Employment Court of New Zealand

Das Transport Limited v Kirkwood [2010] NZEmpC 48 (30 April 2010)

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Last Updated: 5 May 2010

IN THE EMPLOYMENT COURT

WELLINGTON

[2010] NZEMPC 48

WRC 3/10

IN THE MATTER OF an application for leave to challenge out of time

BETWEEN DAS TRANSPORT LIMITED Intending Plaintiff

AND HAYDEN KIRKWOOD Intended Defendant

Hearing: 30 April 2010 (by telephone conference call) (Heard at Wellington)

Appearances: John Gwilliam, Counsel for Intending Plaintiff

Leo Watson, Counsel for Intended Defendant

Judgment: 30 April 2010

JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] Should DAS Transport Limited (DAS) have leave to challenge out of time

the determination of the Employment Relations Authority issued on 13 November

2009[1] finding Hayden Kirkwood to have been dismissed unjustifiably and granting him monetary remedies?

[2] Because it affects the question of how and when the Authority's determination was received by DAS, it is necessary to describe briefly the nature of the Authority's investigation meeting. This took place at Wellington 12 November

2009. The company was not represented at that meeting. It had, however,

participated earlier in the process including by filing a statement in reply to Mr

Kirkwood's statement of problem of his grievance in mid January 2009. The

Authority's determination records that although mediation was arranged in March

2009, this did not occur because no representative of DAS attended. A further mediation arranged for early June 2009 did not proceed for the same reasons. There was, however, mediation on 23 June 2009 but the matter did not settle.

[3] In mid August 2009, the company's lawyer advised the Authority that he was

no longer acting for the employer. The determination records that the lawyer, Michael Gould, declined to give the Authority his former client's contact telephone numbers or its changed address and the company itself took no steps to contact the Authority or to communicate these details to it. Not surprisingly then, the Authority sent advice to the company's current address for service notifying it of a scheduled telephone conference to take place in early September. It appears that the company took no further part in preparations for the Authority's investigation of Mr Kirkwood's grievance. At the preliminary conference on 3 September 2009 the Authority directed an investigation meeting to take place on 12 November 2009 and required the company to provide witness statements by 29 October 2009. The Authority's determination confirms that a copy of these directions and a record of the conference, together with a notice of the investigation meeting, was sent to the company's address for service but again there was no response.

[4] Very shortly before the scheduled investigation meeting new counsel representing the company, Mr Gwilliam, contacted the Authority on 10 or 11 November 2009 saying that although he had been instructed about a month previously, he was unable to attend the Authority's investigation meeting on 12

November 2009 because of his involvement in another case for another client on that day. The Authority declined Mr Gwilliam's request for an adjournment and declined

to direct the case to further mediation. It proceeded with its investigation meeting on

12 November 2009 in the absence of the company or any representative of it.

[5] The evidence in support of the company's application for leave is provided

by an affidavit sworn by Tania Stewart, a director and shareholder of the company authorised to give evidence on its behalf. Ms Stewart asserts that the company only received notice of the Authority's investigation meeting about a week before its

scheduled date of 12 November 2009 and that it therefore had insufficient time to instruct counsel, Mr Gwilliam, who was unable to represent the applicant at the investigation meeting in any event.

[6] Ms Stewart asserts that although the Authority's determination is dated 13

November 2009, it was not received by the company's solicitor until 17 November

2009. Ms Stewart says that a copy of the determination was e-mailed to her by Mr Gwilliam on 19 November 2009. She says that Mr Gwilliam was instructed to challenge the Authority's determination and those instructions were conveyed to him

on 27 November 2009. That was, of course, still well within the 28 day period after the Authority's determination during which there was a right of challenge. Ms Stewart says that Mr Gwilliam was engaged in a High Court trial during the week 7

to 11 December 2009, that she and her co-director, David Stewart, were both in Australia and unable to instruct counsel, and that they assumed that the 28 day period within which to challenge by right ran from the date on which the Authority's determination had been received, that was 17 November 2009.

[7] During the hearing Mr Gwilliam admitted that it was he who was mistaken about the period for filing a challenge and so advised his client. I also understood him to say that at least part of the reason for the delay after about 15 or 16 December

2009 was that he considered that the Registrar's advice that the proceeding had been filed out of time was erroneous and he was considering challenging this. I do not intend any disrespect to counsel when I suggest that it is a bold lawyer who does not

act immediately on a Registrar's advice about such a matter, even if he or she checks later.

[8] The intending plaintiff says that in these circumstances the proceedings were filed in the Employment Court on 14 December 2009 but, because they were then out of time, on the following day the papers were returned to Mr Gwilliam who was invited to apply for leave to challenge out of time.

[9] At about the same time, on 14 December 2009, a copy of the intended statement of claim (although not signed or sealed by the court) was served on Mr Kirkwood's solicitor and, in fact, a statement of defence to this was filed

subsequently. The application for leave to file a late challenge was not made until 5

February 2010 although the intended defendant was made aware of that intention on

or very shortly after 14 December 2009 so that, in this sense, the company was about three days (or one working day) late.

[10] There is no adequate explanation for the delay from 14 December 2009 until

5 February 2010, that is between the company and its solicitor becoming aware that

it was out of time and the filing of the application for leave. Although this period includes the Christmas and New Year holiday period, it is not insignificant that there

is no explanation for the period of 10 days or so from 14 December 2009 to Christmas or for the period consisting of at least half of January and the first week of February 2010.

[11] The intending plaintiff says that the fact that Mr Kirkwood filed a statement

of defence to what was, in reality, a draft statement of claim (although styled a statement of claim) indicates, in combination with the fact that the service was only a matter of a few days after the expiry of the period, that there can really have been no prejudice to Mr Kirkwood. The intending plaintiff says that the delay in notifying the Court and Mr Kirkwood of its intention to challenge was minimal.

[12] Mr Kirkwood opposes the company's application for leave on a number of grounds. First he points out that s 179(2) of the Employment Relations Act 2000 (the Act) provides clearly that a challenge to a determination of the Authority must

be made within 28 days after the date of its determination. It is plain and well known that it is not the date of receipt by the parties of the determination which starts the clock running. The challenge ought to have been filed by 12 December

2009, yet the statement of claim is not itself dated until Tuesday 14 December 2009.

[13] Next, Mr Kirkwood emphasises that this is just the latest example in a pattern

of behaviour by the company since the grievance was first raised which has been characterised by delay, obstruction, and an unwillingness to engage in a resolution of the problem.

[14] Mr Kirkwood says that he will be significantly prejudiced if leave is granted because it is now almost two years since he raised his employment relationship problem in mid May 2008 and no compensation or other remedy has yet been provided to him. He says that he was affected by distress and financial pressures which arose from the events at work with the intending plaintiff and that he is continuing to incur further costs associated with defending the challenge.

[15] Finally, Mr Kirkwood points out that the application for leave does not address at all the merits of the case as the Court is entitled to expect following a strong finding on the merits in favour of him in the Authority. The intended defendant says that the Court will more effectually dispose of the matter according to the substantial merits of equities by dismissing the application for leave.

[16] Addressing the established criteria for an application such as this, I find as follows.

[17] The reason for the initial delay in challenging within the 28 day period has been explained although not entirely satisfactorily. The subsequent delay from realisation of that error until the application for leave was made has not been explained satisfactorily at all.

[18] The extent of the delay from the time of expiry of the 28 day period and bringing to Mr Kirkwood's notice the company's intention to challenge is minimal.

[19] There is no prejudice to Mr Kirkwood arising from the period between the expiry of the 28 days and the bringing to his notice of the intention to challenge. Although, as with most litigants who learn of an appeal brought right at the end of the period within which it may be by right and asserting prejudice by reason of delay of finality, Mr Kirkwood cannot in truth be said to have been prejudiced by the short delay, at least in a way that cannot be compensated for by conditions attaching to the leave.

[20] Finally, the tests include an assessment of the merits of the challenge. The company has not addressed at all the merits of Mr Kirkwood's personal grievance

for unjustified constructive dismissal. That is all the more surprising because the Authority's determination contains strong findings of serious maltreatment of Mr Kirkwood in his employment leading to what the Authority found was his enforced resignation from it that constituted a constructive dismissal. There is, however, simply no information before the Court as to the merits of the company's case.

[21] Although only by a fine margin, I consider that the interests of justice require leave to be given to the intending plaintiff to bring its challenge but on three conditions.

[22] The intending plaintiff has leave to bring its challenge out of time on the following conditions that will be enforced strictly. The first condition is that it pays

to the Registrar of the Employment Court at Wellington, to be held on interest bearing deposit for disbursement by order of the Court, the sum of $20,027.38, such sum to be paid no later than 4 pm on Friday 7 May 2010. The second condition attaching to the grant of leave is that the challenge must be prosecuted promptly. The third condition affects costs and is set out at the conclusion of this judgment.

[23] The sum to be paid in and held by the Registrar is made up as follows. It consists, first, of the sum of $19,585.33 being the compensation awards and costs allowed by the Employment Relations Authority and as set out in its certificate of determination dated 24 March 2010. Added to that sum is the interest directed by the Authority to be paid at the rate of 6 per cent per annum on wage arrears of $736 calculated from 27 May 2008 to 7 May 2010 being the sum of $78.38. Finally, the amount consists of an additional $363.67 being interest calculated at the rate of 4.75 per cent (the 90 day bill rate plus 2 per cent at the relevant time) on the sums awarded by the Authority totalling $19,585.33 calculated from 13 November 2009 (the date of the Authority's determination) to 7 May 2010.

[24] If the conditions relating to payment in and costs are met by the intending plaintiff, I call for a report under s 181 of the Act from the Authority as was intimated in the first minute issued by the Court on 9 February 2010. For that purpose, the Registrar should send a copy of this judgment to the Authority member (Mr Denis Asher) if those conditions are met.

[25] The intending plaintiff should be clear that if it fails to satisfy these conditions, then leave will not be granted to challenge out of time, and Mr Kirkwood will be at liberty to enforce his Authority determination against the company.

[26] Although leave has been granted following an opposed application, I consider that the most just course on costs is to require the intending plaintiff to meet the intended defendant's reasonable costs of participating in this hearing. This was certainly not a case in which Mr Kirkwood could be expected other than to oppose the application for leave in view of the background in the Authority. Mr Kirkwood should not suffer financially for being essentially an unwilling participant in this aspect of the case. He is entitled to costs on this application of $1,500. It is a further condition of this grant of leave that Mr Kirkwood's costs are paid within seven days from the date of this judgment.

GL Colgan

Chief Judge

Judgment signed at 4.30pm on Friday 30 April 2010

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[1] WA178/09
