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Edminstin v Sanford Limited [2017] NZEmpC 5 (27 January 2017)

Last Updated: 2 February 2017

IN THE EMPLOYMENT COURT CHRISTCHURCH

[\[2017\] NZEmpC 5](#)

EMPC 80/2016

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

BETWEEN JOHN EDMINSTIN Plaintiff

AND SANFORD LIMITED Defendant

Hearing: 27 January 2017 (in Chambers)
(Heard at Auckland)

Appearances: J Katz QC, counsel for plaintiff
P Wicks QC, counsel for
defendant

Judgment: 27 January 2017

Reasons: 27 January 2017

REASONS FOR INTERLOCUTORY JUDGMENT (NO 2) OF CHIEF JUDGE G L COLGAN

[1] These are the reasons for my decision made earlier today at the conclusion of an urgent hearing with counsel for the parties in Chambers that:

(a) Steven Robin Frame be recalled as a witness for the purposes of:

i. demonstrating to the Court the Koden memory card produced on or about 5 March 2015 and supplied to the plaintiff in purported compliance with the settlement agreement and supplied to and retained by the defendant;

ii. demonstrating to the Court the Koden memory card purchased by the plaintiff and formatted and loaded with data off the

Toiler's Koden plotter device by Steven Frame on or about

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6 November 2014 and supplied by Steven Frame to the plaintiff on or about 6 November 2014;

iii. permitting any further evidence to be given by and cross-examination of Steven Frame as may be consequential upon the orders above;

iv. directing that the defendant produce and make available for the foregoing purposes the Koden memory card supplied to it by Steven Frame and produced on or about 5 March 2015.

(b) Alternatively, the plaintiff has leave to call David James, Business Development Manager of Marintec Ltd, of Timaru to give evidence after the plaintiff has closed his case.

(c) The defendant is to disclose and make available for inspection by the plaintiff and the Court no later than 9 am on Monday 30 January 2017 in Invercargill, any Koden electronic data cards in its power, possession or control relating to the vessel *Toiler*.

[2] This proceeding was adjourned part-heard shortly before Christmas 2016 and is to resume in Invercargill at 9.30 am on Monday 30 January 2017 or, if arrangements can be made by the Registry with the courthouse, at 9 am on that date. Because of other commitments and flight times, the hearing of evidence is intended to cease at approximately 4.30 pm on Tuesday 31 January 2017 (at the latest) although final submissions from counsel are to be heard in Auckland (with a video link to Invercargill) at 10 am on Friday 3 February 2017.

[3] One issue in the case concerns the electronic contents of a Koden GPS plotter device carried on a fishing vessel including notations and other data entries which are said to constitute the skipper's 'marks'. Mr Edminstin contends that he is the sole owner of those data and that Sanford Ltd (Sanford), his former employer, is not entitled to any interest in them. Sanford says that it and Mr Edminstin own jointly the property in those data; that it has provided him with an electronic copy of them;

and that, in any event, it has not used, and does not propose to use, those data in its commercial oyster fishing operations in any event.

[4] At the hearing last December the Koden device from the vessel that Mr Edminstin skippered formerly, *Toiler*, was produced as an exhibit in court and its electronic contents demonstrated to the Court. A number of photographs or screen shots of particular pages of data were taken on junior counsel's mobile phone and subsequently became exhibits in the proceeding. A witness who conducted this in-court demonstration (Mr Frame) expressed concern about the risk that introducing electronic data cards into the Koden, for the purpose of viewing their contents, might endanger the retention of the data in the device's in-built electronic memory. In these circumstances, no attempt was made to view the contents of what was then known to be one Koden data card that Mr Edminstin was given by Sanford in March

2015.

[5] Sanford has subsequently offered to give the Koden device, now not used by it, to Mr Edminstin but he has not, so far at least, accepted this 'gift' which Sanford says will also satisfy its contractual obligation to provide him with his 'marks'. The Koden device will now be regarded as an exhibit in the case and therefore in the Court's custody.

[6] After the hearing was adjourned shortly before Christmas 2016, two sets of events occurred. First, Mr Edminstin disclosed to his lawyers that he held another Koden data card which had been provided to him by the same witness (Mr Frame) who had demonstrated the Koden device to the Court only a week or so previously, and who was Sanford's usual point of contact for purchasing and maintaining on-board electronics including the Koden. It appears that the Koden card was provided to Mr Edminstin by Mr Frame at the former's request and that Mr Frame travelled to Bluff and downloaded Koden and other electronic data from *Toiler* but without the involvement or perhaps even knowledge of Sanford. Mr Frame then billed Mr Edminstin for these services and for the purchase of the relevant electronic gadgetry. Mr Edminstin says that he had not previously made known the existence of this Koden card (and had therefore not disclosed it to the defendant) because he did not consider it was relevant to this proceeding.

[7] That all changed, however, when, over the adjournment, Mr Edminstin travelled to Port Chalmers where, with the assistance of another marine electronics technician from Timaru (David James), he inserted his card (provided to him by Mr Frame) into a similar or identical Koden on another vessel and was able to read the contents of that card. These, he said, were significantly deficient in comparison to the information from the Koden's internal memory as displayed to the Court during the hearing.

[8] Mr Edminstin says that he also connected the Koden memory card given to him by Sanford in March 2015 with the Koden device at Port Chalmers and obtained a similar result as to its content.

[9] In these circumstances, Mr Edminstin seeks to have Mr Frame recalled to give further evidence and will seek to have these two Koden cards in his possession displayed on the Koden device in the courtroom at next week's resumed hearing. Further, Mr Edminstin says (and there appears to be no dispute) that Sanford itself has retained another Koden memory card, the contents of which Mr Edminstin seeks to have displayed to the Court after production of this Koden card by order of the Court.

[10] The defendant opposes the orders both requiring it to disclose, and make available for inspection, its Koden card, and for the inspection of all Koden cards. It says that the card and its contents are not relevant to the proceeding. It follows, also, that it necessarily opposes the application to recall Mr Frame, even if only that there would be nothing further for him to give evidence about in these circumstances.

[11] I agree with Mr Katz QC, counsel for the plaintiff (and Mr Wicks QC, counsel for the defendant, did not demur) that the disclosure and the making available for inspection of relevant documents are ongoing obligations which apply at this point in the hearing. That is not only consistent with the requirement in r 8.18 of the High Court Rules but is the interpretation that has also been given by this Court on a number of occasions to the relevant document disclosure rules in the [Employment Court Regulations 2000](#).

[12] As to relevance, I consider that the contents of each of the three Koden memory cards will, or at least may, be relevant to the matters in contention in the proceeding. An important issue in the case is whether Sanford provided Mr Edminstin with his 'marks' as it was obliged to do under the parties' settlement. Whether that was on a shared or sole proprietary basis is an issue of interpretation in the case, but in any event a second issue now arises as to whether what Sanford says was its provision to Mr Edminstin of his marks, was the provision of all such data. Mr Edminstin's evidence in support of his interlocutory application raises the serious possibility, as a result of the content of the two Koden memory cards observed in the Koden device at Port Chalmers over the last few weeks, that they may be significantly different from the content of the internal memory of the Koden device observed by the Court at the hearing in December 2016. For these reasons, the Koden cards (including, in particular, the card the subject of this application held now by

Sanford) are relevant and warrant an order requiring them to be disclosed and available for inspection at next week's hearing.

[13] Turning to the second element of Mr Edminstin's application, I infer that there is, if not general agreement, then muted opposition by Sanford to the application to recall Mr Frame. As the hearing earlier today developed, however, there emerged the possibility that the plaintiff might obviate the need for recalling Mr Frame if he can adduce evidence from the second maritime electronics technician, Mr James from Timaru, who was present at one or more of the three Koden card inspections arranged by Mr Edminstin over the last few weeks in Port Chalmers. There are possible difficulties in arranging Mr James's attendance to give evidence. Mr Katz says that because Mr James's firm performs work for Sanford, it is likely that he will require a summons to witness and arrangements have been put in place for a summons to be obtained this afternoon from the Court in Auckland. Next, because Mr James is based in Timaru, arrangements will have to be made for him to travel to Invercargill to give evidence. These are matters to which Mr Katz will attend between now and the recommencement of the hearing

[14] The order that I have made, therefore, is that the plaintiff is permitted to have Mr Frame recalled or, if he is able to adduce the relevant evidence from Mr

James, the order will be one that permits Mr James to be called despite the plaintiff having closed his case.

[15] Although the plaintiff has been successful in obtaining these orders, Mr Katz acknowledged frankly that the need to do so was entirely the responsibility of the plaintiff and for which he has expressed regret to the Court and to the defendant. In these circumstances, it would be wrong for the plaintiff to benefit from an order for costs attendant upon the hearing of these applications and any steps to be take in consequence of them.

GL Colgan

Chief Judge

Judgment signed at 4.45 pm on Friday 27 January 2017

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