

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

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

**[2020] NZEmpC 181
EMPC 85/2020**

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

BETWEEN SHAUN EVANS
 Plaintiff

AND JNJ MANAGEMENT LIMITED
 Defendant

Hearing: 28 September 2020
 (Heard at Auckland)

Appearances: A Mapu, advocate for plaintiff
 J Leenoh and E Morrison, counsel for defendant

Judgment: 5 November 2020

JUDGMENT OF JUDGE J C HOLDEN

[1] This judgment resolves Mr Evans’s non-de novo challenge to a determination of the Employment Relations Authority (the Authority).¹ The background to Mr Evans’s challenge is outlined in my earlier judgment but, for convenience, it is set out again.²

[2] Before the Authority, Mr Evans claimed the respondent, JNJ Management Limited (JNJ), unjustifiably disadvantaged and unjustifiably dismissed him. The Authority found that the trial period provision in Mr Evans’s employment agreement with JNJ was valid; JNJ terminated Mr Evans’s employment in accordance with its

¹ *Evans v JNJ Management Ltd* [2019] NZERA 337 (Member Larmer).

² *Evans v JNJ Management Ltd* [2020] NZEmpC 16 at [1].

contractual notice obligations; and Mr Evans therefore was statute-barred from bringing a personal grievance claim for unjustifiable dismissal. Mr Evans does not seek to challenge any of those findings. The Authority also found that Mr Evans's disadvantage grievance was so intrinsically linked to his dismissal grievance that it could not succeed because the Authority could not investigate his dismissal grievance.³ It is that finding that Mr Evans wishes to challenge.

The Court must direct the nature and extent of the hearing

[3] Where a party is not seeking a hearing de novo, its statement of claim must specify:⁴

- (a) the part of the determination to which the election relates;
- (b) any error of law or fact alleged by that party;
- (c) any question of law or fact to be resolved;
- (d) the grounds on which the election is made, which grounds are to be specified with reasonable particularity as to give full advice to both the Court and the other party of the issues involved; and
- (e) the relief sought.

[4] The Court must direct, in relation to the issues involved in the matter, the nature and extent of the hearing.⁵

[5] The directions from the Court are important because non-de novo challenges require different approaches, depending on the nature of the challenge.

[6] In some cases, the challenge is to confined issues of law and the hearing will be in the nature of an appeal. In other cases, there are distinct claims before the Authority and a party does not wish to challenge the outcome in all of them. In such

³ *Evans*, above n 1, at [12].

⁴ Employment Relations Act 2000, s 179.

⁵ Section 182(3).

circumstances, it will often be appropriate for the hearing to proceed in a similar fashion to a de novo challenge, but with the subject matter confined. This would mean the Court essentially holds a full rehearing on the points in issue before it.⁶ Mr Evans's challenge falls closest to this latter category of non-de novo challenges.

[7] The nature and extent of the hearing for this proceeding were addressed at a directions conference and, by agreement, it was ordered that the hearing would cover:

- (a) whether Mr Evans's disadvantage claim is intrinsically linked to his claim of unjustifiable dismissal so that there is no jurisdiction to determine the disadvantage claim;
- (b) whether JNJ entered into a restructuring plan;
- (c) if it did, whether it failed to meet its obligations to Mr Evans, in particular in relation to concerns that he raised about it;
- (d) whether the Court has jurisdiction to consider Mr Evans's complaint regarding privacy;
- (e) if it does, whether JNJ breached Mr Evans's privacy such as to disadvantage him unjustifiably;
- (f) whether JNJ breached Mr Evans's employment agreement;
- (g) whether JNJ failed to act in good faith; and
- (h) if any of Mr Evans's claims succeed, what remedies are to be ordered.

⁶ *Carter Holt Harvey Ltd v Yukich* CA 42/04, 28 April 2004 at [37].

Mr Evans was employed by JNJ as Head of Security

[8] As at December 2018, JNJ was using an external provider to undertake security at its SkyWorld Indoor Entertainment Centre in central Auckland. It wished to terminate that arrangement and move security in-house.

[9] Mr Evans was employed by JNJ as Head of Security and commenced in that role on 10 December 2018. Mr Evans's duties and responsibilities included securing the premises and personnel by patrolling the property; monitoring surveillance equipment; inspecting buildings, equipment and access points; and permitting entry. They also included responsibility for controlling the budgets for security operations and monitoring expenses, and for recruiting, training and supervising security officers and guards.

[10] His employment was subject to a trial period for 90 days, during which his employment could be terminated on one week's notice.

[11] His individual employment agreement included an express term that JNJ would deal with all employees in good faith.

[12] It also included a term dealing with the resolution of employment relationship problems. That term provided for Mr Evans to raise an employment relationship problem first with his manager. If he and his manager were unable to resolve the matter, Mr Evans was to write to the company setting out the details of his problem and the solution he sought. A meeting would then be arranged within seven days to discuss the issues raised.

[13] When he commenced work, Mr Evans reviewed JNJ's security systems to work out what JNJ needed to do to put the in-house arrangements in place.

[14] As part of that review Mr Evans says he realised that CCTV cameras located in the security office were recording audio as well as video, which he considered to be a breach of the Privacy Act 1993 and the Crimes Act 1961. He says he advised JNJ of this issue in December 2018.

[15] Also, in view of the termination of the external provider's contract, which was to take effect on 14 January 2019, Mr Evans set about finding staff for JNJ to employ directly. As part of that process, Mr Evans interviewed a potential staff member and offered him employment, to commence on 26 February 2019.

[16] However, on Monday 25 February 2019, Mr Evans was advised not to hire the employee and the recruitment stopped. On the same day Mr Evans learned that JNJ had engaged another external provider to carry out security work. He also was advised that he would need to change the roster. On 27 February 2019 Mr Evans was shown a revised roster that did not include him or any other JNJ security staff. Nevertheless, he was advised that Mr Kwak, the Director of JNJ, wanted him to stay on and continue as Head of Security.

[17] Following that meeting, Mr Evans emailed the new security firm to arrange a time to discuss the new implementation and training. The following day, 28 February 2019, Mr Evans emailed Mr Kwak setting out some "major concerns" that he had. The first concern was regarding the outsourcing of security services, and his lack of involvement with the decision to bring in the new security firm. Mr Evans referred to his duties, which included recruiting security staff and managing security budgets. He expressed his concern that the engagement of the external provider was done "behind [his] back" with information being withheld.

[18] The second concern Mr Evans raised in his email is with respect to the CCTV cameras, which he said were still recording audio. Mr Evans said this was "highly illegal and a major intrusion into [his] privacy and others". He advised that he was going to seek legal advice and take action under New Zealand employment law and through the Privacy Commissioner, who he expected "would be extremely interested in investigating anyone breaching the law to this degree", suggesting JNJ would potentially incur "major implications and fines".

[19] Finally, Mr Evans sought confirmation that his wages would remain as they had been. Mr Evans asked Mr Kwak to give attention to the matters raised and return to him directly with what Mr Kwak was prepared to do to address, compensate and resolve them.

[20] On receipt of that email, JNJ took legal advice and decided to terminate Mr Evans's employment within the trial period. Of particular concern to JNJ were Mr Evans's comments regarding alleged breaches of privacy, which JNJ considered to be incorrect and misconceived and that he "appeared to be seeking pecuniary advantage by threatening complaints to be made to the authorities".

[21] Mr Evans's employment then was terminated, with a week's notice, on 1 March 2019. Mr Evans stayed on for the notice week and continued to undertake security duties.

[22] JNJ accepts that Mr Evans was not involved in any of the discussions about or with the new provider. JNJ said in evidence that this was because the discussions were conducted in Korean, which Mr Evans does not speak. The discussions with the new security firm commenced in around mid-February 2019 and its proposal to provide services was agreed at that time. Mr Kwak says he expected his secretary would pass the information on to Mr Evans.

[23] JNJ said that the arrangements with the new security firm were that JNJ internal security staff would continue in their roles but the new security firm would provide additional support. It says Mr Evans's role was to continue.

[24] JNJ also accepts it did not arrange a meeting with Mr Evans after receiving his email of 28 February 2019 but placed matters in the hands of its solicitors who, on 22 March 2019, responded to Mr Evans's representative's letter dated 8 March 2020.

Reorganisation not linked to dismissal

[25] The Authority found that Mr Evans's disadvantage grievance was so intrinsically linked to his dismissal grievance that it could not succeed because the Authority could not investigate his dismissal grievance. I do not agree.

[26] The evidence established that, as at 27 February 2019, JNJ was not intending to terminate Mr Evans's employment. The termination of his employment was

because of the comments he made regarding the Privacy Act issues and as his trial period was soon coming to an end.

[27] While s 67B of the Employment Relations Act 2000 (the Act) prevents Mr Evans from pursuing a personal grievance in respect of the dismissal, that section does not preclude a personal grievance being raised in relation to a claimed disadvantage that occurred during the employee's employment, unconnected to the dismissal.

[28] Accordingly, the Court has jurisdiction to consider whether Mr Evans was unjustifiably disadvantaged by JNJ's approach to the reorganisation of its security operations.

Engaging external contractors represented a restructuring of JNJ's security systems

[29] It is common ground that, in February 2019, JNJ engaged external contractors to perform security work for it. It says that the reason for engaging the external contractors was to supplement its internal resources and to provide coverage as needed. It says its decision to do that arose out of concerns Mr Evans raised that JNJ was under-staffed.

[30] While that might have been the thinking behind the decision to engage external contractors, the decision represented a change in the structure of JNJ's security services.

JNJ should have involved Mr Evans in the discussions

[31] The term in Mr Evans's employment agreement requiring JNJ to act in good faith means JNJ was contractually required to be active and constructive in maintaining the employment relationship, including being responsive and communicative, those being core requirements of good faith in employment.

[32] JNJ did not involve Mr Evans at all in discussions over whether external security personnel should be brought in and did not keep him informed of the arrangements it entered into with those contractors, which was counter to Mr Evans's

stated responsibilities for the security operations budget. It then provided him with a draft roster that did not include him or other internal security staff, which understandably was concerning to Mr Evans. JNJ says that the roster was only intended to show the external workers and was not intended to demonstrate that either Mr Evans or the other internal employees would lose their positions. But none of that was made clear to Mr Evans.

[33] At the time JNJ was discussing arrangements with the external supplier, Mr Evans was engaged in a recruitment process to employ the needed security staff, again one of his responsibilities. He was undermined in that process when JNJ moved forward with acquiring external contractors.

[34] While I acknowledge the point made by Mr Kwak that discussions between JNJ and the external security contractors were conducted in Korean as that was convenient to them, that did not prevent JNJ from discussing its plans with Mr Evans, getting his input and then including him in discussions over the proposed arrangements with the external provider.

[35] In these ways, JNJ failed to meet its contractual obligation of good faith to Mr Evans. JNJ's actions were unjustifiable.

Mr Evans's complaint regarding privacy fails

[36] There are difficulties with Mr Evans's claim that he was unjustifiably disadvantaged by JNJ's response to his concerns over privacy.

[37] Mr Evans's principal issue is that JNJ did not accept his advice regarding the privacy issue and make the changes he said were necessary to comply with the legislation. But a disagreement in itself does not give rise to an actionable disadvantage claim.

[38] There is little evidence of Mr Evans being personally disadvantaged by the alleged audio recordings. In any event, the Privacy Act does not give or impose

obligations that are enforceable in the Court.⁷ Mr Evans has laid a complaint with the Privacy Commissioner and that is where the issues regarding privacy should be resolved.

JNJ failed to follow dispute resolution process in employment agreement

[39] JNJ did not respond to Mr Evans's email of 28 February 2019, or at least not within the timeframe provided for in his employment agreement.

[40] While I acknowledge JNJ's focus shifted to termination of Mr Evans's employment, it had contracted to meet within seven days of an issue being raised and did not do so. That was a breach of Mr Evans's employment agreement.

Mr Evans is entitled to distress compensation

[41] The failure to consult properly with Mr Evans and keep him informed of the changing structure of the security services took him by surprise and left him frustrated and unhappy, particularly as he was left to inform the proposed new staff member that they did not have a job after all. He was disadvantaged by JNJ's actions, and felt humiliated, felt a loss of dignity and suffered injury to his feelings.

[42] He also was unhappy and hurt that he was not offered a meeting to discuss his concerns.

[43] However, any compensation must only reflect the distress caused by those matters; the distress that Mr Evans felt when his employment was terminated is not a matter for which he can be compensated.

[44] In the circumstances, Mr Evans is entitled to compensation under s 123(1)(c)(i) of the Act in the sum of \$5,000 for the disadvantage caused to him by JNJ's unjustifiable actions. That sum is to be paid to Mr Evans by JNJ within 21 days of the date of this judgment.

⁷ *NZ Amalgamated Engineering Printing and Manufacturing Union Inc v Air New Zealand Ltd* [2004] 1 ERNZ 614 (EmpC) at [218].

Parties should agree on costs

[45] The parties are encouraged to agree on any costs. If agreement cannot be reached, then any party seeking costs may file and serve a memorandum within 21 days of the date of this judgment. Any response to that memorandum is to be filed and served within a further 14 days, with any reply then to be filed and served within 7 days thereafter. The application then will be determined on the papers.

J C Holden
Judge

Judgment signed at 3.30 pm on 5 November 2020