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Bentan Twisted Limited v Stevenson WC15/09 [2009] NZEmpC 49 (11 June 2009)

Last Updated: 22 June 2009

IN THE EMPLOYMENT COURT

WELLINGTONWC 15/09WRC 7/09

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

AND

IN THE MATTER OF an application to extend time for filing a statement of defence

BETWEEN BENTAN TWISTED LIMITED

Plaintiff

AND SHAUN STEVENSON

Defendant

Hearing: On the papers

Appearances: Gary Tayler, advocate for plaintiff

Trent Petherick, counsel for defendant

Judgment: 11 June 2009

INTERLOCUTORY JUDGMENT OF JUDGE A A COUCH

[1] The immediate matter before the Court for decision is an application to extend time for filing a statement of defence. To put this application and my decision into context, however, it is necessary to understand the history of the dispute between the parties.

[2] Bentan Twisted Limited (“the Company”) operates a small bar and restaurant in Hawkes Bay. Mr Stevenson was employed by the Company between August 2007 and May 2008. There arose an employment relationship between the parties which was referred to the Employment Relations Authority and determined by it on 16 February 2009 (WA 14/09).

[3] In its determination, the Authority dealt with five issues. The nature of those issues and the Authority’s conclusions were:

a personal grievance alleging unjustifiable dismissal - *rejected*

a personal grievance alleging unjustifiable disadvantage - *rejected*

a claim for unpaid wages – *upheld in relation to payment for days in lieu of public holidays worked*

a claim for holiday pay – *upheld*

a claim for penalties in respect of:

the unpaid wages - *rejected*

the holiday pay - *rejected*

the failure by the Company to provide Mr Stevenson with a written employment agreement – *penalty of \$500 imposed*

[4] Both parties have now challenged the Authority’s determination. The first to do so was the Company. In a

statement of claim filed on 12 March 2009, it commenced a non de novo challenge to the Authority's interpretation and application of several provisions of the [Employment Relations Act 2000](#) ("the Act") and the [Holidays Act 2003](#). That challenge is before the Court as WRC 7/09.

[5] In a statement of claim dated 13 March 2009, Mr Stevenson also sought to challenge selected aspects of the Authority's determination. His challenge was to the Authority's rejection of his personal grievance claims. Unfortunately, this statement of claim was not filed within the 28 day period prescribed by s179(2) of the Act. Appropriately, he applied for an extension of time. That application was not opposed by the Company and was granted by Judge Shaw in a judgment dated 7 May 2009 (WC 12/09). Mr Stevenson's challenge is now before the Court as WRC 14/09.

[6] In the meantime, the time allowed for Mr Stevenson to file a statement of defence to the Company's statement of claim in WRC 7/09 expired. Accordingly, he has made application for an extension of time for taking that step also. The Company opposes that application and I must now decide it.

[7] Mr Petherick has filed an affidavit in support of the application taking personal responsibility for the delay. He confirms in that affidavit that he suffered an unexpected bereavement of a close relative on 14 April. As a result, he was on leave for more than a week in order to attend a funeral in Central Otago and to deal with the bereavement. He says that this unexpected absence, coupled with the other demands of his practice, led to the delay in filing a statement of defence and that Mr Stevenson was not at fault. I understand this last statement to mean that Mr Stevenson gave Mr Petherick the instructions necessary to draft and file a statement of defence within time.

[8] For the Company, Mr Tayler has filed a document entitled "Notice of Opposition" but which comprises detailed written submissions. These submissions are based on the several issues which Judge Shaw found to be relevant to the exercise of the discretion to extend time in *Stevenson v Hato Paora College Trust Board* [2002] NZEmpC 39; [2002] 2 ERNZ 103. These include the reason for the delay, the length of the delay, any prejudice to third parties, the effects on the rights and liabilities of the parties, subsequent events and the merits.

[9] There is no doubt that these are appropriate considerations in the exercise of the discretion to extend time under s 219 of the Act but it must always be remembered that the overriding consideration is the justice of the case.

[10] Dealing firstly with the length of the delay, it appears there is a minor dispute between the parties about when the Company's statement of claim was served on Mr Petherick. For the purposes of this application, however, a difference of one day more or less is of little significance. I proceed on the basis that the application to extend time, accompanied by a draft statement of defence, was filed 13 days after the expiry of the 30 day period in which the statement of defence ought to have been filed.

[11] Were this an application for an extension of time in which to initiate proceedings in the Court, this would have to be regarded as a substantial and significant delay. Where an extension of time is sought for filing a statement of defence to proceedings already before the Court, however, the significance of delay will be less – see the reasoning in my decision in *An Employee v An Employer* [2007] ERNZ 295 at paragraph [17].

[12] Turning to the reasons given for the delay, Mr Tayler invites me to conclude that Mr Petherick's approach to timeliness "*would smack of complete disregard for the statutory obligations owed to this Court*". I reject that proposition. While it may be said that the explanation offered by Mr Petherick for the delay lacks detail and precision, it is nonetheless a reasonable and acceptable explanation for much of the time in question. I also accept that, in even the best regulated professional practices, there can be occasional oversights.

[13] Mr Tayler submits that the Company will be prejudiced by an extension of time being granted because it will lose the opportunity for its challenge to be decided swiftly and economically on an undefended basis. Had the Company's challenge been to findings of fact, there may have been some substance in this submission in the sense that evidence given by its witnesses would not be subject to cross-examination. In this case, however, the Company's challenge raises questions of law involving statutory interpretation. Whether or not Mr Stevenson is heard, the Company will have to persuade the Court that the proper interpretation of the statutory provisions in question is other than that adopted by the Authority. It must also be observed that the Company will have to respond to Mr Stevenson's challenge regardless of the outcome of this application so that any saving to the Company overall would be minimal.

[14] In part F of his submissions, Mr Tayler mounts a strong attack on the merits of any defence Mr Stevenson might raise to the Company's challenge. This is a somewhat surprising submission given that Mr Stevenson would effectively be defending the considered determination of the Authority. I am not willing to dismiss the Authority's conclusions on a preliminary view of the matter and without the benefit of submissions. It seems to me at present that the issues raised by the Company's challenge are arguable both ways.

[15] Standing back and looking at the matter as a whole, I find that the justice of the case requires that the extension of time sought be granted. The draft statement of defence filed with the application will now be regarded as the statement of defence.

[16] This matter should now be the subject of a call-over in conjunction with Mr Stevenson's challenge, WRC 14/09.

[17] Costs in relation to this application are reserved.

Judge

Judgment signed at 4.15 pm on 11 June 2009

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