Employment Court of New Zealand

South Pacific Limited v Tian [2013] NZEmpC 44 (22 March 2013)

Last Updated: 13 April 2013

IN THE EMPLOYMENT COURT AUCKLAND

[2013] NZEmpC 44

ARC 76/12

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN SOUTH PACIFIC LIMITED Plaintiff

AND JINGXIN TIAN Defendant

Hearing: By submissions filed on 11, 12 and 18 March 2013

Counsel: Paul Pa'u, advocate for plaintiff

May Moncur, advocate for defendant

Judgment: 22 March 2013

INTERLOCUTORY JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] The plaintiff has filed a statement of claim challenging, on a de novo basis, a determination of the Employment Relations Authority (the Authority) dated 15

October 2012.[1] In its determination the Authority found that the plaintiff had

breached s 12A(2) of the Wages Protection Act 1983, and awarded wages and penalties against it. The Authority also found that the defendant had been unjustifiably dismissed and awarded compensation of $10,000 together with a penalty of $5,000 pursuant to s 4A of the Employment Relations Act 2000 (the Act).

[2] A Good Faith Report was called for from the Authority pursuant to s 181 of the Act. That was because it appeared, from the Authority's substantive determination that the plaintiff may not have participated in the Authority's

investigation in a manner that was designed to resolve the issues involved. The

Authority, having received and considered submissions on its draft report, provided its final report to the Court on 22 February 2013. The parties were then given an opportunity to comment on the question of how the challenge is to be heard in this Court.

[3] Submissions were filed on behalf of the defendant on 11 March 2013, with the plaintiff filing submissions on 12 March 2013. Supplementary submissions were provided by the defendant's advocate on 12 March 2013, responding to two issues raised in the plaintiff's submissions, and further documentation was received on behalf of the defendant on 18 March 2013.

[4] In its Good Faith Report the Authority concluded that:

The plaintiff did not facilitate the Authority's investigation. It failed to make contact with Mediation Services to attend mediation despite being contacted by Mediation Services for that purpose on three occasions, failed to provide documents that it had agreed to provide, failed to comply with the timetable agreed to in respect of the provision of documents and

witness statements and it failed to attend the investigation

meeting.

The plaintiff, through its director (Ms Kwok), did not act in good faith towards the defendant. It failed to comply with the timetable set for progressing the investigation meeting. It failed to provide written instructions for its lawyer to act. It failed to attend the investigation meeting, despite having notice of the meeting (and it having been served at its registered office and address for service around one month

previously).

The plaintiff did not constructively assist in resolving the employment relationship problem in a timely, economic and efficient way. Resources of the defendant and the Authority were wasted as a result of the conduct of the plaintiff.

[5] The plaintiff accepts that it did not facilitate the Authority's investigation, but essentially submits that this was explicable in the circumstances. In this regard it is submitted that the company was no longer trading at the time the claim was filed and that Mr Wyatt (who is said to be the husband of the director of the plaintiff company), undertook the initial representation of the company although he is not a lawyer and nor does he have any background in the field of employment law. It is said that this was the first time the company and its officers had been involved in an employment dispute and they had not previously had any dealings with either the Mediation Service or the Authority. It is further said that a lawyer was subsequently instructed, and a retainer paid. However, when the lawyer was told that the company was effectively no longer trading, the director of the company was advised that there was no point in taking any further part in the investigation. It is submitted that Ms Kwok acted in good faith believing this advice to be correct and ceased to have any further involvement in the process. It is submitted that Ms Kwok was unaware that the lawyers engaged by the company had written to the Authority stating they had no further instructions.

[6] The plaintiff accepts that by not engaging in the process, on advice, it was not acting in good faith. However, it has also submitted that the defendant (in giving allegedly false and misleading evidence to the Authority) also did not act in good faith and that this should have been noted in the Authority's report.

[7] Mr Pa'u (the plaintiff 's representative) submits that s 182 of the Act is to be read subject to the equity and good conscience principles that underpin the workings of the Court. He says that while the plaintiff's behaviour did not facilitate the Authority's investigation, this was based on the advice it had received and a general misunderstanding. Finally, it is said that the plaintiff has attended a recent mediation as directed by the Authority but that the defendant failed to personally attend.

[8] The plaintiff submits that a serious injustice is likely to arise if the plaintiff's ability to challenge the Authority's findings is restricted.

[9] The defendant's advocate (Ms Moncur) essentially adopts the view stated in

the Authority's report, but does not otherwise directly address the issue that is now

before the Court, namely whether a direction ought to be given under s 182(1) that the hearing ought to be limited to a non-de novo hearing.

[10] I am satisfied from my consideration of the Authority's report to the Court, together with the parties' written submissions on it, that the plaintiff failed to attend the Authority's investigation and failed to attend mediation as directed. These steps obstructed the Authority's investigation as opposed to facilitating it. In *Pacific Palms International Resort & Golf Club Ltd v Smith,[2]* the Court held that a failure to attend mediation as directed by the Authority could give rise to a finding under s

182(2) of the Act that a person has not participated in the Authority's investigation of the matter in a way designed to resolve the issues involved. The Chief Judge went on to observe that whether or not a litigant has been legally advised to resist mediation or ignore a direction to attend mediation, is of no bearing on this finding.[3]

The same analysis logically apples to a decision not to actively participate, or

participate at all, in the Authority's investigation meeting.

[11] The effect of the plaintiff's conduct was that the defendant and the Authority were not informed of the plaintiff's case. The investigation was delayed and it was made more difficult because the Authority had less information on which to base its investigation and conclusions.

[12] The Court may sanction a party who fails to properly take part in the Authority's investigative process in a manner designed to resolve the issues involved.

[13] Section 182 provides that:

(1) Where the election states that the person making the election is seeking a hearing *de novo*, the hearing held pursuant to

that election is to be a hearing *de novo* unless the parties agree otherwise or the court otherwise directs.

[14] Section 182(3) provides that:

Where-

(a) the court gives a direction under subsection (1)

...

the court must direct, in relation to the issues involved in the matter, the nature and extent of the hearing.

[15] The Court's discretion must be exercised judicially and consistent with the

interests of justice.

[16] As Judge Couch observed in *The Travel Practice Limited v Owles*:[4]

In some cases, a just result can be found by restricting the issues which may be the subject of challenge or allowing the plaintiff to adduce only the evidence put before the Authority. In a case such as this, however, where the plaintiff has effectively taken no part in the investigation, such options are not open. If I do not allow the plaintiff to proceed with a hearing de novo, there is realistically no other way in which a challenge can proceed at all. The challenge is based entirely on the facts. If the plaintiff cannot adduce evidence, its case must fail with a consequent risk of injustice.

Allowing the plaintiff to proceed with a *de novo* challenge will obviously subject the defendant to additional stress and cause her to incur further cost. If her case is sound, however, she will not be deprived of the outcome she has achieved in the Authority. It also seems to me that the potential prejudice to the defendant of having to respond to evidence provided for the first time in the Court and the additional cost associated with that process can be dealt with effectively by directions and through orders for costs. The plaintiff's failure to attend mediation can also be remedied through a direction under s 188(2).

[17] These observations apply with equal force in the present case. There is effectively no way for the plaintiff to pursue its challenge if the hearing is not permitted to proceed on a de novo basis. That is because of the scope of the challenge and the intensely factual nature of it.

[18] Ms Moncur points out that while these proceedings are before the Court Ms Tian is exposed to ongoing costs and (it appears) she has not yet been paid the amounts ordered in her favour by the Authority. The latter point can be readily dispensed with. The Authority's orders must be complied with, absent a stay.

[19] One of the underlying principles of the Act is that employment relationship problems be dealt with in the first instance through mediation and investigation by the Authority. That principle will be undermined if the plaintiff 's challenge is permitted to proceed on a de novo basis.[5] However I am satisfied that in the circumstances of this case a just result can be achieved by imposing strict conditions on the challenge, and by having regard to any additional costs that the defendant has

been put to through any subsequent costs award.

[20] The plaintiff may proceed with its challenge on a de novo basis on the following conditions:

a) The plaintiff is to file and serve within 28 days after the date of this judgment affidavits of the evidence it relies on. Any documents relied on are to be annexed to those affidavits as exhibits.

b) The plaintiff shall not be permitted to adduce any other evidence without leave of the Court.

c) The parties are directed to mediation which is to take place as soon as possible after the expiration of the 28 day period specified above. Mr Pa'u is to promptly advise the Registrar of this Court in writing of the date set for mediation and the outcome.

d) The plaintiff is to strictly comply with all orders and directions of the Court made in the course of this proceeding. In default, the plaintiff's challenge is liable to be struck out.

[21] If the proceeding is not resolved at mediation a telephone conference is to be convened to enable further directions to be made to progress the challenge to hearing.

[22] The defendant is entitled to a contribution to her costs in relation to the good faith report process, which I set at $600. This sum is to be paid within 14 days of the

date of this judgment.

Judgment signed at 1.15 pm on 22 March 2013

Christina Inglis
Judge

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[1] [2012] NZERA Auckland 367.

[2] [2008] ERNZ 295.

[3] At [26]-[27].

[4] CC15/09, 14 October 2009 at [21]-[22].

[5] See *Owles*, at [19].
