Employment Court of New Zealand

Detection Services Limited v Pickering [2013] NZEmpC 36 (15 March 2013)

Last Updated: 25 March 2013

IN THE EMPLOYMENT COURT AUCKLAND

[2013] NZEmpC 36

ARC 56/12

ARC 6/13

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

AND IN THE MATTER OF application to extend time

AND IN THE MATTER OF an application for stay

BETWEEN DETECTION SERVICES LIMITED Applicant

AND CHRISTOPHER LORRAINE PICKERING

Respondent

Hearing: 1 March 2013

(Heard at Auckland)

Counsel: Simon Dench, counsel for applicant

Stephen Langton and Ronelle Tomkinson, counsel for respondent

Judgment: 15 March 2013

INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE CHRISTINA INGLIS

[1] These proceedings have a tangled history, although they remain in their early stages. There are two applications before the Court – an application for an extension of time to file a challenge and an application to stay a costs determination of the Employment Relations Authority (the Authority).

Application to extend time

[2] It is necessary to understand the background to the proceedings to put the application in context.

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[3] The respondent pursued two separate claims before the Authority. One related to an alleged underpayment/failure to pay a bonus said to be owing to the respondent (the bonus proceeding).1 The other related to a claim of unjustified dismissal (the unjustified dismissal proceeding).2 Both claims were allocated

different case numbers, but were heard together by the Authority. A determination[3]

was issued on 31 July 2012. The Authority found the respondent's dismissal was unjustified and awarded $10,000 non-economic loss (reduced by 50 per cent by way of contribution). No award was made for lost salary on the basis that there was insufficient evidence in respect of mitigation. The Authority found that the respondent was entitled to a bonus of $117,351

and awarded that amount in his favour.

[4] On 27 August 2012, and within the 28 day timeframe for doing so, the applicant filed a de novo challenge relating to the whole of: "the determination of case no. 5350102, which comprised the [respondent's] claim for payment of a bonus and which was heard together with case no. 5353837 [unjustified dismissal claim]."4

[5] The same day, counsel for the applicant (Mr Dench), wrote to counsel for the respondent advising that the applicant had not filed a challenge to the unjustified dismissal determination as the award of $5,000 (reduced from $10,000 for contribution) in the respondent's favour did not, in its view, warrant such a step. Nevertheless counsel advised the respondent that, should the respondent choose to reopen the dismissal, it would do the same.

[6] On 26 September 2012 the respondent filed a non-de novo cross-challenge to aspects of the Authority's determination relating to the unjustified dismissal determination. The challenge was limited to the question of remedies. Unsurprisingly the respondent did not seek to challenge the Authority's finding that

he had been unjustifiably dismissed.

1 NZERA 5350102.

2 NZERA 5353837.

3 [2012] NZERA 260.

4 At [3] Statement of Claim, filed 27 August 2012.

[7] By way of letter of the same date, the applicant notified the respondent that it would be reopening the unjustified dismissal determination beyond the issues raised by the respondent, and challenging the Authority's finding of unjustified dismissal. This was consistent with the approach that counsel for the applicant had previously flagged. The application to extend time for filing a challenge followed, and has been staunchly opposed by the respondent.

[8] The proposed statement of claim challenges de novo the finding of unjustified dismissal and pleads that the respondent's contribution should be 100 per cent, not 50 per cent as assessed as appropriate by the Authority. The applicant submits that leave should be granted, essentially for reasons of fairness. Most particularly it is said that if leave is not granted the respondent will effectively control the scope of the proceedings as he will decide the scope of the cross- challenge.

[9] The respondent submits that as the applicant exercised its election under s

179 to challenge only one part of the Authority's determination it has no further right to elect to challenge any other parts of the Authority's determination. It is submitted that ss 219 and 221 (which relate to the validation of informal proceedings and extensions of time) have no application, as the plaintiff has already exercised his right of election. Counsel for the respondent, Mr Langton, described this as a jurisdictional stumbling block for the Court. I disagree.

[10] Section 179(1) provides that:

A party to a matter before the Authority who is dissatisfied with the determination of the Authority or any part of that determination may elect to have the matter heard by the court.

[11] Section 179(3) provides that:

The election must-

(a) Specify the determination, or part of the determination, to which the election relates; and

(b) State whether or not the party making the election is seeking a full hearing of the entire matter [a hearing de novo].

[12] Mr Langton places particular emphasis on the word "matter" in s 179, submitting that the right of election (which he contends may only be exercised once) is linked to the matter that was before the Authority. He accepts that this case comprised two proceedings before the Authority but says that each proceeding was not a separate "matter" for the purposes of s 179, and so no additional right of election arises. Mr Langton relied on the broad definition of matter adopted in *Sibly*

v Christchurch City Council,5 where the full Court confirmed that "matter" is to be

given a wide meaning for the purposes of s 179.

[13] On one analysis Mr Langton is correct. The justifiability of the respondent's dismissal was a matter before the Authority during the course of its investigation, and is referred to in its subsequent determination. However, that overlooks the fact that the Authority was investigating two separate cases which, for convenience, it heard together. It then issued a determination in relation to each case (referring to both case numbers in its determination, and dealing with them separately

– including in its subsequent costs determination), albeit within one overall determination. In reality the applicant exercised a right of election in relation to the matter before the Authority in its bonus payment determination, and provisionally decided against

exercising a right of challenge against the determination of case number 5353837.6

[14] Mr Langton submitted that such an approach was overly technical and would result in "procedural gymnastics", requiring multiple elections and differing time periods for cross challenges to be filed. He suggested that this would run counter to the current practice (reflected in the Chief Judge's Practice Note)7 of there being one challenge followed by one cross-challenge. Two points can be made in relation to this. Firstly, the Practice Note is directed at singular rather than multiple determinations of the Authority. Where the Authority has, in the exercise of its

procedural powers, investigated two proceedings at the same time the determination of each proceeding gives rise to a right of challenge, and cross challenge. I do not

regard such a process as overly complex.

5 [2002] NZEmpC 76; [2002] 1 ERNZ 476 at 488.

6 The Authority dealt with costs associated with each claim on an individualised basis, in its determination of 29 January 2013 ([2013] NZERA Auckland 28), namely awarding $10,000 on the bonus claim and $14,000 in relation to the personal grievance.

7 [2005] ERNZ 60.

[15] Secondly, the Practice Note states, under the heading "Amended Challenges"

that:8

...

(b) where the initial statement of claim was limited to a challenge to a specified part of the decision and the amended statement of claim has sought to extend that appeal to other aspects of the decision.

[10] ... an amended statement of claim altering the scope of the challenge requires leave if out of time.

[16] Although the Practice Note uses the terminology of an amended statement of claim, it suggests that a new part of the determination may be challenged with leave of the Court if out of time. This suggests that if a plaintiff decides to change the election from non de novo to de novo during the 28 day window for challenge no leave is required.

[17] The applicant failed to file a challenge within time in relation to the matter before the Authority in its determination of the unjustified dismissal claim. In these circumstances the Court has jurisdiction to consider an application for leave to extend time. And because the applicant had not filed a challenge, there was nothing for the respondent to cross-challenge. As Mr Dench pointed out, the respondent's challenge to the Authority's unjustified dismissal determination is also out of time and similarly requires leave.

[18] However, even if I am wrong on the dual determination point I do not accept the narrow reading of s 179 advanced on the respondent's behalf. While it is evident that the provision contemplates one election in terms of whether a de novo or non de novo challenge is being advanced, there is no express restriction on a party's ability to revisit that election. Nor do I consider that there is anything in s 179, or the Act more generally, that requires such a restriction to be read in. It would mean that a party who had filed a challenge within time would be stuck with the scope of the challenge elected at that early stage, restricted in his/her/its ability to later seek to

extend the challenge or the basis on which it was to be pursued (de novo or non de

8 [2005] ERNZ 60 at [9]-[10].

novo). That has never been the approach of the Court,9 and runs counter to the underlying purposes of the Act.

[19] While counsel was unable to identify any cases directly on point, the issue was touched on in *Nelson v Fletcher Steel Limited.*10 There the Chief Judge considered an application for leave to amend a statement of claim challenging a determination of the Authority. Originally Mr Nelson had filed the challenge electing a non de novo hearing to a specific aspect of the Authority's determination. He subsequently wished to change that election to one by hearing de novo. The

Chief Judge observed that the Practice Note requires such a variation to be by leave of the Court and said:11

I should say something first about the tests applicable to an application such as this. Initially both counsel appeared to rely on the line of cases and the tests set out in them where applications to appeal or to challenge out of time are made.

...

I do not think that the tests applied by courts (including this Court) for leave to appeal or challenge out of time where no appeal within time has been brought, are entirely apposite. Here, an appeal or challenge has been brought within time. What is sought is leave to alter by addition the nature of the challenge. A better analogy would be to the line of cases where a party seeks to add a cause of action before trial to an existing proceeding where of course that cause of action is within time. But even if there is an analogy with the leave to appeal out of time cases, the essential test to be applied by the Court is the same, that is whether the interests of justice of the case warrants the grant of leave or not.

[20] If, as I have found, the applicant's challenge to the bonus proceeding is distinct from the unjustified dismissal proceeding, leave to extend time for filing a challenge is now required. If it is not properly regarded as a separate proceeding, and a challenge has already been filed within time, it is questionable whether leave is required until setting down (which has not yet occurred). And even if it is required at this stage, the ultimate test remains the same, namely whether the grant of leave

would be in the overall interests of justice.

9 See for example, although in relation to the Employment Contracts Act 1990, the approach in *Lang v*

Shirley WEC27/95, 28 April 1995.

10 AC 18/08, 26 May 2008.

11 At [3]-[4].

[21] The respondent submits that if ss 219 and/or 221 apply, the Court's discretion should be exercised against the grant of leave. Four points are made in support of this submission. Firstly, that the additional and late challenge would introduce a new subject and issue for the Court's determination, which is materially different to those which the parties have elected to challenge pursuant to s 179. Secondly, that the plaintiff has no good and/or just excuse why it should be permitted to elect another part of the Authority's determination which it previously elected not to challenge, particularly given that the applicant was aware of the time limits and was legally represented. Thirdly, it is submitted that the respondent would be prejudiced if the application was granted, in that he based his election to challenge other parts of the Authority's determination, on a non-de novo basis (in reliance on the applicant's election) and a full hearing de novo of the unjustified dismissal personal grievance claim would represent a financial hardship for him. Finally, it is submitted that the merits of the applicant's proposed challenge to the Authority's determination that the respondent was unjustifiably dismissed are weak.

[22] The respondent concedes that the applicant is not required to file an amended statement of claim to challenge the parts of the Authority's determination relating to contribution and mitigation. That is because the respondent has elected to challenge those parts of the determination. In these circumstances this aspect of the application can be put to one side.

[23] Section 219 provides as follows:

219 Validation of informal proceedings

(1) If anything which is required or authorised to be done by this Act is not done within the time allowed, or is done informally, the court, or the Authority, as the case may be, may in its discretion, on the application of any person interested, make an order extending the time within which the thing may be done, or validating the thing so informally done.

(2) Nothing in this section authorises the court to make any such order in respect of judicial proceedings then already instituted in any court other than the court.

[24] Section 221 relates to joinder, waiver and extension of time. It provides:

221 Joinder, waiver, and extension of time

In order to enable the court or the Authority, as the case may be, to more effectually dispose of any matter before it according to the substantial merits and equities of the case, it may, at any stage of the proceedings, of its own motion or on the application of any of the parties, and upon such terms as it thinks fit, by order,—

...

(c) subject to section 114(4), extend the time within which anything is to or may be done; and

...

[25] The principles for the exercise of the Court's discretion to make orders extending time are well established. The overriding consideration is the justice of the case. A range of factors may be relevant, depending on the circumstances of the

case, including the reason for the omission to bring the case within time; the length of the delay; any prejudice or hardship to any other person; the effect on the rights and liabilities of any person; and the merits of the substantive case.12

[26] I am not drawn to the respondent's submission that he would be prejudiced if leave to extend time was granted. He was on notice, from the time the original challenge (relating to the bonus proceeding) was filed and served, that the reason why no challenge was being pursued in relation to the unjustified dismissal determination was that it was not considered economic to do so. However, the respondent was also put on notice that if he chose to put aspects of that determination into issue on a challenge to the Court then the applicant would do so too.

[27] Mr Langton submitted that a deliberate decision not to challenge within time, made for tactical reasons, does not amount to a justifiable reason that excuses the applicant from filing its challenge within time. However, the situation must be viewed in the context in which it arose, including the fact that the respondent was on notice in relation to the applicant's position on the unjustified dismissal determination, and the fact that the respondent subsequently chose to file a non de

novo challenge without (apparently) earlier warning to the applicant. It seems that

12 *Stevenson v Hato Paora College Trust Board* [2002] NZEmpC 39; [2002] 2 ERNZ 103 at [8].

tactics played a role more broadly. It is not uncommon for parties to consider the economics of pursuing appellate processes, and to decide against it unless the other party elects to do so. The respondent was squarely on notice of the applicant's position in relation to this.

[28] While I accept that an expanded challenge may give rise to additional costs to the respondent, those costs would have arisen had the applicant pursued the challenge in relation to both determinations within the 28 day period. They do not arise as a result of the delay itself.13

[29] It is for the applicant to show that the matter being advanced out of time has some reasonable prospect of success. If not, then the discretion ought not to be exercised in favour of allowing the late filing.14

[30] The applicant points to the Authority's finding that while the respondent's dismissal was unjustified it nevertheless had valid concerns about his honesty and his ability to fulfil his obligations to his employer to act ethically. The applicant submits that this finding bolsters the prospects of successfully challenging the Authority's findings as to justification.

[31] The respondent submits that the proposed challenge will be definitively answered by an application of *Sky Network Television Ltd v Duncan.*15 There it was essentially held that an employee cannot be justifiably dismissed on the basis of an assertion of a right that is in dispute. In the present case the respondent argues that he was dismissed based on an incorrect assumption as to who owned the technology in question. The Authority found that:16

Mr Simmons' refusal to investigate the issue of ownership by undergoing an inspection process destroyed the possibility of a fair investigation and a resolution.

[32] Mr Dench submitted that *Sky Television* is distinguishable from the present case and, if taken to its logical conclusion, no employer could ever justify the

13 *Stevenson* at [12].

14 *Pacific Plastic Recyclers v Foo* [2002] NZEmpC 64; [2002] 2 ERNZ 75 at [24].

15 [1998] NZCA 246; [1998] 3 ERNZ 917 (CA).

dismissal of an employee. *Sky Television* is a Court of Appeal judgment that is binding on this Court. I accept that it is likely to strengthen the respondent's argument that the dismissal was unjustified. However, much will depend on the way in which the evidence relating to the dismissal and the circumstances surrounding it comes out at any hearing.

[33] The Authority held that aspects of Mr Pickering's behaviour during the course of his employment impacted negatively on the employment relationship and adversely affected the performance of his duties.17 It found that the way in which he had behaved cast considerable doubt on his ability to continue in his role as general manager, as his employer's ability to trust him had been impaired.18 The Authority concluded that the employer's conclusion that Mr Pickering could no longer be trusted to act in the best interests of the company or to act honestly or ethically on behalf of the business was valid.19

[34] The justification for the dismissal will need to be assessed having regard to all of the circumstances. I do not consider, at this early stage, that it can confidently be stated that the ratio of *Sky Television* presents an insurmountable stumbling block for the applicant as contended for by the respondent. The Authority's factual determinations, including in relation to contribution (which the applicant argues should be 100%), provide some support for the applicant's submissions as to the strength of its case.

[35] Having weighed the matters identified on each of the party's behalf I grant the application for leave to extend time for

filing a challenge in relation to the Authority's unjustified dismissal determination. I have concluded, for reasons set out above, that the respondent's challenge was also out of time. I did not understand Mr Dench to be arguing that a formal application is required, or that leave would be opposed. In the circumstances, leave is also granted in relation to the respondent's

challenge.

17 At [84].

18 At [89].

[36] The applicant must file and serve its challenge in relation to the Authority's

unjustified dismissal determination within seven days from the date of this judgment.

Application for stay of Authority's costs determination

[37] The applicant has applied for a stay of the Authority's costs determination20 dated 29 January 2013. Interim orders were made, by consent, until final determination of the application.

[38] The Authority awarded the respondent $92,408.00 by way of costs. A significant component of the award related to the reimbursement of the fees of an expert witness, who had been instructed by the respondent.

[39] The applicant seeks a stay on the grounds that it has concerns that the respondent will be unable to repay the applicant in the event the applicant succeeds with all or parts of its challenge and that the respondent may also attempt to avoid repayment in that event. These matters are more fully traversed in Mr Simmons' affidavit.21

[40] The respondent opposes the application for a stay, deposing that he will be able to repay the costs award if the applicant's challenge succeeds. He is the sole director and shareholder of a company which holds assets with equity sufficient to meet any repayment obligation following a successful challenge. He also says that a family trust owns a property and that he has recently purchased a business. He deposes that once profits on the business are being made he would be in a position to repay the company, if the company's challenge succeeded.

[41] Mr Pickering says that he would be prejudiced if a stay was granted, as his financial position is not strong and he was counting on the Authority's costs award to pay off his expert's fees ($42,000 of which remain outstanding) and his ongoing legal costs. He says that his ability to pursue a challenge to aspects of the

Authority's unjustified dismissal determination would be prejudiced, and he may

20 [2013] NZERA Auckland 28.

21 Dated 13 February 2013.

need to discontinue his claim. This, it is submitted, would limit the respondent's access to the Courts, which should not lightly be denied, particularly where (as is alleged here) the applicant has put the respondent in the position he now faces by unjustifiably dismissing him. Finally, he makes the point that the proceedings have placed a huge stress on his family and that if a stay was ordered the financial strain would impose an additional burden on his wife and children.

[42] The starting point is s 180 of the Act. It provides that orders of the Authority remain in full force and effect unless the Court, or the Authority, orders otherwise. It follows that Mr Pickering is entitled to have the Authority's costs order enforced, unless a stay of proceedings is granted. The power to grant a stay is discretionary. The overriding consideration is the interests of justice. While Mr Langton sought to argue that the threshold for leave ought to be high, reflecting the unique nature of employment relationships and the circumstances in which many challenges come

before the Court,22 I do not think that it is necessary to place an additional gloss on

the approach previously adopted by the Court. As the Court of Appeal in *Duncan v*

*Osborne Buildings Ltd*23 observed, albeit in a different context:24

In applications of this kind it is necessary carefully to weigh all of the factors in the balance between the right of a successful litigant to have the fruits of a judgment and the need to preserve the position in case the appeal is successful. Often it is possible to secure an intermediate position by conditions or undertakings and each case must be determined on its own circumstances.

[43] The applicant is concerned that the respondent will either not be able to meet any costs award because of his current financial position or will take steps to avoid any obligation that arises. The second concern is said to be supported by an alleged incident involving the respondent communicating with a third party. There is no evidence that the respondent has a

history of breaching court orders or of flouting his financial obligations. I do not consider that there is a sufficient basis for the applicant's expressed concerns about deliberate default and I put them to one side. The point is, however, that the litigation raises issues about personal liability, rather

than the liability of any of the companies in which the respondent has an interest.

22 Including where a plaintiff has been dismissed, and seeks to challenge the justification for such an action.

23 (1992) 6 PRNZ 85 (CA).

24 At 87, cited in *Hanover Grove Ltd v Finnigan* AC41/06, 31 July 2006 (EC) at [13].

[44] The applicant's concerns relating to the respondent's present, and future, ability to pay are based on the ownership structures of the assets which he has an interest in but no direct ownership over. This raises the spectre of legal issues that would need to be overcome in order to trace any money owed and to extract it. Counsel for the respondent accepted that this was relevant. The applicant says that its concerns are exacerbated by a paucity of evidence relating to the respondent's personal financial position, including what (if any) debts or liabilities he has. I accept that that is so.

[45] Also relevant to a consideration of the application is an assessment of the merits of the challenge: *Keung v GBR Investment Ltd*.25 In this regard counsel for the applicant says that, depending on the outcome of the substantive challenge, the positions may be reversed, with the respondent owing the applicant costs. Particular issue is taken with the quantum of the Authority's award, with full reimbursement of Mr Walker's fees (of $66,658.00) without (it is said) an assessment of whether those

fees were reasonably incurred and whether a different approach ought to be followed to such expenses in the Authority applying the principles expressed in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*.26

[46] The Authority's starting point in relation to expert fees appears to have been that the full amount ought to be awarded, "in principle".27 On any analysis the award is high and it is not immediately apparent, on the face of the determination, that detailed consideration was given to whether or not the expenses were reasonably incurred in the circumstances. While the Authority has a broad discretion to award costs, that discretion must be exercised in accordance with principle. I accept that there are a number of arguments that are likely to weigh in favour of the applicant's challenge to the Authority's costs determination, including whether full

reimbursement of expenses for expert witnesses is appropriate having regard to the intended cost effective, low level, and speedy nature of proceedings in that forum. I

do not accept Mr Langton's assessment that the prospects of success are low.

25 [2010] NZCA 396 at [11].

26 [2005] NZEmpC 144; [2005] ERNZ 808 at [44].

27 At [20].

[47] The respondent says that the overall balance of convenience does not favour the grant of a stay, having particular regard to the fact that an investment property would need to be sold to fund the litigation and there are assets that can be realised to repay the costs award, should that become necessary. It is submitted that any risk to the applicant that the respondent might seek to dissipate his assets to avoid having to repay any costs award may be countered by the expressed willingness of the respondent, as sole shareholder and director of a company with assets, to be subject to an order that the equity in one of its properties not be reduced below $100,000. While such a proposal is, on one level, attractive it does not adequately address the concerns identified by the applicant in relation to the likely legal complexities of any enforcement action, if that becomes necessary.

[48] At the end of the day, a balancing exercise is required, having particular regard to the overall interests of justice. Standing back and considering the matters identified by both parties I am satisfied that a stay, on conditions, is appropriate. Mr Dench offered to release $10,000 to the respondent, with the balance of the Authority's award to be paid into Court. I consider that such a proposal is reasonable in the circumstances.

[49] The Authority's costs determination will be stayed on the following

conditions and until the disposal of the challenge:

(a) The applicant will pay to the respondent the sum of $10,000 within 7 days of the date of this judgment;

(b) The balance of the award made by the Authority in relation to costs is to be paid into Court and is to be held on an interest bearing account as security in the event the challenge is unsuccessful, with the proceeds to be paid out according to the

judgment of the Court.

[50] Costs on these two applications are reserved, at the request of the parties.

Christina Inglis

Judge

Judgment signed at 12 noon on 15 March 2013
