Employment Court of New Zealand

Musa v Whanganui District Health Board [2010] NZEmpC 104 (4 August 2010)

Employment Court of New Zealand

Musa v Whanganui District Health Board [2010] NZEmpC 104 (4 August 2010)

Last Updated: 11 August 2010

IN THE EMPLOYMENT COURT WELLINGTON

[2010] NZEMPC 104

WRC 24/08

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN MEMO MUSA Plaintiff

AND WHANGANUI DISTRICT HEALTH BOARD

First Defendant

AND CLIVE SOLOMON Second Defendant

Hearing: By written submissions filed on 2 August 2010 and oral submissions made (at Whanganui) on 4 August 2010

Appearances: Gerard Dewar, Counsel for Plaintiff

Peter Churchman, Counsel for First Defendant (appearing and being heard by leave)

Michael Leggat, Counsel for Second Defendant

Judgment: 4 August 2010

ORAL INTERLOCUTORY JUDGMENT (NO 2) OF CHIEF JUDGE GL COLGAN

ON ADMISSIBILITY OF EVIDENCE

[1] On the eve of the hearing the plaintiff has challenged the admissibility of some of the evidence intended to be called by the defendant. This followed my first interlocutory judgment delivered on 23 July 2010 with detailed reasons on 26 July

2010[1] which modified necessarily some of the evidence able to be called by the

MUSA V WHANGANUI DHB AND ANOR WN 4 August 2010

plaintiff and in response to which the defendant filed and served briefs of the evidence of his intended witnesses late last week.

[2] Applying the same reasoning set out in the reasons for judgment given on 26

July 2010, I determined the following in respect of the intended evidence to be called by the defendant which will require those witnesses to modify some parts of their briefs of evidence-in-chief.

[3] In respect of the intended evidence of Rana Waitai, I accept that the contents of paragraphs 6, 7, 8, 9, 10 and 11 are irrelevant to the issues to be determined in this case and should not be led. Over the objection of counsel for the plaintiff, however, I accept that the matters referred to in paragraphs 12 and 13 of Mr Waitai's brief are relevant. To make the necessary deletions make sense, therefore, paragraph 12 of Mr Waitai's brief should begin with the words: "I do not believe that Mrs Joblin had the authority of the Board ...".

[4] With regard to the intended evidence of Michael Brian Laws, I accept Mr Dewar's submission that the contents of paragraphs 8 and 9 are irrelevant to the issues to be determined in this case and should not be led. Contrary to the plaintiff's submissions, however, and consistently with the approach to Mr Waitai's evidence, I do not find that the contents of paragraph 10 of Mr Laws's intended evidence are irrelevant and may be led.

[5] Turning to the evidence intended to be led from the defendant, Mr Solomon, the first challenge is to the contents of paragraphs 25 to 31 (inclusive). Mr Solomon is entitled to explain the context in which he made the statement or statements to the media outlet known as "Doctor On Line" which is the subject of the proceeding. This includes evidence that the plaintiff has long and consistently asserted that he would not resign. Addressing those issues, I have concluded that paragraphs 25, 26,

27, 28, 29, 30 and 31 of Mr Solomon's intended brief of evidence are admissible.

[6] Next challenged by the plaintiff are the contents of paragraphs 34 to 38 of Mr Solomon's evidence. Mr Dewar submits that these address the very matters arising in 2002 and 2003 that I directed not be the subject of Mr Musa's evidence. I agree

that is so in respect of paragraph 34 and its contents should not be led. Paragraph 35 addresses the evidence of one of the plaintiff's intended witnesses, Ailsa Stewart. If the plaintiff wishes to lead Ms Stewart's evidence, then, for what it is worth, Mr Solomon is entitled to respond to it as he intends to do in paragraph 35 of his brief. This paragraph is not inadmissible. Paragraph 36 is likewise admissible because it explains and puts in context both the evidence and the inference that the defendant says the plaintiff wishes the Court to draw from Ms Stewart's evidence. So, too, does paragraph 37 explain legitimately Ms Stewart's evidence. If the plaintiff continues to lead Ms Stewart's evidence then Mr Solomon is entitled to explain and contradict that with his intended paragraphs 35, 36, 37 and 38 of his brief. If the plaintiff elects not to call Ms Stewart's evidence in this regard, then these paragraphs will be irrelevant. Therefore, it is over to Mr Dewar and the plaintiff to elect whether to call Ms Stewart's evidence which will in turn determine the admissibility of Mr Solomon's intended evidence.

[7] Next challenged by the plaintiff are paragraphs 44 to 46 of Mr Solomon's intended evidence. These fall under a heading "Paediatrics Crisis – 2006". I agree with Mr Dewar that these paragraphs are not sufficiently related to the matters at issue in the case and are of such historical and peripheral value as to be irrelevant to the issues in the proceeding and should not be led in evidence-in-chief. Mr Solomon's evidence will have to delete paragraphs 44 to 46 of the draft brief.

[8] Next, I move to paragraphs 52 to 56 (inclusive). These fall under a heading "HDC Hasil report". For the same reasons as I have just determined the inadmissibility of similar passages, I conclude that paragraphs 52, 53 and 54 are inadmissible and should not be led. Paragraph 55 contains a mixture of admissible and inadmissible evidence. It purports to relate events about a meeting at which Mr Solomon was not present. The documentary records of the meeting will be in evidence and I consider that Mr Solomon should not be permitted to lead evidence about what happened in these circumstances. Paragraph 55 of his intended brief is therefore similarly inadmissible. Paragraph 56 is also background material and is not sufficiently relevant to the matters at issue in this case to be admissible and should also be deleted from Mr Solomon's brief.

[9] Next, Mr Musa challenges the admissibility of what he says is opinion evidence about Mr Solomon's general character. Criticised is the evidence of two witnesses intended to be called for the defendant, Heather Margaret Kubiak and Maria Jane O'Leary. Mr Solomon seeks to have them give evidence as to his dedication, sincerity, trustworthiness and honesty.

[10] Mr Leggat submits that the evidence of these two women is called to contradict what counsel says are the generalised criticisms of Mr Solomon in the evidence of the plaintiff's witnesses and, in particular, the intended evidence of Ms Stewart that Mr Solomon's criticism of Mr Musa was, if not expressly, then inferentially, motivated by racial dislike of the plaintiff by the defendant. I agree that this inference was intended by, and may be drawn from, Ms Stewart's intended evidence at paragraph 8 of her brief.

[11] If it is the plaintiff's intention to continue to lead that evidence by Ms Stewart alleging dislike of Mr Musa by Mr Solomon for racial or nationalistic reasons, then Mr Solomon is, in fairness, entitled to respond by calling the evidence of Ms O'Leary and Ms Kubiak. In this case, also, whether their evidence is admissible and therefore to be called, depends on the plaintiff. If Mr Musa calls Ms Stewart's evidence as briefed, then the challenge to the intended evidence about those matters of Ms O'Leary and Ms Kubiak is not sustained.

GL Colgan

Chief Judge

Judgment delivered orally at 10.05 am on Wednesday 4 August 2010

---

[1] [2010] NZEmpC 95.
