IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 175
EMPC 2/2023

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	CARRINGTON RESORT JADE LP Plaintiff
AND	TONI MAHENO Defendant

Hearing: On the papers

Appearances: W Tan, agent for plaintiff
A Kersjes, advocate for defendant

Judgment: 6 October 2023

INTERLOCUTORY JUDGMENT (NO 3) OF JUDGE KATHRYN BECK
(Good Faith Report)

Background

[1] Carrington Resort Jade LP (Carrington) has filed a de novo challenge to a substantive determination of the Employment Relations Authority (Authority).[1] The Authority found that Carrington followed unfair processes and, as a result, unjustifiably disadvantaged Ms Maheno by suspending her and then unjustifiably dismissed her.[2] However, it also concluded that the suspension and dismissal were substantively justified because Ms Maheno had admitted to behaviour which constituted serious misconduct.[3] Ms Maheno was awarded $21,000 in compensation

1 *Maheno v Carrington Resort Jade LP* [2022] NZERA 635 (Member Larmer).
2 At [239].
3 At [172] and [218]–[221].

under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).[4] The Authority subsequently awarded costs of $10,071.56 in a separate determination.[5]

[2] During the Authority's investigation, Carrington was represented by its agent, Mr Tan. In its substantive determination, the Authority recorded that:[6]

> Mr Tan has acted in a contemptuous manner towards the applicant, her advocates and the Authority. His conduct could also be viewed as an attempt to intimidate the applicant, her advocates and the Authority by making spurious allegations about them.

[3] Further, the Authority recorded in some detail the procedure that preceded the investigation meeting, noting numerous occasions on which it says Carrington and Mr Tan failed to comply with directions or to meet timetabling obligations, either as prescribed in legislation or as set out by the Authority.[7]

[4] As a result of those findings, the Court sought a good faith report from the Authority under s 181 of the Act giving the Authority's assessment of the extent to which Carrington facilitated, rather than obstructed, the Authority investigation and whether it acted in good faith towards Ms Maheno during the investigation.[8] The purpose of obtaining a good faith report is so that the Court can consider possible directions defining the nature and extent of the hearing of the challenge.[9]

[5] As required by s 181(3) of the Act, the Authority provided the parties with a copy of its report in draft for comment before submitting its final report to the Court.

[6] Ms Maheno, through her advocate Mr Kersjes, indicated that she had no comment to make about the draft good faith report. The Authority Member recorded that Carrington did not provide feedback on the draft report. Attached to the good faith report was a copy of a read receipt from Carrington for the emails an officer of the Authority sent attaching the draft report. The good faith report of the Authority, therefore, was completed without any input from Carrington.

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4 At [240].
5 *Maheno v Carrington Resort Jade LP* [2023] NZERA 27 (Member Larmer) at [37].
6 *Maheno v Carrington Resort Jade LP,* above n 1, at [29].
7 At [26]–[83].
8 Employment Relations Act 2000, s 181(1).
9 Section 182(3).

[7] Subsequently, the report was completed with a number of administrative changes and one clarifying sentence being added. After the Court received the report on 29 June 2023, the parties were given until 17 July 2023 to file and serve any submissions on it, including on any directions they considered the Court should make on the nature and extent of the hearing of the challenge.

[8] Ms Maheno provided submissions on those matters, but Carrington did not.

Good faith report details numerous incidents of concern

[9] The Authority noted that Carrington engaged with the Authority by:

(a) filing a statement in reply;

(b) filing some, minimal, documents to the Authority;

(c) filing some witness statements;

(d) attending a case management conference;

(e) attending the investigation meeting; and

(f) filing substantive submissions.

[10] However, the Authority considered that Carrington or Mr Tan extensively obstructed the Authority's investigation by:

(a) failing to attend a case management conference on the agreed date and time;

(b) failing to file witness statements and relevant documents by notified dates;

(c) failing to respond to the Authority's attempts to communicate with Carrington;

(d) failing to provide the Authority with all relevant information;

(e) making a late application for remote attendance for its witnesses, which prejudiced the Authority's ability to arrange for the witnesses to appear in person;

(f) writing parts of witness statements on behalf of witnesses which those witnesses professed to know nothing about in oral evidence;

(g) secretly recording the investigation meeting;

(h) failing to delete the recording when directed to do so;

(i) disparaging the Authority; and

(j) including disparaging and untrue information in its submissions.

[11] The Authority also recorded that after the investigative meeting, Mr Tan approached the Authority Member, stood over her, and accused her of being biased, unprofessional, and very unfair.

[12] In relation to whether Carrington acted in good faith towards Ms Maheno, the Authority noted that it failed to provide her with relevant information and made disparaging comments about her and her advocates.

[13] Accordingly, the Authority stated that Carrington obstructed the Authority's investigation to some extent, did not participate in the Authority's investigation in a manner that was designed to resolve the issues involved, and failed to act in good faith towards Ms Maheno. Additionally, the Authority stated that Ms Maheno and her advocates participated in the investigation in a manner which was designed to resolve the issues.

[14] Having reviewed the Authority's good faith report and the substantive determination of the Authority, I agree with the Authority's view of Carrington's conduct. Therefore, I find that Carrington did not participate in the Authority's

investigation of the matter in a manner that was designed to resolve the issues involved.

Should directions be made as to the nature and extent of the hearing?

[15] Mr Kersjes submitted that directions should be made narrowing the scope of Carrington's challenge to the issue of remedies on a non-de novo basis. He submitted that the evidence is irrefutable that Ms Maheno's suspension and dismissal were procedurally unfair and that it is fair to limit the issues for consideration in light of Carrington's bad faith behaviour.

[16] Where the Court is satisfied that a party who has challenged a matter on a de novo basis did not participate in the Authority's investigation in a manner that was designed to resolve the issues involved, it may direct that the matter not be heard on a de novo basis. When such a direction is made, it must also direct, in relation to the issues involved in the matter, the nature and extent of the hearing.[10]

[17] In *GEA Process Engineering Ltd v Schicker*, Judge Perkins held that when issuing directions under s 182, the interests of justice must be balanced.[11] He also made the following helpful observations:[12]

> [22] In applying an appropriate balance to the matter, the Court has, on occasion, restricted both the nature of the challenge from a de novo to a non-de novo basis and the scope and extent of the evidence permitted.[13] One or both methods have been adopted as a means of providing a result in response to obstructive behaviour in the Authority's proceedings. An alternative response has been to give an indication that the behaviour will be appropriately met by a sanction in costs while allowing the matter to proceed on a de novo basis.[14] The way the matter has generally been approached by the Court is that there should be considerable hesitation in rejecting the Authority's view that the plaintiff failed to facilitate the investigation to a significant extent. However, the consequences of restricting the nature of the challenge and the extent of the evidence entitled to be led in some cases would nevertheless lead to an unacceptable miscarriage of justice.

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10 Employment Relations Act, s 182.
11 *GEA Process Engineering Ltd v Schicker* [2018] NZEmpC 117 at [21].
12 At [22].
13 See for example *Rawlings v Sanco NZ Ltd (No 1)* [2006] ERNZ 29 (EmpC).
14 See for example *Pacific Palms International Resort & Golf Club Ltd v Smith* [2008] ERNZ 295 (EmpC).

[18] Where the Court makes directions under s 182, it can have the same effect as an order striking out all or part of the challenging party's statement of claim. In the present circumstances, Mr Kersjes seeks a direction that only the issue of remedies be considered by the Court. If that submission is adopted, Carrington will lose its ability to challenge the Authority's finding that Ms Maheno was unjustifiably suspended and dismissed. As the statement of claim filed by Carrington does not even mention the issue of remedies, such a direction would have the effect of striking out the central issues in Carrington's challenge.

[19] When considering a strike-out application, the Court normally considers the principles set out in r 15.1 of the High Court Rules 2016 pursuant to reg 6 of the Employment Court Regulations 2000:

> **15.1 Dismissing or staying all or part of proceeding**
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> (1) The court may strike out all or part of a pleading if it—
>
> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
>
> (b) is likely to cause prejudice or delay; or
>
> (c) is frivolous or vexatious; or
>
> (d) is otherwise an abuse of the process of the court.
>
> …

[20] Carrington's substantive claims could not be struck out under r 15.1(1)(a) because the facts as pleaded disclose a clearly arguable cause of action. Pleaded facts, whether or not admitted, must be assumed to be true for the purposes of a strike-out application.[15]

[21] Considering the Authority's good faith report, there is perhaps more merit in the suggestion that the proceedings may be in some way an abuse of the Court's processes for the purposes of r 15.1(1)(d) of the High Court Rules. However, the right to access justice is an important human right.[16] Therefore, the Court of Appeal has

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[15] *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267; and *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33]; see also *Carrington Resort Jade LP v Maheno* [2023] NZEmpC 78 at [13].

[16] *Faloon v The Planning Tribunal at Wellington* [2020] NZCA 170 at [1].

indicated that "a court will not lightly strike out a viable proceeding for the abusive manner in which it has been conducted."[17]

[22] Carrington's failings have already been set out above in relation to the Authority's investigation. The issues with its conduct of the proceedings continue into this Court. In its pleadings for this challenge, Carrington has made irrelevant and unsubstantiated allegations against the Authority which are entirely inappropriate. Further, it has not engaged with the Court's processes and has proved unwilling to communicate with Court registry staff.

[23] Carrington has brought a challenge and is choosing not to pursue it diligently. As with the Authority proceedings, Carrington is not engaging with the Court's processes in a manner designed to resolve the issue at hand. Therefore, I am concerned that Carrington is using this challenge for purposes other than simply seeking a decision in relation to its claims. This may constitute an abuse of the processes of the Court. However, in the circumstances, I am not willing to make the orders sought by Mr Kersjes because I consider that will have the effect of striking out the challenge. The issues raised by Carrington's conduct can be mitigated by a less severe approach.

Conclusion

[24] The concerns of Ms Maheno and her advocate can be resolved with strict timetabling orders such that if Carrington files evidence, documents or submissions late, they will not be considered by the Court without leave first being obtained.[18]

[25] Carrington's conduct will also attract liability for costs. If Ms Maheno is unsuccessful in her defence, she can expect that Carrington's behaviour will limit the costs to which she is liable. Similarly, if she is successful, this may be an appropriate situation for the Court to consider whether it ought to order indemnity costs.

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17 *O'Neill v New Zealand Law Society* [2022] NZCA 500 at [14].
18 See Employment Relations Act, s 221(c); and High Court Rules 2016, r 1.19.

[26] A telephone directions conference should now be scheduled with the parties' representatives at a time to be arranged by the registry (after consultation with the parties) to discuss next steps.

Costs

[27] Ms Maheno has incurred costs in relation to the issues raised by the good faith report. She is entitled to an award for those costs. If the parties are unable to reach an agreement, she is invited to apply to the Court by memorandum filed and served within 10 working days of the date of this judgment. Any memorandum in response from Carrington is to be filed and served within a further 15 working days, with Ms Maheno entitled to file and serve a memorandum in reply within a further five working days. Costs on this matter then will be determined on the papers.

Kathryn Beck
Judge

Judgment signed at 4.20 pm on 6 October 2023