

AUSTRALIA / JUDGMENT

Danaher v Westfund Limited [2020] FCA 908

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FEDERAL COURT OF AUSTRALIA

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Danaher v Westfund Limited [2020] FCA 908

File number: NSD 501 of 2018

Judge: BROMWICH J

Date of judgment: 30 June 2020

Catchwords: PRACTICE AND PROCEDURE – application for particulars – where respondent previously responded to request for particulars by reference to affidavit – where application for particulars different to those requested – particulars necessary to respond to pleadings – application granted

Legislation: Federal Court Rules 2011 (Cth) r 16.02, r 16.08, r 16.45

Date of last submissions: 25 March 2020

Registry: New South Wales

Division: Fair Work Division

National Practice Area: Employment & Industrial Relations

Category: Catchwords

Number of paragraphs: 21

Counsel for the Applicant: Mr S A Lawrence

Solicitor for the Applicant: Watson Mangioni Lawyers Pty Ltd

Counsel for the Respondent: Mr E A J Hyde

Solicitor for the Respondent: Carter Newell Lawyers

ORDERS

NSD 501 of 2018

BETWEEN: MR GRAHAME DANAHER

Applicant

AND: WESTFUND LIMITED ACN 002 080 864

Respondent

AND BETWEEN: WESTFUND LIMITED ACN 002 080 864

Cross-Claimant

AND: MR GRAHAME DANAHER

Cross-Respondent

JUDGE: BROMWICH J

DATE OF ORDER: 29 JUNE 2020

THE COURT ORDERS
THAT:

1. Within 28 days or such further time as may be allowed by the Court, the respondent provide to the applicant particulars of any conduct by act or omission, other than those pleaded at paragraph 33A(c) of the respondent's Amended Defence, relied upon by the respondent to support the validity of its purported termination of the applicant's contract of employment on 28 November 2016, including:
 - (a) a description of any alleged act or omission relied upon as constituting misconduct;
 - (b) so far as practicable, the place, date and time at which each instance of alleged misconduct is said to have occurred.
 2. The costs of and incidental to the applicant's interlocutory application dated 5 February 2020 be costs in the cause.
- Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

REASONS FOR JUDGMENT

BROMWICH J:

1 This is the determination of an interlocutory application by which the applicant, Mr Grahame Danaher, seeks particulars of any grounds other than those specifically pleaded that are relied upon by the respondent, Westfund Limited, to support the validity of its purported termination of Mr Danaher's contract of employment. That termination was communicated to Mr Danaher by a letter dated 28 November 2016 (termination letter), that was sent following a Westfund Board meeting on 26 November 2016. Pursuant to r 16.45 of the Federal Court Rules 2011 (Cth), Mr Danaher seeks an order that Westfund furnish particulars by way of a description of any further alleged misconduct relied upon to justify his termination, including, so far as practicable, the place, date and time at which any such misconduct is said to have occurred. The parties have agreed to this application being determined on the papers.

2 The specifically pleaded basis for validity of termination going beyond the matters considered by the Board of Westfund on 26 November 2016, giving rise to the termination letter two days later, is said to relate to certain material alleged to have been found on electronic devices provided by Westfund to Mr Danaher and used by him. In substance, Mr Danaher wants to know with pleading-like specificity, pre-trial, what else might be relied upon as a basis for the validity of his termination that has not been pleaded or particularised. Westfund contends that it has adequately disclosed everything else known to it that might be relied upon.

3 The genesis for this dispute about particulars is at the core of an important part of the proceeding itself, being the termination letter dated 28 November 2016, which stated in part:

Westfund has recently become aware of matters in relation to your conduct which are inconsistent with the fitness and propriety required of you in your role, and which constitutes serious misconduct.

The Board has made a decision to terminate your employment for serious misconduct without notice to you, with effect from 4pm today.

No further specifics of the alleged serious misconduct or any other ground for termination was stated in that letter.

4 Mr Danaher contends that the termination of his employment was invalid. His solicitor, Mr Mark Popplewell, contends that in order to properly prepare his case for hearing and to ensure that the applicant is not ambushed, he has been endeavouring since November 2019 to obtain particulars of all the grounds of termination relied upon by Westfund. In an affidavit affirmed in support of the interlocutory application, Mr Popplewell annexes and reproduces key parts of correspondence by which those particulars have been sought and provided to date. As will be seen, there is a material difference between what was sought by correspondence and what was sought by the present interlocutory application.

5 The issue of particulars was raised with the Court by the filing of Mr Danaher's interlocutory application on 5 February 2020. As this proceeding was set down for trial for seven days commencing on 23 March 2020, it can be said that the application was made relatively late in the piece. However, that trial date, along with all trials in the Court up to the end of June 2020, had to be vacated due to the COVID-19 pandemic. Further, new trial dates in the present matter have not yet been allocated because of the likely need for oral evidence to be adduced in-court by at least some witnesses, rather than at an online hearing, with numerous witnesses being both elderly and residing in country New South Wales. This application therefore falls to be determined with a trial that is pending but not imminent.

6 By a letter from Mr Popplewell dated 21 November 2019, Mr Danaher asked that Westfund:

- (1) identify "each of 'the matters considered by its Board on 26 November 2016' pleaded at paragraph 33A of the Amended Defence", being the meeting that took place two days before the termination letter, and apparently when the termination decision was made; and
- (2) to the extent that they are different to those matters considered at that meeting, identify each ground of termination relied upon that is different to those considered by the Board at that meeting.

The letter sought particulars of what was considered by the Board, and only sought identification of grounds of termination to the extent that this went beyond what was before the Board. The problem that the applicant faces is that the particulars sought by the present interlocutory application were never sought in prior correspondence, yet the competing arguments were framed by reference to what was in that correspondence.

7 The response furnished by Westfund makes clear that it only relied on what was considered by the Board, apart from what was later found on electronic devices said to be provided by Westfund to Mr Danaher and used by him, which are separately pleaded without objection as to particulars. A letter in reply by Westfund's solicitors dated 6 December 2019 included a table that listed seven topics that were before the Board at the 26 November 2016 Board meeting, identifying the

paragraphs of the affidavits from each of the Board members which depose to those topics. This is best illustrated by way of example. The first of the seven topics in the table was "bullying and/or mismanagement of staff". On that topic the table provided the following details:

Particulars Evidence

Bullying and/or Mismanagement of staff Witness Paragraph

Wesley Anderson 74, 75

Graeme Osborne 66, 68

Edward Butcher 24

Phillip Burgett 37

Michael Serong 39

Howard Fisher 88

8 Similar cross-references to the affidavit evidence was provided for the remaining six topics, often by reference to the same affidavit and the same paragraph numbers. The letter then concluded:

For the avoidance of doubt, our client includes references to relevant paragraphs of the lay evidence in the table above. Our client relies upon the contents of the evidence it has filed and served, in its entirety in its defence of the claim.

9 The first of the references in the table reproduced above, being paragraphs 74 and 75 of Mr Anderson's affidavit, being a reasonably representative sample for present purposes, are as follows (as relied upon by Mr Danaher to make his point), referring to the 26 November 2016 Board meeting:

[74] I recall that Mr Fisher opened the meeting and invited Minter Ellison, attending by conference call, to report on their review. I recall that Minter Ellison provided a verbal report on the matters and that they told us that based on their review of the material provided to them by NRF, there was evidence to support the allegations which Ms Tormay had made against Mr Danaher, including:

- (a) Bullying;
- (b) Mismanagement of staff, and mind games; and
- (c) Sexual harassment of Ms Tormay including that Mr Danaher had sent sexually explicit images to her.

[75] I also recall them saying that the investigation had uncovered:

- (a) Comments from staff that Mr Danaher had a hit list of staff that he wanted to get rid of;

- (b) Evidence that Mr Danaher would ostracise staff that did not agree with him; and
- (c) Evidence of a drinking culture at off site meetings which was supported by Mr Danaher.

10 The references identified by Westfund in the letter dated 6 December 2019 are cast in reasonably general terms. They provide little detail as to when any of the conduct alleged is said to have taken place, or what Mr Danaher was said to have done, or perhaps failed to do (except to a limited degree, as in paragraph 74(c) of Mr Anderson's affidavit set out above). The reason for that limitation is that the particulars sought were directed to what was before the Board at its 26 November 2016 meeting, not by reference to the underlying allegations, or what had actually occurred.

11 The remaining references to evidence identified by Westfund on the remaining six topics also concern what was communicated to Board members, including reporting at the meeting on 26 November 2016 on the results of an investigation conducted on its behalf. These are expressed in similarly general terms by other members of the Board in attendance at the 26 November 2016 Board meeting, being Messrs Burgett, Butcher (by telephone), Fisher, Kelly, Osborne, Serong (by telephone), and White. As such, it is evidence of allegations, or hearsay evidence of alleged events, not direct evidence of what is said to have occurred. However, this meets the description of what Mr Popplewell sought by his 21 November 2019 letter.

12 The central complaint now made by Mr Danaher as to the particulars that have been provided by Westfund is that he asserts that they are not particulars at all, but rather topic headings under which alleged misconduct might fall. That is an apt description of what was given in the table, but it is also an apt description of what was sought by correspondence. That particular problem lies not in the response given but rather in the information that was sought in the first place.

13 In follow up correspondence Mr Popplewell sought to confine Westfund to the seven topics, but said that as most were not pleaded it was not accepted that they could be relied upon. However the correspondence in evidence does not reveal that this was developed further, nor that the particulars sought in the interlocutory application were ever sought in correspondence.

14 The interlocutory application seeks:

- [1] The respondent provide to the applicant particulars of any grounds, other than those pleaded at sub-paragraph 33A(c) of the respondent's Amended Defence, relied upon by the respondent to support the validity of its purported termination of the applicant's contract of employment on 28 November 2016.
- [2] The particulars referred to in Order 1 are to include:
 - (a) a description of any alleged misconduct relied upon;
 - (b) so far as practicable, the:
 - (i) place;

(ii) date and time;

at which each instance of alleged misconduct is said to have occurred.

15 Mr Danaher's complaint seems to be that the approach of pointing to where such evidence is to be found taken in the letter from Westfund's solicitors dated 6 December 2019 does not give him fair notice of what Westfund is going to allege were the actual acts or omissions constituting serious misconduct said to justify his termination (necessarily assuming that termination is found to be unlawful). In particular, he complains that the reliance on the entirety of the evidence magnifies the problem because there are several thousand pages of evidence. He contends that he should not have to guess, or work out for himself, what he is alleged to have done, assuming that the seven topics are exhaustive, which he says is not clear. He relies upon rr 16.02(1)(d) and 16.08 of the Rules, containing, respectively:

- (1) the requirement to plead material facts and not evidence; and
- (2) the requirement to plead expressly, subsequent to a statement of claim, a matter of fact or point of law, that raises an issue not arising out of the earlier pleading, and that, if not expressly pleaded, might take another party by surprise if later pleaded, or it is alleged makes another claim not maintainable.

16 Westfund's response is to point to the requirement in r.16.45 of the Rules that such an application for an order for particulars may only be made if the particulars in the pleading complained about (which must be taken to include the particulars provided separately and subsequently) are inadequate and the party seeking them, Mr Danaher, could not conduct his case without further particulars. Westfund contends that threshold has not been met. In support of that contention, Westfund points to:

- (1) the history of the proceeding, including pleading, evidence, and mediation; and
- (2) the history of the correspondence on the pleadings in late 2019 and early 2020, including in particular the confirmation that the seven topics set out in the table were the matters considered by the Board at its meeting on 26 November 2016

to contend that there could be no suggestion that Mr Danaher is unaware of the matters that were considered by the Board, such that the material facts relied upon are identified. Westfund also points to certain of these matters being traversed by Mr Danaher in his affidavit evidence in reply, characterising the request for further particulars as an attempt to be given a "road-map" for his cross-examination.

17 Mr Danaher's response is that Westfund's submissions tend to confirm the need for the requested particulars, by perceiving that the provision of such particulars will advantage him in his cross-examination by giving him, in advance, a description of the alleged misconduct relied upon, including when and where it is said to have occurred. He submits that if this is properly characterised as an advantage it is one to which he is entitled, by being told he necessary specifics of the defence case that he has to meet. He further submits that this goes beyond cross-

examination as he may be able to adduce evidence that corroborates his account, being a course that is unfairly hindered by not clearly knowing the case that he has to meet, and having to guess what it is said that he has done by way of misconduct.

18 I have given careful consideration to the competing arguments. An immediate gulf between the competing submissions is that Mr Danaher is referring to the allegations, and details of those allegations, of what he is said to have done or failed to do. Westfund is referring only to disclosure of the allegations that were before the Board at its meeting on 26 November 2016. That is the same gulf between what was sought in correspondence from the applicant and what is sought by the interlocutory application.

19 The particulars already furnished by Westfund would be adequate if the only live issue at trial is going to be what information was before the Board, as Mr Popplewell's correspondence sought. However it seems doubtful that Westfund's case is so confined, especially in light of the final paragraph of the response of 6 December 2019, reproduced at 9 above. That paragraph suggests that it is at least likely that Westfund will rely upon particular acts or omissions having actually having taken place, and being of a nature to justify the dismissal if the termination of Mr Danaher's employment was otherwise unlawful. In that event, Mr Danaher is entitled to know, with reasonable specificity, what it is alleged that he did or failed to do that justified his termination, and when he is alleged to have done any such act or omission to the extent that this can be identified.

20 In light of the foregoing, I will make orders that Westfund provide the particulars sought in relation to any act or omission which it relies upon as having actually occurred to justify the termination of the employment of Mr Danaher. This will in turn depend upon the particular acts or omissions that Westfund ultimately decides to rely upon to justify the termination of Mr Danaher's employment in the event that it is found to be unlawful.

21 The particulars sought by this interlocutory application should first have been sought by correspondence expressed in clear terms, not by oblique reference. However, once sought, further particulars of the alleged misconduct should have been furnished by Westfund. In those circumstances I will order that the costs of the interlocutory application be costs in the cause.

I certify that the preceding twenty-one (21) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromwich.

Associate:

Dated: 30 June 2020

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Prepared on 28 October 2026 · Esheria