Employment Court of New Zealand

Edwards v Two Degrees Mobile Limited [2012] NZEmpC 149 (3 September 2012)

Last Updated: 8 September 2012

IN THE EMPLOYMENT COURT AUCKLAND

[2012] NZEmpC 149

ARC 49/12

IN THE MATTER OF application to set aside the interim injunction

BETWEEN SIMON MAXWELL EDWARDS Plaintiff

AND TWO DEGREES MOBILE LIMITED Defendant

Hearing: 30 August 2012 (Heard at Auckland)

Appearances: Michael O'Brien and Nura Taefi, counsel for Mr Edwards

Harry Waalkens QC and Penny Swarbrick, counsel for Two Degrees

Mobile Ltd

Judgment: 3 September 2012

INTERLOCUTORY JUDGMENT OF JUDGE B S TRAVIS

[1] The defendant has applied to set aside the interim injunction I granted on

12 July 2012.[1] The grounds on which that application was made are that the circumstances upon which the injunction were granted have materially changed.

[2] The injunction was granted restraining the dismissal of the plaintiff until further order of the Court on the following conditions:

[19] ...

a) from 5pm on Friday 13 July 2012 the plaintiff will commence garden leave and will not be required to attend to any work on behalf of the defendant or attend at its premises or access its systems;

SIMON MAXWELL EDWARDS V TWO DEGREES MOBILE LIMITED NZEmpC AK [2012] NZEmpC 149 [3 September 2012]

b) the defendant will pay to the plaintiff all his contractual entitlements as an employee;

c) because the plaintiff was prepared to continue full employment with the defendant, the defendant will not be entitled to recover from the plaintiff pursuant to his undertaking as to damages should the plaintiff be unsuccessful in the substantive proceedings;

d) the defendant will advise the plaintiff of any vacancies to which he might be redeployed;

e) leave is reserved to the parties to apply for a variation of these conditions or the underlying order should there be any change of circumstances including any change in the dates of the investigation or the hearing of any substantive matters.

[3] At the time the original injunction application was made, the substantive issue between the parties was whether or not the defendant could justify its decision to dismiss the plaintiff. That dismissal had been intended to take effect on Sunday 15

July 2012. The matter was due to be investigated by the Employment Relations Authority (the Authority) in a meeting commencing on 22 August 2012 and extending for some three days. The injunction restrained the defendant from implementing its decision in the meantime.

[4] After having found there was an arguable case against the dismissal being allowed to proceed, and referring to the consequences the dismissal could have upon the plaintiff in the interim period, I expressed the view that I considered it necessary to try to reach an arrangement on the balance of convenience that did the least harm to both parties. I also considered it important not to make a ruling that in any way indicated a firm view on any aspect of the complex issues which could compromise the position of the parties in the mediation which was scheduled to take place the following Tuesday.

[5] I referred to various offers the defendant had made to place the plaintiff on garden leave until 31 August 2012 or earlier if the parties resolved the issue or the Authority issued a determination substantively resolving the matter before that time. I concluded:

[15] I was satisfied from the material that was put before me that the overall justice of the case required such an order to be made to simply

hold the position, the status quo, until the parties can have their substantive matters resolved either by mediation or by the Authority. To have declined the application or to have granted it in the unconditional terms that the plaintiff has sought, would, in my view, have not been just and what I have attempted to do is to achieve a balance.

[6] Since the granting of that injunction I have been advised by counsel that the mediation did not resolve the matter and, on the plaintiff's application, by a determination dated 1 August 2012,[2] the Authority ordered the substantive matter to be removed to the Employment Court for hearing and determination without the Authority investigating it.

[7] Mr Waalkens, counsel for the defendant, submitted that at the time of applying for the removal of the matter to the Employment Court the plaintiff knew, or ought to have known, that if his application was successful the prompt investigation allocated for the matter, upon which the interim injunction was ordered, would be deferred or lost. Notwithstanding this, the plaintiff pursued his application for removal and was ultimately successful. The Employment Court hearing of the matter has been set down for the week commencing 29 October 2012 which is two months after the date allocated for the investigation by the Authority.

[8] Mr Waalkens contended that these events so affected the balance of convenience and the overall justice of the case that they now favoured the complete revocation of the injunction. He also submitted that if all else failed, damages would be an appropriate remedy for the plaintiff if he succeeded in asserting that he had been unlawfully made redundant by the defendant.

[9] Mr Waalkens also sought to reopen the issue of whether the plaintiff had an arguable or sufficiently arguable case and contended that the defendant should be able to exercise its rights to reorganise its business as it thinks fit.

[10] There has been no change of circumstances or new evidence which would

enable me to reconsider the arguability of the plaintiff's case and, in particular, his contention that the defendant by contract restricted its rights to reorganise its

business in the sense that it allegedly agreed to provide him with three years' notice

of any termination.

[11] Similarly, Mr O'Brien, on behalf of the plaintiff, took the opportunity to contend in his notice of opposition that the injunction should be varied to permit the plaintiff to return to work and not remain on garden leave.

[12] I do not consider that the change of circumstances brought about by the plaintiff's election to pursue the removal of his proceedings into the Court and the delay thereby occasioned, allows for all aspects of the injunction to be reconsidered. I agree with the views of Judge Colgan, as he then was, in *Bamber v Air New*

Zealand Ltd[3] where he stated:[4]

All parties accepted that the first defendant must establish a change in circumstances since the making of the interlocutory injunctive order and that it will be just in this event that the injunction be set aside or varied. It was common ground that a party cannot reopen the merits already argued and decided upon unless these have been affected by a material change in circumstances. It is this delay which the first defendant company says permits and requires the Court to revisit the question of interim relief. ...

[13] As in the *Bamber* case, the defendant contends that the delay determining the substantive matter will cause the defendant to suffer material damage if the injunction remains in place without variation.

[14] Mr Waalkens submitted that the defendant has by the injunction been put to the significant expense of having to pay the plaintiff's disputed salary. He referred to the plaintiff's existing other claim before the Authority which has been investigated and for which the parties are awaiting a determination. This will determine the plaintiff's claim that the defendant unilaterally and unlawfully reduced his annual salary from $350,000 to $200,000 per annum in May 2008.

[15] Mr Waalkens submitted that the plaintiff's salary is substantial and that the

actual cost to the defendant while it employs the plaintiff on a garden leave basis is

$18,000 per month. For the six weeks since the injunction was granted on 12 July, these monies are not recoverable, in terms of the order I previously made. To

illustrate the costs to the defendant, Mr Waalkens submitted that, allowing four months for the Court to issue a decision on this complex matter, including the two months which would have elapsed from the hearing of the variation application to the date of hearing on 29 October, its irrecoverable cost would be approximately

$108,000. He observed that this would potentially significantly increase depending upon the outcome of the Authority's determination of the plaintiff's salary claim. If the plaintiff is successful, the defendant would have to pay $29,000 per month and the total cost of the injunction remaining in its present terms would be approximately

$174,000. These amounts do not include the incidental costs of employment including holiday pay and ACC levies.

[16] The defendant was concerned that unless the injunction was set aside, those costs would all be irrecoverable by the defendant even if it was successful in defending the substantive claim, because of the present conditions attached to the injunction.

[17] The defendant continues to maintain that there is no recognisable role or work for the plaintiff to perform at the defendant company and, whilst the plaintiff maintains he is willing to work, in reality, there is no work for him. This is clearly an issue between the parties and there is conflict in the affidavits as to whether work is available. The plaintiff continues to maintain that there is vital work for him to perform and that he needs to remain in employment in order to safeguard his shareholding in the defendant.

[18] As the terms of my judgment indicated, if there was to be any delay in determining the substantive issues, I contemplated that the conditions may well be varied. The plaintiff's election to successfully apply to remove the matter to the Court will considerably lengthen the time before there can be a substantive judgment. This is a material change of circumstances and I consider that therefore the conditions should be altered.

[19] The issue then became the extent of the alteration of those conditions. Mr Waalkens took the position that if the injunction should remain in place, contrary to his submissions, it should be amended so that the defendant was no longer required

to pay the plaintiff his contractual entitlements as an employee. This would mean the removal of paragraph 19(b) of the injunction judgment and the plaintiff would, in effect, be on leave without pay.

[20] In support of that proposition, Mr Waalkens submitted that the Court would be ensuring, on the balance of convenience, that there is an arrangement in place that does the least harm to both parties and maintains the status quo until the substantive claim is resolved. Mr Waalkens submitted that this would also adequately address the plaintiff's concerns about reputational damage and the defendant's contention that there is no longer work available for him. Mr Waalkens submitted that if I accepted this alternative, the plaintiff would still be employed and, if ultimately successful, he will be able to claim his lost salary for the period he was not paid as well as other employment benefits as part of his damages. Mr Waalkens submitted this could be contrasted with the current conditions where the defendant will be left with considerable unrecoverable losses.

[21] I saw the force in that argument which could be met in part by removing the condition at 19(c) of the judgment. This was the condition that because the plaintiff was prepared to continue full employment, the defendant would not be entitled to recover from him, pursuant to his undertaking as to damages, if the plaintiff was ultimately unsuccessful in his substantive proceedings.

[22] The issue that was then addressed was whether on balance there was less harm in allowing the plaintiff's undertaking as to damages to take full effect, as against the defendant's alternative submission that no pay should be ordered in the meantime.

[23] Mr Waalkens stressed the difficulty of enforcing undertakings as to damages even if the defendant was ultimately successful in substantively justifying its decision to dismiss the plaintiff. He suggested it would still be open to the plaintiff to contend that, as he was willing to work, that he would have provided significant consideration for the maintenance of his salary during his period on garden leave, irrespective of the final results. Again, I could see the force in that submission.

[24] Mr O'Brien submitted that notwithstanding the value of the plaintiff's shareholding in the defendant, he was still reliant on his salary and would suffer substantial detriment in the interim period. He proffered an amended undertaking as to damages from the plaintiff in the following terms:

Should the Court find that the defendant's decision to dismiss the plaintiff was substantively justified the plaintiff undertakes within 28 days of this Court's judgment, to repay the amounts paid pursuant to condition 19(b) (the amount the defendant will pay to the plaintiff for his contractual entitlements as an employee in the interim) from the date of this variation.

Monies paid from today will be offset against any amounts the Court may order the defendant to pay to the plaintiff and which it may otherwise be obliged to pay to the plaintiff (including holiday pay, compensation, penalties and costs).

[25] Mr Waalkens addressed difficulties that might still arise in the interpretation of that undertaking, including issues as to whether it would apply should the Court ultimately find that the decision to terminate the employment was substantively justified but carried out in a procedurally unfair manner which vitiated the decision. He contended that there could be other issues which might create considerable difficulties in the enforcement of that undertaking which were not presently able to be contemplated by the parties but could result from the outcome of these complex proceedings. He continued to submit that it would be far simpler to provide that the defendant was not required to pay any salary or other contractual entitlements in the interim.

[26] Whilst I accept Mr Waalkens's submissions that there may be some risks in enforcement of the undertaking, with some additional modifications to the wording those risks can be substantially reduced. The requirement to pay in the interim can remain, but with an undertaking incorporated into the conditions requiring the plaintiff to unconditionally repay those amounts if he is ultimately unsuccessful in establishing that the decision to dismiss was substantively unjustified. This would apply regardless of whether work had been available in the interim. This will go a considerable distance to redressing the balance of convenience. It will also continue to make interim provision for the plaintiff but with a realistic prospect of the defendant recovering those payments if the defendant is successful. I am satisfied the plaintiff has the financial means to meet his undertaking as to damages.

[27] I put to counsel that any orders made should be conditional upon the parties co-operating and pursuing their respective cases with diligence. If a party failed to meet that condition, it would entitle the other party to apply for an appropriate variation or even the setting aside of the interim injunction. Counsel on both sides were agreeable to that condition being added.

[28] I consider that the following alterations of the conditions meet the material change of circumstances and still preserve the balance of convenience by causing the least respective detriment to the parties.

[29] The plaintiff having given an undertaking as to damages, there will be an order restraining the dismissal of the plaintiff until further order of this Court on the following conditions.

(a) From 5pm on Friday 13 July 2012 the plaintiff will commence garden leave and will not be required to attend to any work on behalf of the defendant or attend at its premises or access its systems;

(b) the defendant will pay to the plaintiff all his contractual entitlements as an employee;

(c) should the Court find that the defendant's decision to dismiss the plaintiff was substantively justified, the plaintiff undertakes within 28 days of the Court's judgment to repay the amounts paid to him pursuant to (b) above, from the date of this variation;

(d) if the defendant's decision to dismiss the plaintiff is found to be substantively justified, the plaintiff undertakes within 28 days of the Court's decision, to repay the amounts pursuant to (b) above, from the date of this variation, regardless of whether or not the Court finds that there was work the plaintiff could have performed for the defendant in the interim;

(e) money paid from the date of today's decision will be offset against

any amounts that the Court may later order the defendant to pay to the

plaintiff and which it may otherwise be obliged to pay to the plaintiff

(including holiday pay, compensation, penalties and costs);

(f) the defendant will advise the plaintiff of any vacancies to which he might be redeployed;

(g) the parties will pursue these proceedings with due diligence;

(h) leave is reserved to the parties to apply for a variation of these conditions or the underlying order should there be any material change of circumstances;

(i) in addition, if any of the conditions I have modified in this judgment, which contain wording which counsel did not have the opportunity to address, cause difficulties to either party, leave is reserved to make further application to the Court.

[30] Costs in respect of the application for variation are reserved.

B S Travis

Judge

Judgment signed at 4.45pm on 3 September 2012

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[1] [2012] NZEmpC 111.

[2] [2012] NZERA Auckland 264.

[3] AEC 32F/95, 6 July 1995.

[4] At 4.
