



Employment Court of New Zealand

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Manuhiri Kaitiaki Charitable Trust v McClymont [2023] NZEmpC 3 (26 January 2023)

Last Updated: 1 February 2023

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2023\] NZEmpC 3](#) EMPC 302/2022

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN MANUHIRI KAITIAKI CHARITABLE TRUST

Plaintiff

AND MATTHEW MCCLYMONT

Defendant

Hearing: On the papers

Appearances: J A Hope, counsel for plaintiff

D Grindle and S Davies-Colley, counsel for defendant

Judgment: 26 January 2023

INTERLOCUTORY JUDGMENT OF JUDGE J C HOLDEN

(Good Faith Report)

[1] Mr McClymont was an employee of Manuhiri Kaitiaki Charitable Trust (the Trust) from 9 September 2019, until his employment was terminated on 28 July 2020.

[2] In its determination dated 9 August 2022 the Employment Relations Authority (the Authority) found that:1

(a) Mr McClymont had a personal grievance for unjustifiable dismissal;

1 *McClymont v Manuhiri Kaitiaki Charitable Trust* [\[2022\] NZERA 373](#).

MANUHIRI KAITIAKI CHARITABLE TRUST v MATTHEW MCCLYMONT [\[2023\] NZEmpC 3](#) [26 January 2023]

(b) the Trust was to remedy that grievance by paying him compensation and reimbursing his wages to a sum totalling \$28,849 net;

(c) the Trust breached a term of Mr McClymont's employment agreement relating to notice of termination for

redundancy;

(d) the Trust had to remedy that breach by paying Mr McClymont salary in lieu of notice, totalling \$16,750;

(e) interest had to be paid by the Trust on the wage reimbursement and notice payments; and

(f) Mr McClymont was entitled to \$4,471.50 for his costs and disbursements.

[3] The Trust has filed a de novo challenge to that determination. On the basis of the determination, it seemed that the Trust may not have participated in the Authority's investigation of the matter in a manner that was designed to resolve the issues involved.² The Court therefore requested a good faith report from the Authority pursuant to [s 181\(1\)](#) of the [Employment Relations Act 2000](#).

[4] The Authority's good faith report recorded that:

- (a) the Trust had failed to lodge a statement in reply when it was due;
- (b) the Trust failed to attend a case management conference; and
- (c) the Trust failed to give reasons for its failure to lodge a statement in reply when it was due (and still has not done so).

[5] The Trust also failed to attend the investigation meeting.

² [Employment Relations Act 2000, s 181\(2\)](#).

[6] The Trust says it made an effort to be involved in the investigation, albeit at a late stage. It applied for leave to file a late statement in reply, but that was not granted. The Trust says it understood from the Authority's leave decision that it was unable to attend the investigation meeting and be heard.

[7] Mr McClymont says that in view of the Trust's behaviour in the Authority, the challenge should not proceed on a de novo basis but should be limited to the issues:

- (a) Was the Authority correct in concluding that, in the conversation between Mr McClymont and Mr Hohneck (the Chair of the Trust) on 28 July 2020, Mr Hohneck dismissed Mr McClymont summarily?
- (b) Was the Authority correct in concluding that, in the conversation on 28 July 2020, the procedure and manner in which the summary dismissal was carried out were not things a fair and reasonable employer could do?

[8] Matters the Court will consider include where a party:³

- (a) has taken an obstructive approach and continues to fail to properly explain that approach;
- (b) did not participate in a manner designed to resolve the issues involved; and
- (c) has been disrespectful, contemptuous, or unhelpful in correspondence to/about the other party.

[9] While I acknowledge the points made by Mr McClymont, this is not a case where it seems there was deliberately obstructive or contemptuous behaviour by the party. There seems to have been issues between the Trust and its former representative and then further health issues involving its current representative.

³ *Allen Chambers Ltd v Pelabon* [\[2018\] NZEmpC 114](#) at [\[25\]](#)- [\[28\]](#).

[10] I accept that the Trust ought to have explained the reasons for failing to file the statement in reply when it applied for leave to file it late, but I acknowledge that it did provide a draft statement in reply to the Authority at that time.

[11] I also accept that the Trust's understanding as to what it could do at the investigation meeting seems to have been coloured by the Authority declining leave to file a statement in reply out of time.

[12] While Mr McClymont suggests the hearing should be confined to the conversation of 28 July 2020, the Court will need to understand the context of that discussion. It would seem artificial to consider the issues identified and not to consider the dismissal as a whole.

[13] I accordingly consider the matter should proceed by way of a de novo hearing. A statement of defence to the statement of claim is to be filed by 4 pm on Friday 3 February 2023.

[14] The Trust's conduct in the Authority that potentially led to the need for the challenge, however, will be relevant to the issue of costs once the matter has been dealt with substantively. In addition, I accept that Mr McClymont should not have been put to the costs of addressing the good faith issues. He suggests that \$800 is an appropriate amount for costs in relation to the good faith process. I agree. The Trust is to pay Mr McClymont \$800 as costs for the good faith process, with payment to be made by 4 pm on Friday 10 February 2023.

J C Holden Judge

Judgment signed at 11 am on 26 January 2023

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