



Employment Court of New Zealand

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Labour Inspector v Daleson Investment Limited [2018] NZEmpC 109 (20 September 2018)

Last Updated: 3 October 2018

IN THE EMPLOYMENT COURT
AUCKLAND

[\[2018\] NZEmpC 109](#)
EMPC 93/2018

IN THE MATTER OF a challenge to a determination of
the Employment Relations
Authority
BETWEEN A LABOUR INSPECTOR
Plaintiff
AND DALESON INVESTMENT LIMITED
Defendant

Appearances: A Dumbleton, counsel, and T Begum, Labour
Inspector D Yan, counsel for defendant

Judgment: 20 September 2018

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS FOLLOWING TELEPHONE DIRECTIONS CONFERENCE

HELD AT 9.30 AM ON THURSDAY 20 SEPTEMBER 2018

[1] The plaintiff has filed a statement of claim, challenging a determination of the Employment Relations Authority imposing penalties in the sum of \$220 against the defendant company.¹ The plaintiff has elected not to pursue the challenge by way of hearing de novo. Rather, discrete findings made by the Authority are identified with which the Labour Inspector takes issue. It is said that the penalties ordered by the Authority were manifestly inadequate; were imposed in error of law (in misapplying this Court's judgment in *Borsboom v Preet PVT Ltd*) and that the Authority erred in failing to sufficiently state relevant findings and conclusions as required by s 174E(a) of the [Employment Relations Act 2000](#) (the Act).² A substantial increase in the quantum of penalty is sought by way of relief (to \$80,000).

¹ *Campbell v Daleson Investment Ltd* [2018] NZERA Auckland 79.

² See *Borsboom v Preet PVT Ltd* [\[2016\] NZEmpC 143](#), [\(2016\) 10 NZELC 79-072](#).

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[2] The defendant did not seek to pursue its own challenge to the Authority's determination as it was entitled to do under [s 179](#) of the Act. Rather, it has filed a statement of defence which incorporates four affirmative defences (referred to as positive defences in the [Employment Court Regulations 2000](#)). The pleaded positive defences in the present case are:

- (a) The penalties sought by the plaintiff represent an incorrect starting point for the penalty assessment (first positive defence);
- (b) the defendant's actions in admittedly underpaying the affected employee were significantly contributed to by the employee's allegedly dishonest behaviour (second positive defence);
- (c) the defendant is in financial hardship and it is "impractical to impose a penalty for which there is no realistic prospect of recovery" (third positive defence); and
- (d) taking a "holistic view" there is not a strong case for payment of penalties to the affected employees rather than the Crown (fourth positive defence).

[3] Section 182 of the Act provides that where the election states that the person seeking the election is not seeking a hearing de novo the Court must direct, in relation to the issues involved in the matter, the nature and extent of the hearing. Regulation 21 makes provision for a defendant to incorporate in their statement of defence an indication of their view as to the appropriate nature and extent of the hearing; the plaintiff may then file a reply. The Court subsequently gives a direction on the matter.

[4] The parties have different views as to the appropriate nature and extent of the hearing. I understand the disagreement to be focused on the second positive defence, as reflected in the defendant's pleadings (although Ms Yan, counsel for the defendant, suggested that the defendant may wish to provide further information to the Court in relation to financial matters). The disagreement arises because the defendant wishes to adduce evidence in relation to a number of mitigating factors which, it is said, are

relevant to an appropriate assessment of quantum. The plaintiff contends that all such evidence should be excluded and the challenge should be heard and determined on the basis of the evidence which was before the Authority during its penalty-setting investigation.

[5] In deciding the nature and extent of the hearing it is important to bear two points in mind. First, the defendant has not sought to mount its own (de novo) challenge to the Authority's determination, despite its assertions as to why it did not participate in the investigation and the ramifications of the failure to participate (namely that the Authority proceeded without the benefit of information which the defendant now says is relevant to the quantum of penalties appropriately imposed). Nor did the defendant take steps to reopen the Authority's investigation.

[6] Second, under s 182 the Court has the power to limit the scope of challenge where it is satisfied that a party has failed to participate in the Authority's investigation in a manner designed to resolve the issues involved, and having regard to a good faith report provided by the Authority. No good faith report was called for in relation to the defendant's conduct, and none could have been. That is because it is a challenge by the Labour Inspector, pursued on a non-de novo basis, rather than a de novo challenge pursued by the defendant. If it had been, the powers in s 182 may have been triggered, to limit any such challenge. As I say, that is not the position in this case.

[7] It seems to me that adopting the process advanced by the defendant would undermine the statutory scheme. It would enable a party who had not fully participated in an Authority investigation, and who then chose not to exercise their rights of challenge (which might then be limited by the Court), to achieve a de novo hearing of key issues via circuitous procedural means.

[8] The key point at issue on the plaintiff's non-de novo challenge is the quantum of penalty imposed by the Authority and whether it was appropriately arrived at based on the material before it. That means that information and evidence which was not before the Authority, and which it accordingly did not take into account, are not relevant. I have not overlooked the broader interests of justice which might otherwise arise. They are, however, outweighed in my view. I do not consider that it would be

appropriate, including having regard to the relevant statutory framework for challenges, to broaden the nature and extent of the hearing in the manner proposed by the defendant.

[9] The questions for determination at the hearing are the alleged errors of law made by the Authority in determining penalty as identified in the statement of claim. These questions will be determined based on affidavit evidence as to the material which was before the Authority in its penalty investigation and any legal submissions either party wishes to advance.

[10] The challenge is to be set down for a one-day hearing in Auckland on a date to be confirmed by the Registrar in consultation with the representatives. The plaintiff is to file and serve any written legal submissions at least 10 working days prior to the date of hearing; the defendant is to do likewise at least five working days before the date of hearing.

[11] Costs are reserved.

Christina Inglis Chief Judge

Judgment signed at 4.15 pm on 20 September 2018