



Employment Court of New Zealand

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McNabb v Silver Fern Farms Limited [2019] NZEmpC 71 (11 June 2019)

Last Updated: 18 June 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURĀU

[\[2019\] NZEmpC 71](#)

EMPC 139/2017

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for “unless” orders
BETWEEN	MARIE MCNABB Plaintiff
AND	SILVER FERN FARMS LIMITED Defendant

Hearing: 7 June 2019
(Heard at Auckland by telephone conference)

Appearances: S Mitchell and J Lynch, counsel for plaintiff
T Cleary, counsel for defendant

Judgment: 11 June 2019

INTERLOCUTORY JUDGMENT (NO 3) OF JUDGE J C HOLDEN

(Application for “unless” orders)

[1] In my judgment dated 8 April 2019, I ordered the plaintiff, Ms McNabb, to provide a further sworn or affirmed statement of certain documents about Ms McNabb’s interactions with her former partner and his subsequent partner, and to provide the defendant, Silver Fern Farms Limited (Silver Fern Farms) with copies of the non-privileged documents described in that statement. She was to attend to this within 20 working days of the date of my judgment.¹

¹ *McNabb v Silver Fern Farms Ltd* [\[2019\] NZEmpC 42](#) (discovery judgment).

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[2] Ms McNabb did not provide that list of documents within the timeframe provided for, and, when the list and documents were supplied, Silver Fern Farms considered her disclosure to be significantly deficient.

[3] Silver Fern Farms now seeks an order that, if Ms McNabb fails to fully comply with the orders made on 8 April 2019 within the period now set by the Court, she is barred from taking further part in the proceedings.

[4] Mr Mitchell, counsel for Ms McNabb, acknowledges that there were documents missing from the disclosure. He advised that, in part anyway, this was due to inadvertence on his part and that he had further documents he would be able to provide to Silver Fern Farms for Ms McNabb.

[5] He otherwise maintains that some of the documents sought by Silver Fern Farms do not come within the order made in my earlier judgment, either because they do not relate to Ms McNabb’s interactions with her former partner and/or his

subsequent partner, or because they do not fall within the timeframe for which disclosure was required.

[6] Nevertheless, he appeared to acknowledge there may be documents that are dated outside the timeframe referred to in my judgment, but which relate to Ms McNabb's interactions with her former partner and/or his subsequent partner during that period. That must be correct.

[7] In support of Silver Fern Farms' application, Mr Cleary, counsel for Silver Fern Farms, points to Ms McNabb's failure to comply, or to comply in a timely way, with other Court orders.

[8] Silver Fern Farms relies on reg 52 of the [Employment Court Regulations 2000](#), and r 7.48 of the [High Court Rules 2016](#), which applies by virtue of reg 6(2)(a)(ii) of the [Employment Court Regulations](#). Where there is non-compliance with an interlocutory order, r 7.48 allows the Court to make any order the judge thinks fit. This may include an unless order, which decrees that, unless the specified action is taken

by the specified time, the stated sanction will automatically result.² Silver Fern Farms also relies on the Court's implied statutory jurisdiction to control its affairs.³

[9] The principles that apply regarding unless orders are:⁴

(a) As an unless order is an order of last resort, it is properly made only where there is a history of failure to comply with earlier orders.

(b) An unless order should be clear as to its terms. That is, it should specify clearly what is to be done, by when and what is the sanction for non-compliance. That sanction should be proportionate to the default.

(c) The sanction will apply without further order if the party in default does not comply with the order by the time specified. However, the party in default may seek relief by application to the Court.

(d) Justice may require that the party in default be relieved of the consequences of the unless order where the Court is satisfied that the breach resulted from something for which that party should not be held responsible. The party should not assume that belated compliance will suffice.

(e) Where the unless order has been deliberately breached – that is, flouted – it is difficult to conceive of any situation where the interests of justice would require granting the flouter relief from the sanction imposed, notwithstanding belated compliance with the order.

(f) In deciding whether or not to excuse breach of an unless order the question for the Judge is: what does justice demand in the circumstances of this case? Considerations in answering that question include:

(i) The public interest in ensuring that justice is administered without unnecessary delays and costs.

(ii) The interests of the injured party, in particular in terms of delay and wasted cost.

(iii) Any injustice to the defaulting party, although that consideration is likely to carry much less weight in the circumstances than considerations (i) and (ii).

[10] I accept that there has been non-compliance, or delayed compliance, by Ms McNabb on several matters. While that is not acceptable, the non-compliance has not

² *SM v LFDB* [2014] NZCA 326, [2014] 3 NZLR 494 at [29].

³ *Hynds Pipe Systems Ltd v Forsyth* [2017] NZEmpC 89, (2017) 14 NZELR 740 at [9].

⁴ *SM v LFDB*, above n 2, at [31].

been egregious. It points to a lack of organisation and/or focus on the Court proceedings rather than deliberate flouting of the orders of the Court.

[11] The documents sought, but not yet provided, are relevant to the question of whether Ms McNabb, if successful in her challenge, should be reinstated to her previous employment with Silver Fern Farms. In those circumstances, if Ms McNabb's disclosure of documents continues to be deficient, it would be disproportionate to bar her from taking further part in the proceedings. The proportionate response would be an order striking out her claim for reinstatement.

[12] Further, it is difficult to specify clearly what is to be done, given the inherent debatability as to whether documents fall within the class of documents that are required to be provided. Mr Mitchell and Ms McNabb will need to use their judgement as to whether documents relate to interactions between Ms McNabb and her former partner and/or his subsequent partner during the timeframe specified in the discovery judgment, and Mr Cleary and Silver Fern Farms may take a different view. This makes a sanction that applies without further order inappropriate.

[13] Nevertheless, Silver Fern Farms is entitled to an order that puts Ms McNabb on clear notice that non-compliance has consequences.

[14] In the circumstances, I make the following order:

Unless Ms McNabb, no later than 15 working days from the date of this judgment, fully complies with the Court's orders in paragraphs [17] and

[18] of the discovery judgment, the Court may, on application from Silver Fern Farms, strike out paragraph 12.1 of her statement of claim dated 26 June 2017, by which Ms McNabb seeks reinstatement to her former position with Silver Fern Farms.

[15] Silver Fern Farms seeks costs on its application on a 2B basis. That is appropriate considering Ms McNabb's current default and her history of defaulting on Court orders in this proceeding. The parties are to use their best efforts to agree costs using Category 2B in the Employment Court Guideline Scale for a defended

interlocutory application. If agreement cannot be reached, application may be made by Silver Fern Farms to the Court within 15 working days of the date of this judgment with any response to be filed and served by Ms McNabb within a further 10 working days following service.

J C Holden Judge

Judgment signed at 10 am on 11 June 2019

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