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Spotless Facility Services NZ Limited v MacKay [2016] NZEmpC 124 (7 October 2016)

Last Updated: 14 October 2016

IN THE EMPLOYMENT COURT CHRISTCHURCH

[\[2016\] NZEmpC 124](#)

EMPC 125/2016

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN SPOTLESS FACILITY SERVICES NZ LIMITED

Plaintiff

AND ANNE MACKAY Defendant

Hearing: (on the papers by submissions dated 23 and 29 September 2016)

Appearances: G Ballara, counsel for the plaintiff

R Boulton, counsel for the defendant

Judgment: 7 October 2016

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment deals with an objection lodged by Spotless Facility Services NZ Limited (Spotless) in respect to parts of Ms Anne MacKay's brief of evidence. That brief has been filed for the purposes of an upcoming substantive fixture which will consider a non de novo challenge of a determination of the Employment Relations Authority (the Authority).¹ Spotless challenges one aspect of the

Authority's liability findings, as well as its approach on remedies.

¹ *MacKay v Spotless Facility Services (NZ) Ltd* [2016] NZERA Christchurch 52.

SPOTLESS FACILITY SERVICES NZ LIMITED v ANNE MACKAY NZEmpC CHRISTCHURCH [\[2016\] NZEmpC 124](#) [7 October 2016]

[2] In its determination, the Authority began by describing the background to Ms MacKay's claim that she had been constructively dismissed. It is necessary to describe its summary of facts for the purposes of the objections.

[3] Spotless provides various services to industry including catering. Ms MacKay was employed by it as a kitchen assistant in the Timaru Hospital.

[4] She complained of ill treatment by her supervisor and another co-worker, and raised her concerns with her manager. Soon after, she made another similar complaint to the same manager.

[5] Fractious relationships with staff persisted and a meeting was arranged between Ms MacKay's manager and a national manager. There it was revealed that staff had themselves made complaints about Ms MacKay.

[6] In later correspondence, Ms MacKay stated she did not feel safe and queried the national manager about how he might resolve the conflict. Ultimately she did not receive a reply and tendered her resignation.

[7] A short while later and on advice given to her by her union representative, she telephoned the national manager to ask if she could put her resignation on hold. This was done in the hope that a resolution could be found. She also raised her objection to a petition that was circulating of which she was the focus, and of which she only became aware after her resignation was tendered. The national manager informed her that she could either resign or withdraw her resignation; she resigned.

[8] When dealing with Ms MacKay's claim, the Authority considered four issues. She succeeded on the last of these: the Authority found that Spotless should have investigated Ms MacKay's claim that a petition was circulating amongst staff about her, after she raised this issue in a telephone conversation of 8 August 2014.

[9] Each party has filed detailed submissions as to the objection. Mr Ballara, counsel for the plaintiff, submits first that given the non de novo nature of the challenge, multiple paragraphs of Ms MacKay's intended brief of evidence are "irrelevant" in the sense in which that term is used in [s 7](#) of the [Evidence Act 2006](#) (EA).

[10] In particular, Mr Ballara said some of the intended evidence will not have a "tendency to prove or disprove anything that is of consequence to the determination of the proceeding", because it relates to facts that have not been put in issue.

[11] Secondly, objection is raised with regard to intended evidence which will address the alleged states of mind of other persons.

[12] Ms Boulton, counsel for the defendant, reminds the Court of the manner in which a non de novo hearing should proceed, as outlined in *Lim v Meadow Mushrooms Ltd*.²

[13] Submitting that this Court is not strictly speaking bound by the EA, Ms Boulton referred to the dicta of the Supreme Court as to the test of relevance in [s 7](#) of that Act, as discussed in *Wi v R*.³ There, the Supreme Court said with reference to [s 7\(3\)](#) of that Act:⁴

This is not an exacting test: nor should it be. Any definition of relevance has to accommodate all kinds of evidence and in particular circumstantial evidence, individual pieces of which are often of slender, and sometimes very slender, weight in themselves. The question is whether the evidence has some, that is any, probative tendency, not whether it has sufficient probative tendency. Evidence either has the necessary tendency or it does not.

[14] Ms Boulton referred also to the wide powers of admissibility which the Court has, having regard to the equity and good conscience jurisdiction which arises under

[s 189](#) of the [Employment Relations Act 2000](#) (the Act). Ms Boulton submitted in

² *Lim v Meadow Mushrooms Ltd* [2015] NZEmpC 192, (2015) 10 NZELC 79-060 at [23].

³ *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11.

⁴ At [8].

evidence that having regard to these principles the disputed paragraphs of

Ms MacKay's brief contained admissible evidence.

[15] Each counsel has addressed particular paragraphs of the intended brief in light of these propositions.

Analysis

[16] The starting point, in my view, must be the pleadings. It is evident from the amended statement of claim that the focus of the challenge is on alleged errors of fact and law arising from the determination of the Authority which dealt with its discussion as to whether Spotless acted unreasonably in failing to tell Ms MacKay that staff were circulating a petition about her, at paras [74] to [85] of the determination.

[17] It is also pleaded that if the Authority did not err in that regard, there is nonetheless a consequential issue as to whether compensation should have been awarded, and if so, whether the Authority properly applied [s 124](#) of the Act – bringing into play paras [93], [94] and [98] to [100] of the determination. Also challenged is the finding that Spotless should pay an award for lost wages despite, it is alleged, a failure by Ms MacKay to mitigate her loss; this brings into play paras [89] to [91] of the determination.

[18] The amended statement of defence pleads that the Authority's findings were

correct in fact and in law. No cross-challenge has been brought.

[19] After hearing from counsel at the initial timetabling conference, I ruled that the hearing of the challenge would relate to the import of the telephone discussion on

8 August 2014, together with, in the alternative, issues as to remedies.⁵

[20] Next, it is appropriate to refer to the relevant principles which apply to the hearing of a non de novo challenge, since these differ from those relating to a

de novo challenge:

5 Minute of 18 July 2016.

- a) A non de novo hearing is in the nature of an appeal. The challenger or plaintiff is required to show that the Authority's determination was wrong.⁶
- b) Thus, the challenger has an onus of persuading the Court of the existence of an error of fact and/or law by the Authority in its determination.⁷
- c) Making such an election does not indicate the way in which the appeal is to be heard. There may be evidence or further evidence about the matters at issue in the non de novo challenge. It may be necessary for the Court to make its own decision, as required by [s 183](#) of the Act.⁸
- d) If the Court is satisfied that the Authority has made one or more errors so that it is necessary to set aside some or all of the Authority's determination, then it may reconsider the issue involved taking into account any evidence called at the hearing of the challenge.⁹

[21] In this instance, however, the key issue is whether Ms MacKay's parts of intended evidence should be admitted because many of the disputed paragraphs relate to matters which are the subject of factual findings by the Authority which have not been challenged by either party in their pleadings.

[22] The Authority undertook what it described as a "brief account of the events leading to Ms MacKay's resignation".¹⁰ Then, after distilling the issues and summarising the law, it dealt with the four discreet issues which it identified.¹¹ They were:

- a) Whether Spotless took reasonable steps to investigate a letter of complaint which Ms MacKay had submitted.

6 Counties Manukau District Health Board v Trembath [\[2001\] NZEmpC 222](#); [\[2001\] ERNZ 847 \(EmpC\)](#) at [\[9\]](#); *Jerram v*

Franklin Veterinary Services (1977) Ltd [\[2001\] NZEmpC 79](#); [\[2001\] ERNZ 157](#) at [\[8\]](#).

⁷ *Robinson v Pacific Seals New Zealand Ltd* [\[2015\] NZEmpC 84](#) at [\[24\]](#).

⁸ *Cliff v Air New Zealand Ltd* [\[2005\] NZEmpC 14](#); [\[2005\] ERNZ 1](#), [\(2005\) 2 NZELR 412](#) at [\[7\]](#).

⁹ *Robinson v Pacific Seals New Zealand Ltd*, above n 7 at [\[33\]](#).

¹⁰ *MacKay v Spotless Facility Services (NZ) Ltd*, above n 1, at [\[6\]](#) - [\[51\]](#).

¹¹ At [\[54\]](#).

- b) Whether Spotless was unreasonable in refusing to allowing Ms MacKay

to "put her resignation on hold";

- c) Whether Ms MacKay had affirmed any breach by Spotless; and

- d) Whether Spotless was unreasonable in failing to tell Ms MacKay that it would investigate her claim that a petition was circulating amongst staff about her.

[23] It is only the last of these which is in issue; along with remedies thereon. Having regard to the discretion bestowed on the Court by [s 189\(2\)](#), I do not consider that the Court will be assisted by hearing evidence about matters that are not in dispute; I decline to admit such evidence. Evidence that may assist the Court with regard to any challenged issue should be admitted.

[24] As to the secondary point regarding evidence as to state of mind, I accept

Mr Ballara's submission. The Court will not be assisted by this evidence.

Disposition

[25] I now review the various paragraphs of Ms MacKay's brief in light of the foregoing analysis:

1. Paragraph 3: this paragraph is admissible; the evidence is potentially relevant to the challenged issues.
2. Paragraphs 4 to 20: the evidence contained in these paragraphs is the subject of unchallenged findings by the Authority, at paras [9] to [27] of the determination. It is therefore inadmissible. I note, however, that the Court's consideration of events described by the Authority will be assisted not only by the findings in the determination, but also by the documents to which the Authority referred, since the parties have agreed to place these before the Court in the common bundle.

3. Paragraphs 22 and 23: these events are the subject of findings by the

Authority at paras [30] to [35], and [46]. It is therefore inadmissible.

4. The last sentence of para 26: in this sentence Ms MacKay would refer to the state of mind of employees in the workplace when she was away on leave. No proper foundation has been laid for this assertion, and it is on the face of it unreliable evidence. It is accordingly inadmissible.

5. Paragraphs 35 and 36: this evidence is potentially relevant to the challenged issues. I admit that evidence for that purpose.

6. Paragraphs 37 to 39: these paragraphs refer to documents contained in the bundle which the parties have agreed should be before the Court. The documents are potentially relevant to the challenged issue. The evidence in the disputed paragraphs is accordingly admissible.

[26] Ms MacKay's brief of evidence should be amended in light of the foregoing conclusions. That brief should be filed and served by 17 October 2016.

[27] Costs in respect of the objection are reserved.

B A Corkill

Judge

Judgment signed at 10.45 am on 7 October 2016

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