

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**[2010] NZEMPC 118
CRC 36/10
CRC 37/10**

IN THE MATTER OF challenges to determinations of the
Employment Relations Authority

CRC 36/10
BETWEEN

DAMIEN MICHAEL BURTTON
Plaintiff

AND

TALLEY'S GROUP LIMITED
Defendant

CRC 37/10
BETWEEN

KARL PETER BROWNE
Plaintiff

AND

TALLEY'S GROUP LIMITED
Defendant

Hearing: 7 September 2010 (by telephone conference call)

Appearances: Anjela Sharma, Counsel for Plaintiffs
Graeme Malone, Counsel for Defendant

Judgment: 8 September 2010

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] Less than three clear days before the hearing of their challenges to the refusals of the Employment Relations Authority to grant them interim reinstatement in employment, the plaintiffs seek orders requiring the defendant to disclose to them the identities of persons alleged by the defendant to have implicated the plaintiffs in unlawful drug taking for which they were dismissed from employment.

[2] The plaintiffs' challenges have been brought on for a priority hearing because they seek interim reinstatement until the Authority can investigate and determine

their substantive grievances. The plaintiffs have not sought this information from the defendant as they might have, using the document disclosure rules in the Employment Court Regulations 2000.

[3] The plaintiffs purport to make this urgent application for disclosure under s 69 of the Evidence Act 2006. That is, however, inappropriate for a number of reasons. First, the Evidence Act does not govern proceedings in the Employment Court. The Employment Court is not one of the courts specified as being subject to the Act and it has its own statutory code for determining such matters in s 189 of the Employment Relations Act 2000 (the Act) which provides:

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- (1) In all matters before it, the Court has, for the purpose of supporting successful employment relationships and promoting good faith behaviour, jurisdiction to determine them in such manner and to make such decisions or orders, not inconsistent with this or any other Act or with any applicable collective agreement or the particular individual employment agreement, as in equity and good conscience it thinks fit.
- (2) The Court may accept, admit, and call for such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.

[4] Later on the same day the plaintiffs sought, by memorandum, a direction that the defendant be required to divulge to the Court the identities of the informants (described by the plaintiffs' counsel as "secret witnesses") although it was still not explained how such information could assist materially in determining the challenge to the Authority's refusal to grant interim reinstatement.

[5] The plaintiffs' challenge in this Court is against the Authority's determination under s 127 of the Act declining to order interim reinstatement. Section 127(4) requires the Authority (when determining whether to make an order for interim reinstatement) to apply the law relating to interim injunctions, having regard to the object of the Act. That requirement also applies to the Court on a challenge. Even if it did not, s 127(7) makes it clear that such a proceeding must be dealt with as an interim injunction would be. Such cases are dealt with generally on affidavit evidence and in respect of which leave to cross-examine any witness is generally required. The interlocutory procedures for document disclosure that apply

to substantive hearings are generally inapplicable to such interlocutory injunctive hearings.

[6] Whilst I accept that the nature and quality of the information upon which the defendant relied in dismissing the plaintiffs will be an important issue in the substantive investigation into their personal grievances to be carried out by the Authority, and the Authority may well require the defendant to provide to it both documents and other information about the identities of informants, that is not a matter for the case at this stage. If there is a significant issue of law arising about this question, it may be an appropriate case for the substantive proceedings to be removed to the Court under s 178 of the Act. That is, however, a matter for the parties and the Authority to determine if appropriate.

[7] It is difficult to see how the provision of information about the identities of informants may assist the plaintiffs meaningfully on an application for interim reinstatement in employment. The defendants' witnesses have sworn on oath that they were told by so far unidentified other persons that Mr Browne used illegal drugs whilst a crew member on board one of the defendant's vessels.

[8] Even if the Court could do so, which I am satisfied it cannot, it would be premature to require the defendant to comply with a direction under s 69(2) of the Evidence Act directing it to disclose the identities of the informants, at least not without hearing from the defendant on the question. I decline to make the directions the plaintiffs seek at this stage of the case.

[9] I should also record the concern which I expressed to counsel about their intentions to act in that role when it appeared to me that each is potentially a witness in the Authority about matters that are seriously in dispute between the parties and crucial to Authority's determination of the case. I re-emphasise that I have not determined whether either or both of Ms Sharma and Mr Malone should not continue to act as counsel in the proceeding, whether in this Court or in the Authority, although Mr Malone has subsequently accepted that it is appropriate for the defendant to instruct other counsel to appear tomorrow. Who appears as counsel in the Authority is, in any event, a matter for the Authority itself which will give

directions about the identities of the persons from whom it wishes to hear at its investigation. So far as the present proceedings in this Court are concerned, I have asked counsel to consider whether they can continue to act in that role. That is for the following reasons.

[10] In his affidavit, sworn on 21 July 2010, filed in the Employment Relations Authority and now, pursuant to my directions, tendered as evidence on the challenge, the defendant's deep sea division general manager, Anthony Hazlett, deposes in detail to what he says was Ms Sharma's participation in a significant investigation meeting which led to Mr Burtton's dismissal. At paragraph 19 of his affidavit Mr Hazlett says that "Anjela ... did virtually all the talking for him [Mr Burtton]" at this meeting.

[11] At paragraph 43 of his affidavit, sworn on 21 July 2010, which was put before the Authority and is now before the Court in opposition to Mr Burtton's interim reinstatement, the operations manager of Talley's deep sea division, Andrew Smith, says:

Throughout the process he [Mr Burtton] has shown himself to be dishonest. He lied to us at interview repeatedly; he then through his representative [Ms Sharma] and directly, lied at the disciplinary meeting; even now, he lies in his affidavit.

[12] In these circumstances it appears at least likely that the Employment Relations Authority will need to consider the evidence of Ms Sharma to determine the truth of what was said at meetings at which she was present, in which she played a participatory role, and as a consequence of which the defendant claims to have been justified in dismissing Mr Burtton. I am concerned that, in these circumstances, Ms Sharma may have a conflict with her role as counsel which will include inviting the Authority (and the Court at the forthcoming hearing) to find her client to be a witness of truth. That is, of course, not to determine the disputed issues but, rather, illustrates the potentially incompatible roles of witness and counsel.

[13] The same may be true for Mr Malone, although in different circumstances. The evidence shows that Mr Malone, as the defendant's solicitor, both advised it strategically from an early stage in its investigations and was present at, and took

part actively in, important investigative meetings considering allegations of very serious misconduct against both plaintiffs. The evidence also suggests, not unnaturally, that following his participation in those meetings, Mr Malone retired with his client's representatives when they considered their decision about those allegations and following which one plaintiff was dismissed summarily and the other was dismissed constructively. What was said by participants at those meetings is, either actually or potentially, in dispute and may be critical to questions of justification for dismissal. In these circumstances Mr Malone's evidence about what occurred may well be called for by the Authority to enable it to determine the truth of those events. There may also be a professional conflict if Mr Malone is also to appear as counsel asking the Court to accept the veracity of the accounts of these events given by his client's witnesses and otherwise inviting the Court and the Authority to determine the justification of important decisions in which Mr Malone may well have participated. As I have noted already, Mr Malone has now indicated commendably that other counsel will be instructed to appear for his client at tomorrow's hearing

[14] There is a third issue that I raised with counsel yesterday about the absence of information which is of concern to the Court. This is when the Authority will begin its investigation of the plaintiffs' personal grievances. Counsel indicated that although there had been some discussions with the Authority about that matter and some dates had been suggested, there were then no dates set for the investigation meeting. So it is still unclear how long any period of interim reinstatement or interim unemployment might be. That ought to have been an important consideration for the Authority when it determined the plaintiffs' applications for interim reinstatement and will be a vital consideration for the Court's reconsideration of the same questions tomorrow. Belatedly, counsel indicated that they would confer with the Authority about this matter but I regret to say that it ought to have been addressed much sooner.

[15] I should record, also, my view expressed to the parties that some of the affidavit evidence tendered to the Authority and now to the Court, particularly from the defendant's witnesses, is couched in intemperate and inappropriate terms that will not assist the Court to determine the issues before it. Although, no doubt,

witnesses believe sincerely what they have said and in the manner that they have expressed themselves, it is for counsel to ensure that such evidence as is tendered, is relevant, admissible, and appropriately expressed. It is for the Court to determine whether reinstatement will be practicable and just. Numerous and voluminous affidavits setting out the deponents' subjective views about the issues to be decided by the Court do not assist it in making a difficult decision at short notice.

GL Colgan
Chief Judge

Judgment signed at 10.00am on 8 September 2010