



Employment Court of New Zealand

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Johnston v Fletcher Construction Company Limited [2018] NZEmpC 118 (9 October 2018)

Last Updated: 19 October 2018

IN THE EMPLOYMENT COURT
AUCKLAND

[\[2018\] NZEmpC 118](#)
EMPC 381/2017

IN THE MATTER OF proceedings removed from the
Employment Relations Authority
AND IN THE MATTER OF an application for an extension of time
to file evidence
BETWEEN GRANT JOHNSTON
Plaintiff
AND THE FLETCHER CONSTRUCTION
COMPANY LIMITED
Defendant

Hearing: On the papers
Appearances: T Drake and Mark Donovan, counsel for
plaintiff R Upton, counsel for defendant
Judgment: 9 October 2018

INTERLOCUTORY JUDGMENT (NO 2) OF CHIEF JUDGE CHRISTINA INGLIS

(Application for an extension of time to file evidence)

[1] The defendant has filed a belated application (by way of memorandum of counsel) for an extension of time to file its briefs of evidence and the bundle of documents. The application was filed the last working day the briefs of evidence were due, and after the close of business.

[2] The defendant proposes filing briefs of evidence for three witnesses – Ms Hatlauf, Ms Morris and Mr King. Mr King is said to be one of the defendant’s primary witnesses. An extension is sought in relation to each: one day for Ms Hatlauf, to 12 October for Ms Morris, and to 19 October for Mr King. The defendant also seeks an extension of time for filing the bundle of documents, to 24 October 2018.

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[3] The application for an extension in relation to the briefs of evidence of Ms Morris and Mr King, and the bundle of documents, is opposed for reasons set out in a memorandum of counsel dated 9 October 2018.

[4] The application follows an earlier unopposed application for leave to file a second amended statement of claim. However, as Mr Drake (counsel for the plaintiff) points out, the reasons said to support the application for an extension of time are not related to the amended pleadings. Rather, they have to do with counsel availability and the availability of Mr King, who is said to be on a cruise in Cuba and in intermittent contact. He is thought to be due back in New Zealand in a week’s time and will be available to finalise his brief of evidence after that.

[5] The timetabling orders for filing and serving briefs of evidence and the bundle of documents were made more than three months ago (namely 5 July 2018), and were made by agreement. The dates for trial were set by the Registrar in consultation with counsel, and presumably once counsel had made inquiries as to witness availability. The timetable for

filing briefs of evidence built in an opportunity for the plaintiff to file evidence in reply. The plaintiff's briefs of evidence were due (and were filed) on 24 September 2018; the defendant's briefs were due on 8 October 2018; and the plaintiff's briefs of evidence in reply were to be filed and served by 15 October 2018. The defendant was to file the bundle of documents by 19 October 2018. The hearing is set down to commence on 29 October 2018.

[6] As will be evident, the defendant's proposed extensions significantly conflate the time that would otherwise have been available to the plaintiff in terms of trial preparation, including in terms of preparing and filing evidence in reply. Mr Drake says, and I accept, that the defendant's proposal that any potential prejudice can adequately be addressed by deferring Mr King's evidence until a later date during the hearing would not sufficiently ameliorate the issues he has identified.

[7] I am not satisfied, based on the material before me (including the limited information in relation to why Mr King's evidence could not have been briefed in advance of his Cuban holiday if availability during the holiday was going to present

difficulties, and why counsel's current commitments could not otherwise have been factored into trial preparation), that the extensions sought should be made.

[8] In the circumstances, and balancing the interests of both parties, I make the following orders:

- (a) By agreement, the defendant is to file and serve the brief of evidence of Ms Hatlauf by 5 pm today, 9 October 2018.
- (b) A four-working-day extension of time is granted in relation to the filing and service of the briefs of evidence of Ms Morris and Mr King. That means that their evidence is to be filed and served no later than 5 pm on 12 October 2018.
- (c) The plaintiff will have a four-working-day extension of time to file and serve any evidence in reply. That means that any evidence in reply is to be filed and served by 5 pm on 19 October 2018.
- (d) The bundle of documents is to be filed and served by the defendant no later than 5 pm on 19 October 2018.

[9] If the defendant considers it appropriate to advance an application for an adjournment, such an application would need to be adequately supported by affidavit evidence and would need to be filed and served within the four-working-day extension of time I have granted to the defendant for filing and serving the briefs of evidence of Ms Morris and Mr King.

[10] The plaintiff is entitled to costs on this application, the quantum of which will be set following the hearing.

Christina Inglis Chief Judge

Judgment signed at 4.15 pm on 9 October 2018

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