Employment Court of New Zealand

Lloydd v Diagnostic Medlab Services Limited AC17/09 [2009] NZEmpC 28; [2009] ERNZ 42 (15 April 2009)

Last Updated: 23 April 2009

IN THE EMPLOYMENT COURT

AUCKLANDAC 17/09ARC 12/09

IN THE MATTER OF special leave to remove proceedings from the Employment Relations Authority

BETWEEN DR RICHARD LLOYDD
Plaintiff

AND DIAGNOSTIC MEDLAB SERVICES LIMITED
Defendant

Hearing: 8 April 2009

(Heard at Auckland)

Appearances: Mr Cook and Ms van der Wel, counsel for plaintiff
Ms Meechan, counsel for defendant

Judgment: 15 April 2009

REASONS FOR JUDGMENT OF JUDGE B S TRAVIS

[1] At the conclusion of a hearing on 8 April 2009, I granted Dr Lloydd's application for special leave to remove the proceedings in the Employment Relations Authority to the Employment Court. These are my reasons.
[2] The proceedings in the Authority were commenced by the respondent, Diagnostic Medlab Services Ltd ("DMSL") to enforce the terms of the employment agreement between it and Dr Lloydd. On 30 March 2009 the Authority declined Dr Lloydd's application for the removal of those proceedings to the Court.
[3] DMSL had applied to the Authority for an interim injunction requiring him to act in the best interests of DMSL and to observe his obligations of good faith, confidentiality and fidelity while serving a 3-month notice period on garden leave, following his resignation on 4 March 2009. Dr Lloydd's period of notice expires on 4 June 2009. DMSL relied on an express term in the employment agreement which provides:

The company may at its sole discretion place you on Garden Leave during a notice period and may at its sole discretion not require you to discharge your normal duties during any notice period.

[4] The interim injunction application was heard by the Authority on 1 April 2009, but as at 8 April a determination had not been issued.
[5] Dr Lloydd has counter-claimed in the Authority alleging that DMSL breached its obligation of good faith to him by placing him on garden leave in a harsh and pre-emptory manner in order to prevent him from taking up employment with Lab Tests Auckland Ltd ("Lab Tests").
[6] Dr Lloydd's application was made under s178 of the Employment Relations Act 2000 which provides:

(1) Where a matter comes before the Authority, any party may apply to the Authority to have the matter, or part of it, removed to the Court for the Court to hear and determine it without the Authority investigating the matter.

(2) The Authority may order the removal of the matter, or any part of it, to the Court if—

(a) an important question of law is likely to arise in the matter other than incidentally; or

(b) the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Court; or

(c) the Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or

(d) the Authority is of the opinion that in all the circumstances the Court should determine the matter.

(3) Where the Authority declines to remove any matter, or a part of it, to the Court, the party applying for the removal may seek the special leave of the Court for an order of the Court that the matter or part be removed to the Court, and in any such case the Court must apply the criteria set out in paragraphs (a) to (c) of subsection (2).

...

[7] The grounds relied on for the removal of the proceedings to the Court were that:

a) an important question of law was likely to arise in the matter, other than incidentally (s178(2)(a) of the Act);

b) the case is of such a nature and of such urgency, that it is in the public interest that it be removed immediately to the Court (s178(2)(b) of the Act);

[8] As Mr Cook submitted, only one of the statutory tests needs to be satisfied in order for the matter to be removed to the Court: *Auckland DHB v X (No 2)* [2005] NZEmpC 62; [2005] ERNZ 551 at para 30.
[9] In the course of argument it became clear that the principal ground relied on was that an important question of law was likely to arise in the matter other than incidentally.
[10] Mr Cook submitted one of the important questions of law which arose was whether or not there was a fetter on an employer's right to rely on the express garden leave clause. He submitted that there were two fetters. The first was that DMSL failed to exercise its discretion in good faith or reasonably. Mr Cook further refined that by submitting that the question of law was whether, in exercising the discretion contained in the garden leave clause, DMSL must consider the extent to which the garden leave period is reasonably necessary for the protection of DMSL's legitimate business interests. Mr Cook submitted that these concepts were being borrowed from the law of restraint of trade.
[11] The second question he formulated was whether, in exercising the discretion, DMSL was required to do so in good faith by consulting with Dr Lloydd before placing him on garden leave.
[12] The third question was whether DMSL was prevented from placing Dr Lloydd on garden leave if this was for an illegitimate purpose. That purpose was said to be to disrupt the transition process involved in transferring the contract to provide community laboratory services to the public of greater Auckland from DMSL, the current provider, to Lab Tests. This is to take effect from 7 September 2009.
[13] Mr Cook accepted there was no direct authority in New Zealand for the underlying proposition that garden leave provisions should be treated in the same or similar manner as covenants in restraint of trade. That is by incorporating into the former the requirement that they be enforceable only to the extent that they are reasonable and limited to the purpose of protecting the legitimate interests of the employer.
[14] Mr Cook cited a number of English authorities and one in Australia, in which the Courts, in considering either express garden leave provisions or, where there were no express provisions, had acknowledged the need to enforce garden leave only to the extent that it was necessary to protect the legitimate interests of employers. These decisions were: *Provident Financial Group Plc v Hayward* [1989] ICR 160; *GFI Group Inc v Eaglestone* [1994] IRLR 119; *Euro Brokers Ltd v Rabey* [1995] IRLR 206; *William Hill v Tucker* [1998] 1 CR 291 (EWCA); *Cantor Fitzgerald v George* [1996] CLY 2523; *Symbian v Christensen* [2000] EWCA Civ 517; [2001] IRLR 77; *TFS Derivatives Ltd v Morgan* [2004] EWHC 3181 and *Bearing Point Australia PTY Ltd v Hillard* [2008] VSC 115.
[15] Ms Meechan contended that garden leave provisions did not raise any important questions of law in New Zealand. She submitted the Employment Relations Authority, the Employment Court and the Court of Appeal have determined a number of cases in which garden leave clauses have been involved and cited: *Maguire v Drake NZ Ltd* WA 66/08, 15 May 2008, *Marlborough Mortgages Ltd v Nichols* CA40/08, 14 April 2008; *Cullen Building Supplies Ltd v Caddick* WA49A/05, 23 May 2005; *Radio Horowhenua v Bradley* [1993] NZEmpC 204; [1993] 2 ERNZ 1085; *Ogilvy and Mather (NZ) Ltd v Darroch* [1993] 2 ERNZ58; *Ogilvy and Mather (NZ) Ltd v Turner* [1995] 2 ERNZ 398; *Ravensdown Corp Ltd v Groves* [1998] NZEmpC 224; [1998] 3 ERNZ 947.
[16] However, it became clear in the course of argument that the Courts in New Zealand have not yet had to grapple directly with the question of law Dr Lloydd wishes to raise, and that is whether garden leave provisions are enforceable only to the extent that they protect legitimate interests.
[17] Whether the question of law raised is important is to be measured in relation to the case in which it arises. "*A question of law arising in a matter would be important if it is decisive of the case or some important aspect of it, or strongly influential in bringing about a decision of it or a material part of it*" *Hanlon v International Educational Foundation (NZ) Inc* [1995] NZEmpC 2; [1995] 1 ERNZ 1 at 7, Chief Judge Goddard.
[18] Mr Cook submitted that the questions of law he set out would be decisive of the matters at issue, both in relation to DMSL's employment relationship problem and Dr Lloydd's counter-claim. He submitted that the

Authority's determination declining the application for removal may not have appreciated the significance of these questions of law because the matter was dealt with only on the papers.

[19] Mr Cook also submitted that the questions of law he raised may affect a number of employers who may seek to rely on express garden leave provisions.

[20] Whilst I accepted Ms Meechan's submission that in the end the facts will determine the case, I was satisfied by Mr Cook's submissions that the questions of law he has raised are "*important*" in the sense used in s178(2)(a).

[21] Because this issue has not been before the Courts directly in New Zealand there is no guiding authority and Dr Lloydd is entitled to rely on the overseas cases as persuasive support for the questions of law he seeks to have the Court determine.

[22] I was also satisfied that DMSL would not be prejudiced if the substantive questions are removed to the Court for determination. The interim injunction application has been heard by the Authority and, in the narrow timeframe available, neither party will have the opportunity to challenge the determination when it is issued, before the substantive matter can be heard. The substantive issue can be investigated by the Authority on 13 and 14 May 2009. The Court was able to accommodate a hearing commencing on 7 May 2009 and counsel were able to agree on a timetable, contingent on the special leave being granted.

[23] Ms Meechan developed an argument that if the Court dealt with the substantive issue there would be no opportunity to obtain leave to appeal the Court's decision to the Court of Appeal before the notice period expired. That is not necessarily so, as the Court of Appeal demonstrated in *Fuel Espresso Ltd v Hsieh* [2007] NZCA 58; [2007] ERNZ 60; [2007] 2 NZLR 651.

[24] Further, as I have indicated, the timeframe is so tight that neither party would have the opportunity to exercise the right to challenge either the interim determination or the substantive determination of the Authority. The grant of the special leave to remove the matter to the Court would at least enable the parties to have had part of the case dealt with in the Authority, and part of it in the Court. Section 178 allows for the removal of the matter, or part of it, to the Court.

[25] In view of the conclusions I reached, it was not necessary to consider the alternative ground that the case was of such a nature and of such urgency that it was in the public interest for it to be removed immediately to the Court. I had reservations about whether this ground was made out, and preferred Ms Meechan's submissions to that of Mr Cook. I also noted with interest Ms Meechan's submission that when her client was declined leave to appeal to the Supreme Court on the issue of the communal laboratory services contract awarded to Lab Tests, the Supreme Court found that there was no arguable question of public or general importance[1].

[26] Having been satisfied that the criteria set out in s178(2)(a) applied and there being no reason why the residual discretion should not be exercised in favour of the applicant, I granted special leave to remove the substantive proceedings to the Court.

[27] I reserved costs.

B S Travis

Judge

Judgment signed at 11.30am on 15 April 2009

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[1] *Diagnostic Medlab Ltd v Auckland District Health Board* [2009] NZSC 10
