

**IN THE EMPLOYMENT COURT
WELLINGTON**

**WC 22/09
WRC 19/09**

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

BETWEEN PHILLIP WILLIS
Plaintiff

AND FONTERRA COOPERATIVE GROUP
LIMITED
Defendant

Hearing: On the papers following good faith report of the Employment
Relations Authority dated 2 September 2009 and submissions of the
parties filed on 11 and 17 September 2009

Judgment: 8 October 2009

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

Introduction

[1] This interlocutory judgment decides whether the plaintiff, Phillip Willis, should be entitled to proceed with his challenge to a determination of the Employment Relations Authority by a hearing of the entire matter.

Procedural history

[2] On 5 June 2009, the Authority determined that Fonterra's dismissal of Mr Willis for serious misconduct was justified (WA 78/09). On 2 July 2009, Mr Willis filed a statement of claim in the Court to challenge that determination. He sought a full hearing of the entire matter de novo. The Court called for a report under s181 of the Employment Relations Act 2000 in the circumstances set out below.

[3] After an adjournment and attempts at mediation the matter was set down in the Authority for 3 June 2009. Mr Willis changed lawyers shortly before the investigation meeting. A further adjournment application was lodged on 29 May 2009 but was refused. Mr Willis then failed to appear at the investigation meeting of 3 June 2009. He was not represented.

[4] The Authority, in declining the further adjournment, stated at para [16] that the applicant was not “*entirely open about the information he has disclosed*” and concluded at paras [23]-[24] that “*there has been no good cause why Mr Willis could not have made arrangements to attend his investigation meeting and make arrangements to be represented. This is a wholly unsatisfactory situation. It is of Mr Willis’s own making.*” At para [28] the Authority recorded that it had a “*lingering impression that Mr Willis has not been fully open with [the Authority], and his lawyers.*”

[5] I issued a minute on 21 July 2009 pursuant to s181(1) of the Employment Relations Act 2000 to request from the Authority a s181(1) “good faith” report about whether the parties involved in the investigation facilitated rather than obstructed the Authority’s investigation and whether they acted in good faith towards each other during the investigation. I did so because, from the above comments, I considered 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.

[6] The good faith report was supplied to the Court on 3 September 2009 after it received comments from the parties on its draft report. I issued a further minute on 4 September 2009 giving the parties the opportunity to make submissions by written memorandum to the Court. The plaintiff’s submissions were received on 11 September 2009 and the defendant’s on 17 September 2009.

The determination

[7] In the Authority, Mr Willis claimed that he was unjustifiably dismissed by Fonterra for both procedural and substantive reasons. The dismissal centred on Mr Willis’s breach of Fonterra’s “*permit to work policy and procedures*” and serious

misconduct. The Authority found that a fair process was followed and that it was open to Fonterra to dismiss Mr Willis.

Good faith report

[8] In its report to the Court, the Authority re-stated its conclusion that Mr Willis would have known of the date of the investigation and that therefore no good cause existed for having failed to attend.

[9] Despite making no finding as to the extent to which Mr Willis, or Fonterra for that matter, facilitated the investigation as s181(1)(a) requires, the Authority concluded at para [26] that:

Mr Willis's failures to reasonably attend the investigation meeting and not to raise any suggestions about being heard were not obstructive since I was able to proceed. Thus the situation has more to do with an issue for costs for the respondent if the respondent had incurred any costs, than any breach of good faith.

[10] It appears that despite the comments in the original determination, the Authority did not find that Mr Willis's actions obstructed its investigation. The oblique reference to "*any breach of good faith*" can be taken to read that the Authority's assessment of the extent to which the parties involved in the investigation acted in good faith towards each other during the investigation did not cause the Authority any undue concern.

[11] In his submissions to the Court, Mr Willis submits that there was a breakdown in communication between him and his previous solicitor and that he did, at all times, participate in the Authority's investigation of the matter in a manner designed to resolve the issues involved.

[12] In its submissions, Fonterra supports and agrees with the Authority's good faith report. It submits however that while Mr Willis did not obstruct the investigation he did not participate in a manner designed to resolve the issues involved. Fonterra submits that the matter should be determined by the Court only

on the basis of documents adduced before the Authority. Fonterra also invites the Court to consider whether it would be appropriate to seek security for costs from Mr Willis.

Discussion

[13] The Authority has reported to the Court, albeit not in the clearest terms, that at least Mr Willis did not obstruct its investigation and that it did not perceive Mr Willis's failure to attend the investigation as a good faith issue. Rather, according to the Authority, the issue was a matter of costs.

[14] The Court called for a good faith report under s181 because it appeared on the basis of the determination that one of the parties, Mr Willis, may not have participated in the investigation in a manner that was designed to resolve the issues involved.

[15] The Court, under s182(2), may only direct that the hearing be other than de novo if it is satisfied on the basis of the good faith report and submissions received that the person making the election, in this case Mr Willis, did not participate in the Authority's investigation of the matter in a manner designed to resolve the issues involved.

[16] I do not accept Fonterra's submissions. The Authority's view was that Mr Willis's behaviour did not obstruct and was not a good faith issue. I must and do take note of the Authority's report and find that it is not affected by the submissions for Fonterra. On the basis of the good faith report and submissions, I conclude that Mr Willis is entitled to proceed with a hearing of the entire matter, by a hearing de novo.

[17] It follows that I do not accept Ms Beard's submission that only evidence adduced in the Authority should be placed before the Court. As this will be a de novo challenge, the parties are free to adduce such evidence as they wish. Mr Willis's conduct in the Authority may, however, be reflected in costs.

[18] It is not appropriate, in this guise, for the Court to consider whether Fonterra should have security for costs on the challenge. If it wishes, it may make an application to the Court in the appropriate manner. It will be aware of the rarity of such applications succeeding but that is not to determine the outcome if an application is made.

[19] Costs will lie where they fall on the s181 exercise just undergone. The Registrar should now arrange for the case to be called over so a fixture may be set and directions made if necessary.

GL Colgan
Chief Judge

Judgment signed at 2 pm on Thursday 8 October 2009