Employment Court of New Zealand

Industrial Services Nelson Limited v Stewart [2010] NZEmpC 21 (10 March 2010)

Last Updated: 17 March 2010

IN THE EMPLOYMENT COURT

CHRISTCHURCH [2010] NZEMPC 21CRC 9/09

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

BETWEEN INDUSTRIAL SERVICES NELSON LIMITED
Plaintiff

AND JUDY STEWART
Defendant

Hearing: 3 February 2010

(Heard at telephone conference)

Appearances: Geoff Brodie, counsel for plaintiff
Stephen Thomas, counsel for defendant

Judgment: 10 March 2010

INTERLOCUTORY JUDGMENT (No 2) OF JUDGE B S TRAVIS

[1] The plaintiff company has applied for an order extending the time for filing its statement of claim. This application is opposed by the defendant.
[2] The grounds for the application were that in my interlocutory judgment of 7 December 2009 (CC 20/09), dealing with a "good faith report", I noted that the defendant in her submissions filed on 24 September 2009, had stated that she had yet to be served with the plaintiff's statement of claim. I stated this would raise issues as to the plaintiff's compliance with regulation 12 of the Employment Court Regulations 2000. This regulation requires the plaintiff, as soon as practicable after filing a statement of claim, to serve a copy on the defendant. I directed, in paragraph [23] that the statement of claim should be served within seven days of the date of my 7 December judgment.
[3] By this stage the plaintiff had instructed solicitors in Christchurch to take over the conduct of this dispute. The grounds for the application for leave were that by oversight the previous counsel who received my judgment did not draw the contents of this direction to the attention of the plaintiff and the direction was therefore overlooked. The application for leave pleaded that the interests of justice required that the plaintiff should have a proper opportunity to be heard as there was no prejudice to the defendant.
[4] The application was supported by an affidavit of the previous counsel representing the plaintiff. He deposed that on about 8 December 2009, he received a memorandum from the Employment Court in relation to the matter which he copied and placed in an envelope and forwarded it to the plaintiff's Christchurch office. It was not until receipt of a minute of mine, dated 16 December, drawing attention to the defendant's claim that the statement of claim had not yet been served upon her in breach of the order I made on 7 December, that the application for leave was filed.
[5] The leave application and a previous application by the defendant to have the challenge struck out was scheduled for hearing on 5 February.

[6] Prior to the hearing, Mr Thomas, the defendant's advocate, filed extensive submissions in opposition and by the time of the hearing, counsel for the plaintiff, Mr Brodie, had not received these. I considered that Mr Brodie must have the opportunity of responding.
[7] In a minute dated 8 February, recording the events that had taken place on 5 February, I noted that in substance the opposition amounted to a strike out application because if leave was not granted the challenge, not being able to be served, would have failed. The considerations that apply to a strike out application, for example the assumption that the plaintiff will be able to prove its case at the hearing, will therefore need to be taken into account by analogy. I noted that the defendant had suffered additional anxiety and concerns as she had considered that the plaintiff was not pursuing the matter and, because of her appreciation of the plaintiff's financial situation, she had doubts as to whether she would ever be paid the remedies she was awarded by the Authority. I suggested that some of those concerns might be allayed if the parties were prepared to adopt a solution that I suggested at the end of the chambers hearing.
[8] This suggestion was that the remedies, which Mr Thomas calculated totalled $17,445.74, should be paid into Court by the plaintiff, together with the sum of $3,000 as security for costs on the challenge, and be held in an interest bearing account by the Court until further order.
[9] The challenge would then be able to proceed and be disposed of in the usual way. Mr Brodie indicated that he would need to take instructions, having only recently been instructed in the matter. He sought two weeks to have that opportunity and advised that in the meantime, by 4pm on 12 February, he would advise the Court and the defendant whether the plaintiff would adopt the Court's suggestion of the payment into Court of the amounts of the remedies and security for costs on the challenge.
[10] On 12 February 2010 Mr Brodie filed a memorandum seeking an extension of time until 4pm on Tuesday 16 February to indicate whether the plaintiff was prepared to voluntarily pay the judgment amount into Court. The defendant's advocate advised that although the defendant was frustrated she did not oppose the extension and it was duly granted.
[11] On 19 February 2010 the registry was advised that the plaintiff did not agree to the proposal to make the payment into Court and the matter would therefore have to proceed to a further fixture. Mr Brodie advised that this could be dealt with by way of a telephone conference. He also advised that he had now seen Mr Thomas's submissions and was able to commit to filing submissions in reply by Monday 22 February.
[12] On 26 February 2010 I issued a minute in response to a memorandum from Mr Thomas pointing out that the plaintiff had not filed its submissions and seeking to have the matter dealt with on the material presently before the Court. From enquires of the registry it appeared that attempts to contact Mr Brodie had been unsuccessful. I therefore directed that unless the plaintiff's submissions were filed and served by 4pm on Friday 1 March 2010 the matter would be determined on the material currently before the Court. The submissions have not been filed within that time.

The plaintiff's initial submissions

[13] In a memorandum filed on 23 December 2009, counsel for the plaintiff referred to the inadvertence in not following the direction to serve the statement of claim within seven days. After investigating the matter, once new solicitors were instructed, they filed an application for an order extending the time on 23 December 2009. The new counsel did not have any formal address for service for the defendant. On 24 December 2009 the defendant was apparently sent by email a copy of counsel's covering letter which listed the documents to be served and asked her to confirm her address for service. As no reply had been received by midday all the documents were placed in the post and apparently received by the defendant around New Year.
[14] Mr Brodie referred to a minute of the Chief Judge issued on 24 December, referring to the application to extend the time for service of the statement of claim and noting that that application did not indicate whether the statement of claim had yet been served and directing that it be attended to immediately. Counsel for the plaintiff expressed his regrets for the inconvenience to the defendant but submitted that the delay in the case was not so serious as to justify depriving the plaintiff of its statutory entitlement to have this case, which involves serious accusations against the company, heard in Court.

Defendant's submissions

[15] The defendant's opposition included an affidavit from her setting out the plaintiff's various delays since she first raised her personal grievance in July 2008, and referring to the failure to pay her any money pursuant to the Authority's determination dated 19 June 2009. The defendant also expressed increasing stress as she believes the chances of her successfully recovering the remedies awarded reduces considerably as time goes on.
[16] In addition an affidavit of Ian Bruce Stewart, apparently no relative of the defendant, was also filed. Mr Stewart deposes that he was made redundant by the plaintiff on 4 June 2009 and for approximately the last eight months of his employment there was little work to do in his area and virtually no stock in the store, and he witnessed no substantial work being carried out at the site. His evidence suggested that the plaintiff may well be impecunious. Although there has been no written application I have taken the submissions of Mr Thomas and his responses during the chambers conference to amount to an oral application for security if his prime submission

that the extension should not be granted is not upheld.
[17] Mr Thomas submitted that the onus is on the applicant to prove that an extension for time should be granted. He referred to *An Employee v An Employer*[1] where the Court noted that the discretion under s 219 of the Employment Relations Act 2000 must be exercised judicially and in accordance with established principles. He submitted that the overriding factor is the justice of the case and the matters which would go to the exercise of the discretion included the extent of the delay, the reason, whether there is prejudice, the surrounding circumstances and the merits of the substantive case.
[18] Mr Thomas invited the Court to take the same approach to the plaintiff's failure to serve the statement of claim as soon as practicable, in terms of reg 12 of the Regulations and its failure to comply with the direction in the interlocutory judgment.
[19] Addressing the length of delay, there being two separate ones, he submitted that in relation to reg 12 approximately 154 days had passed from the filing of the statement of claim on 2 July 2009 to the service of a copy on the defendant. He submitted this should be considered a gross delay. The delay after 14 December in terms of my direction was nine days and again he submitted this should not be tolerated.
[20] He contended that the plaintiff's evidence made no comment as to why the statement of claim was not served as soon as practicable in terms of reg 12. It also did not assist the plaintiff because the affidavit of the former counsel did not cover the period after 18 November 2009. He therefore submitted there was no evidence before the Court that explained either of the delays.
[21] Mr Thomas claimed that the defendant had been prejudiced in the sense of a disruption to the finality that exists after time has passed in which to appeal a decision and that in itself is a serious detriment capable of being regarded as prejudicial, citing *Bilderbeck v Brighouse Ltd.*[2]
[22] There was evidence that the defendant had informed the Court and the plaintiff in September 2009 that she was yet to be served with a statement of claim, as a result of which I made my direction on 7 December. Failing to act in terms of that direction meant, in Mr Thomas's submission, that the defendant was entitled to assume that the matter would be going no further. He also referred to her emotional and financial stresses as deposed by her in her affidavit and the real possibility that the plaintiff is no longer carrying on significant business.
[23] In dealing with the surrounding circumstances, Mr Thomas asked the Court to turn its attention to the fact that the plaintiff had made no payment to the defendant pursuant to the determination of the Authority. This, he submitted, amounted to an abuse of the system given that significant extra costs would be incurred by the defendant in trying to enforce the determination. He also referred to the penalty of $2,000 payable to the Crown which had not been paid even though my first interlocutory judgment limited the plaintiff's challenge to liability for the constructive dismissal alone.
[24] Mr Thomas submitted there was a well documented trail of missed judicial deadlines and attempts to postpone them and in such circumstances the plaintiff should have been vigilant in meeting deadlines and the Court should not tolerate any further breaches. He then addressed the merits of the challenge which he submitted was an attempt to re-run the arguments before the Authority, where the plaintiff was unsuccessful and had chosen not to fully participate in the investigation. Mr Thomas relied on the factual findings in the determination and contended that the plaintiff's challenge did not have a reasonable prospect of success. In all these circumstances he submitted the factors were sufficient for the Court to exercise its discretion not to grant the leave sought by the plaintiff.
[25] As an alternative, he submitted following *Pani v Transportation Auckland Corporation Ltd*[3] that any extension should be granted on conditions which on the evidence should include a requirement that within 21 days of the interlocutory judgment the plaintiff pays to the Registrar of the Court, the sum of $17,445.74 being the amount due to the defendant as at 5 February 2010 to be held on interest bearing deposit and for disbursement by either agreement of the parties or according to a judgment of the Employment Court.

Conclusion

[26] As I have observed above, there have been no submissions by the plaintiff in response to Mr Thomas's detailed submissions. The only material that has come in since that time is the indication from Mr Brodie that his client does not agree to make the payment into Court and suggesting there might need to be a further fixture.
[27] As my interlocutory judgment of 7 December 2009 demonstrates, there have been a series of failures on the part of the plaintiff to comply with time limits or to make submissions in a timely manner. I concluded that the plaintiff had not participated in the matter in a manner designed to resolve the issues involved and restricted the plaintiff from a hearing of the entire matter de novo. I restricted the hearing only to the question of liability for constructive dismissal, and directed that the Authority's findings as to quantum should stand.
[28] The conduct of the plaintiff since the time of that judgment has not engendered any confidence in its wish to properly engage in pursuing its challenge.
[29] Mr Thomas's well presented submissions almost persuaded me not to grant the leave sought by the plaintiff. The one factor that led me to conclude that leave ought to be granted was Mr Brodie's invocation of the plaintiff's statutory right to pursue its challenge, albeit in the limited form that I have ordered. For this reason leave is granted but, in order to deal with the prejudice the defendant has undoubtedly suffered, I accept Mr Thomas's

submission that leave should be on the condition that he has suggested.

[30] This would have been the effect had an application for stay or security for costs been formally before the Court but, as I have previously noted, it has been raised informally, and there is evidence from the defendant which supports the need for such a condition.

[31] I therefore grant the plaintiff the order it seeks extending time for serving the statement of claim or varying the direction I made on 7 December 2009, by determining that the service of the statement of claim that has already taken place be deemed to be proper service but on the condition that, within 21 days from the date of this judgment, the plaintiff pays into the registry of the Employment Court at Wellington the sum of $17,445.74. This sum is to be held in an interest bearing deposit account for disbursement by further order of this Court. If such sum is not paid, or an extension of time for such payment is not granted by the Court on an application made before the expiration of the 21 days, then the challenge by the plaintiff will be struck out.

[32] Costs are reserved.

B S Travis
Judge

Judgment signed at 4.15pm on 10 March 2010

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[1] [2007] ERNZ 295 at 298.
[2] [1993] NZEmpC 77; [1993] 2 ERNZ 74.
[3] AC 45/09, 3 December 2009.
