

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2013] NZEmpC 37  
ARC 65/12**

IN THE MATTER OF      an application for compliance order

BETWEEN                HOWARD DELL  
                                 Plaintiff

AND                        ABC01 LIMITED (FORMERLY  
                                 PRIMARY HEART CARE LIMITED)  
                                 First Defendant

AND                        JOHN WILLIAM HINCHCLIFF (ALSO  
                                 KNOWN AS JOHN-WILLIAM:  
                                 HINCHCLIFF)  
                                 Second Defendant

Hearing:                15 March 2013  
                                 (Heard at Auckland)

Appearances: Plaintiff in person by video link  
                                 Sheila McCabe for defendants

Judgment:             15 March 2013

---

**ORAL INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN**

---

[1]      Mr Dell asks the Court to now impose sanctions on Mr Hinchcliff for what is said to be his non-compliance with the orders of the Court made against him on 18 February 2013. Those applications are for three sanctions:

- the imposition of a financial penalty on Mr Hinchcliff;
- an order for the sequestration of Mr Hinchcliff's assets; and
- an order for Mr Hinchcliff's imprisonment.

[2] As I have said before in this proceeding, there is simply insufficient in the plaintiff's case for the Court to make an order for sequestration. It is a complex legal mechanism and Mr Dell has simply, and understandably, not been able to provide the Court with sufficient material to enable it to do so.

[3] As to the application for an order for Mr Hinchcliff's imprisonment, that is, as Ms McCabe has submitted, a remedy of last resort and, despite Mr Dell's scepticism of this, I am not satisfied that we are yet in last resort territory. Mr Dell confirmed that his real aim is to be paid the money that he says he is owed and for which he has a determination of the Employment Relations Authority<sup>1</sup> which, by now, with interest and costs, must be approaching \$200,000. It would clearly be better for Mr Dell to have his money than to have only the satisfaction of Mr Hinchcliff sitting in prison, costing the community a lot of money, but still not paying Mr Dell what may be due to him.

[4] The third remedy claimed, a financial penalty, could potentially be imposed by the Court but that too would still not, of itself, ensure that Mr Dell is paid the money by the first defendant company that the Authority has said is owed.

[5] On the other hand, Ms McCabe, who has now been instructed for both defendants in the last few days, asks that Mr Dell's applications be dismissed. She says that Mr Dell has not been able to establish in evidence Mr Hinchcliff's non-compliance with the compliance order made against him by the Court on 18 February 2013. That may or may not be correct. It is difficult for somebody in Mr Dell's circumstances, particularly not in the country, to establish non-compliance with what was imposed on Mr Hinchcliff on that day.

[6] I propose to follow neither of the positions advanced by the parties today for the following reasons. There have been a number of recent developments which affect the position now.

[7] First, and again despite Mr Dell's scepticism of the motivations or consequences of this, Mr Hinchcliff, who operates ABC01 Limited, has taken legal

---

<sup>1</sup> [2012] NZERA Auckland 318.

advice and is now represented by counsel and solicitors. That is a significant development in light of the background to this litigation which I will not repeat but is set out in previous judgments of the Court.<sup>2</sup>

[8] Mr Hinchcliff has said that he will instruct his solicitors to make application to the Employment Relations Authority on behalf of the company to reopen its investigation. He says, supported by some documentation that may be credible, that the company is not liable to Mr Dell for breach of their employment agreement. That is a matter for the Authority to determine but the steps that I am going to take today will attempt to ensure that any application to reopen the investigation in the Authority will be made and will be prosecuted promptly.

[9] The next matter on which the Court needs to be satisfied to a better standard is the company's financial position. I have Mr Hinchcliff's affidavit that says that it is unable to pay the debt due to Mr Dell but, in the circumstances, I would expect to be provided with better evidence of that. That better evidence would probably include affidavit evidence from the company's accountants, its last annual accounts, its draft accounts, a statement of its current financial position, and the like. That may either confirm, or prove otherwise, Mr Hinchcliff's assertions and may well assist Mr Dell to ascertain what moves he has to make.

[10] The next recent development is that Mr Dell has given notice to the company of his intention to commence proceedings for its liquidation in the High Court. Mr Dell has mentioned, but I am not entirely clear, something about that process that may have been going to occur yesterday (14 March 2013) but has not occurred. The option of seeking to have the company liquidated remains open to Mr Dell and he has the debt collection company Baycorp acting for him in that regard.

[11] Ms McCabe has told me that while the company is trading and can meet its day to day debts, it could not meet a debt now of about \$200,000 and, in those circumstances, can probably not defend liquidation proceedings. Liquidation of the company has always been a remedy open to Mr Dell although he has chosen to seek

---

<sup>2</sup> [2012] NZEmpC 188; [2012] NZEmpC 190; [2012] NZEmpC 198; [2013] NZEmpC 14.

enforcement in this jurisdiction. It may be that when he is able to consider the position, that might be Mr Dell's best opportunity to pursue liquidation.

[12] Nevertheless, Mr Dell has said that he is prepared to consider a proposal for a settlement of the proceedings between the parties which might involve other than a single payment by the company to him. It seems that the company is trading. Mr Hinchcliff is working there and it is at least a possibility that if these two men can agree between themselves, there may be another outcome which would both see the company continue to operate and Mr Dell satisfied that it has met its liability to him.

[13] For all of those reasons, I think the most just course is to adjourn Mr Dell's applications, but not indefinitely, and on conditions.

[14] The plaintiff's applications currently before the Court are therefore adjourned to 10 am on Wednesday 27 March 2013 which is less than a fortnight away and when the proceeding will be back before this Court. The conditions attaching to that adjournment are:

1. The first defendant must now make prompt application to the Employment Relations Authority to reopen its investigation. If that order is made by the Authority, ABC01 Limited must prosecute promptly its reopened proceedings in the Authority.
2. The first and second defendants are to provide to the Court, no later than three working days before that hearing, better evidence on affidavit of the first defendant's financial position in the way that I have outlined earlier in this judgment.<sup>3</sup>

[15] If the parties consider that they may be assisted, in discussions between themselves about a possible settlement, the Mediation Service of the Ministry of Business Innovation and Employment is available to assist them and, indeed, this Court has an obligation to refer the parties to that mediation assistance. Now that

---

<sup>3</sup> At [11].

Ms McCabe is involved in the proceeding, I think I can rely on counsel and her instructing solicitors to assist in setting up a mediation if that might help the parties.

[16] For the sake of completeness, it is still open to Mr Dell, as one of his options, to continue with his insolvency proceedings in the High Court if that is how he wishes to deal with this matter.

[17] I propose to reserve costs on this hearing today. My inclination is that no costs orders should be made either way but I am open to persuasion about that at a later stage.

GL Colgan  
Chief Judge

Judgment delivered orally at 10.54 am on Friday 15 March 2013