New Zealand Employment Relations Authority Decisions

Gibson v Crane (Auckland) [2018] NZERA 120; [2018] NZERA Auckland 120 (18 April 2018)

Last Updated: 27 April 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2018] NZERA Auckland 120
3009692

BETWEEN JORDAN GIBSON Applicant

AND MURRAY CRANE Respondent

Member of Authority: Robin Arthur

Representatives: Michael Smyth, Counsel for the Applicant

Garry Pollak, Counsel for the Respondent

Submissions: 17 April 2018

Determination: 18 April 2018

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This determination concerns whether this matter should be removed to the

Employment Court on the Authority's own motion.

[2] Jordan Gibson's application to the Authority began as a claim for unjustified dismissal and wage arrears. It was lodged on 9 May 2017. Mr Gibson's employer was 1949 Limited, a company in which he was also a ten per cent shareholder and Murray Crane was the director and majority shareholder. Mr Gibson also sought a penalty against Mr Crane for aiding and abetting a breach of his employment agreement.

[3] The company went into liquidation on 27 June 2017. By letter dated 3 July

2017 the liquidator, Craig Young of Restructuring Services Limited, advised he did not agree to Mr Gibson going ahead with his claim against the company. This had the effect of triggering a particular provision in the Companies Act 1993 that meant Mr

Gibson's proceeding against 1949 Limited could not continue.[1]

1 Companies Act 1993, s 248(1)(c)(i).

[4] Mr Gibson has since then twice amended his statement of problem. His application now pursues only Mr Crane. He has two claims against Mr Crane.

[5] The first seeks leave to pursue Mr Crane personally for the recovery of unpaid wages, holiday pay and Kiwisaver contributions said to comprise around $22,300 in total. Leave is sought under s 142Y of the Employment Relations Act 2000 (the Act). The section allows for such leave to be granted where four criteria are met: there has been a default in payment, the default is due to a breach of employment standards, the person against whom leave is sought was involved in the breach, and the employer is unable to pay the arrears. What comprises the necessary nature or degree of involvement is defined by a

142W of the Act.

[6] Mr Gibson's second claim seeks a penalty against Mr Crane for aiding and abetting a breach of Mr Gibson's employment agreement with 1949 Limited.

[7] The matter is made somewhat more complex by Mr Crane's response to these claims, in its more recent form, which seeks to enforce restraint of trade provisions in Mr Gibson's former employment agreement with the company in liquidation. The liquidator is said to have authorised Mr Crane's counsel to pursue that claim and seek remedies for it. I understand that after 1949 Limited closed its business and went into liquidation Mr Gibson opened a new business of his own (through another company) running a clothes shop. His shop was in the same street as a clothes shop in which Mr Crane (through another company) has interests. This situation, and Mr Gibson's earlier involvement as a shareholder in the failed business operated by 1949 Limited, adds elements of commercial interest and personal disappointments that make the contest between the parties somewhat more than a simple employment relationship problem.

[8] Following a case management conference on 21 March, held in an attempt to arrange progress in the investigation of this matter, counsel for both parties lodged memorandum about various issues that arose. This led to me asking them whether this matter had reached a point where the issues raised warranted removal to the Employment Court, either in relation to important questions of law (under s 178(2)(a) of the Act) or solely on the Authority's opinion of all the circumstances (under s

178(2)(d)). Removal if it were made would be on the Authority's own motion, as

permitted by s 178(1) of the Act, rather than on the application of a party. My message to counsel summarised the issues as follows:

Those issues in relation to Mr Gibson's wage arrears and penalty claim against Mr Crane include:

• *the operation of s 142Y leave to pursue a person in breach?*

• *how (and when) to ascertain the extent to which an employer is unable to pay arrears where the employer is a company in a liquidation process?*

• *what role Mr Gibson's status as a shareholder of the company has (if any at all)?*

In relation to the counterclaim (alleged damages due to breach of restraint)

those issues include:

• *Who can or should pursue a restraint and damages claim – the liquidator or can those rights be assigned to Mr Crane to pursue?*

• *Is the liquidator's purported consent (to Mr Pollak and Mr Crane, per para 5 of Mr Young's 22 March letter) sufficient for purposes of*

Companies Act 1993 s 248(1)(c)(i) and (ii)?

In relation to the Authority's opinion [referring to s 178(2)(d) of the Act] *I wonder whether the commercial and personal aspects of all the circumstances, as well as those multiple legal issues, make this a matter more suitable for resolution by the Court.*

Arguments regarding removal

[9] Counsel took the opportunity offered to be heard regarding the prospect of removal.

[10] Mr Pollak, for Mr Crane, agreed with the proposal. In particular he noted there appeared, as yet, to be no Court decisions directly dealing with the operation of s

142Y. Removal of this particular matter might result in a decision about interpretation of s 142Y that could be of wider use and interest as more cases of this type are brought.

[11] Mr Smyth, for Mr Gibson, opposed removal for two reasons.

[12] Firstly, he said Mr Gibson should not have to face the cost and effort of pursuing his claim in the Court when his claim and the operation of s 142Y involved relatively straightforward factual matters. It was quite likely Mr Gibson would not go on to the Court if put to that cost. As a result he would then not get his claim resolved, which he should be able to have done at the lower level of the Authority. Instead he might seek the assistance of a Labour Inspector to pursue his wage arrears

claim although there was some doubt that the inspectorate presently applied its limited resources to dealing with such individual cases.

[13] Secondly, Mr Crane's counterclaim, regarding the restraint, was not properly or fully pleaded. It had been included as an

alternative in his statement in reply. There was also considerable doubt over whether Mr Crane really had the necessary standing to pursue such a claim and whether, instead, it was the liquidator or the company in liquidation, who would need to do so.

[14] I agree with both concerns expressed on Mr Gibson's behalf. The claim concerning restraint provisions in Mr Gibson's previous employment agreement with the company now in liquidation faces a number of hurdles. The fairly standard clauses in the restraint term prohibited involvement with "any business in competition" with the employer as well as solicitation of employees or customers. One factual and legal issue is whether any new business operated by Mr Gibson could even be in competition with the business of the company now in liquidation and, by definition, unable to trade. There may, arguably, be a proprietary interest (protectable by a restraint) in customer or trade connections that amount to an asset of some potential value in a liquidation (such as if a business was to be sold). However, if such a restraint remained enforceable and was breached, it would be difficult to assess damages, in terms of custom or trade lost, for a closed shop. The public policy concern about free exercise of skills and experience might also weigh against the enforceability of a restraint where the business operated by the former employer had closed its doors and could not offer employment in any event.

[15] While those issues could possibly result in questions of law of some importance, it cannot confidently be said at this stage which are likely or unlikely to arise other than incidentally. Initial questions about whether only the liquidator could pursue a claim regarding the restraint would need to be resolved first so that, depending on where that point ended up, the issue may not arise in this proceeding anyway. Removal on such an uncertain basis was not warranted.

[16] However Mr Gibson's application for leave to pursue Mr Crane for arrears under s 142Y of the Act did raise at least one question of law of some importance and other than incidentally. This arose from the liquidation of the company, which has begun but not yet ended. Leave may be granted under s 142Y "only ... to the extent

that the employee's employer is unable to pay the arrears in wages or other money". This raises the question of when that assessment of the employer's ability to pay is to be made. On one argument, the date of liquidation must be such a time. Most often liquidation is entered because the company is unable to meet debts and, so, must be "unable to pay the arrears" at that time. Yet the process of liquidation, at least theoretically, turns assets to cash that may meet some if not all debts to creditors. On that argument there may be a need to wait to see if the employer is truly unable to pay, however unlikely it may seem to be.

[17] In this particular case Mr Gibson says he is owed the money and had lodged a creditor's claim form for the sum of $22,372.95.

[18] The Liquidator's Report for the six month period ending 27 December 2017, as filed with the Companies Office, stated it was not practicable to estimate the date of completion of the liquidation at this stage. A further report to creditors was expected in the next six months. The report included this statement:

Based on current information available it is now likely that preferential creditors will be paid in full and a dividend will be made to creditors who have filed a Proof of Debt and been accepted by the Liquidators.

[19] On those facts, still sketchy at this stage, the question of when the assessment of the ability of 1949 Limited in liquidation to pay the arrears should be made was likely to arise in the matter other than incidentally. Mr Gibson's argument would probably be that the time had passed and the company's inability to pay was already established, so leave should be granted. Mr Crane's argument may be that it is too soon to say definitively and any assessment of that point should wait for completion of the liquidation before making a decision about giving Mr Gibson leave to pursue him personally under s 142Y.

[20] Accordingly I accept that at least that question meets the statutory criteria as s

178(2)(a) for consideration of removal. However removal is not automatic. The Authority must still exercise its residual discretion to consider whether there is a good and sufficient reason not to remove the particular case in spite of one or more of the

tests being established.[2]

2 *Auckland District Health Board v X (No 2)* [2005] NZEmpC 62; [2005] ERNZ 551 at [29]- [30].

[21] In the particular circumstances of this case, and on reflecting on the submissions of counsel, I have reached the view that the residual discretion should be exercised against removal. The statutory provision at s 142Y(2)(b) of the Act can be plainly interpreted in light of the facts as they at the time during the Authority investigation that the assessment of the ability to pay needs to be determined. The Authority is charged with construction and application of the statute as enacted by Parliament: see clause 1 of Schedule 2 of the Act. There are only a few determinations by the Authority so far that have applied the s 124Y provision but it has and can be done. *Gillette v Roofpower Installations Limited & Green* [2017] NZERA Christchurch 198 is an example.

[22] If either party comes to the view, once determination in the present matter is made, that the Authority's interpretation

and application to the particular facts was wrong, they each have rights of challenge so that the Court may assess it then. Given the delay that has already occurred in this particular case, the parties should not be put to the time and expense of having to go to the Court first. They retain the option of going later if they feel the need to do so.

[23] I had already raised the separate question of whether removal might be warranted under s 178(2)(d). On reflection I did not come to the opinion that in all the circumstances the Court should determine the whole matter. The commercial backdrop – relating to the failed business in which Mr Gibson and Mr Crane were involved – and any personal animus that may have ensued are irrelevant to the factual issues to be determined in the employment jurisdiction regarding arrears, liability for them and, if that separate claim is pursued, the enforceability of restraint terms. The Authority's role in resolving employment relationship problems by establishing facts and determining matters according to their substantial merits favoured continuing the investigation in all the circumstances of this particular case rather than its removal to the Court.

[24] This outcome has been set out in a determination although the prospect of removal was raised not by a party. Because this question was considered on the Authority's own motion I doubt there is a right for a party to now seek special leave of the Court for removal because the Authority has declined to do so. Section 178(3) refers to special leave being able to be sought by a party that applied for removal. In this instance there was no party application.

Next steps

[25] Some steps are already underway to have the liquidator provide relevant records. Shortly an Authority Officer will contact the representatives to arrange a further case management conference and set timetable directions for continuation of the Authority's investigation. This conference will also need to confirm whether Mr Crane has the necessary authority or assignment, if one can be made, to pursue the claim regarding the restraint, or whether the liquidator or the company in liquidation would need to seek to join the proceeding for that purpose. Either an amended statement in reply from Mr Crane or a statement of problem from the liquidator would then need to be lodged.

Robin Arthur

Member of the Employment Relations Authority
