**IN THE EMPLOYMENT COURT**
**AUCKLAND**

**AC 47/09**
**ARC 46/09**

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| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| AND IN THE MATTER OF | a good faith report |
| BETWEEN | HYRO SERVICES PTY LTD<br>Plaintiff |
| AND | ANDREW SPEED<br>Defendant |

Hearing: By submissions filed on 2 October for the plaintiff and 23 October 2009 for the defendant

Judgment: 4 December 2009

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**INTERLOCUTORY JUDGMENT OF JUDGE B S TRAVIS**

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[1] The Employment Relations Authority's determination on 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.

[2] The determination recorded that there was no appearance for either the plaintiff or Hyro New Zealand Limited (in liquidation) ("the New Zealand company") at the investigation meeting and that after the filing of an amended statement of problem neither company lodged any statement in reply. A communication from the plaintiff's director of human resources stated that the matter would be dealt with by the liquidator of the New Zealand company, which was the sole employer of the defendant. The investigation was not attended by either the plaintiff or the New Zealand company, despite the plaintiff having been given an

opportunity to take part in a telephone conference and having been served with a formal notice of the investigation meeting.

[3] I therefore requested a report from the Authority, under s181(2) of the Employment Relations Act 2000 ("the Act").

[4] That request required the Authority, under s181(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.

[5] The Authority issued its draft good faith report on 29 July 2009 and its final report on 24 August 2009. In the draft report and confirmed in the final report, the Authority found that the plaintiff did not facilitate its investigation to the extent that the plaintiff's failure to participate in the investigation did not "*leave the Authority best placed to establish **correctly** all relevant factual matters, or to determine the employment relationship problem **correctly***".

[6] The draft good faith report also discussed defences raised in the plaintiff's statement of claim in the Court, including a mistake in relation to an offer of an employment document that cited the plaintiff, as opposed to the New Zealand company, as the employer and that the personal grievance was not raised with the plaintiff within the required 90 days under s114(1) Act. In relation to these two matters, the Authority observed that they were not raised during the investigation and as a result it was not able to rule on them. The Authority concluded, at paragraph [12] of its draft report, that "*for this reason*" the plaintiff "*did not facilitate the Authority's investigation*".

[7] It further found that the actions or omissions of the plaintiff were contrary to good faith because the plaintiff "*simply ignored a significant phase of a statutory procedure provided for parties such as Mr Speed to use to resolve employment relationship problems at the lowest level possible*". No adverse findings were made in relation to the defendant.

[8] In accordance with s181(3) 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 which affirmed the draft decision and also went further in making observations on the comments provided by the parties. The plaintiff has taken issue with some of the Authority's observations of the plaintiff and stated that it did not have the opportunity of commenting on some of the material which was included in the final version of the Authority's report.

[9] In accordance with the Employment Court's usual practice I gave the parties the opportunity to make submissions to the Court on the application of the relevant statutory provision of the Authority's report and, in particular, about the nature and extent of the hearing of the challenge. Both sides provided submissions.

[10] In its memorandum of 17 August 2009 on the draft good faith report, plaintiff's counsel submitted that it did not deliberately or knowingly obstruct the Authority's investigation and did not act in bad faith toward the defendant. The plaintiff claimed its behaviour was reasonably explicable and resulted from a misunderstanding, namely that as the plaintiff's Chief Operating Officer was of the view that the New Zealand company was the defendant's employer, no further action was required. The plaintiff described this as a mistaken belief and advised that it did not have in-house counsel at the relevant time and did not seek legal advice.

[11] The plaintiff submitted the email sent to the Authority by Ms Bridee Clifton, the plaintiff's Director of Human Resources, stating that the plaintiff was not the employer and that the New Zealand company was in the hands of a receiver, was consistent with this mistaken belief. The plaintiff further submitted that it believed that this was the appropriate course of action, had advised the Authority that this was the plaintiff's view, and the Authority never corrected the plaintiff. Finally, the plaintiff submitted that its behaviour did not show an absence of good faith but rather that it was the result of a misguided belief that its presence was not necessary.

[12] After outlining its submissions on the draft good faith report, the plaintiff refined its arguments in further submissions to the Court filed on 2 October 2009. The plaintiff sought to distinguish this case from those in which the challenger's

behaviour amounted to intentional obstruction or other destructive/inappropriate behaviour. The plaintiff relied on *Taylor v Von Tunzelman* [2008] ERNZ 101 for the proposition that for the Court to limit the nature and extent of the hearing of a challenge following a good faith report, the failures must have been deliberate in the sense of being more than the consequence of simple inadvertence or reasonably explicable behaviour.

[13] The plaintiff provided alternatives to the Court in its submissions because as it rightly pointed out, this case is similar to the one described in my decision of *Real Cool Ltd v Gunfield* AC 53/08, 23 December 2008. As an alternative to denying it a de novo challenge, the plaintiff submitted that a compromise position might be to allow the plaintiff to produce evidence, on a de novo basis, regarding the preliminary issue of whether the plaintiff was the defendant's employer, while reserving the question of whether a hearing de novo should be granted in respect of the substantive matters.

[14] In its memorandum of 17 August 2009 on the draft report, the defendant noted that the plaintiff had failed to participate in scheduled mediation. The defendant concurred with the Authority's comments on the 90 day defence raised for the first time in the statement of claim and submitted that the plaintiff was on notice that it had been joined because all correspondence between the defendant and the Authority, including the amended statement of problem, were copied to Ms Clifton. The defendant agreed with the Authority's assessment that the plaintiff's conduct was contrary to good faith.

[15] In his further submissions to the Court dated 23 October 2009, the defendant discussed the statutory purpose of good faith reports by reference to Cabinet papers and relevant commentary. The defendant relied on two decisions in which the Court limited the right of a challenging party to have a full hearing of the entire matter, a hearing de novo.[1] As a matter of policy, the defendant submitted that there would be a danger in allowing overseas companies, such as the plaintiff, to elect to have a hearing of the entire matter after not taking any part at all in an investigation. The

[1] *North Harbour Windows & Doors (1999) Ltd (t/a Nulook (North Shore)) v Henman* [2003] 1 ERNZ 48; *Smith v Harvey* WC10A/07, 7 August 2007.

defendant submitted this would be contrary to the objectives of the Act. Finally, the defendant submitted that, regardless of the circumstances, the plaintiff was aware that it had been made a party to the investigation and ignorance was no excuse.

[16] The defendant opposes the plaintiff's election for a hearing de novo and says that the plaintiff's challenge should be limited to submissions of law and fact based on the pleadings set out in the New Zealand company's statement in reply and the evidence there attached. The defendant further submitted that the 90 day issue should not be heard by the Court because it was not raised in the Authority. The defendant here opposed the suggestion in other cases that costs may be an appropriate means by which to sanction a party's failure to participate in the Authority's investigation. That, he submitted, gave insufficient weight to the statutory purpose. He also opposed the other alternatives suggested by the plaintiff. Finally, if the challenge proceeds in any form the defendant has expressed concerns about being paid the amounts awarded if he is successful. Although a stay has not been sought by the plaintiff the amount of the Authority's awards, which exceed $48,000, has not been paid. The defendant has requested that if the challenge proceeds the amount of the awards and $6,000 as security for costs, should be paid into Court.

## Decision

[17] The Authority has found that the plaintiff did not facilitate the investigation and did not act in good faith because it failed to attend the investigation meeting.

[18] I must decide, on the basis of the report and the comments of the parties, whether the plaintiff did not participate in the Authority's investigation of the matter in a manner that was designed to resolve the issues involved.

[19] The plaintiff elected not to participate in the Authority's investigation at all even though it had noticed that it was joined in the proceedings. It would be difficult, if not impossible, to conceive how such an approach to litigation could ever be designed to resolve the issues involved.

[20] The difficulty is that I am again faced with the problem of having to decide whether to prevent a party from having its challenge heard by way of a hearing of the entire matter de novo when that would severely limit the party's chances of success because it did not attend the investigation meeting and did not lead any evidence to justify its actions. That was the situation in *Real Cool Ltd*, relied on by the plaintiff.

[21] However, the plaintiff was aware that the investigation was to take place and that it was a party to the proceedings. Had the plaintiff not been joined as a party to the investigation, its approach would have been perfectly understandable. However, once formal notice of investigation meeting is received it should not be ignored.

[22] I accept that in this case, the plaintiff's behaviour was not abusive or destructive however I do not accept that it was the result of simple inadvertence or reasonably explicable behaviour. I do not accept that the plaintiff's failure to participate was based on a simple misunderstanding as to whether it needed to be involved. As stated above, the plaintiff was aware that it was a party to the proceedings and aware of the investigation. The plaintiff, as evidenced by Ms Clifton's email, chose not to attend the investigation meeting or to take part in the Authority's processes. The plaintiff's behaviour was therefore a result of an inherently flawed yet deliberately adopted view of its obligations. I agree with the defendant that ignorance is no excuse.

[23] I conclude that the plaintiff's chosen course of conduct was obstructive of the Authority's process and did not facilitate it and therefore the plaintiff did not participate in the Authority's investigation of the matter in a manner that was designed to resolve the issues involved.

**Nature and extent of hearing**

[24] I must now direct pursuant to s182(1) and s182(3) of the Act, the nature and extent of the hearing.

[25] Whatever direction I give must take into account the draconian consequences of limiting the plaintiff's right to challenge de novo when it failed to engage in the Authority's investigative process.

[26] I do not accept the defendant's submission that the plaintiff's challenge should be limited to submissions on the pleadings set out in the New Zealand company's statement in reply. That document was lodged by a different corporate personality. To accept the defendant's submission would be to effectively preclude the plaintiff from prosecuting its challenge at all. I consider one of the alternatives offered by the plaintiff would be appropriate in all the circumstances.

[27] I direct therefore that the nature and extent of the challenge shall be as follows. As to the extent of the challenge, the plaintiff will, as it suggested in its submissions, be entitled to challenge on a de novo basis the preliminary issue of whether it was the defendant's employer. Should that challenge succeed, that will be the end of the matter. Should it fail the plaintiff will not be entitled to further challenge the Authority's findings as to liability and quantum or raise time limitation defence.

[28] The nature of the challenge will be that of a point of law challenge on the issue of who was the defendant's employer with each party calling witnesses, cross-examining the other's witnesses and producing all documents relevant to the dispute.

[29] I have reservations as to my jurisdiction to order the payment of the amount of the awards into Court and to provide security for costs as a condition of the challenge proceeding. Appropriate applications by the defendant, especially as the plaintiff is overseas, are likely to receive favourable consideration by the Court. The costs of such applications may be avoided if the parties can agree on orders by consent.

[30] The Registrar should be advised when a call-over can be arranged to timetable the matter to a fixture once the parties have concluded any remaining interlocutory matters, including disclosure.

[31] I consider the defendant has largely been successful and is entitled to a contribution towards his costs. If the parties cannot agree the defendant should, within 30 days from the date of the judgment, file a memorandum. The plaintiff will have 30 days to reply.

B S Travis
Judge

Judgment signed at 3.15pm on 4 December 2009