

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2011] NZEmpC 64
ARC 108/10**

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

AND IN THE MATTER OF interlocutory applications

BETWEEN JUDITH BRAKE
Plaintiff

AND GRACE TEAM ACCOUNTING
LIMITED
Defendant

Hearing: 10 June 2011
(Heard at Auckland)

Appearances: Warwick Reid, advocate for plaintiff
Garry Pollak, counsel for defendant

Judgment: 20 June 2011

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] There are two preliminary issues before Judith Brake's challenge to the determination of the Employment Relations Authority can be heard and decided. They are, first, the plaintiff's challenge to objection to disclosure of certain documents held by Grace Team Accounting Limited (GTAL) and, second, whether the plaintiff should be required to give security for the defendant's costs as a condition of proceeding with her challenge.

[2] Dealing with the challenge to objection to disclosure, the first question is the relevance of the disputed documents. This is determinable primarily by the pleadings and, in particular, the plaintiff's statement of claim. A relevant summary of the plaintiff's allegations is as follows.

[3] Ms Brake says she was employed from August 2009 as a senior accountant to replace another member of GTAL's staff who was going on maternity leave. The plaintiff says that despite these reasons for her engagement, she was to be a "permanent" or at least a long term employee and would not be dismissed upon the other employee's return from parental leave.

[4] The plaintiff says that in mid April 2010 the defendant told her of its proposal to disestablish her position for economic reasons although she says that at about the same time the defendant had become aware that she was suffering from a serious illness. She alleges that there was a consultative process between the parties over the last two weeks of April 2010 which culminated in her dismissal for reasons of redundancy with immediate effect from 30 April 2010. The plaintiff says that the defendant asserted during this process that it was restructuring for financial reasons caused by an economic recession, that it had incurred a significant drop in fees turnover for the year ended 31 March 2010, that its costs had increased, and that it had been overstaffed for the amount of work on hand and anticipated. The plaintiff says that three employees were proposed to be made redundant although the other two of these resigned at the start of the consultative process in mid April.

[5] Ms Brake says that, contrary to the defendant's assertion, it had not suffered a turnover downturn in 2010, either actual or projected, at the time of her dismissal, and the firm was not overstaffed nor was she considered surplus to requirements. She claims that she was provided with erroneous information about the company's 2010 financial turnover, she was not provided with any information about its projected workload although this had been requested, and the defendant refused to explain the process that led to include her among the redundancies proposed. She says that the defendant predetermined the outcome of the consultative process which was her dismissal. The plaintiff says that for these reasons, her dismissal was unjustified.

[6] Ms Brake's claims were heard by the Employment Relations Authority in mid 2010 and its determination was issued on 13 September 2010.¹ It appears from the

¹ AA409/10.

Authority's written determination that the same issues were raised before, and investigated by, it.

[7] The Authority found that some of the financial and related data on which the defendant relied in making its assessment that Ms Brake's position was redundant, was flawed and made the company's financial position appear worse than it really was. For example, the Authority found that, despite the information relied on indicating a prospective loss for the relevant financial year, the company made a profit. It found, however, that there had been no deliberate falsification of the data. Indeed, the mistakes were not discovered until May 2010 by which time Ms Brake had been dismissed. The Authority concluded that it was not entitled to take into account information discovered after the time of dismissal pursuant to s 103A of the Employment Relations Act 2000 (the Act). It found that at the time the decision to dismiss was made, the defendant had no reason to suspect any error in its data.

[8] The Authority concluded that the decision to dismiss by reason of redundancy was made in good faith solely in the interests of saving costs and achieving greater efficiency. Those conclusions are challenged by the plaintiff in these proceedings.

[9] Objection to disclosure of the documents by the defendant is principally based on the disputed relevance of the documents to the matters in issue, the onerous nature of making disclosure, and the confidential nature of the records of clients of the accounting practice.

[10] Regrettably, because this appears to have occurred only in the course of the hearing in Auckland to which representatives of the defendant had travelled (in one case for the purpose of cross-examination), a large measure of agreement was able to be reached between the parties about what documents should be disclosed. The real controversy was then focused on how this should be achieved.

[11] I deal first with the second tranche of documents for which disclosure is sought by the defendant and which, although not formally before the Court, was nevertheless dealt with at the hearing.

[12] The defendant will disclose to the plaintiff the minutes of a staff management meeting held on 7 April 2010. The defendant will also disclose any work schedules prepared by Michael Grace and Kristen Retter for the 2011 year showing all clients in respect of which work was allocated. The defendant will likewise disclose all cash flow forecasts for the 2011 year prepared at the time of the plaintiff's dismissal. Finally in this regard, the defendant will disclose all other documentary financial information considered by it at the meeting of Monday 10 April 2010 at which it was decided that the plaintiff was redundant. The same conditions of disclosure of these documents will apply to the disclosure of those set out subsequently in this judgment.

[13] Turning to the documents referred to at para [9] of this judgment, I make the following orders:

- (a) The defendant is to disclose its annual accounts and GST returns for the two financial years preceding the plaintiff's dismissal.
- (b) The defendant is to disclose a summary of individual employees' charge out rates at the time of the plaintiff's dismissal.
- (c) The defendant will compile schedules, and provide these to the plaintiff, of work undertaken and charged out by Janine Hogg (Edgar), Kirsty Redmayne and Jo Stirling for the periods of two years from December 2008 to December 2010.
- (d) The defendant will provide to the plaintiff a list of employees and shareholders and a list of the wages or salaries or drawings of those persons but without correlating the information in the two lists.
- (e) The defendant will disclose to the plaintiff a list of its bad debts and of clients who left the practice in the period of 12 months before the plaintiff's dismissal.

- (f) The plaintiff will particularise the documents sought in relation to Janine Hogg for the years 2009-2010 and leave is reserved if any further orders are required in respect of such documents.
- (g) The defendant will supply to the plaintiff, to the extent that there are records in existence, a list of staff members employed by it on a year by year basis from 2006, with any documents evidencing the hours worked by those staff members, but this does not extend to the creation of records by the defendant where those do not exist at present.
- (h) Finally, the defendant will supply to the plaintiff a list of all clients lost by the defendant since the plaintiff's recruitment and the details of the reduction in revenue as a result of the loss of this business.

[14] Leave is reserved for either party to apply for any further orders or directions on reasonable notice.

Confidentiality of disclosure of documents

[15] I agree with the defendant that a number of the documents to which the plaintiff will be entitled are either the confidential accounting records of the clients of the defendant or otherwise contain such information. It is important that the confidentiality of this information be maintained as those clients would justifiably expect of the defendant.

[16] I agree with the defendant also that the plaintiff's proposed expert to whom she says these documents should be disclosed will not qualify as an independent expert witness in the proceedings. I do not doubt the experience and professional standing of Don Pilbrow, a longstanding member of the Institute of Chartered Accountants of New Zealand, who was formerly a partner in a major Tauranga accountancy firm and continues to be a consultant to it.

[17] However, Mr Pilbrow has deposed to his very longstanding acquaintance with the plaintiff and to the high regard in which he held her during the period of her employment in the firm or firms of which he was a partner. Other elements of Mr Pilbrow's affidavit indicate that he will not necessarily be impartial as between the parties on this issue in the proceedings as is expected of an expert witness and, in these circumstances, I would not be prepared to direct the disclosure of confidential information to him as has been requested by the plaintiff. I reiterate that it should not be taken as any reflection on Mr Pilbrow or his professionalism and I am sure that he will understand the need for clear and complete objectivity and impartiality on the part of an expert witness in a case such as this.

[18] In the circumstances, I invite the plaintiff to confer with Mr Pollak about the identity of an alternative expert witness and, if agreement cannot be reached on that person's identity, that the Institute of Chartered Accountants of New Zealand be invited to nominate a Bay of Plenty chartered accountant to undertake this role.

[19] The foregoing documents required to be disclosed by the defendant to the plaintiff must be disclosed in the first instance only to the independent expert chartered accountant. The terms of engagement of that expert must include to maintain the confidentiality of this information unless authorised by the Court. Such independent expert to whom disclosure is made will prepare a report for the Court which should be sent to the Registrar of the Employment Court in the first instance for consideration by a Judge and subsequent determination, after hearing from the parties, about its disclosure to them.

Security for costs?

[20] The defendant says that if it is successful in this Court as it was before the Authority, there is little or no prospect of being able to recover its costs of representation. It therefore seeks to have these, or at least a contribution towards them, secured before the case continues further.

[21] GTAL was awarded costs of \$3,500 by the Authority and Ms Brake has made no attempt to make any arrangement for the payment of these. The defendant has

not moved to enforce their payment. Ms Brake's agent in the proceedings (Mr Reid) is her former husband and neither he nor she has denied the defendant's assertion that the plaintiff is not paying any fees for her own representation. The plaintiff's financial circumstances (and therefore the defendant's ability to recover costs against her) are not propitious. Until very recently, when Ms Brake began a part-time job at a golf club paying \$200 per week, she had not worked since her dismissal by the defendant although she attributes this to her inability to do so as a consequence of the dismissal. It is unclear from the Authority's determination whether these alleged consequences of the dismissal were the subject of independent evidence in that forum. There is no suggestion, at least so far, of independent verification of Ms Brake's claim that she was unable to seek further employment as a result of her dismissal.

[22] Ms Brake also asserts that she does not have assets which might form the basis of security for costs. The evidence establishes that, along with her three adult children, Ms Brake is a beneficiary of a discretionary trust. She says that Lyon & Co Nominees is the registered owner of a house property at 308 Papamoa Beach Road, Bay of Plenty, as trustee. She says that she has no entitlement to pledge the Papamoa Beach property without the consent of the trustee and the beneficiaries whom she considers would not agree to an order for security. Ms Brake says that the Papamoa Beach property in which she lives is subject to a mortgage which enabled one of her daughters and her family to purchase another home. Ms Brake deposes to the balance owing on the loan secured by the mortgage being only slightly less than the value of the property although her affidavit does not make it clear whether this is the Papamoa Beach property or the home in which her daughter lives in Solomon Street.

[23] Ms Brake deposes to having only a nominal bank balance, in addition to clothing, personal effects and household furniture, a motor vehicle worth approximately \$6,000. She says that her son lives with her at the Papamoa Beach property paying between \$50 and \$190 per week in board although, she says, her costs of maintaining him exceed his contributions. Ms Brake is 56 years of age and suffers from chronic myeloid leukaemia although she is able to work in an office environment. She says that she now earns \$200 per week but pays all of this as "rent" for her use of the Papamoa Beach property. In addition she says she receives

a Work and Income benefit of \$209.43 per week and an accommodation supplement of \$100 per week.

[24] Estimating, I consider accurately, that the hearing of the challenge will take four days, the plaintiff proposes that security for costs be set in the relatively modest sum of \$6,000. Although this Court is usually reluctant to make orders for security for costs, especially against grievants whose financial circumstances may have been caused, or at least contributed to significantly by the fact of their dismissal, this is an exceptional, if not unique, case. That is for the following reasons. Ms Brake is not either contributing to her own costs of representation or subject to the costs discipline of legal aid. She has made no effort to address the relatively modest costs awarded by the Authority against her. There has already been substantial interlocutory skirmishing between the parties, principally in the area of document disclosure. Ms Brake is asserting that her dismissal was not genuinely for reasons of redundancy as she claims that there was ample accounting work for her to do and that the defendant was not in the difficult financial circumstances in which it claims to have been at the time of dismissing her and which, she says, it has subsequently acknowledged. Establishing these claims involves obtaining and analysing substantial quantities of the defendant's financial and managerial information and will involve expert evidence including probably for the defendant.

[25] In these circumstances, I am satisfied that the defendant will be put to more than the usual costs of a defendant employer on a challenge such as this. I am also satisfied that, without an order for security for at least some of its costs, the defendant is unlikely to be able to recover any of them if it is successful as it has been to date.

[26] On the other hand, an order for security for costs in a case such as this should not have the effect of disabling the plaintiff from pursuing her challenge. However, I am not satisfied that to make a relatively modest order for security would necessarily have this consequence as Ms Brake has asserted will be the result of any order the Court might make. The plaintiff has a beneficial interest in a property owning trust. It is not necessary for the plaintiff to have to lodge a cash bond to provide security. A variety of legal means for doing so are available to the plaintiff if the Registrar of

the Court is satisfied that they secure sufficiently an asset to which the defendant may have recourse in the event that it is successful and is awarded costs.

[27] In these unusual circumstances, therefore, I find it in the interests of justice to require the plaintiff to give security for costs before the case progresses further in this Court. I therefore make an order staying the plaintiff's challenge unless and until she gives security for costs in the sum of \$6,000 to the satisfaction of the Registrar of the Employment Court at Auckland.

[28] Costs are reserved on these applications.

GL Colgan
Chief Judge

Judgment signed at 3 pm on Monday 20 June 2011