

**IN THE EMPLOYMENT COURT OF NEW ZEALAND  
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA  
TĀMAKI MAKĀURAU**

**[2024] NZEmpC 174  
EMPC 238/2023**

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

BETWEEN                      A IFRAZ INVESTMENTS LIMITED  
   Plaintiff

AND                              MOHAZAM JAMAL  
   Defendant

Hearing:                      On the papers

Appearances:              A Ifraz, agent for plaintiff  
   No appearance for defendant

Judgment:                    17 September 2024

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**JUDGMENT OF JUDGE M S KING  
(Dismissal for want of prosecution)**

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[1]      On 17 July 2023, the plaintiff, A Ifraz Investments Ltd, filed a non-de novo challenge to a substantive determination of the Employment Relations Authority.<sup>1</sup>

[2]      The proceedings were served on the representative who had acted for the defendant, Mohazam Jamal, when the proceedings were before the Authority. However, the representative did not have authority to accept service in these proceedings and on 21 August 2023, the Court directed that the statement of claim be served personally on the defendant.

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<sup>1</sup>      *Jamal v A Ifraz Investments Ltd* [2023] NZERA 317 (Member Arthur).

[3] The Court registry has followed up with the plaintiff multiple times to ascertain whether the statement of claim for its challenge had been personally served on the defendant. The plaintiff responded infrequently to advise that attempts would be made to complete service but that progress appeared not to have been made.

[4] On 3 July 2024, a telephone directions conference was held with the plaintiff's representative, Abdul Ifrac, to discuss service of the statement of claim. During the directions conference, Mr Ifrac advised that he had effected service on the defendant in or about February 2024, and he believed the defendant had been deported from New Zealand.

[5] During the directions conference, and as recorded in the minute dated 3 July 2024 following the conference, the Court emphasised the importance of the plaintiff prosecuting its claim in a timely manner and warned that any failure to effect service within 12 months of the statement of claim being filed could result in its claim being dismissed for want of prosecution. To ensure that proceedings progressed in a timely manner, the plaintiff was directed to file its affidavit of service, confirming that personal service of the statement of claim had been effected on the defendant, by 4 pm on Thursday 18 July 2024. A further directions conference was scheduled to monitor progress of the matter.

[6] On 17 July 2024, the plaintiff filed an affidavit of service. The affidavit did not provide sufficient particulars to satisfy the Court that service had been effected in accordance with reg 28 of the Employment Court Regulations 2000 (the Regulations) and rr 6.10 and 6.11 of the High Court Rules 2016. This included that, in lieu of annexing copies of the documents served, the affidavit had failed to sufficiently describe the documents and the date of service of the documents. The affidavit also failed to explain how the person serving the documents knew the recipient and the particulars of how personal service was effected, including whether the defendant accepted service or, if not, what steps were taken by the person serving the documents to satisfy the Court that the defendant knew, or had the means of knowing, the nature and contents of the documents tendered to him.<sup>2</sup>

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<sup>2</sup> *Campbell v Campbell* [1965] NZLR 653 (SC) at 655.

[7] On 24 July 2024, a directions conference was held to monitor the filing of the affidavit of service and the progress of the proceedings. In a minute dated 24 July 2024, the Court directed the plaintiff to file and serve an amended affidavit of service, addressing the issues raised by the Court, by 4 pm on Wednesday 31 July 2024.

[8] On 7 August 2024, the Court granted leave for an extension of time until 4 pm on Friday 9 August 2024. The Court also directed that unless the plaintiff filed the amended affidavit of service by this date, the document would not be accepted by the Court, service would not be deemed to be effected and the proceedings would be dismissed for want of prosecution. The Court observed that the unless order was necessary due to the lack of progress in the matter. Specifically, the statement of claim was filed with the registry more than 12 months ago.

[9] The Court has convened two directions conferences to attend to the matter of service of the statement of claim, and to progress the timetabling of the matter. At both conferences, the plaintiff was advised of the importance of prosecuting its claim in a timely manner and that failure to do so could result in the claim being dismissed for want of prosecution.

[10] On 12 August 2024, the plaintiff filed an amended affidavit of service. The affidavit was not only late, but it was incomplete. In particular:

- (a) there is no date showing when the affidavit was sworn or affirmed;
- (b) the affidavit states that it is an affirmation of service, but on the bottom page it says it was sworn (without the date);
- (c) the exhibits do not have exhibit notes; and
- (d) the exhibit “statement of claim” is not complete – two pages are missing, including the signed page and the page with the notice to the defendant regarding the filing of a statement of defence signed and sealed by the Registrar.

[11] The registry informed the plaintiff of the above issues and requested that the affidavit be re-sworn and affirmed to address the above issues. More than a week passed, and the plaintiff failed to file an amended affidavit of service.

[12] On 20 August 2024, the Court issued a further minute directing the plaintiff to file an affidavit of service, addressing the issues raised by the registry, by 4 pm on Tuesday 27 August 2024. It directed that unless the plaintiff filed a complete and accurate affidavit of service by that date, the document would not be accepted by the Court, service would not be deemed to be effected and the proceedings would be dismissed for want of prosecution.

[13] The plaintiff has not filed an affidavit of service in accordance with the Court's direction of 20 August 2024. Nor has it provided any excuse or explanation for this failure. The Court now considers whether the proceedings should be dismissed for want of prosecution.

### **Legal principles**

[14] Regulation 6(2)(a)(ii) of the Regulations incorporates the High Court Rules insofar as they relate to dismissing or staying a proceeding without a trial. Rule 15.2 provides for the dismissal of a proceeding for want of prosecution as follows:

#### **15.2 Dismissal for want of prosecution**

Any opposite party may apply to have all or part of a proceeding or counterclaim dismissed or stayed, and the court may make such order as it thinks just, if—

- (a) the plaintiff fails to prosecute all or part of the plaintiff's proceedings to trial and judgment; or
- (b) the defendant fails to prosecute all or part of the defendant's counterclaim to trial and judgment.

[15] Although the provision does not explicitly permit the Court to strike out proceedings for delay on its own initiative, power to do so arises under the Court's inherent powers.<sup>3</sup>

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<sup>3</sup> *Reid v New Zealand Trotting Conference* [1984] 1 NZLR 8 (CA) at 10; and Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 902 and fn 604.

[16] In *Lovie v Medical Assurance Society New Zealand Ltd*, Eichelbaum J, in dealing with the application of the rule, stated:<sup>4</sup>

... the applicant must show that the plaintiff has been guilty of inordinate delay, that such delay is inexcusable, and that it has seriously prejudiced the defendant. Although these considerations are not necessarily exclusive, and at the end one must always stand back and have regard to the interests of justice, in this country, ever since *New Zealand Industrial Gases Ltd v Andersons Ltd* [1970] NZLR 58 it has been accepted that if the application is to be successful, the applicant must commence by proving the three factors listed.

[17] In *Commerce Commission v Giltrap City Ltd*, the Court of Appeal also addressed the need to stand back by considering whether the overall interests of justice would allow the case to proceed.<sup>5</sup>

[18] The issues of whether there is inordinate delay and whether that delay is inexcusable depend upon the circumstances of a particular case.<sup>6</sup> As to whether there is serious prejudice, the most important factor is whether justice can still be done between the parties if the proceeding goes to trial.<sup>7</sup>

[19] In the circumstances, I find that the plaintiff is guilty of inordinate delay. Its challenge relates to an Authority determination issued in favour of the defendant over a year ago. The determination relates to events that date back more than four years. More than a year passed between the plaintiff's statement of claim being accepted for filing by the Registry and the plaintiff failing to file an affidavit of service confirming to the Court's satisfaction that service had been effected.

[20] In the circumstances, the delay is inexcusable. The plaintiff has been given numerous opportunities and clear directions from the Court on the importance of prosecuting its claim in a timely manner, and the potential consequences should it fail to comply with the Court's directions. Despite this, the plaintiff has failed to comply with the Court's directions or provide any explanation or excuse for failing to do so.

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<sup>4</sup> *Lovie v Medical Assurance Society New Zealand Ltd* [1992] 2 NZLR 244 (HC) at 248.

<sup>5</sup> *Commerce Commission v Giltrap City Ltd* (1997) 11 PRNZ 573 (CA) at

<sup>6</sup> Jessica Gorman and others *McGechan on Procedure* (online ed, Thomson Reuters) at [HR15.2.02] and [15.2.03].

<sup>7</sup> At [15.2.04].

[21] The passage of time since the plaintiff's challenge to the Authority determination was filed is significant and, combined with the defendant's failure to engage or participate in the proceedings, possibly due to being deported, raises serious concerns about whether the passage of time has had the effect of impinging on the ability of the Court to fairly deal with the plaintiff's challenge. Further, the plaintiff's failure to follow the Court's directions despite being warned that this could result in its claim being dismissed, undermines the Court's processes, and goes against the public interest in having an effective and efficient justice system.

[22] Collectively, these factors lead me to find that the action or inaction of the plaintiff seriously prejudices the defendant.

[23] Standing back and having regard to the interests of justice in the circumstances, it is appropriate to strike out the proceedings for want of prosecution, and I order accordingly.

[24] As the defendant has taken no steps in this proceeding, there is no issue as to costs.

MS King  
Judge

Judgment signed at 4.30 pm on 17 September 2024