

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**CC 20/09
CRC 9/09**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN INDUSTRIAL SERVICES NELSON LTD
Plaintiff

AND JUDY STEWART
Defendant

Hearing: By submissions filed by the defendant on 24 September 2009
(Heard at Christchurch)

Judgment: 7 December 2009

INTERLOCUTORY JUDGMENT OF JUDGE B S TRAVIS

[1] The determination of the Employment Relations Authority in this matter (CA 85/09) indicated to me that the plaintiff, Industrial Services Nelson Limited (ISNL), may not have participated in the Authority's investigation of the matter in a manner that was designed to resolve the issues involved. I therefore requested from the Authority a report under s181 of the Employment Relations Act 2000 ("the Act") giving its assessment of the extent to which the parties facilitated rather than obstructed the investigation and acted toward each other in good faith during the investigation.

[2] The Authority issued its report, commonly referred to as a "good faith report", on 20 August 2009 finding that the defendant, Judy Stewart, facilitated the Authority's investigation and acted in good faith towards ISNL.

[3] As for ISNL, the Authority concluded that it had obstructed the investigation. The good faith report set out the background to the investigation and the problems it encountered in reaching a determination. These included:

- ISNL's statement in reply not being lodged until a month after the lodging of the statement of problem.
- Protracted attempts by the mediation service to arrange mediation, after which the file was allocated to the Authority Member who directed the parties to mediation.
- Further unsuccessful efforts at arranging mediation and a further direction that the parties attend mediation with a firm date of 15 December 2008.
- ISNL's failure to advise the Authority as to whether it would be able to attend the directed mediation on 15 December 2008.
- Counsel for ISNL then advising the Authority that his client would not be able to attend mediation until February 2009, leading the Authority to set the matter down for investigation without mediation on 26 February 2009
- ISNL lodging its statement of evidence 8 days late.
- ISNL's unsuccessful adjournment application on 24 February 2009, 2 days before the investigation was to begin.
- ISNL's failure to appear by any representative at the investigation meeting.

[4] Unfortunately, the Authority failed to indicate in its good faith report whether it considered ISNL to have acted in good faith towards Ms Stewart. This is somewhat surprising given the nature of the exercise.

[5] The Authority, pursuant to s181(3), provided a copy of the good faith report to the parties who were invited to comment on it. This they did and their comments were annexed to the report provided to the Court. I then provided the parties further

opportunity to make submissions on the good faith report. Only Ms Stewart took up this opportunity. There was no response on behalf of the plaintiff.

[6] In his comments on the good faith report, Mr Thomas, counsel for Ms Stewart, asked that it be noted that ISNL had unsuccessfully attempted to delay a teleconference on 28 April 2009 when ISNL's general manager, Mr Anil Singh, gave evidence, some time after the investigation meeting. Mr Thomas also drew attention to the fact that ISNL's submissions were filed out of time.

[7] In his comments on the good faith report, Mr Ryan, counsel for ISNL, submitted that it had not obstructed the investigation because its delays did not prejudice Ms Stewart. Mr Ryan took issue with a comment at paragraph [6] of the good faith report that, even when counsel are dealing with a difficult client, they are still under a duty to comply with timetabling directions and to seek leave to have them amended if there are genuine delays. Mr Ryan stated in his memorandum that he did not have "*any duty to manage*" his client and that his "*sole duty*" was to the client and its instructions.

[8] Unfortunately, ISNL did not make submissions to the Court on the good faith report in which it might have elaborated on the difficulties in arranging mediation as directed by the Authority, the eleventh hour adjournment application, the failures to meet deadlines and the failure to appear at the investigation meeting.

[9] In this case, the Court is not faced with the situation of a plaintiff electing to challenge by way of a hearing of the entire matter *de novo* who had failed to take any part in the investigation whatsoever. Mr Singh gave evidence and Mr Ryan filed submissions for ISNL in the Authority, albeit 1 and 2 months after the final investigation meeting, respectively. There was engagement with the Authority's processes.

[10] The purpose of the good faith report provisions in the Act are to ensure that a party does not participate in the first instance hearing to simply test the waters without making any genuine attempt to resolve the case on its merits.¹

[11] In this case, ISNL consistently failed to meet timetabled directions, after an unsuccessful eleventh hour adjournment application no appearance was made on its behalf and it failed to attend mediation as directed by the Authority.

[12] As to the first of these, the failures to meet timetabled directions, it is arguable that Ms Stewart was not unduly prejudiced, as Mr Ryan submitted. ISNL did engage with the Authority's procedure only it did so inconsistently and poorly. Any additional attendances by Ms Stewart's counsel as a result of these failures could be addressed by costs.

[13] The failure to attend the investigation and to attend mediation as directed are different matters.

[14] After the very late adjournment application failed, ISNL was required to attend the investigation meeting. It did not do so. It is difficult to conceive how a party could fail to appear at an investigation meeting and then be found to have participated in a manner that was designed to resolve the issues involved.

[15] In *Pacific Palms International Resort & Golf Club Ltd v Smith*², Chief Judge Colgan found that a failure to attend mediation as directed by the Authority can in law give rise to a finding under s181(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 employer having failed to attend mediation did not fail to attend the investigation meeting, as occurred in the present proceedings.

[16] I therefore conclude that ISNL did not participate in the matter in a manner designed to resolve the issues involved.

¹ *North Harbour Windows & Doors (1999) Ltd t/a Nu-Look (North Shore) v Henman* [2003] 1 ERNZ 48.

² [2008] ERNZ 295

[17] I now turn to direct, in relation to the issues involved in the matter, the nature and extent of the hearing pursuant to s182(3).

[18] I direct that ISNL is not entitled to proceed with its challenge by way of a hearing of the entire matter de novo. Rather, ISNL will be entitled in this Court to challenge by a hearing de novo only the question of liability for constructive dismissal. Should ISNL fail to prove that the Authority erred in its assessment of liability, the Authority's findings as to quantum will stand. As a result, Ms Stewart will not be required to prepare or lead evidence on that point.

[19] In the Authority, Ms Stewart was awarded significant sums: \$5,190 gross in lost wages, \$288 in respect of a fuel allowance, plus interest and \$8,000 compensation for hurt and humiliation under s123(1)(c) of the Act. ISNL was also ordered to pay a penalty of \$2,000, costs in the sum of \$3,443.25 and disbursements of \$120.

[20] Ms Stewart is entitled to costs on the good faith report exercise just undertaken.

[21] If the parties cannot agree on costs she should file a memorandum within 30 days from the date of this judgment. ISNL will have 30 days to respond.

[22] In her submissions filed on 24 September 2009 the defendant noted that she had yet to be served with the plaintiff's statement of claim. If that was so it may raise issues as to the plaintiff's compliance with reg 12 of the Employment Court Regulations 2000.

[23] The defendant, if already served with the plaintiff's statement of claim, should now, within 30 days from the date of this judgment, file and serve a statement of defence. If not yet served with the statement of claim, the time for filing and serving a statement of defence will run for 30 days after service of the statement of claim, which should be served within 7 days from the date of this judgment.

[24] Once the parties have disposed of any other interlocutory matters, including disclosure, they should advise the Registrar so that a call-over can be arranged for a fixture.

B S Travis
Judge

Judgment signed at 4.50pm on 7 December 2009