



Employment Court of New Zealand

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AB Roofing Limited v Lane [2021] NZEmpC 192 (4 November 2021)

Last Updated: 9 November 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA TE WHANGANUI-A-TARA

[\[2021\] NZEmpC 192](#)

EMPC 386/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	AB ROOFING LIMITED Plaintiff
AND	JACK LANE Defendant

Hearing: (On the papers)
Appearances: No appearance for AB Roofing Ltd
P Drummond, counsel for
defendant
Judgment: 4 November 2021

JUDGMENT OF JUDGE B A CORKILL

[1] This judgment resolves an application to strike out a challenge of a determination of the Employment Relations Authority, for want of prosecution. No opposition to the application has been filed by the plaintiff.

[2] A brief summary of the background is necessary. The Authority issued an oral determination after an investigation meeting which was conducted in the absence of the employing company, AB Roofing Ltd (ABRL).¹ The Authority found the grievance of the employee, Mr Jack Lane, was established. It concluded he had been unjustifiably dismissed; and that he was due unpaid wages. A total of \$20,037.06 was ordered to be paid by AB Roofing Ltd (ABRL) by 30 October 2019. This did not occur. Nor have the monies been paid since.

¹ *Lane v AB Roofing Ltd* [2019] NZERA 565 (Member Loftus).

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[3] A statement of claim raising a de novo challenge was filed on 21 October 2019. It was claimed that a representative of the company who was responsible for administration matters had not been active in passing on relevant communications so that the Director of ABRL, Mr Billington, was unaware of the investigation meeting. He said the matter should be resolved at mediation, although the company had not taken up the opportunity to do so when Mr Lane's claim was before the Authority.

[4] Mr Lane filed a statement of defence on 17 February 2020.

[5] There were difficulties in setting up a telephone directions conference, but eventually this took place on 4 June 2020. Mr Billington did not participate, but Ms Vanderberg, who said she was authorised to represent the interests of ABRL, did. She provided contact details, so as to obviate the communication difficulties which had arisen to that point. She repeated that ABRL had always wished to resolve the matter at mediation. Mr Drummond, counsel for Mr Lane, did not object to mediation being directed. I made that direction.

[6] On 5 October 2020, when I convened a further telephone directions conference to review the matter, I was informed that mediation had not yet occurred. Ms Vanderberg said ABRL was still keen to participate. I indicated that the parties had been given sufficient time for this step to be taken and that the case should now be set down for hearing. Directions were made for a hearing to take place on 2 March 2021, at the Palmerston North court, with ABRL's briefs to be filed by 19 January 2021.

[7] It then became necessary to reschedule the fixture for 30 March 2021, in part because ABRL had not filed its evidence. A telephone directions conference was to be convened for 15 March 2021, to ensure arrangements for the hearing were in place.

[8] On 15 March 2021, Mr Lane filed an application to strike out ABRL's challenge for want of prosecution.

[9] The ground relied on was that ABRL had failed to file briefs of evidence as had been directed on 5 October 2020; and that this default had occurred against a long history of non-compliance with directions in both the Authority and the Court.

[10] At the time scheduled for the telephone directions conference, an attempt was made by the Registrar to contact Ms Vanderberg, but there was no response to the cell phone number she had previously given. There was accordingly no appearance for ABRL.

[11] In a minute which I issued that day, I noted that there had been a failure to file briefs of evidence in accordance with the Court's direction. I also recorded that advice of the new hearing date had been sent by email and by letter sent to the address which Ms Vanderberg had provided at the previous telephone directions conference; and that an email was also sent that gave notification of the intended telephone directions conference. There had been no acknowledgment of receipt of these communications.

[12] I also recorded that the Registrar had arranged for a copy of the rescheduled hearing date to be held by staff of the Palmerston North Registry on the original hearing date, 2 March 2021. This was to be given to any representative of ABRL who may have arrived at the court in expectation of a hearing. The Court understands no representative of ABRL attended the court for the purposes of a fixture that day.

[13] As there was no evidence ABRL intended to advance its challenge, I vacated the fixture for 30 March 2021.

[14] I directed that service of Mr Lane's application to strike out the proceeding was to be served on ABRL at its email address, at its registered office, and at any other likely address that came to counsel's attention. A copy of my minute of 15 March 2021 was to be served with those documents.

[15] On 3 August 2021, Mr Drummond, counsel for Mr Lane, filed a memorandum stating service had occurred as directed. He said email service had occurred on 7 April 2021, and personal service at ABRL's registered office had occurred on 23 April 2021, via a New Zealand Courier track and trace process.

[16] An affidavit of service sworn on 3 November 2021 verifies these details. I am satisfied that the application for strike out was properly served.

[17] This Court has jurisdiction to strike out a proceeding for want of prosecution. This jurisdiction arises via r 15.2 of the [High Court Rules 2016](#) and r 6 of the [Employment Court Regulations 2000](#).

[18] It is well settled that where a plaintiff has been guilty of inordinate delay in prosecuting a claim, which is inexcusable, and there is serious prejudice to the defendant, a strike out order may be made.²

[19] I am satisfied that there has been significant non-compliance with the Court's directions. This is against a background of silence and lack of engagement on the part of the company in the Authority including failure to engage in mediation; failure to file a statement of reply to Mr Lane's statement of problem; and failure to attend an investigation meeting.

[20] The challenge was filed in late 2019. Since then, there has been no constructive attempt by the company to prosecute its claim, despite opportunities being given to do so, and despite directions being made to progress the company's challenge.

[21] I accept that Mr Lane has been prejudiced. He has incurred legal costs in dealing with his opposition to the challenge. On advice, he has not enforced the orders made by the Authority because of the existence of the challenge. This was not an unreasonable step although no application for a stay had been filed. Further prejudice was thereby caused.

[22] At one stage, the Registrar of Companies indicated consideration was being given to removing the company from the register as it had ceased to carry on business. However, it remains on the register.

[23] In all the circumstances, it is appropriate to strike the proceeding out for want of prosecution.

[24] Mr Lane is entitled to costs. I direct ABRL to pay Mr Lane the sum of \$2,000 as a contribution to his costs within 14 days of the date on which a copy of this judgment is served by Mr Lane on ABRL.

B A Corkill Judge

Judgment signed at 9.35 am on 4 November 2021

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