IN THE EMPLOYMENT COURT
AUCKLAND

AC 53/08
ARC 58/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	REAL COOL LTD Plaintiff
AND	CHRISTINE GUNFIELD Defendant

Hearing: By submissions received from plaintiff's counsel on 19 September and 22 October 2008
From defendant's advocate on 1 October 2008

Judgment: 23 December 2008

INTERLOCUTORY JUDGMENT OF JUDGE B S TRAVIS

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[1] The Employment Relations Authority's determination in this challenge indicated that the plaintiff may not have participated in the Authority's investigation of the matter in a manner that was designed to resolve the issues involved. Chief Judge Colgan therefore requested a report from the Authority, under s181 of the Employment Relations Act 2000 (the "Act"), giving the Authority's assessment of the extent to which the parties involved in the investigation had facilitated rather than obstructed the investigation and acted in good faith towards each other during the investigation (s181(1)).

[2] The s181(1) report (which I shall refer to, as it is commonly called, a "good faith report") was issued by the Authority on 8 September 2008. The good faith report found that the defendant, Ms Gunfield, had facilitated the Authority's investigation and had acted in good faith towards the plaintiff, Real Cool Ltd. A different conclusion was reached about the plaintiff. The Authority found that there had been

a marked pattern of failing to co-operate with the Authority and to facilitate the investigation. It set out the following summary of the actions of the plaintiff which it found were all indicative of attempts to obstruct rather than to facilitate the Authority's procedures and investigation:

- *failing to provide a Statement in Reply within the statutory time frame;*
- *failing to provide instructions to counsel;*
- *failing to reply to messages regarding the arranging of a conference call to set the matter down for a hearing and to arrange a timetable for the filing and exchanging of briefs;*
- *failing to file briefs of evidence as instructed;*
- *providing an employment agreement that was not a copy of the original document signed by the applicant.*

[3] If the plaintiff is prevented from having its challenge heard de novo its chances of success will be severely limited because it did not attend the investigation meeting and has not led any evidence to justify its dismissal of the defendant. I have therefore given this issue close attention.

[4] In accordance with s181(3) of the Act each party was served with a copy of the good faith report, given 14 days to comment and the written comments from the parties were annexed to it. Chief Judge Colgan then invited the parties to make submissions on the final report as to the tests applicable to the exercise of the Court's discretion and the consequences for the nature and extent of the challenge. These submissions were duly filed.

[5] Counsel for the plaintiff in their submissions contended that s182(1) of the Act provides that, where the person making the election is seeking a hearing de novo, as the plaintiff is in the present case, the hearing is to be a hearing de novo, unless the parties agree or the Court otherwise directs. They submitted that the wording of the

section indicates that the general rule was that a hearing de novo will be granted where sought unless there is some proper reason to limit the challenge.

[6] In the present circumstances, s182(2) of the Act provides that the Court may only make such a direction if the Court has requested a report under s181(1), which it has, and the Court is satisfied that on the basis of that report, and having regard to any comments submitted by the parties on that report, that the person making the election did not participate in the Authority's investigation of the matter in a manner that was designed to resolve the issues involved (s182(2)).

[7] Where the Court has given a direction that the hearing is not to be a hearing de novo, the Court must direct, in relation to the issues involved in the matter, the nature and extent of the hearing (s182(3)).

[8] Counsel for the plaintiff and the advocate for the defendant then dealt with each of the actions of the plaintiff which the Authority found were indicative of attempts to obstruct rather than to facilitate the Authority's procedures and investigation. I shall deal with each in turn.

Failing to provide a statement in reply within the statutory timeframe

[9] The Authority found that the statement of problem was lodged on 11 October 2007. On 26 October the Authority received correspondence from MacKenzie Elvin stating that Ms Tisch had been instructed, had received a copy of the statement of problem and was seeking further instructions. On 27 November, Mr Single wrote saying that he had not received a statement in reply and his correspondence was forwarded to Ms Tisch. On 11 December, the parties were directed to mediation. On 17 December, Mr Single wrote to Ms Tisch thanking her for supplying the time and wage records that had been requested and noting that he had still yet to receive a statement in reply. The Authority Support Officer left messages for Ms Tisch on 18, 19 and 20 December and also attempted, unsuccessfully, to contact the plaintiff directly.

[10] Mr Single has advised the Court that the statement in reply was received by the defendant on 23 January 2008, one day before the date the Authority directed mediation was to take place. On 25 January Mr Single notified the Authority that the parties had agreed to adjourn the mediation in order to allow the plaintiff to supply documentation which had been previously requested. This was to be provided by 1 February.

[11] On 5 February 2008 the Authority received a letter from Ms Olsen of MacKenzie Elvin stating that, pursuant to a direction from the mediator, she was enclosing a copy of the employment agreement and a second statement in reply, dated 1 February 2008, which referred to a previous statement in reply dated 23 January. A copy of the 23 January statement in reply had not been supplied to the Authority.

[12] The second statement in reply provided that "*Mediation took place on 24 January 2008 and was adjourned with a direction from the mediator that Real Cool Limited located the Employment Agreement and provided copies of the Employment Agreement and a more detailed Statement in Reply*".

[13] The plaintiff's explanation to the Authority, in its comments on the Authority's report, was that the defendant's employment was terminated because the part of the business she worked in was sold on or about 1 September 2007 and, as a result, her position was made redundant. Counsel for the plaintiff submitted that all of the previous staff of the plaintiff transferred to the new employer along with the records and documentation relating to that portion of the business.

[14] Counsel for the plaintiff rely on the evidence of William Taylor who was a director of the plaintiff. He filed an affidavit in the Court in support of an application by the plaintiff for a stay of proceedings, dated 29 July 2008. He states in the affidavit that all of the plaintiff's previous staff who were directly involved in the day to day operation of the company, including the defendant's immediate supervisors, transferred to the new purchaser and, as he no longer had access to any of the documentation, or to the staff involved, it was difficult for the plaintiff

company to investigate the claim in the first instance and to provide an informed response.

[15] Counsel for the plaintiff gave a similar explanation to the Authority, stating that Mr Taylor had no direct involvement or knowledge of the matters complained of by the defendant and accordingly he was not in a position to respond quickly to her claim. The plaintiff acknowledged that due to these unusual circumstances it took some time to investigate the claim in the first instance and to provide an informed response to the requests being made. It appeared that the initial response was filed by the previous solicitors, MacKenzie Elvin, with the Mediation Service, rather than the Authority.

[16] No explanation for the delay has been offered by the plaintiff's previous solicitors. Mr Single expressed the view that the defendant had been disadvantaged by the delays in providing even the simplest statement in reply and submitted that the explanation that was offered for the delays was inadequate.

[17] Counsel for the plaintiff, while accepting that the statements in reply were outside the statutory time limits, submitted there was no deliberate intent by the plaintiff to delay the Authority's investigation. Counsel submitted that no prejudice would result to the defendant if a de novo hearing was granted by the Court as full pleadings had been filed in the Court.

[18] This latter claim that there is no prejudice to the defendant is repeated in relation to each of the matters relied on by the Authority, on the basis that, if a de novo hearing was granted, these earlier failures on the part of the plaintiff would have no relevance and there would be no prejudice. This submission overlooks the policy reasons behind ss 181 and 182. The parties are required, as a matter of good faith, to co-operate with the Authority in its investigation. A failure by the challenger to do so may prevent the challenger from having the benefit of a de novo hearing. The legislative provisions were designed to deal with the longstanding problem in employment law of "... *a party participating in the first instance hearing of a case only to gauge the strength of the other party's case, or for any other reason than in a genuine attempt to resolve the case on its merits*" (*New Harbour Windows*

& Doors (1999) Ltd (t/a Nulook (North Shore) v Henman [2003] 1 ERNZ 48, 53 para [15]. The issue that the Court has to resolve is whether the person making the election did not participate in the investigation in a manner that was designed to resolve the issues involved. The participation of the challenger in a de novo hearing does not answer that question.

[19] Counsel for the plaintiff also contended that the sole focus of the Court's enquiry, under s182(2), is the plaintiff's participation "*in the Authority's investigation of the matter*". Accordingly, while the plaintiff's acts and omissions prior to the investigation hearing or prior to any mediation might be relevant to the Court's consideration under s182(2), they submitted that the main issue is the plaintiff's participation in the Authority's investigation hearing and the plaintiff's acts and omissions immediately related to that hearing. Consequently they submitted the delays in filing the statement in reply were not relevant.

[20] In *Pacific Palms International Resort & Golf Club Ltd v Smith* AC 25/08, 21 August 2008, Chief Judge Colgan had to deal with a situation in which the electing party failed to lodge its statement in reply within the prescribed time, as well as having failed to attend mediation as directed by the Authority, but had attended the investigation meeting. Chief Judge Colgan rejected a submission that the electing party's failure to attend mediation as directed by the Authority, could not, in law, amount to an obstruction or failure to facilitate the Authority's investigation and resolution of the problem. He found that, in law, a failure to attend mediation as directed by the Authority can give rise to a finding under s182(2) that a person did not participate in the Authority's investigation of the matter in a manner that was designed to resolve the issues involved. In that case the Authority's good faith report found that the plaintiff had failed significantly to facilitate the investigation but had acted in good faith towards the defendant to a significant extent. Not without hesitation the Chief Judge allowed the plaintiff to proceed with a de novo hearing of its challenge, holding that its "*...conduct can and should be most justly sanctioned in costs*", both in the Court and in the Authority.

[21] Similarly I consider it open as a matter of law to find that a failure to file a statement in reply can give rise to a finding of a failure to participate in the

investigation. The pleadings are necessary to assist the parties and the Authority in resolving the employment relationship problem and a failure to file a statement in reply can therefore hinder the Authority in resolving the issues involved.

[22] However, in the present case, although it led to delays, the failure to file the statement in reply until immediately prior to the mediation did not appear of itself to have caused difficulties for the Authority in resolving the issue. The plaintiff's failure was in a sense cured by its filing of the second fuller statement in reply with the Authority in February. I have also taken into account the provision of the time and wage records requested and the late explanation that has been offered and, although it was somewhat inadequate in fully explaining the delays, it does suggest that the failure was not a deliberate action on the part of the plaintiff designed to prevent the issues being resolved.

Failing to provide instructions to counsel

[23] Counsel for the plaintiff contended this failure identified by the Authority does not relate to the manner in which the plaintiff participated in the Authority's investigation. They submitted it is unfair to speculate on what may have passed between the client and counsel as there is no mandatory requirement for parties to be represented in the Authority and that this should not be taken as an indication of obstructive behaviour by the plaintiff.

[24] In their comments to the Authority on the draft report, counsel for the plaintiff referred to Mr Taylor's sworn affidavit that it was around April 2008 when he learned that he may have prostate cancer. The Authority had referred to a communication from Mr Single reporting that he had been unable to advance matters with Ms Tisch, because she had been unable to get instructions.

[25] On 23 April the Authority received correspondence from Ms Tisch saying that she no longer acted for the plaintiff and would not be taking part in the conference call set down for that date. She suggested that the Authority contact Mr Taylor. An Authority Support Officer made a number of attempts to contact Mr Taylor but these were unsuccessful.

[26] A notice of hearing was sent to the plaintiff on 8 May and delivered on 9 May and signed for. It included a timetable for the filing and exchanging of briefs by 11 June 2008. It advised of the hearing scheduled for 25 June 2008 in Tauranga. No briefs were received nor was there any application for an extension of time to file the briefs. The plaintiff did not appear at the hearing on 25 June.

[27] Plaintiff's counsel claimed that the plaintiff's actions were explained by Mr Taylor because of his prostate cancer and his attention being diverted to the surgery and treatment required to deal with that.

[28] Again it is contended that this would have no bearing on the defendant's position in a de novo hearing as fresh evidence would be required from both parties in any event.

[29] As I have indicated earlier, that is a misconception of the role of the Court in determining whether there has been sufficient cooperation at the Authority's level to allow the challenging party to proceed with a de novo hearing. I will deal with my reasoning and conclusion on this issue together with the next two matters.

Failing to reply to messages/failing to file briefs of evidence

[30] As a similar response relating to Mr Taylor's illness has been given to the third and fourth reasons, namely the failure to reply to messages regarding arranging a conference call and arranging timetabling issues and failing to file briefs of evidence as instructed, it is convenient to deal with these together with the second issue. As Mr Single pointed out in his memorandum, Mr Taylor's affidavit says that when he received a letter from the defendant's representative requesting the reconvening of mediation or around 22 February 2008, it was around this time that he learned that he might have a problem with prostate cancer. That is difficult to reconcile with the statement of the plaintiff's counsel to the Authority that it was around April 2008 when Mr Taylor learned that he might have prostate cancer. It was also on 23 April that Ms Tisch advised the Authority she no longer acted for the plaintiff. Why those instructions were withdrawn at a time when Mr Taylor was dealing with a severe illness is not explained. Mr Taylor was then in hospital in

Australia on 7 and 8 May with a follow up appointment on 14 May 2008 in Australia, although his affidavit refers to various follow up treatments during May to June 2008.

[31] I agree with Mr Single that none of this explains why he did not communicate his difficulties to the Authority or Mr Single. The Authority dealt with the matter as follows:

> *[21] I note that the Statement of Claim filed in the Employment Court says that Mr Bill Taylor was unable to attend the Investigation due to a serious illness which required urgent surgical intervention. No application for adjournment was received at any stage nor was the Authority made aware of any illness suffered by Mr Taylor.*
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> *[22] An urgent illness on the day of the hearing does not explain the failure to provide briefs of evidence. Neither does it explain the failure to provide instructions to MacKenzie Elvin or to reply to messages left by the Authority seeking to arrange a conference call.*

[32] This led then to the Authority's conclusion that there had been a marked pattern of failure to co-operate with the Authority and to facilitate the investigation.

[33] Counsel for the plaintiff made much of what has clearly been a serious and troubling illness for Mr Taylor and have attempted to use it as a full explanation for the failures the Authority identified. They contended that the plaintiff was prevented from participating further in the investigation due to Mr Taylor's illness and that the plaintiff's failures were not deliberate but were caused by Mr Taylor's inability to participate because of serious illness.

[34] Again that is difficult to reconcile with the statements in Mr Taylor's affidavit. Under the heading "*Investigation meeting*" he deposed:

> *18. RCL's previous solicitors ceased acting for us on 17 April 2008.*
>
> *19. In late June once my health had improved sufficiently, I began to look at the correspondence that had been directed to me on this*

matter. I learned that the investigation meeting was set down to take place in the near future.

20. *I instructed new solicitors to take over the matter, but by the time they had obtained the file from RCL's previous solicitors, the investigation meeting had already been held and a determination made.*

[35] On one view of this, in late June prior to the investigation meeting, Mr Taylor would have been able to view the correspondence which would have included the date of that meeting namely 25 June 2008. Whilst Mr Taylor's illness may explain the plaintiff's failure to provide instructions to MacKenzie Elvin, or to reply to some messages left by the Authority seeking to arrange the conference call, on his own evidence it does not explain his failure, or that of the solicitors for the plaintiff, to contact either the Authority or Mr Single to arrange an adjournment of the 25 June hearing.

[36] Even after that hearing had taken place there would still have been time to have written to the Authority explaining the situation, prior to the determination being issued on 2 July. It was only after the issue of the determination on 9 July that the current solicitors for the plaintiff made contact with the Authority advising that they acted, and asking for a copy of the determination.

[37] Whilst the third and fourth actions may be explained by the Mr Taylor's illness, the inaction in relation to the hearing has not been adequately explained. That inaction, however, was not, of itself, a ground upon which the Authority relied.

Providing an employment agreement that was not a copy of the originating document signed by the Authority

[38] This final ground appears to be a reference to the Authority's findings in its substantive determination concerning a written individual employment agreement. The Authority found that about a month after the defendant started her employment with the plaintiff she was given an individual employment agreement which included a three month probationary period. This was returned by her to her workplace. She

was later given another version which she took home and checked and then signed and returned it to her employer, but was not given a copy.

[39] The Authority then made the following findings:

> *[5] Ms Gunfield was eventually provided with what is purportedly a copy of the second version of the employment agreement. This was after proceedings had been filed. Ms Gunfield says this is the same agreement that she signed.*
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> *[6] In its Statement in Reply the respondent asserted that Ms Gunfield was employed pursuant to a three month fixed term agreement. However, the document supplied by the respondent (attached to the Statement in Reply) has no reference to a fixed term apart from the fact that Schedule A gives the date of the agreement as being 11 June 2007, the date of commencement being the same day and the date of termination being 1 September 2007. This is despite the fact that Schedule C – Working Hours – has a handwritten notation by Ms Gunfield dated 27 May 2007. There is a further handwritten notation by Ms Gunfield in the body of the agreement, also dated 27 May 2007. The contract also has a provision for a review of wages, the review to take place on 1 September 2007. There is no reference to a three month probationary period.*
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> *[7] Given the above, the length of time it took to supply the document and the odd formatting of the document I conclude that the individual employment agreement attached to the Statement in Reply was not the agreement given to and signed by Ms Gunfield but a poor and inadequate attempt by the respondent to provide an agreement in support of its contention that the employment was fixed term.*

[40] Counsel for the plaintiff took issue with the finding that the employment agreement provided by the plaintiff was not the one signed by Ms Gunfield and had been falsified. They pointed out that there is a finding in paragraph [5] that Ms Gunfield had said it was the same agreement that she had signed. Mr Single acknowledged this difficulty and submitted that there is a word missing in the last sentence of paragraph [5] which should read:

Ms Gunfield said this is not the same agreement that she signed.

[41] He submitted this is confirmed in paragraphs [6] and [7] of the determination.

[42] Counsel for the plaintiff took issue with that submission and the Authority's reasoning in paragraphs [6] and [7]. They endeavoured to explain that the length of time taken to provide the agreement was because of what had happened to the business records, stating that if the plaintiff had set out to deliberately falsify the document it could have provided an agreement that complied with all the requirements of fixed term agreements under the Employment Relations Act 2000. They also submitted that Ms Gunfield's handwriting was on several pages of the agreement including one of the schedules, after the allegedly falsified schedules.

[43] The Court has not been provided with any of the briefs of evidence that may have been filed by the defendant before the Authority or a copy of the agreement in question. The Authority's findings about the document may therefore be open to challenge but the issue cannot be resolved on the material presently before the Court. In these circumstances for the reasons advanced by counsel for the plaintiff I do not rely on the findings of the Authority about the agreement as a reason for concluding there has been a failure on the part of the plaintiff to properly participate in the investigation in a manner that was designed to resolve the issues involved.

Conclusion

[44] Like Chief Judge Colgan in the *Pacific Palms* case, I too have considerable hesitation in rejecting the Authority's view that the plaintiff failed to facilitate the investigation to a significant extent. I am particularly troubled by the failure to make contact with the Authority or the defendant's representative to seek an adjournment of the investigation hearing. Because a refusal to allow a de novo hearing would, in substance, be fatal to the plaintiff's challenge as it would have no evidence to present I had approached the matter as though it were an application for a rehearing because of a failure to attend the investigation meeting. I too find that the plaintiff is entitled to proceed with its challenge by way of a full hearing of the entire matter. However, like Chief Judge Colgan, I consider the plaintiff's conduct can and should be

sanctioned in costs both in the Authority, if these have not yet been fixed, and in the challenge regardless of the outcome.

[45] I also consider the defendant is entitled to a contribution towards her costs which like the Chief Judge in *Pacific Palms*, I too fix in the sum of $500 with the same condition that these must be paid by the plaintiff before it may progress with its challenge.

[46] I observe that the plaintiff has now met the condition of the stay of proceedings having paid the sum of $20,129.66 into the Court's account. The stay now remains until further order of the Court. Once the parties have disposed of any other interlocutory matters, including disclosure, they should advise the Registrar so that a callover can be arranged for a fixture.

B S Travis
Judge

Judgment signed at 5pm on 23 December 2008