith* [2008] NZEmpC 295; *Real Cool v Gunfield* EmpC Auckland AC 53/08, 23 December 2008; *South Pacific Ltd v Tian* [2013] NZEmpC 44.

5 *The Travel Practice Ltd v Owles*, above n 4, at [20].

6 See *Pacific Palms International Resort & Golf Club Ltd v Smith*, above n 4.

7 Employment Relations Act 2000, s 180; Employment Court Regulations 2000, reg 64.

8 *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50.

9 At [4]-[6].

principle. In this exercise, the Court weighs the discretion carefully between the rights of a successful litigant to have the benefits of the judgment subject to challenge and preserving the position of the opposing party in case that challenge succeeds. Even if a stay is granted, the Court will generally require the judgment sum, or a portion of it, to be secured in some way, generally by payment into the Court Registry to be held on an interest-bearing deposit.10

> [17] In the present case, the penalties and the damages in their entirety have been awarded to the defendant. This is probably a departure from the usual course of events where only a portion of the penalties are awarded in favour of the successful litigant, with the balance being payable to the Crown.
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> [18] In the present case, I do not propose to analyse the circumstances against all the factors considered in *Pais*. As there are contentious matters arising from the determinations of the Authority which have already been discussed, I consider that this is an appropriate case to order a stay without imposing any condition that the plaintiffs secure monetary awards pending outcome of the challenge. That is not to be taken as dismissive of the defendant's position. Nevertheless, this is not a situation where the defendant has recovered monetary awards by way of reimbursement for losses and will remain out of pocket until the outcome of the challenge. The penalties and damages have been awarded for punitive and deterrent purposes.
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> [19] In view of the fact that the matter is now sub judice, the stay will be conditional upon the plaintiffs, pending the outcome of the challenge, ceasing from making any further disparaging comments about the defendant or its counsel, the Authority Member who issued the determinations, or this Court or its Judges. In addition, the stay is conditional upon the plaintiffs taking down from their social media pages all comments presently existing relating in any way to these proceedings. This is to be completed on or before 4pm on 2 October 2018. The order staying execution is conditional upon those conditions being observed and activated. Any breach of these conditions pending the outcome of the plaintiffs' challenge will result in the order for

10. Employment Court Regulations 2000, reg 64(3)(b). See for example *Quality Consumables Ltd v Hannah* [2017] NZEmpC 114.

stay lapsing and leaving the defendant free to enforce the monetary awards of the Authority.

Conclusion

> [20] In view of the fact that a good faith report had been requested in this matter, there was a direction contained in the Court's minute of 11 June 2018 that the requirement on the defendant to file and serve a statement of defence was suspended. So that these proceedings may now be advanced, the defendant is to file and serve a statement of defence on or before 4 pm on 19 October 2018. Once that statement of defence is filed, a directions conference with counsel is to be held so that the proceedings may be advanced to a hearing.
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> [21] In the meantime, costs are reserved.

Judgment signed at 4.30 pm on 1 October 2018

M E Perkins Judge