N 2 C R

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

A.97/84

2017

819

BETWEEN TOM KING
of Taharoa, Farm Manager

Plaintiff

A N D TAHAROA C. INCORPORATION
a body corporate having its registered office at the offices of K. Bowker, Chartered Accountant, Garden Place, Hamilton

First Defendant

AND GEORGE WETINI of Taharoa, Farmer, NORA KING of Kawhia, Housewife, DARKIN BRYERS of Taharoa, Contractor, TED WILLISON of Taharoa, Leading Hand, RICHARD WILLIAMS of Te Awamutu, Chartered Accountant, KENNETH BOWKER of Hamilton, Chartered Accountant

Second Defendants

Counsel: E.J. Hudson for Plaintiff
J. Haigh for Defendants

Hearing and Judgment: 5 July 1984

ORAL JUDGMENT OF GALLEN J.

I propose to deliver an immediate oral judgment in this matter. This is no disrespect to the careful and detailed arguments of counsel, but it seems to me to be a matter where in the interests of all involved, a decision should be given as soon as possible.

The plaintiff was employed as a farm manager by the first defendant. The affidavits filed indicate that a number of matters of dispute have arisen between them, culminating in the forwarding of a letter by the first defendant to the plaintiff indicating a termination of his employment on a period of notice. I use those terms advisedly because there could well be some significance in whether or not that action constituted a dismissal. The plaintiff maintains that there was no ground for the issuing of that material or for terminating his employment. The defendant indicates that there were grounds. In proceedings of this kind, I am in no position to make any determination on disputed factual matters. This brings me to a question of procedure.

In the ordinary interlocutory injunction application, the application is brought on an interlocutory basis while awaiting a hearing of the substantive proceedings. That is not the case here since the substantive proceedings which the plaintiff contemplates are not being dealt with in this Court, but the Arbitration Court under the special provisions of the Agricultural Workers' Act 1977. That gives rise to some difficulties in that there will be no future opportunity in this Court to make determinations on matters of fact which are in dispute. That creates some disadvantages in determining this application, but it is obviously undesirable that decisions should be reached at this stage which could have a bearing on matters which may ultimately be determined in another jurisdiction and moreover, a jurisdiction which Mr

Haigh rightly says is of a specialised character and where there are advantages for considerations involved with industrial matters. The plaintiff has invoked the disputes procedure which is provided by the Agricultural Workers' Act 1977, a procedure which is set out in detail in s.39 of that Act. That is a procedure which is found in varying forms in other acts which deal with industrial matters. That procedure involves various steps, including investigation by committees and if resolution is not reached, the matter is ultimately to be dealt with by the Arbitration Court. I am informed from the Bar that even if the Arbitration Court was able to deal with the matter urgently, it would be at least 4 months before the matter could be dealt with. Mr Haigh also submits that before the matter can be brought before the Arbitration Court at all, it is necessary for the preliminary procedures to be gone through and this will involve an additional period. The Arbitration Court under the provisions of s.39 (5) has power to order reinstatement of the plaintiff. In the meantime, he seeks an injunction from this Court to prevent the defendants from dismissing him or from taking related actions until such time as his remedies under the provisions of the Act have been dealt with. He bases his claim on the provisions of s.39 and in particular the provisions of s.39 (3) which is in the following terms:-

> "For the purpose of ensuring that the work of an employer shall not be impeded but shall at all

times proceed as if no grievance against him had arisen, -

(a) No worker employed by an employee shall discontinue or impede normal work, either totally or partially, by reason of the existence of any grievance against that employer, whether on his own part or on the part of any other worker;

(b) While the foregoing provisions of this section relating to the settlement of grievances are being observed, no employer shall dismiss any worker involved in the circumstances out of which a grievance arose by reason only of his involvement."

The plaintiff effectively says therefore, that the defendant should be enjoined from dismissing him under the provisions of that section, at least until the Arbitration Court has disposed of his application under the grievance procedure assuming that that application ultimately reaches the Arbitration Court.

The first question is as to jurisdiction. Mr Hudson submits that this Court does have jurisdiction, even although the provisions of s.39 contemplate that disputes of this nature will be dealt with by the specialised jurisdiction of the Arbitration Court. Mr Haigh who made submissions in this regard, effectively conceded that jurisdiction existed and indeed in my view, there is

jurisdiction and there are of course authorities which support that and in particular I refer to that referred to by Mr Haigh, the decision of Barker J. in The New Zealand Shop Employees' Industrial Association of Workers v. Foodtown (Auckland Registry, A.1348/82) judgment delivered 16 December 1982.

In order to succeed at all, the plaintiff must establish that there is a serious question to be tried. It is in this respect that there are some difficulties arising out of the procedure which has been adopted. In the normal course, it is usual to talk in terms of establishing only a serious question to be tried because the factual matters upon which the ultimate decision will turn will be established at some future date. In this case, since there are no subtantive proceedings in this Court, the factual matters may never be determined but this application has to be dealt with on the basis of affidavits. Nevertheless, because of the urgency of the matter it seemed appropriate to me to deal with it on this basis.

The first question which will need to be determined is the nature of what has occurred between the plaintiff and the first defendant. Although Mr Haigh submitted that really there was no difference between a dismissal and a termination of employment, for some purposes at least there are distinctions in the two situations and there could be a bearing on the effect and application of s.39 as to which of these properly

represented the situation which exists between the parties.

It is true that the general bias of the law is against making orders which would have the effect of promoting or enforcing obligations between employer and employee although it will do so on special occasions, see the decision of the Court of Appeal in Hill v. C.A. Parsons Limited (1972) 1 Ch.305, a case to which I shall need to return. I mention this at this stage because it is just possible that there may be some claim available to the plaintiff at common law which would justify the possibility of an order for reinstatement. At the same time, I do not know of any authority which has granted such an application and I think if this were the basis of the plaintiff's claim, he would be bound to fail. The plaintiff relies upon s.39 and in particular the provision to which I have already referred. Mr Haigh made a number of submissions to the effect that the section did not give rise to any right of reinstatement to the plaintiff. When grouped together, his submissions fall into three main categories.

The first effectively depends upon the element of futurity which appears from the language of s.39 (3) (b) of the Act. Mr Haigh submits that in cases such as the present where the plaintiff complains of a previous dismissal, it is inappropriate to apply the provisions of s.39 (3) (b) which in terms purports to prevent an employer from dismissing a worker involved in the circumstances out of which the grievance arises. This contemplates a dismissal which has not already

taken place. However, it may be that in the situation which exists, what has occurred is not as such a dismissal and it is also prudent to observe that the provisions of s.39 contemplate grievances which are wider than those contained in the term "dismissal". It may well be that the provisions of s.39 (3) (b) are designed not only to deal with persons who are peripherally involved in the dispute, but with the person who is principally involved because he had not at that time been dismissed in a technical sense or because his grievance may be something which applies to something other than dismissal.

Secondly, Mr Haigh submits and submits I think with some strength, that s.39 (5) refers to a power of the Arbitration Court to reinstate and that that would be quite inappropriate if a dismissal had not taken place. He submits from this, that s.39 (3) (b) can have no application to a situation such as that of the present. Nevertheless, the scope of the word "reinstatement" as used in the section may need to be considered. It may be appropriate to cover a case where the contract had been improperly and perhaps therefore never terminated.

Thirdly, Mr Haigh relies on the peculiar wording of s.39 (3) and in particular the preamble to that sub-section which contains the following words:-

> "For the purpose of ensuring that the work of an employer shall not be impeded but shall at all times proceed as if no grievance against him had arisen....."

It then goes on to provide in sub-para. (a) for workers to continue in their employment without impeding normal work and in sub-para. (b), to prevent the employer from taking action to dismiss workers.

Mr Hudson submits that these sub-sections must both be read together and that they cover a normal on-going situation. Mr Haigh's argument is that the sub-section should be interpreted in the light of the preamble as being one which applies only in a situation where the employer's interests require protection. He points out that in this case the employer's interests are not going to be protected by continuing to employ the plaintiff. This is largely a question of fact and one which I am not in a position to determine. In any event, although the language is somewhat difficult to apply in respect of relating the preamble and sub-section (b), the sub-section is in clear and unambiguous terms.

I therefore come to the conclusion that although it may be a very tenuous case, there is some possibility that the plaintiff might be able to establish some sort of right under the provisions of the section. Even assuming however that the plaintiff was able to establish that there was a serious question to be tried, there still remains the balance of convenience.

The plaintiff has filed an undertaking as to damages. Mr Haigh points out that there is no information before the Court indicating the means of the plaintiff to meet any order

made against him. I am informed and I understand that this is not disputed, that the defendant is already seriously out of pocket in respect of its obligations to a replacement worker and is likely to be more so if there is any further delay. If this matter takes 4 months to reach a conclusion, then obviously the defendant is going to be substantially out of pocket by the time the conclusion is arrived at, assuming it is ultimately successful. That obviously has to be a matter of urgency when taking into account any assessment of the balance of convenience.

There is another matter which has greater strength. There is ample authority to the effect that where an appropriate remedy is damages, it is inappropriate to grant an interlocutory injunction. The plaintiff has not at this stage been reinstated by the Arbitration Court. Assuming that he is employed by the first defendant, then the terms of his employment must be considered as normal terms of employment subject of course to the provisions of any award or Statute which may have application to them. I cannot see any reason why the defendant could not terminate the employment of the plaintiff on proper notice. The question of what is proper notice is a question of fact. It must be considered in relation to the particular circumstances of the employment and the particular circumstances of the plaintiff. Mr Haigh indicated that the award provides that the only notice which needs to be given is a comparatively short period of one week and that in this case in any event,

the defendant has purported to give the plaintiff a month's notice. The reason for referring to this aspect of the matter is that even had the employment of the plaintiff been terminated improperly, there is no reason why the defendant at present cannot terminate it properly, so it is a somewhat pointless exercise to reinstate him unless that reinstatement becomes relatively permanent and this is to include a term in the employment which was not previously there. I should have thought that if the employment of the plaintiff were improperly terminated or not terminated with proper notice, then it should not be too difficult to assess the damages and appropriate damages and apart from the fact that the plaintiff has his special rights under the provisions of the Agricultural Workers' Act 1977 which may in fact give him a greater right than he would have been entitled to at common law. There is no other factor to be taken into account other than the question of reinstatement which would justify the issue of an injunction rather than satisfying the plaintiff's claim by way of an award of damages.

Mr Hudson says that reinstatement is important because if the plaintiff is not reinstated, then someone else will get the job and it will be much more difficult to obtain any reinstatement under the provisions of s.39, but this is an illusory comment if it is open to the defendant to terminate the plaintiff's employment at present on proper notice and as Mr Haigh points out, the statutory powers of the Court of

Arbitration are not affected by the employment of some other person.

In the end the remedy is discretionary and although the discretion must be exercised on a judicial basis, in my opinion for the reasons expressed, it is inappropriate that an injunction should issue in this case.

The application is therefore refused. Under normal circumstances costs would be reserved at this stage and dealt with in the substantive proceedings. In this case, those proceedings will be dealt with in another jurisdiction. In my view, the question of costs should be dealt with when the rights of the parties have been finally determined by whatever Court of jurisdiction ultimately determines them. I reserve leave for either party to make application for costs at that time.

Solicitors for Plaintiff: Messrs Tompkins, Wake and Company, Hamilton

Solicitors for Defendants: Messrs Phillips and Powell, Otorohanga