Employment Court of New Zealand

Patel v OCS Limited [2014] NZEmpC 29 (26 February 2014)

Last Updated: 28 February 2014

IN THE EMPLOYMENT COURT AUCKLAND

[2014] NZEmpC 29

ARC 9/14

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

AND IN THE MATTER of an application for urgency fixture and a stay proceedings

BETWEEN POOJA PATEL Plaintiff

AND OCS LIMITED Defendant

Hearing: 26 February 2014 (Heard at Auckland)

Appearances: Mr L Herzog, counsel for plaintiff

Mr S Langton and Ms A Evans, counsel for defendant

Judgment:

ORAL INTERLOCUTORY JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] The plaintiff has filed a challenge to a determination1 of the Employment Relations Authority finding that her dismissal from her employment with the defendant was justified. The challenge was followed by an application for urgency. The plaintiff contends that the challenge must be heard on an urgent basis or she will suffer significant prejudice. That is because the contract between her former employer (the defendant) and the Auckland District Health Board for cleaning services is coming to an end around 31 March 2014. It is said that the relief sought by the plaintiff (reinstatement) will be rendered nugatory if her challenge is not

heard and determined before that date. That is because, as a non employee, she

1 [2014] NZERA Auckland 19.

would not be entitled to elect to transfer under Part 6A of the Employment Relations

Act 2000 (the Act), and that (she says) is what she is wishing to do.

[2] The defendant opposes the application for urgency. In addition it has applied for a stay of proceedings until the plaintiff has paid a sum of money into Court.

Application for urgency

[3] As Mr Langton, counsel for the defendant points out, the plaintiff could still pursue reinstatement to the defendant following the expiry of the contract, but he accepts that what the plaintiff would effectively lose is her right to elect to transfer as an employee. It is this issue that is of particular importance to the plaintiff, and which is relied on to support the application for urgency.

[4] While this potential for prejudice is accepted by the defendant it is submitted that other factors weigh against the plaintiff's application. In particular Mr Langton submits that the plaintiff has significantly underestimated the amount of hearing time that will be required, that the challenge lacks strength, and that there have been delays in progressing the claim.

[5] Mr Herzog, counsel for the plaintiff, originally submitted that half a day of hearing time would be required to deal with the challenge, given that the facts at issue relate to events that occurred on one particular evening. I do not accept that. The Authority's investigation consumed one full day and written submissions were later received. While the plaintiff seeks a non de novo hearing, focussed on one finding of the Authority, she is also pursuing reinstatement. As Mr Langton points out, it is likely that the evidence will take more than half a day, given the scope of evidence that will likely be required and the position of the defendant on reinstatement (which is strongly opposed). After hearing from counsel I consider that two days would be required to hear the challenge.

[6] Mr Langton submits that the plaintiff has effectively sat on her hands in terms of progressing her grievance and her challenge and that this is relevant to an

assessment of whether her application for urgency ought to be granted. It is necessary to understand the chronology of events to put this submission into context.

[7] The plaintiff was dismissed on 20 March 2013. She raised a personal grievance six days later, on 26 March 2013. The parties attended mediation on 30

April 2013. A claim for unjustified dismissal, unjustified disadvantage, wage arrears and reinstatement were then filed in the Authority, apparently on 13 September 2013 (around 6 months later). As Mr Langton notes, no urgency was sought at this time. Mr Herzog was not then appearing as counsel, although the plaintiff was represented by an advocate.

[8] On 22 October 2013 the Authority directed a one day investigation meeting to be held on 4 December 2013, (so reasonably expeditiously). The Authority determination was issued on 21 January 2014 and the plaintiff filed her challenge on

7 February 2014. The defendant was served with the challenge on 10 February and an application for urgency was filed on 13 February 2014 with the defendant being served with the application some five days later, on 18 February 2014.

[9] While delay was an issue identified by the defendant in its opposition to the application and during the course of a telephone directions conference, it is an issue that was not addressed in affidavits filed on behalf of the plaintiff. However, it appears that the plaintiff was aware that the defendant's contract with the Health Board was coming to an end by 13 September 2013.

[10] There were delays, as Mr Langton submits, in progressing the challenge and the application for urgency. And as Mr Langton also points out, no application for interim reinstatement was pursued. I accept that delay is a factor that is relevant to the exercise of the Court's discretion, although that must be balanced along with other relevant factors. It is the overall interests of justice that must be taken into consideration.

[11] The defendant submits that the challenge is weak, compounded by issues of credibility. There are difficulties in accurately assessing the strength of a challenge

at this early stage, particularly where much will depend on the way in which the contested evidence comes out at hearing.

[12] The Statement of Claim discloses that the key focus of challenge relates to an error made by the Authority, where it is said that the plaintiff allocated a staff member from a "critical area" to a "non-critical area" and that finding was incorrect. The defendant accepts that this was in error. Mr Reynolds, the Human Resources Manager of the defendant, who was the decision maker and who has sworn an affidavit in support of the defendant's opposition to the application for urgency and in support of the application for a stay, says that he found that the plaintiff had reallocated a staff member away from a critical area to another critical area, and that this was in breach of an instruction that a whole shift must be worked in that area to clean it. An analysis of the Authority's determination discloses that the Authority also found that there was a basis for a finding of serious misconduct in relation to another aspect of the plaintiff's actions.

[13] The defendant contends that the claim for reinstatement is weak, even if the plaintiff succeeds in challenging the finding of serious misconduct. Mr Reynolds has deposed that a permanent replacement for the plaintiff's supervisory role was employed in November 2013 after the plaintiff was dismissed and that there are no vacant similar roles; that issues of credibility arose during the course of the employer's investigative process and subsequently during the Authority's investigation which significantly undermine the prospect of reinstatement being ordered; that reinstatement would pose difficulties for other staff and that there was evidence before the Authority that the plaintiff had deliberately failed to follow reasonable instructions from the company.

[14] While it appears that a permanent replacement has been appointed to the plaintiff's previous position, that occurred while the plaintiff's proceedings were on foot in the Authority and accordingly at a time the defendant was aware that the

plaintiff was challenging her dismissal and seeking reinstatement. The fact that another employee has been appointed is not a bar to reinstatement, as previous authorities disclose.

[15] Much of the preparation that would be required to progress the challenge through to a hearing will already have been undertaken in the context of the Authority's recent investigation and, accordingly, while it is still fresh in the minds of the parties and their counsel. It is clear, after having had the advantage of hearing from counsel during the course of this morning's hearing, that they are both well acquainted with the issues, both factual and legal, in these proceedings. These factors reduce the prejudice that might otherwise be suffered by the defendant in responding to an urgent challenge.

[16] As I have said, I consider that two days of hearing time would be required. With some juggling this could be accommodated during the week commencing 17

March. That would allow the parties time to prepare, for the hearing to take place and for a judgment to issue before the contract is likely to come to an end.

[17] I consider that the potential prejudice to the plaintiff if her challenge is not heard and determined prior to 31 March 2014 significantly outweighs any identifiable prejudice to the defendant. Balancing all matters before me, including those identified on the defendant's behalf, I am satisfied that the plaintiff 's challenge ought to be dealt with on an urgent basis and the application is accordingly granted.

[18] I turn to consider the application for a stay. Where an election has been made under s 179 of the Act the Court has the power to order a stay of proceedings under the determination to which the election relates.2 An order for a stay may be made subject to such conditions, including conditions as to the giving of security, as the Court thinks fit to impose.

[19] The defendant has applied for a stay of proceedings. The grounds essentially reduce to the following points. The Authority yesterday issued a costs determination awarding $10,000 costs against the plaintiff. The defendant is concerned that the plaintiff will not be in a position to meet the costs award and that it will be financially exposed on the challenge. Some support for the defendant's concerns about whether the challenge will be pursued expeditiously and in an efficient manner

can be found in the Authority's costs determination. I make the obvious point that

2 Employment Court Regulations 2000, reg 64.

any conduct unnecessarily increasing costs is likely to reflect in any costs award made by this Court.

[20] The plaintiff opposes the application for a stay.

[21] The Authority's determination has only just been issued and the challenge will be dealt with within just over three weeks. The conditions imposed on a stay would need to be so tight as to render them unrealistic for the plaintiff, if the orders relating to urgency are to be effective. I am not minded to order a stay in the circumstances and in light of the tight timeframes that will apply to progressing the challenge.

[22] The defendant's application is accordingly dismissed. Of course a challenge does not operate as a stay and that is something that the plaintiff ought to be aware of.

[23] Costs on both applications are reserved in the circumstances.

Christina Inglis

Judge

Judgment delivered at 11.06am on 26 February 2014