

**IN THE EMPLOYMENT COURT OF NEW ZEALAND  
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA  
TĀMAKI MAKĀURAU**

**[2019] NZEmpC 100  
EMPC 98/2019**

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

BETWEEN                      NEW ZEALAND COMPLIANCE AND  
   REPAIRS LIMITED  
   Plaintiff

AND                              HIMANSHU MISTRY  
   Defendant

Hearing:                      On the papers

Appearances:                I Axenov, agent of plaintiff  
   G Finnigan and J Ansell, counsel for defendant

Judgment:                    19 August 2019

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**JUDGMENT OF JUDGE M E PERKINS**

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[1]      These proceedings involve a challenge to a determination of the Employment Relations Authority dated 8 March 2019.<sup>1</sup>

[2]      A statement of claim and statement of defence have been filed. Mr Finnigan, counsel for the defendant, filed a memorandum of counsel accompanying the statement of defence. He complained that the statement of claim did not fully and clearly set out the grounds of the challenge. There was also confusion as to whether the challenge is one seeking a hearing de novo or a non-de novo hearing. Further, the nature of the relief being sought in the statement of claim was unclear.

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<sup>1</sup>      *Mistry v New Zealand Compliance and Repairs Ltd* [2019] NZERA Auckland 135.

[3] The statement of claim, which has been filed on behalf of the plaintiff, does not comply with the requirements of reg 11 of the Employment Court Regulations 2000 (the Regulations). As Mr Finnigan has pointed out, the challenge is alleged to be a challenge de novo and yet the statement of claim has more of the hallmarks of a non-de novo challenge. Without compliance with reg 11, the statement of claim does not fully and fairly inform the defendant or the Court of the grounds of the challenge and other matters which the plaintiff would need to rely upon if the challenge proceeded.

[4] In a minute dated 13 June 2019, a direction was given requiring the plaintiff to file an amended statement of claim in compliance with the Regulations. The time set for the filing of the amended statement of claim was 4 pm on Friday 28 June 2019. The minute indicated that, once the amended statement of claim complied with the Regulations and was filed and served, the defendant would have a further 14 days in which to file a statement of defence to the amended statement of claim.

[5] The plaintiff has not filed an amended statement of claim at all since the direction was given. In response to correspondence from the Court Registry, the plaintiff has now sent an email to the Court as follows:

As NZ Compliance and Repairs did stop all its business activities and currently is in debts, we consider that there is too much risk to proceed with appeal not to implement any extra costs on top of those debts.

We already did notify our opponent about that. If you can please advise me on the following steps to close that appeal application, that would be much appreciated.

Kind Regards,

Tatiana Bond

[6] In response to that email, the Registry sent the plaintiff information regarding the filing of a notice of discontinuance, and a template of such a notice was provided to the plaintiff by email on 8 July 2019. The plaintiff has not responded further, despite two follow up emails being sent on 18 July 2019 and 1 August 2019. In addition, the Registry Officer left voice mail messages on the cell phone of the director of the plaintiff and his partner respectively.

[7] The matter now needs to be concluded. Obviously, if the plaintiff intends to withdraw the challenge, then a notice of discontinuance should be filed. Quite apart from that, however, the plaintiff has not complied with the directions that were given in the minute of 13 June 2019. It is now clear that the plaintiff does not intend to comply. Accordingly, it is appropriate that the proceedings be dismissed for want of prosecution, and an order is made to that effect.

[8] The defendant, of course, has remained entitled to enforce the determination of the Authority. No order staying the proceedings was applied for by the plaintiff, and no such order has been made.

[9] In respect of the dismissal of the challenge, the defendant is entitled to an order for costs. Costs on the dismissal of the challenge are reserved. If the defendant wishes to apply for costs, then a memorandum confirming such an application and setting out submissions in support will need to be filed. The defendant has until 4 pm on 2 September 2019 to file such a memorandum. That should also be served on the plaintiff, which will then have 14 days in which to respond by way of memorandum in answer.

M E Perkins  
Judge

Judgment signed at 11 am on 19 August 2019