Employment Court of New Zealand

Fletcher v Sharp Tudhope Lawyers [2014] NZEmpC 182 (26 September 2014)

Last Updated: 7 October 2014

IN THE EMPLOYMENT COURT AUCKLAND

[2014] NZEmpC 182

ARC 21/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application to strike out
BETWEEN	DARRYL FLETCHER Plaintiff
AND	SHARP TUDHOPE LAWYERS Defendant

Hearing:	18 September 2014 (Heard at Tauranga)
Appearances:	D Fletcher, plaintiff P A Caisley, counsel for defendant
Judgment:	26 September 2014

JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] Mr Fletcher was a partner at Sharp Tudhope Lawyers (STL) for a number of years. He was dismissed for redundancy in May 2012. He filed a grievance with the Employment Relations Authority (the Authority) claiming that his dismissal had been unjustified and that he had not been correctly paid a number of incentive payments. He also sought penalties for breach of good faith and for breach of his employment agreement. His grievance, while filed on 22 November 2012, has yet to be determined.

[2] In the context of advancing his grievance, Mr Fletcher sought disclosure of the STL partnership agreement and partnership policies. STL declined to provide full copies of the documentation on the basis that they were not relevant (in their

entirety) to Mr Fletcher's claim as he had not been an equity partner and was

therefore not party to the partnership agreement. That meant that the related partnership policies were not applicable to him. Mr Fletcher sought an order for disclosure in the Authority. The application was opposed by STL.

[3] By minute dated 13 January 2014 the Authority member required STL to provide the Authority with an unredacted version of the contested documentation in order to assist her in determining whether it was relevant to Mr Fletcher's personal grievance claims. STL complied with the request. By minute dated 4 February 2014 the Authority declined to order full disclosure. Mr Fletcher filed a challenge. STL applied to strike out the challenge, primarily on the basis that it is precluded by s 179(5) of the Employment Relations Act 2000 (the Act). The strike out application also raised a number of additional issues, which have been put to one side for present purposes.

[4] Mr Fletcher has also pursued a strike out application, on the ground that STL has no standing in this Court. The basis for that

contention is that STL failed to file a statement in reply in the Authority within the timeframe specified in the Employment Relations Authority Regulations 2000 (namely within 14 days of service of the statement of problem on STL).1

[5] Accordingly, there are two applications before the Court for determination – STL's strike out application and Mr Fletcher's strike out application. Both parties filed a synopsis of written submissions and I heard from Mr Fletcher and Mr Caisley, counsel for STL, on the applications during the course of the hearing.

[6] It is convenient to deal with the standing point first. I do not accept that STL lacks standing as a party in this Court simply because it failed to file a statement in reply within time in the Authority. A procedural issue in the context of separate proceedings in a different forum cannot negate STL's standing in this Court. Rather, the basis for standing to defend a challenge is set out in the Employment Court Regulations 2000 (the Regulations). The Regulations provide that a statement of

defence must be filed within 30 days of the date on which the statement of claim is

1 Employment Relations Authority Regulations 2000, at reg 8.

served.2 Failure to do so means that a party may only defend, or be heard, with the leave of the Court.3 STL filed a statement of defence to Mr Fletcher's statement of claim, and did so within the specified timeframe. It may accordingly defend the challenge and pursue its strike out application.

[7] Even if Mr Fletcher is right on the standing point, which I do not accept, the Court may deal with the matters raised on STL's strike out application on its own motion. If the decisions at issue are clearly not susceptible to challenge at this stage they ought not to be allowed to proceed and the statement of claim should be struck out.

[8] I turn to the second issue. The Act provides that a party who is dissatisfied with a determination of the Authority may pursue a challenge in the Court (s179(1)). However, the right of challenge is limited. Section 179(5) provides that:

(5) Subsection (1) does not apply –

(a) to a determination, or part of a determination, about the procedure that the Authority has followed, is following, or is intending to follow; and

(b) without limiting paragraph (a), to a determination, or part of a determination, about whether the Authority may follow or adopt a particular procedure.

[9] STL submits that the plaintiff's challenge is excluded by operation of s 179(5). I pause to record that Mr Caisley accepted, for the purposes of the argument, that the decisions at issue constituted "determinations" for the purposes of s 179(5).

[10] As Mr Caisley points out, a useful approach to strike out applications founded on a statutory bar can be found in *Murray v Morel & Co Ltd*.4 There the

Supreme Court observed that:5

2 Employment Court Regulations 2000, reg 19(2).

3 Employment Court Regulations, reg 19(4).

4 *Murray v Morel & Co Ltd* [2007] NZSC 27, [2007] 3 NZLR 721; alternatively cited as *Trustees*

Executors Ltd v Murray.

5 At [33] per Tipping J.

the proper approach, … , is that in order to succeed in striking out a cause of action as statute-barred, the defendant must satisfy the court that the plaintiff's cause of action is so clearly statute-barred that the plaintiff's claim can properly be regarded as frivolous, vexatious or an abuse of process.

[11] The scope and application of s 179(5) has been the subject of full Court consideration in the recent case of *H v A Ltd*.6 As the Court made clear, s 179(5) operates to preclude a litigant from challenging a procedural determination of the Authority. A determination will not be 'procedural' and will not be caught by s 179(5) where it has a substantive effect on rights, which cannot otherwise be remedied on a challenge or by way of review.7

[12] Mr Fletcher has advanced a number of submissions in opposition to STL's

strike out application, all of which I have considered.

[13] Mr Fletcher made the point that the judgment in *H v A Ltd* had not been issued at the time his challenge was filed and that no amendments have been made to s 179 indicating that it is to apply retrospectively. Both these points are correct but I do not consider that they materially advance matters. The issue is whether the Authority's decision relating to the relevance or otherwise of the disputed documentation falls within s 179(5), as properly interpreted. The judgment in *H v A Ltd* assists in that inquiry.

[14] The *H v A Ltd* approach has recently been applied in *Austin v Yoobee Ltd*.8

There the Chief Judge held, in relation to a challenge to an interlocutory determination of the Authority as to the admissibility of

intended evidence, that:9

... s 179(5) of the Employment Relations Act 2000 (the Act), as interpreted by the full Court in *H v A Limited*, precludes statutorily a litigant from challenging a determination of the Authority about its procedure. Determining that proposed evidence is inadmissible is a matter of the Authority's procedure. The scheme of the Act is for the Authority to get on and determine the proceeding on its merits. If Mr Austin is dissatisfied with the Authority's substantive determination of his grievance, he will have a right of challenge by hearing de novo. In the course of this, he will be entitled to re-argue the question of admissibility of the evidence which the Authority has refused to consider. Thus, the Authority's determination on

6 *H v A Ltd* [2014] NZEmpC 92.

7 At [28].

8 *Austin v Yoobee Ltd* [2014] NZEmpC 105.

9 At [4].

the inadmissibility of the evidence does not create an irrevocable injustice for Mr Austin.

[15] Mr Fletcher submitted that the Authority's investigation is awaiting the completion of mediation, which is currently adjourned. He says that the requested documents are important for the mediation process because a mediation result cannot be appealed and any factual or legal anomaly carried into mediation cannot subsequently be corrected. It is accordingly submitted that significant irreversible consequences will be suffered if his challenge cannot proceed. I do not accept this argument. The Authority's minutes, which are at the heart of the proposed challenge, were not part of the mediation process. Rather they were clearly directed at the relevance or otherwise of the documentation for the purposes of determining Mr Fletcher's personal grievance claims filed in the Authority, as the minutes make plain. And while parties have an obligation to mediate in good faith, they are not required to reach agreement if they do not consider it appropriate to do so based on the information they have available at the time.

[16] It was submitted that the Authority's determination involved an examination and interpretation of the parties' employment agreement and that, in making a determination that was within its exclusive jurisdiction, the Authority was making a determination about a substantive matter affecting the rights and obligations of the parties.

[17] The Authority has broad powers under the Act to call for evidence and information, and to take into account such evidence and information as it thinks fit, as part of its investigative process.10 The Authority member was asked to consider whether certain documentation should be provided. She concluded (after examining it) that it should not, as it was irrelevant to the matters at issue. I agree with Mr Caisley's submission that a determination by the Authority as to what documentation is relevant to its investigation is a matter of procedure. The fact that the determination was informed by an interpretation of the employment agreement does not change its procedural character. Issues relating to relevance will often be

resolved having regard to the matters in dispute and key contractual documentation.

[18] Mr Fletcher submitted that *H v A Ltd* wrongly limits s 179(1) and that the correct legal test (under s 179(5)) is whether the determination of the Authority impacts on the parties. Adopting such an expansive interpretation is not consistent with the wording of the provision and would undermine the scheme and purpose of the Act, for the reasons set out in *H v A Ltd*. The reality is that any decision is likely to have some sort of impact. That cannot be the touchstone for founding a challenge from a determination at an interlocutory stage.

[19] While the determination may impact on the outcome of the Authority's investigation it will have no irreversible and substantive effect. That is because the issue of relevance may fall for later consideration on a subsequent de novo challenge, following an application of the formal disclosure provisions in this Court under the Regulations (which are a notably absent feature of the Authority's processes).

[20] While Mr Fletcher may not agree with the Authority's conclusions in relation to relevance, and may take issue with the basis for them, that is not a matter that can be revisited by the Court at this juncture, as *H v A Ltd* makes plain. The Authority must be allowed to get on with its work, consistently with the underlying objectives of the Act.

[21] I conclude that the challenge can properly be characterised as frivolous, vexatious and an abuse of process because of the strength of STL's defence.11 That is because the challenge clearly falls foul of s 179(5). In the circumstances it must be struck out.

[22] It may be that the parties can agree costs. If that does not prove possible STL may file and serve any memoranda within 15 working days of today's date with Mr Fletcher filing and serving any memoranda in response within a further

15 working days.

Judgment signed at 3.30 pm on 26 September 2014

Christina Inglis
Judge