



Employment Court of New Zealand

You are here: [NZLII](#) >> [Databases](#) >> [Employment Court of New Zealand](#) >> [2007](#) >> [2007] NZEmpC 97

[Database Search](#) | [Name Search](#) | [Recent Decisions](#) | [Noteup](#) | [LawCite](#) | [Download](#) | [Help](#)

Smith and Nola v Harvey WC 10A/07 [2007] NZEmpC 97 (7 August 2007)

Last Updated: 16 August 2007

IN THE EMPLOYMENT COURT

WELLINGTONWC 10A/07WRC 32/06

IN THE MATTER OF a challenge to a determination of the Employment Relations Authority

BETWEEN DARRYL JAMES SMITH AND
MAJTI ELIS NOLA
Plaintiffs

AND RONALD HARVEY
Defendant

Hearing: Consideration of papers received 1 August 2007

(Heard at Wellington)

Judgment: 7 August 2007

INTERLOCUTORY JUDGMENT OF JUDGE C M SHAW

[1] The plaintiffs challenge a determination of the Authority which found that in their capacity of a trading entity called DM Transport, a trucking operation, the plaintiffs, Mr Smith and Ms Nola, employed Mr Harvey to work as a driver.

[2] Tensions arose in the employment relationship over taxation issues, an alleged lack of training for Mr Harvey, his dissatisfaction that he was missing out on weekend work, and being unfairly punished.

[3] The Authority found that Mr Harvey left his employment because of those matters and was constructively dismissed. The Authority found that these matters gave rise to a substantial risk that he would resign which was reasonably foreseeable.

[4] Mr Harvey was awarded sums of money for compensation, lost remuneration, unpaid holiday pay, and costs.

[5] In its determination dated 9 October 2006 the Authority described the progress of its investigation as having had a "troubled history" because the plaintiffs failed to attend a conference call, mediation, or the investigation meeting. Therefore, before setting the challenge down for a hearing, I called for a report under [s181](#) of the [Employment Relations Act 2000](#) to assess the extent to which the parties in the investigation facilitated rather than obstructed the investigation.

The Authority's report in relation to good faith.

[6] Initially the plaintiffs engaged with the investigation by filing a statement of reply to Mr Harvey's employment relationship problem. The statement in reply was full and in the Authority's view included all the documentation

that they presumably wished to rely on. Since then, they took no further part in the Authority's investigation until after the Authority had issued its substantive determination.

[7] The Authority identified approximately six points at which the plaintiffs failed to facilitate the investigation:

1. They neither attended nor were represented at the agreed mediation with the mediation service.
2. An attempt by the Authority to serve an amended statement of problem by courier post failed when it was returned to sender.
3. A further amended statement of problem identifying Mr Smith and Ms Nola "trading as DM Transport" was served by process server on 29 May 2006. They would not accept the documents which were left at their front doorstep.
4. Mr Smith and Ms Nola failed to be available for a telephone conference call which they had been advised of by the Authority support officer at their address for service.
5. Mr Smith and Ms Nola failed to file a statement in reply to the amended statement of problem which cited them directly as parties.
6. Mr Smith and Ms Nola failed to prepare written statements pursuant to a timetable which also gave notice of the investigation meeting. The timetable and notice was personally served on Ms Nola by a process server. She refused to accept them and they were dropped at her feet.
7. Neither Mr Smith nor Ms Nola attended the investigation meeting on 5 October 2006. When an Employment Relations Authority support officer managed to speak to Ms Nola by phone to ask if she planned to attend the meeting that was on she replied "No". In that same call, the support officer told Ms Nola that the investigation meeting would now proceed and a determination would be made and a copy sent to her. Ms Nola replied "Okay".

[8] As a result of these failures, the Authority determined that Mr Smith and Ms Nola had failed to attend or be represented without good cause.

[9] Letters were subsequently received by the Authority from Ms Nola claiming that they had been told that they did not have to attend the Authority's meeting, that the process server did not identify himself, and blamed the Authority's support staff for the fact that she and Mr Smith did not involve themselves in the process or attend the investigation meeting.

[10] The Authority concluded that they had not facilitated the Authority's investigation other than providing a statement in reply and had deliberately refused to take part in the Authority's investigation process. Further, they chose to destroy some material because it came from Mr Harvey's representative.

[11] Finally, the Authority noted that although their failures made the investigation more difficult this was mainly to their own detriment. Their failure to accept material sent by the Authority made communication more difficult and not providing witness statements made preparation more difficult for Mr Harvey in the Authority. The Authority concluded that the plaintiffs almost totally failed to facilitate the Authority's investigation, that they significantly obstructed it, and that they failed almost throughout to act in good faith towards Mr Harvey.

Responses from the parties

[12] The parties were given an opportunity to comment on the Authority's report. The representative for Mr Harvey supported the findings of the Authority and added that since the Authority's determination the plaintiffs have failed to pay the defendant the monies awarded by the Authority. The defendant was left with no option but to obtain a distress warrant in the District Court. It was only after the execution of that distress warrant by the bailiff that the plaintiffs took legal advice in the matter although they had filed an application for leave to challenge out of time earlier.

[13] Mrs Irwin submitted that because of these failures the plaintiffs should not be able to progress a de novo challenge but must be restricted in the extent of any challenge to the Authority's determination.

[14] For the plaintiffs, Mr Gould submitted that the plaintiffs did not attend the investigation meeting because they were under the belief there was no strict legal requirement for them to do so but they did not deliberately conceal anything from the Authority or attempt to introduce blatantly irrelevant evidence in an attempt to obscure real issues.

[15] Mr Gould also submitted that, in order to give effect to the plaintiffs' right to challenge, the Court needs to hear evidence from both the plaintiffs. They should be able to have a full hearing because "*it is difficult to see in what manner the Court could restrict the hearing but preserve the Plaintiffs' right to have their challenge heard.*"

Discussion

[16] I accept the Authority's account which finds that the plaintiffs have not acted in good faith.

[17] It is well settled that the Court has the power to restrict the nature of an challenge in circumstances where it is determined that the plaintiffs who wish to challenge a determination have not acted in good faith in the course of the investigation before the Authority.

[18] An example of the Court's attitude to such behaviour is in *North Harbour Windows & Doors (1999) Ltd, (T/a Nulook (North Shore)) v Henman*^[1]. Colgan J found that the objective of the [Employment Relations Act 2000](#) is to resolve all employment relations problems between the parties expeditiously. Further, Parliament could not have been unmindful of the background to [s181](#) and the measures taken in earlier Acts to prevent a party from both not participating in good faith by the Authority and having access to a full challenge by hearing de novo.

[19] Where an employer did not participate in the Authority's investigation of the matter of its claim in a manner that was designed to resolve the issues involved, Colgan J found that it was in the interests of justice to direct that it was not entitled to a full hearing of the entire matter under [ss179](#) and [182](#).

[20] I accept that adopting this course of action in the present case will restrict the plaintiffs challenge but in the circumstances described by the Authority the plaintiffs have no right to a de novo hearing. As in the *North Harbour* case by their actions they have forfeited that right and must bear the consequences.

Decision

[21] The plaintiffs' challenge will not be heard by way of a de novo hearing. No further evidence, other than that adduced before the Authority including the plaintiffs' statement in reply and associated documents and briefs of evidence and documents filed for the defendant may be relied on in the hearing of the challenge.

[22] The challenge will be heard by way of submissions as to law and fact based on those documents.

[23] The Registrar will now arrange a telephone conference to call-over the matter with a view to having the challenge set down for a hearing.

C M Shaw
JUDGE

Judgment signed at 2.00pm on 7 August 2007

^[1] [\[2003\] NZEmpC 71](#); [\[2003\] 1 ERNZ 48](#)