Employment Court of New Zealand

Awesome Art Limited v Milne [2020] NZEmpC 206 (25 November 2020)

Last Updated: 30 November 2020

IN THE EMPLOYMENT COURT OF NEW ZEALAND WELLINGTON

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

[2020] NZEmpC 206
EMPC 203/2020

IN THE MATTER OF	an application to extend time to file a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for a stay of proceedings
BETWEEN	AWESOME ART LIMITED Applicant
AND	IAIN MILNE Respondent

Hearing:	On the papers
Appearances:	K Jarrett, agent for applicant P Drummond, counsel for respondent
Judgment:	25 November 2020

JUDGMENT OF JUDGE K G SMITH

[1] On 8 June 2020 the Employment Relations Authority dealt with two claims by Iain Milne against his former employer, Awesome Art Ltd.1 Mr Milne claimed that he had been unjustifiably dismissed from his employment as an apprentice signwriter and unjustifiably disadvantaged because of the way the company dealt with him when it was considering the possibility of winding down or closing its business.

[2] While Mr Milne's pleaded claims did not succeed, the Authority decided that the evidence heard during the investigation meeting gave rise to a different personal

1 *Milne v Awesome Art Ltd* [2020] NZERA 222 (Member Loftus).

grievance. It held there was an unjustified disadvantage arising from the way Awesome Art communicated with him and his inability to complete an apprenticeship.2 As a result, Awesome Art was ordered to pay Mr Milne $15,000 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act). There was no order for lost wages, because Mr Milne found replacement employment quickly although not as an apprentice.

[3] Mr Milne was employed by Awesome Art as a signwriting apprentice in 2014 and an apprenticeship agreement was entered into between them. According to the Authority, Mr Milne received a letter from Awesome Art on 29 September 2017 advising him that in the new year it would reduce staff, with work being undertaken by the directors and contractors as required. He was also informed that the more immediate likelihood was that it would operate a four-day week to reduce overheads and enable the directors some respite from their workload.3 Despite what these plans meant for other staff, he was informed that the company would ensure his employment until the conclusion of his apprenticeship.

[4] While that was the position in September 2017, ongoing communication between the company and its employees, including Mr Milne, caused uncertainty about its plans.

[5] On 7 February 2018, after further correspondence and meetings, Awesome Art wrote to its staff, informing them of a decision to gradually close down the business. The Authority held that this letter informed staff that their employment would cease by the end of March 2018. Despite what had been conveyed to Mr Milne in September, he also received this letter.

[6] On 9 February 2018 Mr Milne attended a meeting with the company's owners. Two proposals were discussed at this meeting. One was that he buy Awesome Art's business, a prospect that had previously been raised with him. The other was that he transfer his apprenticeship to a new employer in Wellington. Both proposals were

2 Relying on the Employment Relations Act 2000, s 122.

3. The letters sent to Mr Milne and other staff also went to a company called Jarrett and Associates Ltd, and it is apparent that the two businesses were administered together.

rejected by him. The first one on the grounds of cost and the inability to supervise his own apprenticeship, and the second one because of the location of the proposed new employer. Since these proposals were unattractive he decided to take alternative employment, which began in April 2018.

[7] It was the confusing situation created by Awesome Art that led the Authority to conclude Mr Mason had a personal grievance.

[8] Against that background Awesome Art has made two applications: one labelled as an "application for leave" and the other as an application for a stay of the proceeding. Both applications are opposed.

Application for leave

[9] Awesome Art did not challenge the determination within time.4 After time elapsed it filed the application for leave, expressed as if the Act precluded any challenge at all unless the Court first granted permission for one to be filed. This misunderstanding arose from the company's interpretation of s 174C(4) of the Act which requires a brief explanation.

[10] The right to elect to challenge a determination is conferred by s 179(1). A party dissatisfied with a written determination may elect to have the matter heard by the Court. In conferring that right, s 179(1) refers to challenging a determination under ss 174A(2), 174B(2), 147D(2) and 174C(3).5 Section 174C(3) requires a written determination to be delivered within three months of the investigation meeting ending or the last information has been received.

[11] In this case the Authority's determination was not issued within the three months required by s 174C(3), necessitating the Chief of the Authority agreeing that exceptional circumstances existed to allow it to be delivered after that time had elapsed.6 Seeking and granting that permission is authorised by s 174C(4).

4 Employment Relations Act, s 179(2).

5. Sections 174A(2) and 174B(2) impose time limits on the Authority to deliver written determinations where there has been either an oral determination or an oral indication of preliminary findings.
6. The decision that there are exceptional circumstances is made by the Chief of the Authority; the Act does not specify a test to be applied in making such a decision.

[12] Awesome Art considered that the process of seeking and granting permission for a delayed determination took the decision-making outside the scope of those determinations listed in s 179(1). On this reasoning, the company concluded there was no ability to elect to challenge the decision as of right.

[13] At a telephone directions conference on 17 September 2020 Ms Jarrett, who appeared as an agent for Awesome Art, outlined the company's argument about ss 174C(4) and 179(1). In the minute sent to the parties later that day, her attention was drawn to the relationship between ss 179(1), 174C(3) and 174C(4) and the company was encouraged to take legal advice.

[14] In Ms Jarrett's subsequent submissions she accepted that Awesome Art was not precluded from filing a challenge as it had previously thought. She therefore concentrated on explaining why time should be extended to enable a challenge to be filed. No request was made to amend the application or to supplement the reasons advanced for it and the parties treated what was filed as an application to extend the time to challenge the determination.

[15] The Court has jurisdiction to extend time to challenge a determination.7 What has to be assessed is whether the interests of justice are served by granting leave. The assessment criteria usually applied include:8

(a) The reason for the omission to file a challenge within time.
(b) The length of the delay.
(c) Any prejudice or hardship to any other person.
(d) The effect on the rights and liabilities of the parties.
(e) Subsequent events.

7 Employment Relations Act, s 219

8. *An Employee v An Employer* [2007] ERNZ 295 (EmpC); see also by way of example *Freeborn v Sfizio Ltd* [2020] NZEmpC 87.

(f) The merits of the proposed challenge.

[16] Considering the merits of the proposed challenge has only a limited place in this assessment in light of the Supreme Court's decision in *Almond v Read*.9

[17] In this case the relevant criteria are the reason for the omission to file within time, the length of the delay and the effect on the rights of the parties. They are considered below.

The reason for the omission

[18] Initially Owen Jarrett, a director of Awesome Art, attributed the delay in taking steps to not getting an explanation from the Authority of the exceptional circumstances mentioned in the determination.

[19] With the company's acceptance that it had an unfettered right to elect to challenge the determination there was an appreciable shift in the reasons it gave for not filing one within time. While not wholly departing from the company's argument about s 174C(4), Ms Jarrett's submissions relied on her inexperience, and naivety, as reasons for not filing within time. Mr Drummond, counsel for Mr Milne, did not accept those submissions and drew attention to the company's knowledge and the advice it received before the time limit expired.

[20] I am not persuaded by Awesome Art's explanations. Determinations are accompanied by information about the right to elect to challenge within 28 days. That information was relayed to the company as is evident from emails Ms Jarrett sent and received referring to it. On 12 June 2020, four days after the determination was delivered, she sent an email to an Authority support officer asking for information about the exceptional circumstances referred to. She sought an urgent response and, in doing so, mentioned that a challenge had to be filed within 28 days.

9. *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [36]–[37]; The Court held that where a litigant takes steps to exercise the right of appeal within the required timeframe (including advising the other party), but misses the specified time limit by a day or so as a result of an error or miscalculation and applies for an extension of time promptly of learning of that error, it is not appropriate to characterise that extension as granting an indulgence which would necessarily entitle the Court to look closely at the merits of the proposed appeal.

[21] Ms Jarrett followed up with another email on 18 June 2020 again referring to the 28-day time limit. In this email she commented that time was of the essence, because 28 days from 8 June 2020 was either 3 July or 6 July 2020, depending on how the time limit was calculated. A senior Authority support officer responded the same day, advising Ms Jarrett that the only relevant date was the date of the determination, and emphasising that time ran from 8 June 2020. This email informed her about s 179(1) and the necessity to take steps within 28 days of the date of the determination if it was to be challenged.

[22] It follows that Awesome Art was on notice of what was required in sufficient time before the right to elect to challenge was lost.

[23] Being aware of the looming time limit meant that, for this application to succeed, Awesome Art would have to explain what circumstances resulted in the time limit being missed. It has not done that. It is instructive that the company did not adequately explain what happened from mid-June onwards that prevented a challenge from being filed. It also offered no adequate reason for the delay from 6 July 2020 until the application was filed on 13 July 2020. Ms Jarrett attempted to explain part of this delay by her unfamiliarity with the Court's forms or processes but that was not convincing. Awesome Art's application showed it was able to articulate its concerns and there is no reason to assume it could not have expressed them in a timely statement of claim.

[24] There is one further aspect to this part of the assessment that needs to be discussed. On 6 July 2020 Awesome Art deposited $204.44 in the Ministry of Justice's bank account without any explanation or accompanying documents. That is the amount of the filing fee for a challenge to a determination but making the payment does not assist the company. To file within time compliance with reg 7 of the Employment Court Regulations 2000 requires two things; filing three copies of a statement of claim and paying the filing fee.10 It follows that paying the filing fee without the pleading was ineffective. Furthermore, making the payment supports the

10 Employment Court Regulations 2000, regs 7(1) and 7(3).

conclusion that Awesome Art knew what it had to do but did not take all of the action needed to satisfy the regulations.

[25] I am not satisfied that the omission to challenge on time has been adequately explained. This factor points away from granting an extension of time.

The length of the delay

[26] Ms Jarrett characterised the length of the delay as infinitesimal. That was not a reasonable description because it suggests the delay was somehow trivial or inconsequential and tries to minimise its significance. At seven days I consider the length of delay is better characterised as moderate. On balance, this factor points towards granting leave, but only weakly.

Effects on rights and liabilities

[27] The next relevant criterion is the effect on the rights and liabilities of the parties. If leave is granted there will be an effect on Mr Milne, because he will be deprived of the certainty of the Authority's determination and resolution of the employment relationship problem.

[28] Sometimes striking a balance is possible, to ameliorate some of the effect of granting leave, by requiring the amount awarded by the Authority to be held by the Registrar or a stakeholder in an interest-bearing account pending an order of the Court. In this case, the company did two things to attempt to assist its position. It began making payments of $81.11 per fortnight to Mr Milne without explaining to him why. It then paid the whole of the determination sum to a solicitor where it is being held on deposit in a trust account. The instructions accompanying that payment were not disclosed, so the terms on which it is being held are unknown.

[29] The payment of monthly amounts was explained in submissions. The company began paying off the award by instalments of $100 each, but chose to deduct tax, wrongly assuming the award under s 123(1)(c)(i) of the Act was a taxable sum.11

11 See: Inland Revenue Public Ruling BR Pub 06/05 (30 June 2006).

[30] The fact that the amount awarded by the Authority is being held on deposit goes some way towards reducing an adverse impact on Mr Milne. That situation could be improved if the funds were made the subject of a Court order preventing them from being disbursed until otherwise ordered. This factor points in favour of granting the application.

Other matters

[31] There is another matter that needs to be touched on, but only briefly, before concluding this assessment. Ms Jarrett argued that there is a matter of principle at stake that needs to be debated, because there has been no previous decision of this Court about the Industry Training and Apprenticeships Act 1992.12 She coupled that argument with strong criticisms of the apprenticeship supervisor, seeming to cast responsibility for the outcome of this employment relationship problem onto him, and perceived short-comings in that legislation. That submission was unpersuasive because it ignored the real problem identified by the Authority; how Awesome Art dealt with its employee.

Outcome

[32] Weighing up these criteria, I have decided that the overall interests of justice are best served by declining the application. While some of the criteria pointed towards granting it, they were not particularly strong and are overwhelmingly outweighed by Awesome Art's failure to explain why the time to challenge elapsed without steps being taken by it. That time elapsed not through inadvertence, or omission, but out of a simple failure to act.

[33] The application is dismissed.

Stay of proceeding

[34] The decision to decline the application for an extension of time also disposes of the application for a stay of the proceeding.

12. This statute was repealed and replaced from 1 April 2020: Education (Vocational Education and Training Reform) Amendment Act 2020, s 75.

Costs

> [35] Costs are reserved. The parties are encouraged to agree on them. In the absence of agreement Mr Milne may file submissions within 15 working days and Awesome Art may respond within a further 15 working days. Submissions are to be no more than five pages.

K G Smith Judge

Judgment signed at 2.15 pm on 25 November 2020
