



# Employment Court of New Zealand

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## Lorigan v Infinity Automotive Limited [2018] NZEmpC 143 (3 December 2018)

Last Updated: 7 December 2018

IN THE EMPLOYMENT COURT  
AUCKLAND

[\[2018\] NZEmpC 143](#) EMPC 377/2015 EMPC 277/2016

EMPC 304/2018

IN THE MATTER OF	applications as to admissibility of evidence
AND IN THE MATTER	of an application for a stay of a compliance order
BETWEEN	PETER D'ARCY LORIGAN Plaintiff
AND	INFINITY AUTOMOTIVE LIMITED Defendant

Hearing: On the papers

Appearances: P Lorigan, in person  
R Towner, counsel for the defendant

Judgment: 3 December 2018

### INTERLOCUTORY JUDGMENT (NO 5) OF JUDGE B A CORKILL:

**(Applications as to Admissibility of Evidence, and for a Stay of a Compliance Order)**

#### Introduction

[1] Two challenges instituted by Mr Lorigan are to be heard on 10 – 13 December 2018. Three applications have been placed before the Court relating to procedural aspects of that hearing. A yet further application seeks a stay of a compliance order.

[2] On an earlier occasion, I directed that special leave would have to be granted in respect of any interlocutory applications filed prior to the hearing of these challenges, given the multiplicity of applications with which the Court has had to deal with previously. Two of the applications relate to admissibility of evidence which

PETER D'ARCY LORIGAN v INFINITY AUTOMOTIVE LIMITED NZEmpC AUCKLAND [2018] NZEmpC

143 [3 December 2018]

might be called at the upcoming hearing, and should be dealt with now: special leave is accordingly granted. A third application relates to a question as to whether an unless order made by the Court previously should now take effect; if granted, the challenges would be struck out; it too requires prompt resolution and special leave is granted to enable that to occur. The fourth application seeks a stay of a recent compliance order; I consider that it also requires prompt resolution, and grant special leave to enable the application to proceed.

#### First application: Mr Lorigan applies to lead “Relevant Admissible Evidence” at the hearing of the challenges

*Background*

[3] On 8 August 2018, I directed that Mr Lorigan's briefs of evidence and documents were to be filed and served by 5.00 pm on 5 November 2018, time being strictly of the essence.<sup>1</sup> I went on to direct that unless his briefs of evidence and documents were so filed, the challenges which the Court is about to hear would be struck out.

[4] In fact, Mr Lorigan did file a brief of his intended evidence, and documents on 5 November 2018.

[5] However, on 14 November 2018, he sought leave to present evidence with regard to alleged "Crimes in the workplace", evidence that such "crimes were concealed" by various named individuals, and evidence relating to what he described as "falsehoods, perjury, witness tampering and threats" by various named individuals. No particulars of these very serious allegations were provided in the application.

[6] The application is supported by what purport to be transcripts of conversations held between Mr Lorigan and other individuals; these conversations are general in nature, and contain vague assertions of wrongdoing, mainly by Mr Lorigan. Some of them appear to relate to events which occurred well after Mr Lorigan's employment was terminated. Also filed were copies of correspondence apparently related to

<sup>1</sup> *Lorigan v Infinity Automotive Ltd (No 4)* [2018] NZEmpC 89 at [58].

complaints made by Mr Lorigan to the Ombudsman's office and the New Zealand Police, as well as a range of other miscellaneous documents said to be relevant to these allegations.

[7] Infinity Automotive Ltd (Infinity) has filed a notice of opposition. In essence, it is asserted that this material should have been filed pursuant to the Court's earlier direction, that the application is in fact an acknowledgment that Mr Lorigan has not complied with the unless order made by the Court in its judgment of 8 August 2018;<sup>2</sup> that time has already been extended; and that the proposed evidence is unlikely to be relevant to the procedural challenges which the Court is about to consider.

#### *Discussion*

[8] The starting point when considering admissibility issues is s 189(2) of the [Employment Relations Act 2000](#) (the Act). It provides:

#### **189 Equity and good conscience**

...

(2) The court may accept, admit, and call for such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.

[9] It is well established that parts of the Evidence Act 2007 (the EA), and even remnants of the common law of evidence, can affect and guide the exercise of the equity and good conscience test which arises under s 189(2).<sup>3</sup>

[10] Section 7 of the EA provides a helpful test of "relevance", which it is appropriate to consider in the present circumstances. That section states:

#### **7 Fundamental principle that relevant evidence**

...

(3) Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.

<sup>2</sup> At [58].

<sup>3</sup> *Mana Coach Services Ltd v New Zealand Tramways and Public Passenger Transport Union (Wellington Branch) Inc* WC 13A/08 [2008] NZEmpC 53.

[11] Relevancy must first be considered with regard to the pleadings, since these define the scope of the issues before the Court. It is therefore necessary to describe the causes of action as raised by Mr Lorigan's statements of claim.

[12] Mr Lorigan's first challenge is concerned with the question of whether he raised a disadvantage grievance within 90 days, as required under s 114 of the Act. According to his pleading, the focus of the issue will be on a letter written by his then lawyer to the employer on 28 January 2010. In short, was a disadvantage grievance raised with the necessary degree of particularity in that letter? That will require consideration of some context, according to the statement of claim. But no assertions of fraudulent, illegal or dishonest conduct, or particulars of such conduct, are included in that statement of claim.

[13] The second challenge raises an alternative scenario. If the letter of 28 January 2010 did not raise a disadvantage grievance, should leave be granted to Mr Lorigan to pursue a disadvantage grievance out of time, under the provisions of s 114(4) of the Act? This contention is raised upon the grounds that:

- a. the failure to raise a disadvantage grievance was caused by exceptional circumstances, namely that reasonable arrangements were made to have the grievance raised by Mr Lorigan's lawyer, but she unreasonably failed to ensure the grievance was raised within the required time; and
- b. it is just to grant leave in those circumstances.

[14] Again, there are no assertions of fraudulent, illegal or dishonest conduct, or particulars of such conduct, contained in this statement of claim.

[15] Very serious allegations of fraud or dishonesty have to be properly pleaded, and they have to be supported by credible evidence. These propositions are uncontroversial. They were conveniently summarised by the Court of Appeal in *Schmidt v Pepper New Zealand (Custodians) Ltd*, when it said:<sup>4</sup>

4. *Schmidt v Pepper New Zealand (Custodians) Ltd* [2012] NZCA 565, (emphasis added and footnotes omitted).

*[15] Allegations of fraud or dishonesty are very serious. They must be pleaded with care and particularity. As the authors of Bullen & Leake & Jacobs Precedents of Pleadings emphasise, counsel must not draft any originating process or pleading containing an allegation of fraud unless they have reasonably credible material which, as it stands, establishes a prima facie case of fraud – that is, material of such a character which would lead to the conclusion that serious allegations could properly be based upon it. Fraud cannot be left to be inferred from the facts – fraudulent conduct must be distinctly alleged and as distinctly proved. General allegations, however strong the words may appear to be, are insufficient to amount to a proper allegation of fraud.*

*[16] While these principles have been articulated in authoritative discussions of duties imposed upon counsel, they apply with equal rigour to those who represent themselves. Those who seek to portray themselves as well acquainted with the law and its processes cannot shelter behind the barrier of unfamiliarity when it suits. They must satisfy the same exacting standard when preparing their own pleadings. The obligation exists for the benefit of defendants – to allow them to be fully aware of, and able to address, a serious allegation – and for the Court which will be called upon to decide it.*

[16] Given a complete absence in the pleadings of any properly pleaded allegations of criminal or dishonest conduct, the Court must proceed on the basis that the general and vague allegations which Mr Lorigan now makes are not relevant to the issues raised by his statements of claim.

[17] Nor does the application placed by Mr Lorigan before the Court allege that the proposed evidence is relevant for any other reason. Just as allegations of fraud and dishonesty have to be carefully particularised in a pleading, as explained by the Court of Appeal, so too is it necessary for precise details to be given as to why the evidence Mr Lorigan seeks to introduce is relevant to any other purpose, such as for challenging the credibility of any witness who may be called by the defendant. Mr Lorigan's application contains no such particularity; only general and vague assertions in strong language.

[18] The Court of Appeal made a further point, which is that serious allegations must be supported by "reasonably credible material", that is, "material of such a character which would lead to the conclusion that serious allegations could properly be based upon it".

[19] The material produced by Mr Lorigan in support of his application does not satisfy that test. The information, as already mentioned, consists of vague and

imprecise opinions of wrongdoing. As best can be discerned, some of the situations referred to in the conversations relate to events which apparently occurred well after the termination of Mr Lorigan's employment.

[20] Moreover, the material relied on by Mr Lorigan is hearsay. It would be completely inappropriate, even if the very serious allegations raised by Mr Lorigan were properly pleaded, or were relevant for some other purpose in this case, for the allegations to be considered on the basis of hearsay in the absence of any satisfactory explanation as to why such evidence could properly be admitted.

[21] The Court has commented on this issue previously. On 23 October 2018, Mr Lorigan sought leave to bring an application to present what he described as "recorded witness evidence" contained on "soundbite files".

[22] In a minute I issued that day, I indicated that it appeared the files related to one or more individuals, but their names were not recorded in Mr Lorigan's documents so this was unclear. I then went on to record that again Mr Lorigan was repeating the numerous vague assertions as he had advanced on previous occasions. Then, dealing with the hearsay problem, I said:<sup>5</sup>

[3] I note that Mr Lorigan is at liberty to file and *serve briefs of relevant evidence from persons whom he proposes to call* at the hearing of his challenges; and also, if relevant, attached to those briefs of evidence, recordings which may have been made in respect of those

persons.

[23] This resulted in a further application being made by Mr Lorigan on 24 October 2018, to similar effect, but now referring to the names of individuals whose “soundbites” he wished to introduce. There was yet again a hearsay issue. I issued a minute the following day indicating that I had already determined the relevant issues, and there was no proper basis for reconsidering the conclusions that had been expressed two days previously.

[24] I also make the point that as a result of these minutes, Mr Lorigan was on clear notice, well before the date set by the Court for the filing of his evidence, that he would need to file and serve briefs of evidence for individuals he wished to call, and to do so

5 Minute dated 23 October 2018 (emphasis added).

by 5 November 2018. He chose to file only a brief relating to his own intended evidence.

[25] Mr Lorigan’s application must be dismissed.

## **Second application: Mr Lorigan objects to evidence being led by the defendant**

### *Background*

[26] Briefs of evidence, and an affidavit, have been filed by Infinity in respect of four witnesses it intends to call.

[27] Mr Lorigan first asserts that the company’s proposed witnesses are “coconspirators” who were parties to a sham process designed to “be rid of Lorigan”. Other assertions are made to the effect that some witnesses have been party to criminal conduct, and that the Court should accordingly decline to hear their evidence.

[28] Infinity opposes the application on the basis that the proposed evidence is relevant to the hearing of the challenges, and that the objections raised do not amount to recognised grounds for excluding evidence.

[29] A second issue is raised with regard to one of the proposed witnesses, Mr Lorigan’s former lawyer, Ms Emma Butcher. The defendant wishes to call evidence from her to meet an allegation made in Mr Lorigan’s statement of claim to the effect that he made reasonable arrangements to have his grievance raised by the lawyer, and that she unreasonably failed to ensure that the grievance was raised within the required time; and that a finding of exceptional circumstances should accordingly be made.<sup>6</sup>

[30] Mr Lorigan asserts that his communications with his former lawyer are subject to legal professional privilege, and says he does not consent to a waiver of that privilege. In reply, the defendant says that the privilege was waived by a different lawyer who subsequently acted for Mr Lorigan, Mr David Fleming, in emails sent

6 [Employment Relations Act 2000, ss 114\(4\) and 115\(b\)](#).

when the issues arising in one of the challenges to be heard were before the Employment Relations Authority (the Authority).

### *Discussion*

[31] Mr Lorigan’s contention that the defendant should not be permitted to call its intended witnesses confuses an issue of admissibility with an issue of credibility.

[32] Where it can be established that a witness had been involved in criminal activity, it does not follow that the witness should be automatically disqualified from giving evidence. Criminal activities might be relevant to the question of whether that witness is or is not correct in their testimony, but as noted earlier a credible basis for raising the assertion of criminal and inappropriate conduct would need to exist.

[33] The Court’s obligation is to receive relevant evidence which either party chooses to call, subject to the rules of evidence. No proper objection as to the admissibility of evidence from Infinity’s proposed witnesses has been raised. I dismiss this aspect of Mr Lorigan’s application.

[34] Turning to the issue of legal professional privilege, I am satisfied from the communications placed before the Court that any question of privilege in relation to Ms Butcher’s intended evidence has been waived. Mr Fleming recognised that in order to raise an issue under s 115(b) of the Act, such a waiver would be necessary. On two occasions, he confirmed this in writing to the Authority. The Authority’s determination which is the subject of challenge, clearly proceeded on the basis that there was a waiver of privilege.<sup>7</sup> As a result, the Authority issued a summons requiring Ms Butcher to give evidence; this

occurred and her evidence is recorded in the determination of 5 October 2016.<sup>8</sup>

[35] One of the challenges relates to that determination. It is not now possible for Mr Lorigan to reverse the clear waiver which resulted in the placing of evidence before the Authority, and which has been published.

<sup>7</sup> *Lorigan v Infinity Automotive Ltd* [2016] NZERA Auckland 340.

<sup>8</sup> At [22]-[23].

[36] Such a situation was considered by the High Court of England and Wales in *Balu v Dindley Primary Care Trust*.<sup>9</sup> In that instance the Court considered that it was legitimate to consider on appeal documents which had come into the public domain at first instance. The Judge found that it would be wholly wrong to test privileged evidence at first instance, but then permit withdrawal of that evidence under a claim of privilege on appeal. I respectfully agree with this analysis.

[37] Evidence was given by Ms Butcher without objection, which thereby lost its confidentiality and entered the public domain. The waiver was not limited in any way. The waiver must continue to apply for the purposes of the challenge to the Authority's determination. Moreover, it would be inappropriate to consider an allegation that Ms Butcher had unreasonably failed to ensure a grievance was raised within the required time, without the Court being able to consider evidence of relevant interactions between her and Mr Lorigan. On this second point, Mr Lorigan's application also fails.

[38] The application is dismissed.

### **Third application: Infinity asserts the challenges should now be struck out**

#### *Background*

[39] Infinity has filed an application based on the unless order contained in my judgment of 8 August 2018, to which I referred to earlier.<sup>10</sup> It is alleged that as Mr Lorigan has attempted to introduce evidence, beyond that which he filed by the due date on 5 November 2018, he should not be regarded as having complied with the Court's order and his challenges should be struck out pursuant to the unless order.

#### *Discussion*

[40] This assertion relates to the first application considered in this judgment. It has been dismissed. As there is no current and live issue as to the admissibility of further evidence, this application is also dismissed.

<sup>9</sup> *Balu v Dindley Primary Care Trust* [\[2010\] EWHC 1208 \(Admin\)](#), [\[2010\] All ER \(D\) 217 \(Jun\)](#).

<sup>10</sup> *Lorigan v Infinity Automotive Ltd*, above n 1.

### **Fourth application: Mr Lorigan seeks a stay of a compliance order**

#### *Background*

[41] Mr Lorigan seeks a stay of the compliance order contained in a judgment I issued on 12 November 2018<sup>11</sup> which followed a costs judgment issued on 11 September 2018<sup>12</sup>

[42] In short, costs orders were made in two interlocutory judgments on a 2B basis.<sup>13</sup> These were quantified in a costs judgment dated 11 September 2018, the effect of which was that Mr Lorigan was directed to pay Infinity the total sum of

\$14,495.<sup>14</sup>

[43] He did not pay this sum, so Infinity sought a compliance order, which was duly made on 12 November 2018.<sup>15</sup> Mr Lorigan was directed to comply with the Court's orders by 23 November 2018.<sup>16</sup>

[44] In his application of 16 November 2018, Mr Lorigan said he rejected the compliance order and the judgments on which it was based, and stated these judgments would be appealed.

[45] The relevant chronology to these matters was summarised in the judgment which granted the compliance order, as follows:<sup>17</sup>

[2] Mr Lorigan was ordered to pay costs to Infinity on a Category 2, Band B basis in an interlocutory judgment issued on 1 August 2018,<sup>18</sup> and in a further interlocutory judgment issued on 8 August 2018;<sup>19</sup> the amounts were fixed in my costs judgment of 11 September 2018.<sup>20</sup>

[3] On 13 September 2018, the Registrar issued the appropriate certificate of judgment, which was personally served on Mr Lorigan on 21 September 2018.

11 *Infinity Automotive Ltd v Lorigan* [2018] NZEmpC 133.

12 *Lorigan v Infinity Automotive Ltd* [2018] NZEmpC 104.

13. *Lorigan v Infinity Automotive Ltd (No 3)* [2018] NZEmpC 88; *Lorigan v Infinity Automotive Ltd (No 4)* [2018] NZEmpC 89.

14 *Lorigan v Infinity Automotive Ltd*, above n 12.

15 *Infinity Automotive Ltd v Lorigan*, above n 11.

16 At [24].

17 *Infinity Automotive Ltd v Lorigan*, above n 11.

18 *Lorigan v Infinity Automotive Ltd (No 3)* [2018] NZEmpC 88.

19 *Lorigan v Infinity Automotive Ltd (No 4)* [2018] NZEmpC 89.

20 *Lorigan v Infinity Automotive Ltd*, above n 1.

[4] On 24 September 2018, Infinity's lawyers sent an email to Mr Lorigan, requesting him to comply with the Court's costs judgment and pay the sum of

\$14,495 for costs without delay. Advice as to when payment could be expected was also requested. The evidence suggests there was no response.

[5] Mr Lorigan applied to the Court of Appeal for leave to appeal against this Court's judgments declining Mr Lorigan's application for joinder,<sup>21</sup> and his application for a stay of proceedings in the Court,<sup>22</sup> on which the costs orders were based.

[6] On 3 October 2018, Brown J directed Mr Lorigan to file further particulars of his application for leave specifying the question or questions of law he wished the Court of Appeal to consider. Mr Lorigan was also asked to explain, in respect of each question of law, why it is of such general or public importance or for some other reason should be determined by the Court of Appeal. Those particulars were to be provided by 19 October 2018.

[7] On 5 November 2018, the Registrar of the Court of Appeal advised the Registrar of the Employment Court that the former court was waiting for payment of the filing fee, so that no substantive steps were being taken in that court.

[46] More recently, the Registrar of the Employment Court sought an update from the Court of Appeal as to the status of Mr Lorigan's application to the Court of Appeal.

[47] On 28 November 2018, the Registrar of this Court was advised by the relevant case manager that a fee waiver application was declined on 23 November 2018, which meant it was necessary for the filing fee to be paid immediately. The Registrar also advised that Mr Lorigan had not filed further particulars, as directed in the minute of Brown J.

### *Discussion*

[48] On this information, I must conclude that an application for leave to appeal in the Court of Appeal has not been advanced by Mr Lorigan. Nor has any application for leave to appeal been made in respect of this Court's costs judgment, or its judgment making a compliance order.

[49] Accordingly, I am not satisfied that there is any basis for ordering that the compliance order be stayed.

21 *Lorigan v Infinity Automotive Ltd (No 3)*, above n 18.

22 *Lorigan v Infinity Automotive Ltd (No 4)*, above n 19.

[50] Mr Lorigan's application for a stay is dismissed.

### **Costs**

[51] In the result, I have dismissed all the applications placed before me.

[52] Infinity has sought costs, but it is to be noted that it did not establish the application it brought. This is a factor which will need to be taken into account when considering its application for costs.

[53] Given the proximity of the hearing of the challenges, I defer the disposition of Infinity's application until after the upcoming hearing.

B A Corkill Judge

Judgment signed at 11.35 am on 3 December 2018

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