IN THE EMPLOYMENT COURT
WELLINGTON

[2014] NZEmpC 146
WRC 33/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ROBERT RIMENE Plaintiff
AND	PETER JOHN DOHERTY AND NATUSCH GROUP LIMITED Defendant

Hearing: (by way of submissions from counsel for the plaintiff filed on 22 April 2014)

Judgment: 12 August 2014

JUDGMENT OF JUDGE A D FORD

Introduction

[1] The defendant in this part-heard case has been adjudicated bankrupt in Australia. The issue that now arises is whether the plaintiff is entitled to judgment in default.

Background

[2] The history of the litigation has been fraught with problems and difficulties. Initially, each party sought to bring separate proceedings against the other challenging by way of non de novo challenge various aspects of a determination of the Employment Relations Authority (the Authority) dated 4 April 2012.[1] The

[1] *Rimene v Doherty* [2012] NZERA Wellington 32 [Authority determination].

defendant, Mr Doherty is an Australian solicitor residing in New South Wales. He has acted on his own behalf and he has also represented the co-defendant, Natusch Group Limited. There was a problem initially with service of documents out of the jurisdiction and both parties required an extension of time in which to proceed with their challenge. These matters were dealt with in two interlocutory judgments issued contemporaneously on 10 October 2012 in which I granted the parties leave to proceed.[2] Subsequently, I ordered that the two actions were to be consolidated and I directed that the challenge and cross challenge would proceed on a de novo basis.

[3] The Authority fairly accurately described the dispute as a problem about an employment relationship between Mr Rimene and Mr Doherty that turned sour. It noted: "There is a lot of money at stake that has become an issue between them both."[3] In brief, Mr Doherty was engaged in the purchase and renovation of properties in New Zealand for rental and Mr Rimene began working for him. Later Mr Doherty formed Natusch Group Limited. One of the issues in the case was whether the Natusch Group Limited ever became Mr Rimene's employer. There were a number of other issues. Suffice it to say that the Authority concluded that Mr Rimene had not raised a personal grievance for unjustified dismissal and he had failed to establish that he was owed the significant amount he claimed for loss of wages.[4] The Authority did, however, order Mr Doherty to pay Mr Rimene $7,497.64 on account of holiday pay.[5] In his challenge, Mr Rimene sought certain declarations and renewed his claim for unpaid wages. In his cross challenge, Mr Doherty sought certain orders including an order offsetting the holiday pay against other monies he claimed he was owed by Mr Rimene.

[4] After a number of other interlocutory skirmishes, the case proceeded to a hearing scheduled for 17, 18 and 19 July 2013. The three-day time estimate, however, proved to be hopelessly inadequate and it was clear that further sitting days would need to be allocated. As it turned out, on the second day of the hearing, it became necessary to grant an adjournment. The need for the adjournment arose because Mr Parker, counsel for Mr Rimene, sought to produce important

[2] *Rimene v Doherty* [2012] NZEmpC 177; *Doherty & v Rimene* [2012] NZEmpC 178.
[3] Authority determination, above n 1, at [1].
[4] At [19]-[20].
[5] At [23].

documentation relating to one aspect of Mr Rimene's claim for loss of wages which had not previously been disclosed through the discovery process. Mr Doherty, understandably, required time to peruse and analyse the documentation in question. Apart from granting the adjournment, I also granted leave for both parties to produce additional evidence during the adjournment period if they so desired. Principally because of a lengthy priority fixture scheduled for the end of 2013 and problems over Mr Doherty's availability, it was not possible for the Registrar to reschedule the hearing until the week commencing 24 March 2014.

[5] On 24 March 2014 I issued a minute confirming what had taken place when the case was called earlier that day. Relevantly, I noted:

> 3. When the case was called this morning Mr Rimene and his counsel were in attendance but there was no appearance by or on behalf of the defendant. The Registrar produced an email he had received from Mr Doherty on Friday, 21 March 2014 in which he stated that he had been placed in bankruptcy without his knowledge. Mr Doherty stated that this development would have "an obvious impact on my standing in respect of the current matter before the Employment Court."
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> 4. The Registrar has subsequently been able to ascertain that on 23 January 2014 the Federal Court of Australia made a Sequestration Order against Mr Doherty's estate and he was made bankrupt on that day. The order records that the act of bankruptcy was dated 18 October 2013.
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> 5. Given the foregoing developments, this litigation is now halted. A sealed copy of this minute is to be served by email on the parties and on A H J Wily, trustee of the bankrupt's estate. The Registrar is also to forward to Mr Parker a copy of the correspondence he has received from the trustee, Mr Wily.
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> 6. Unless some step is taken in the proceeding either by the trustee or counsel for Mr Rimene within 30 days of the date of this minute then the proceedings will be struck out.

Response

[6] No response to my minute was received from the trustee of Mr Doherty's bankrupt estate. Earlier, however, the trustee Mr Wily had forwarded to the Registrar a complete copy of all relevant documentation leading up to the making of the Sequestration Order by the Federal Court of Australia as well as a copy of a seven-page letter he had sent to Mr Doherty explaining in some detail the effect of the Order. One effect was that under the s 58 of the Bankruptcy Act 1966 all of

Mr Doherty's property became vested in the trustee. Mr Doherty was required to surrender his passport and he is not permitted to travel overseas without the trustees' written permission.

[7] On 22 April 2014, Mr Parker filed two documents - a "Memorandum of Counsel" and a "Synopsis of Submissions of Counsel for the Plaintiff". In his memorandum counsel stated, relevantly:

> 1. …
>
> c. The Plaintiff's have (sic) sealed orders from the District Court and High Court in favour of the Judgment Creditor for the sum of $32,355.91. With regard to these Orders the Plaintiff's have commenced bankruptcy proceedings in this jurisdiction, however, those proceedings have yet to commence to a hearing date.
>
> …
>
> 5. Counsel submits that the Court has the jurisdiction to make Orders against the Defendant by r 15.4 High Court Rules.
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> 6. The Plaintiff seeks the following Orders:
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> a. The Employment Court confirms that Peter John Doherty as undisclosed principal is named as the employer of Robert Rimene.
>
> b. The plaintiff's employment included rental accommodation at 23 Roberts Rd, Masterton.
>
> c. The Plaintiff's employment ended March 2010. Based on the figures presented to the Court by bundle document numbered 1000 the Plaintiff is entitled to $28,467.24 in compensation for unpaid salary and wages to March 2009 and unpaid salary from April 2009 to March 2010 in the amount of $45,760.00 (based on $880 per week).
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> d. The plaintiff is entitled to $7,497.64 for unpaid Holiday Pay as determined by the Employment Relations Authority [2012] NZERA Wellington 32, 5335419 dated 4 April 2012.
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> e. Costs as per the attached schedule.
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> 7. Due to the Defendant's adjudication as bankrupt in Australia we note there is some urgency obtaining judgment due to the plaintiff having to take steps to enforce judgment in Australia.

The schedule attached to counsel's memorandum sought costs under category 2B of the High Court Rules in the sum of $34,825.00.

[8] The synopsis of submissions filed by counsel for the plaintiff were submissions going to the merits of the plaintiff's case and were the type of

submissions the Court would expect to be presented by counsel at the conclusion of all the evidence.

Discussion

[9] The first point I make about the documentation presented on behalf of the plaintiff is that it is irregular and does not follow the prescribed procedure provided for in the Employment Court Regulations 2000 (the Regulations). Where directions or interlocutory applications are sought, these should be contained within a correctly intituled form of application following the format of Form 2A in Sch 1 of the Regulations. It is unsatisfactory for the application to be included in the body of a memorandum from counsel.

[10] The second observation I make about the plaintiff's application is that it seeks orders under r 15.4 of the High Court Rules but that particular rule simply sets out the requirements for affidavits of service to be filed before judgment by default can be sealed in a case. It may be, and the Court should not be left to speculate in these matters, that the plaintiff intended to refer to r 15.7 of the High Court Rules which provides for judgment in default to be entered in certain situations when the relief claimed by the plaintiff is payment of a liquidated sum of money but that rule has application only where the defendant has not filed a statement of defence and that is not the situation in the present case.

[11] Quite apart from those important procedural considerations, even if the Court was mindful to consider an application for judgment by default, it is not clear what jurisdiction the Court has to allow the proceedings to continue even for such limited purposes.

[12] In New Zealand, under s 76(1) of the Insolvency Act 2006, upon adjudication of bankruptcy "all proceedings to recover any debt provable in the bankruptcy are halted." However, s 76(2) of that Act vests in the High Court a discretion to allow proceedings that had already begun before the date of adjudication to continue on terms and conditions that the Court thinks appropriate. The provisions of the

Insolvency Act apply only in relation to adjudications of bankruptcy in New Zealand and in the present case the defendant was adjudicated bankrupt in Australia.

[13] Cross-jurisdictional insolvency issues are governed by the Insolvency (Cross-border) Act 2006 and the application of the rules applying to cross-border insolvency proceedings set out in Sch 1 to that Act. Relevantly for present purposes, art 20 of the rules provides:

> **Article 20. Effects of recognition of a foreign main proceeding**
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> (1) Upon recognition by the High Court of a foreign proceeding that is a foreign main proceeding,
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> (a) commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations, or liabilities is stayed;
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> (b) execution against the debtor's assets is stayed; and
>
> (c) the right to transfer, encumber, or otherwise dispose of any assets of the debtor is suspended.
>
> (2) Paragraph (1) of this article does not prevent the Court, on the application of any creditor or interested person, from making an order, subject to such conditions as the Court thinks fit, that the stay or suspension does not apply in respect of any particular action or proceeding, execution, or disposal of assets.
>
> (3) Paragraph (1)(a) of this article does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor.
>
> (4) Paragraph (1) of this article does not affect the right to request the commencement of a New Zealand insolvency proceeding or the right to file claims in such a proceeding.

[14] For all intents and purposes, art 20(1)(a) appears to have the same effect as s 76(1) of the Insolvency Act. Likewise, art 20(2) appears to preserve to the Court a similar discretion to that provided for in s 76(2) to allow a particular action or proceeding to continue.

[15] Although no submissions were made on the point, it would appear that under art 20(1) the "foreign main proceeding", which in this case is effectively the Australian insolvency proceedings against Mr Doherty, would need to be recognised by the High Court before leave could be granted under art 20(2) allowing the

proceeding before this Court to continue. The "High Court" is defined in the rules as the High Court of New Zealand. In para 1(c) of his memorandum filed 22 April 2014, counsel for the plaintiff states that bankruptcy proceedings have been commenced by the plaintiff in the High Court but a hearing date is apparently yet to be set.

[16] Quite apart from these jurisdictional issues, I am bound to observe that it would be quite inappropriate and unjust for judgment to be entered in default against the defendant. Up until the adjournment, the plaintiff's challenge was being hard-fought every step of the way and both liability and quantum were still very much in dispute.

Result

[17] For the reasons stated, I do not propose to act on the documentation filed on behalf of the plaintiff. The proceeding will remain stayed until further notice.

[18] I direct the Registrar to forward a copy of this judgment to the trustee of the bankrupt defendant's estate.

A D Ford
Judge

Judgment signed at 2.15 pm on 12 August 2014