

**IN THE EMPLOYMENT COURT
WELLINGTON**

**[2010] NZEMPC 16
WRC 38/09**

IN THE MATTER OF	a de novo challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	a good faith report
BETWEEN	AOTEAROA COOLSTORES LTD Plaintiff
AND	MARLENE WAARA Defendant

Hearing: By memoranda of submissions filed on 10 and 27 November 2009

Judgment: 4 March 2010

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] This interlocutory judgment decides whether the plaintiff, Aotearoa Coolstores Ltd (“ACL”), should be entitled to proceed with its challenge to a determination of the Employment Relations Authority by hearing de novo, that is of the entire matter that was determined by the Authority.

[2] The Authority’s determination indicated that ACL may not have participated in its investigation of the matter in a manner that was designed to resolve the issues involved.

[3] The determination recorded that ACL’s director, Mr Thurston, filed no statement of reply to the defendant’s personal grievance application that she was unjustifiably dismissed. Furthermore, despite written advice to the defendant, Ms Waara, that ACL was willing to undertake mediation to settle the matter, no one

from the company returned calls from the Mediation Service when it attempted to set down a date for mediation. No explanation was given for this.

[4] In addition, the determination recorded that, despite notice of the preliminary conference in the Authority being sent to Mr Thurston, attempts to contact him on that day were unsuccessful. An investigation was subsequently instigated and the Authority sent notice of this to ACL's address but, although Mr Thurston attended the investigation meeting, he did not provide any written statements or submissions or documentary evidence at or before the investigation. These events were recorded in the Authority's determination that ACL seeks to challenge.

[5] I therefore requested a report from the Authority, under s 181(2) of the Employment Relations Act 2000 ("the Act"). That request required the Authority, under s 181(1)(a)-(b), to submit to the Court a written report giving the Authority's assessment of the extent to which the parties involved in the investigation facilitated rather than obstructed the Authority's investigation and had acted in good faith towards each other during the investigation.

Good faith report

[6] The Authority issued a draft good faith report and then its final report on 2 November 2009. In the draft report and confirmed in the final report, the Authority stated that ACL did not facilitate the Authority's investigation in that it failed to undertake mediation as previously agreed, failed to file a statement of reply, and failed to provide statements and documentary evidence. The Authority concluded that these failures amounted to the company obstructing the Authority's investigation because, amongst other things, it "delayed until the day of the investigation to put its position to Ms Waara. Even then it did not articulate clear acceptance she had been unjustifiably dismissed, but that it challenged her calculation of losses."

[7] The report also states that ACL has not acted in good faith toward Ms Waara due to its repeated failures to be responsive and communicative and also its late advice to the Authority which implied that it accepted the substantive justification of Ms Waara's claims and only questioned the quantum she claimed. The Authority

concluded that due to the belated nature of this advice, Ms Waara had already suffered considerable stress and ongoing humiliation, as well as unnecessary cost in the preparation and presentation of her case.

[8] In accordance with s 181(3) of the Act each party was served with a copy of the draft good faith report to enable them to make comments. These comments were annexed to the final good faith report.

[9] ACL submitted that “Mr Thurston did not have the full details on hand to challenge the amount claimed by Ms Waara in her statement of claim that she filed with the Authority”. He stated this was due to extreme short staffing and the company’s efforts being concentrated on property settlements, a major restructure and re-banking. Mr Thurston submitted that without these efforts the operations of the company would have been compromised.

[10] Ms Waara’s statement set out clearly the stressful effect of ACL’s failure to be responsive and communicative, as well as the difficulties she faced in calculating her losses. Ms Waara stated that the allegation put by the company at the investigation meeting that she was dismissed because of theft at the plant took her by surprise as this had not been put to her previously. She alleged the delay caused by ACL’s failure to be responsive and communicative diminished her ability to respond to its claim.

[11] In accordance with this Court’s practice I gave the parties the opportunity to make submissions on the application of the relevant statutory provision of the Authority’s final report and, in particular about the nature and extent of the hearing of the challenge.

[12] ACL’s submissions on the final report echo the company’s response to the draft report, namely that Mr Thurston did not have the full details on hand to challenge Ms Waara’s calculations at the Authority investigation due to short-staffing and the company’s efforts being concentrated elsewhere. In addition, ACL submits that it only wishes to challenge the quantum of the award to Ms Waara, not the substantive findings.

[13] Ms Waara, in her submissions, referred to an Authority determination also involving ACL, *Bevin Pollock v Aotearoa Coolstores Ltd*¹ and observed that, although this matter was before the Authority more or less concurrently with Ms Waara's application, ACL did "attend mediation, provide a statement in reply and otherwise communicate with the Authority" in respect of that matter. Ms Waara also submits that a de novo hearing is unwarranted and that ACL, by its own submissions, implicitly admits a hearing on the whole determination is unnecessary.

Decision

[14] The Authority has found that the plaintiff company, ACL, did not facilitate the investigation and did not act in good faith towards the defendant.

[15] From its submissions on the final report, it appears that ACL is no longer seeking a de novo hearing as set out in its statement of claim challenging the Authority's determination.

[16] I therefore accept the defendant's submission that the nature and extent of the hearing should be limited, pursuant to s 182(3)(a) of the Act, to the amount of damages, or compensation, to be awarded to Ms Waara.

[17] The Registrar should now arrange a call-over to timetable the matter, as it is now confined, to a fixture.

GL Colgan
Chief Judge

Judgment signed at 3.30 pm on Thursday 4 March 2010

¹ ERA Wellington WA117/09, 21 August 2009.