Employment Court of New Zealand

Lorigan v Infinity Automotive Limited [2018] NZEmpC 88 (1 August 2018)

Last Updated: 6 August 2018

IN THE EMPLOYMENT COURT
AUCKLAND
[2018] NZEmpC 88 EMPC 377/2015 EMPC 277/2016
EMPC 215/2017

IN THE MATTER OF	challenges to determinations of the Employment Relations Authority
AND IN THE MATTER	of proceedings removed
AND IN THE MATTER	of an application for joinder
BETWEEN	PETER D'ARCY LORIGAN Plaintiff
AND	INFINITY AUTOMOTIVE LIMITED Defendant

Hearing:	19 July 2018 (heard at Auckland)
Appearances:	P Lorigan, in person R Towner and B Norrie, counsel for defendant
Judgment:	1 August 2018

INTERLOCUTORY JUDGMENT (NO 3) OF JUDGE B A CORKILL: APPLICATION FOR JOINDER

Introduction

[1] This interlocutory matter resolves an application for joinder in anticipation of a substantive hearing scheduled for 3 September 2018.

[2] Contrary to statements made by Mr Lorigan in the operative statement of claims filed in this Court that at all material times Infinity Automotive Ltd (Infinity) was his employer, he now wishes to assert otherwise. He argues that four companies

related to Infinity should be joined because one or more of them may in fact have been his employer.

[3] Infinity strongly opposes the application on the grounds Mr Lorigan has no viable claims against those companies, and there are insurmountable substantive and procedural hurdles not the least of which is delay.

Background

[4] The background to Mr Lorigan's claims has been explained in two previous interlocutory judgments.1 For present purposes, it suffices to say that on the basis of Mr Lorigan's current pleadings, it is alleged Infinity:

a. breached the obligations of good faith which were owed to Mr Lorigan;

b. was responsible for diverse unjustified actions which constitute a continuing pattern of conduct towards him thus constituting an unjustified disadvantage personal grievance;

c. unjustifiably dismissed him;

d. is responsible for the unlawful enforcement of a restraint of trade provision; and
e. breached his employment agreement by failing to pay commissions.

[5] A range of remedies have been sought.

[6] For its part, Infinity has also issued proceedings, alleging that after the termination of Mr Lorigan's employment he breached the confidentiality obligations in his individual employment agreement (IEA); it claims an injunction, a compliance order, and a range of financial orders including a penalty.

1. *Lorigan v Infinity Automotive Ltd* [2017] NZEmpC 153 at [3]- [13]; *Lorigan v Infinity Automotive Ltd (No 2)* [2018] NZEmpC 63 at [4].

[7] Under a timetable which was set out by the Court in a minute dated 17 April 2018, a four-day hearing is scheduled to commence on 3 September 2018 to resolve a question as to whether Mr Lorigan is able to pursue a personal grievance for unjustified disadvantage (EMPC 377/2015); the Court will consider alternatively whether he should be granted leave to pursue such a grievance out of time under s 114 of the Employment Relations Act 2000 (the Act) (EMPC 277/2016).

[8] After imposing that timetable, several interlocutory issues arose which were resolved in my judgment of 1 June 2018.2 I concluded that decision by stating that I expected the parties would then concentrate on preparing for the September hearing, for instance by preparing their witness statements as previously directed, and their legal submissions. To ensure that that would become the focus of the hearing of the two challenges, I directed that no further application could be filed prior unless special leave to do so had first been granted by the Court.3

[9] On 20 June 2018, Mr Lorigan filed his application for joinder of the four companies which are related to Infinity – Sime Darby Motor Group (New Zealand) Ltd (SDMG), Sime Darby Automobiles NZ Ltd (SDA), North Shore Motor Holdings Ltd (North Shore) and Perry's Automotive Group (North Shore) Ltd (Perry's). In a minute dated 11 July 2018, I granted special leave for Mr Lorigan to bring this application, stating that it would be unsatisfactory to conduct a substantive hearing with there being an unresolved question as to whether the correct parties were before the Court. I directed an urgent hearing of the joinder application, which took place on 19 July 2018.

History of issues as to identity of parties

[10] I refer to the key events which are relevant to the application for joinder. Some of these events will need to be discussed in more detail later.

[11] SDMG is involved in the motor trade industry and has a number of wholly owned subsidiaries. According to the evidence, it is not an operating company itself.

2 *Lorigan (No 2),* above n 1.

3 At [78].

Subsidiaries include Infinity, SDA, North Shore, and until it ceased to exist, Perry's. At all material times, these entities operated as the Sime Darby Group.

[12] In this Court, Mr Lorigan has asserted that he was employed by Infinity and that he worked for "associated persons pursuant to contracts for services". Before the Court are contracts of that nature between Mr Lorigan on the one hand, and North Shore on the other.

[13] On 14 April 2009, an IEA was signed between Perry's and Mr Lorigan, backdated so as to be effective from 24 March 2009. As will be discussed later, Mr Lorigan pleaded that this document was signed under duress, and he now informs the Court that he considers it to be void.

[14] On 31 May 2009, Perry's amalgamated under Part 13 of the Companies Act 1993 (the CA) with two other companies in the Sime Darby Group. The evidence is that as a consequence of the amalgamation, Infinity assumed the rights and obligations of the amalgamating companies, including those of Perry's. That company was then removed from the Companies' Register and ceased to exist.

[15] On 31 January 2010, it is asserted that Mr Lorigan's employment was terminated by reason of redundancy. Two days prior to that, a lawyer acting on behalf of Mr Lorigan raised a personal grievance, asserting that the termination of employment was an unjustified dismissal. There followed an exchange of correspondence between the parties.

[16] On 8 July 2011, Mr Lorigan's lawyer wrote to lawyers acting for Infinity. The lawyer stated that Mr Lorigan wished to proceed with his claim "against Perry's". However, in a further letter written a few days later, on 15 July 2011, she noted that Perry's had amalgamated with two other companies in May 2009 to become Infinity. In that letter, she went on to state that a range of unjustified actions occurred as from November 2008; these implicated not only Infinity, but also its parent company SDMG. This was put on the basis that cumulatively, events leading up to and surrounding Mr Lorigan's dismissal were unlawful. From then on, those advising Mr Lorigan proceeded on the basis that a personal grievance was being pursued

against both these entities. The notification of the claim against SDMG was more than 90 days after the alleged dismissal, but no application for leave to bring that claim out of time has ever been brought under s 114 of the Act.

[17] On 21 September 2012, counsel acting for Mr Lorigan filed a statement of problem, which cited Infinity and SDMG as respondents. It was asserted that Mr Lorigan had been an employee of those entities between October 2008 and (in effect) March 2009. It went on to state that on 14 April 2009, Mr Lorigan was told that he had to sign an IEA with Perry's, or he would have no job. It was pleaded that when he signed the IEA, he had yet to receive the legal advice which he had requested, but as he could not afford to be without work and believed the agreement would be withdrawn if he did not sign, he did so.

[18] On 28 November 2012, counsel for Infinity wrote to Mr Lorigan's counsel stating that SDMG had never been Mr Lorigan's employer, that it had not been alleged in the statement of problem that it was a joint employer of Mr Lorigan, and there was no evidence of an employment relationship with that entity.

[19] As a result, on 19 December 2012, counsel for Mr Lorigan filed an amended statement of problem which asserted that both Infinity and SDMG were joint employers from 23 October 2008 to 29 January 2010, "owing to the degree of the relationship between these companies". No particulars of that relationship were given. Even at that stage, no application to extend time to bring a personal grievance against SDMG had been filed. As I shall elaborate later, this factor is relevant to the exercise of the Court's discretion to join SDMG.

[20] The next material matter is that the Authority investigated the issue of parties, on the basis of this pleading. It is necessary to refer to the resulting determination4 not because the Court necessarily agrees with the findings which were made, but so as to be clear as to the scope of the issues that were considered by the Authority, and then which of those issues were brought to this Court by way of challenge. In other words,

4 *Lorigan v Infinity Automotive Ltd (No 2)* [2015] NZERA Auckland 357.

the scope of the Authority's determination is relevant when determining the extent of the issues which the Court is now permitted to reconsider, as a matter of law.5

[21] Three preliminary issues were considered by the Authority. The third of these was whether Mr Lorigan had ever had an employment relationship with SDMG, and therefore whether the claim against that entity should be dismissed.6

[22] The Authority recorded the respondents' position, which was that Mr Lorigan had only ever been employed by Infinity after the amalgamation with Perry's, and then only for the relatively short period from 24 March 2009 to 31 January 2010.

[23] For Infinity, it was argued that his previous engagements with members of the Sime Darby Group, prior to 24 March 2009, were exclusively as an independent contractor.7

[24] For his part, Mr Lorigan, now acting in person, submitted to the Authority that he was in effect jointly employed by Infinity and SDMG, and that a proper construction of the agreements entered into by him led to a conclusion that he was actually an employee throughout the period in question.

[25] The Authority reviewed extensive evidence, including documents. It found that an argument Mr Lorigan was employed not just by Infinity but also by SDMG would not avail him, given that the pre-March 2009 engagements (whether on an employment or contractual basis) were with North Shore.8 The Authority stated that it could not be right that just because North Shore was a member of SDMG, any employee of that entity was somehow also an employee of SDMG.

[26] Commenting on the post-March 2009 period, the Authority found that Mr Lorigan had entered into an IEA with Perry's/Infinity, and there was no evidence that SDMG was a party to that agreement.9 Although Perry's, and then Infinity, were part of the Sime Darby Group, a fact referred to in the IEA, that was insufficient to

5 Under the Employment Relations Act 2000, s 179.

6 At [15].

7 At [53].

8 At [71].

9 At [73].

somehow make such an entity a party to the agreement. The Authority also found that the evidence was very clear that Mr Lorigan was to be part and parcel of the Perry's/Infinity business, and not part and parcel of any other business within the Sime Darby Group.10

> [27] The Authority found that for the purposes of the period from March 2009 to January 2010, the relationship was in reality between Mr Lorigan and, (following the amalgamation) Infinity.
>
> [28] The Authority was accordingly satisfied that Mr Lorigan was never employed by SDMG, and as a consequence, the claim against that entity was struck out.11
>
> [29] On 11 December 2015, a non-de novo challenge was brought to that determination by Mr Lorigan. The challenge related only to the second of the three preliminary issues determined by the Authority: that is, to the question of whether a personal grievance for unjustifiable disadvantage had been raised within time. It is to be noted that the statement of claim raising the challenge asserted that Mr Lorigan was employed by Infinity from 24 March 2009 to 31 January 2010, and that prior to that time he had worked under contracts for services (that is, independent contracts); it was not asserted that prior to that date he had worked under contracts of services (that is, IEAs).
>
> [30] This was the position until Mr Lorigan brought on his recent application for joinder.

Joinder principles

> [31] Section 221 of the Employment Relations Act (the Act) bestows a wide discretion on the Court to direct a party to be joined, so as to "more effectually dispose of any matter before it according to the substantial merits and equities of the case". Joinder is a step which may be taken at any stage of the proceedings.

10 At [75].

11 At [85].

> [32] There are numerous cases where the language used in this section has been discussed, whether in this Court or in the High Court where a similar rule operates. The key principles are not controversial. I refer to those which are relevant for present purposes.
>
> [33] One of the leading authorities is the decision of Henry J in *Taylor v McDougall*, where the Court stated:12

The defendant's must also show that the presence of the [joined party] *may be necessary to enable the court effectually and completely to adjudicate and settle* that question. Those words mean more than saying that the court can adjudicate upon the point as between the plaintiff and defendants. Of course the Court can do so in any properly constituted action disclosing a cause of action and a valid ground of defence. But the rule, as I read it, entitles a party to have the issue or issues *effectually and completely* adjudicated upon *and settled*.

> [34] This has been construed to mean that an applicant for joinder must show a tenable cause of action in the sense that the cause of action would be sufficient to survive a strikeout application on well-known strikeout principles, Randerson J made this point in *Bridgeway Projects Ltd v Webb*:13

It must also be remembered that a plaintiff seeking to join an additional defendant at a late stage must satisfy the court that it should exercise its discretion to make the order. The more substantial the plaintiff's case, the better the prospects will be of persuading the court that joinder should be made notwithstanding possible detriment caused to other parties through any cost or delay necessarily entailed if joinder is granted.

> [35] In short, in exercising the Court's discretion to allow joinder, it is necessary to consider the merits of the case which would be brought against the party for whom joinder is sought.
>
> [36] I propose to consider the application with regard to each of the four named companies separately, and on the basis of those principles.

12 *Taylor v McDougall* [1963] NZLR 694 (SC) at 696.

13. *Bridgeway Projects Ltd v Webb* CP453/02, 7 July 2003 at [12]. See also *New Zealand Insurance Co Ltd v Hinton Hill & Coles Ltd* [1996] NZHC 1660; (1996) 9 PRNZ 615 at 619.

Sime Darby Motor Group (New Zealand) Ltd

[37] As already mentioned, SDMG is the holding company of a number of wholly-owned subsidiaries which operate as separate businesses. The evidence is that it only employs individuals who perform common functions that cover the entire group, such as senior leadership, payroll services, IT and HR functions.

Is the issue relating to SDMG before this Court?

[38] It is first necessary to consider whether issues pertaining to SDMG are before the Court. As is evident from the sequence of events to which I referred earlier,14 it was originally pleaded for Mr Lorigan in the amended statement of problem as filed in the Authority that SDMG was one of two employers, the other being Perry's or Infinity.15 It was also asserted in the same pleading that at all times Mr Lorigan was an employee.

[39] Subsequently, these allegations were investigated by the Authority; as mentioned, this was the third preliminary issue resolved by the Authority in its determination of 13 November 2015.

[40] The question then arises as to whether a challenge was brought to those conclusions thereafter. It was not. As already stated, the only issue that was challenged was the second preliminary issue relating to the question of whether a disadvantage grievance had been raised.

Is there any impediment to that issue being brought to the Court?

[41] Since a challenge on these matters was not brought in time, if Mr Lorigan were to be able to argue that he was an employee from October 2008 onwards, and that (at least) one of his employers was SDMG, the grounds for bringing a challenge of the Authority's determination out of time would have to be established. The merits of that likely application is relevant to the exercise of the discretion which the Court must exercise when deciding if an order of joinder is to be made.

14 Above at [17]-[19].

15 The circumstances of the amalgamation of these entities is discussed in more detail below.

[42] In this particular case, it is therefore necessary to consider the criteria which would apply to an application to bring a grievance out of time, and to consider its prospects of success judged against those criteria. If the potential application for leave is doomed, joinder will in my view be inappropriate.

[43] A convenient summary of the applicable principles for such an application for leave is contained in *An Employee v An Employer*.16

[44] In that judgment, Judge Couch referred to the standard factors which are considered when deciding whether the justice of the case lies in granting an extension of time under s 219 of the Act, as follows: 17

a. The reason for the omission to bring the case within time;
b. the length of the delay;
c. any prejudice or hardship to any other person;
d. the effect on the rights and liabilities of the parties;
e. subsequent events; and
f. the merits of the proposed challenge.

[45] Judge Couch went on to say:

> [11] In addition to those factors which the Court has found it appropriate to consider in considering whether to extend time for filing a challenge under s 179, I also have regard to the well established principles applicable to applications for extensions of time generally. In *Ratnam v Cumarasamy* the Privy Council said:

The rules of court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules, which is to provide a time table for the conduct of litigation.

16 *An Employee v An Employer* [2007] ERNZ 295 (EmpC).

17. At [9], referring to *Day v Whitcoulls Group Ltd* [1997] NZEmpC 152; [1997] ERNZ 541 at [9] and *Stevenson v Hato Paora College* [2002] NZEmpC 39; [2002] 2 ERNZ 103 at [8].

[12] I also have regard to the general principle summarised by Richmond J in *Avery v No 2 Public Service Appeal Board*:

When once an appellant allows the time for appealing to go by then his position suffers a radical change. Whereas previously he was in a position to appeal as of right, he now becomes an applicant for a grant of indulgence by the Court. The onus rests upon him to satisfy the Court that in all the circumstances the justice of the case requires that he be given an opportunity to attack the judgment from which he wishes to appeal.

(citations omitted)

[46] A key consideration in the present case relates to delay. The delay concerns the period from when the personal grievance allegedly arose, down to the date when the application for joinder was. That delay is very significant. Mr Towner confirmed that it amounted to 922 days.

[47] In considering this factor, it is necessary to assess the reasons for it.

[48] No evidence was filed by Mr Lorigan on this point. At the hearing, he told the Court that it was due to "late knowledge" on his part. He said this was a reference to the fact that he had come to believe, after the challenge had been filed, that "criminal tainting" had occurred, and that witnesses who had given evidence to the Authority on which it relied had perjured themselves.

[49] This is not the first time that very serious assertions of this kind have been made by Mr Lorigan. As on previous occasions, there is simply no evidence to support them. I have referred to the failure to support such assertions with admissible evidence on two previous occasions; first, in my judgment of 6 December 2017 when Mr Lorigan said he believed a witness for Infinity was "cynically continuing to conceal crimes", one of which was witness tampering.18 In the second interlocutory judgment, I recorded that Mr Lorigan had repeated these allegations.19

[50] In those judgments, it was made very clear to Mr Lorigan that proper evidence needed to be filed before such serious allegations could be considered.

18 *Lorigan v Infinity Automotive Ltd*, above n 1, at [54].

19 *Lorigan v Infinity Automotive Ltd (No 2)*, above n 1, at [37], [44], [46] and [52].

Notwithstanding those statements, no reliable evidence in support of these allegations has been placed before the Court for present purposes.

[51] As noted, it appears Mr Lorigan was attempting to suggest that the evidence relied on by the Authority was the result of perjury, and that information concerning the accuracy of that evidence had only recently become available to him.

[52] In fact, it seems that Mr Lorigan has long held the opinion that criminal conduct occurred when he was an employee; indeed, he told his lawyer this at the time. On the evidence before the Court, there is no possible basis for concluding there has been a "late knowledge", or delayed discovery, of the assertions relied on by Mr Lorigan.

[53] The second ground raised by Mr Lorigan to support the alleged delay, was a contention that he had previously applied to this Court for a ruling as to the identity of his employer, and the Court had not dealt with that application. As best can be ascertained from the Court's record, this is a reference to the fact that on 6 April 2017 (still more than six years after the termination), Mr Lorigan sent two documents to the Court, one of which requested a ruling as to whether a "contempt under the Crimes Act" had occurred; the other appeared to raise a question as to the status of the contracts he entered into prior to April 2009. The documents were returned to Mr Lorigan by the Registry because they were not in proper form and could not be accepted for filing. A copy of the Regulations was provided to Mr Lorigan for his information, and he was advised to seek legal advice in respect of any applications he intended to file in this Court. No relevant applications in proper form were filed thereafter, until the current application for joinder was advanced.

[54] As far as the Court is concerned, all applications which Mr Lorigan has filed have been processed and resolved. Mr Lorigan must be regarded as responsible for the delays which have arisen.

[55] Returning to applicable principles which apply to the issue of delay on an application to bring a challenge out of time, the following statements by Judge Couch in *An Employee v An Employer* are apposite:20

> [15] On any view of it, a delay of more than 2 months must be regarded as very substantial or even gross. In *Peoples v ACC*, I analysed the decisions of this Court over many years in comparable cases. This showed that, with one exception, the longest extension of time granted for an appeal or challenge to the Employment Court was 14 days. The one exception was in *Bilderbeck v Brighouse* where Chief Judge Goddard extended time by 20 days.

[16] In *Bilderbeck*, the former Chief Judge described the significance of the length of delay as follows:

Plainly, where the delay is slight and the merits great they will outweigh the delay. Where, however, the delay is substantial the consideration that an appellant may succeed if allowed to proceed may carry less weight. The Court should not encourage stale appeals or come to the aid of appellants who are less than vigilant in the safekeeping of their own rights and interests.

(citations omitted)

[56] The delays which have occurred in this case are extraordinary. Within the particular context in which they have arisen, they do not begin to justify an extension of time to file a late challenge as to part of the determination of 13 November 2015.

[57] Dealing briefly with the other criteria with regard to the filing of a late challenge, there is strong opposition from Infinity, which for the best part of three years has dealt with the litigation in this Court on the basis that there was no dispute as to the identity of Mr Lorigan's employer; arguably there would be prejudice if another party were to be added now. I accept Mr Towner's submission that further interlocutory applications would likely be brought, including an application for strikeout of the joined party. Preparation for the upcoming hearing has proceeded on the basis of Mr Lorigan's pleading that the employer was Infinity.

Other factors relevant to joinder

[58] There is a further issue as to timing which is relevant to the merits of joinder. It relates to the issue of whether a personal grievance has ever been raised against SDMG.

20 *An Employee v An Employer*, above n 16.

[59] The chronology is set out above. Initially a personal grievance was brought against Perry's /Infinity. The possibility of a personal grievance being brought against that entity was not raised until 15 July 2011, by which time an application for leave was necessary because it was not raised within 90 days starting from the date when the alleged grievance arose. Such an application has to be made under s 114, and can only be granted if the Authority is satisfied that the delay in raising the grievance is due to exceptional circumstances. Furthermore, there is a three-year time limit for making such an application as is made clear in s 114(6) of the Act.

[60] As Judge Couch stated in *Sandilands v Chief Executive of the Department of Correction*s, the scope for an extension of the three-year time period imposed by sub-section must be very limited indeed.21 He described it as "a limitation period whose purpose is to prevent stale grievances from being litigated".22 On the basis of the submissions made in this case, I respectfully agree with those observations. This provision would appear to be yet a further hurdle, which I need to take into account when considering whether to exercise my discretion to join SDMG.

[61] Mr Lorigan also said he had laid complaints of corruption and fraud with the New Zealand Police, the Serious Fraud Office, the Commerce Commission, and the Financial Markets Authority, and had lodged a protected disclosure. He implied that he had pursued these initiatives before seeking leave to join further parties.

[62] Mr Towner advised the Court from the Bar that none of these complaints had resulted in any action being taken. On the limited evidence which has been placed before the Court, which apart from anything else is bereft of any details as to when these steps were apparently taken, I must conclude that such complaints are not relevant to a consideration of whether time should now be extended for joinder.

[63] I am also not persuaded that it is necessary to join SDMG so as to adjudicate on the issues which Mr Lorigan wishes to advance. Whilst the focus when considering Mr Lorigan's claims will be on the period of the employment agreement from March 2009 to January 2010, the preceding events may be referred to if they are

21 *Sandilands v Chief Executive of the Department of Corrections* WC23/09, 14 October 2009.

22 At [26].

nonetheless relevant; no plausible reason has been advanced as to why it is necessary to join SDMG who Mr Lorigan says might have been his employer, particularly when the applicable IEA was entered into with one of its subsidiaries. A general assertion that the "lines were blurred" as between the various companies does not entitle the Court to ignore the separate legal identities of the holding company and its subsidiaries. On the face of it, such joinder is not necessary to effectively dispose of Mr Lorigan's various claims, according to the substantial merits and equities of those claims.

[64] There are two other matters which were raised by Mr Lorigan. The first is his broad assertion at the hearing that the IEA he entered into in mid-April 2009 was signed under duress, and is therefore void. An assertion of duress has been pleaded in the amended statement of problem dated 19 December 2012 (now a pleading in this Court as I shall discuss

shortly). However, that pleading does not allege the document is void. In fact, other provisions of the IEA are relied on.

[65] Mr Lorigan argued that having regard to his allegations of duress, he was "stateless", and that this accordingly meant the holding company, SDMG, should be regarded, in effect, as being his employer. The pleadings do not go this far; nor does the evidence provide a satisfactory foundation for such an assertion. Accordingly, I do not agree therefore that this provides an adequate reason to join that company.

[66] For completeness, I refer to a procedural issue which followed the determination of the Authority of 16 August 2017 removing the proceedings to this Court;23 and its minute of 9 October 2017.

[67] Because it was apparent that Mr Lorigan as a self-represented person would have difficulty in re-pleading the removed matters, and on the acquiescence of Mr Towner, I ruled that the statements of problems and statements of reply regarding the proceedings in the Authority would now be pleadings in this Court.24 For the avoidance of doubt, I record that it should not be inferred that SDMG thereby became a party again. Obviously that direction was subject to the subsequent procedural steps

23 *Lorigan v Infinity Automotive Ltd (No 5)* [2017] NZERA Auckland 239.

24 Minutes of 4 September and 10 October 2017.

which had occurred, namely the determination striking out SDMG as a party, and the fact that a non-de novo challenge had then been brought in respect of that determination which did not challenge that striking out.

Conclusion as to joinder of SDMG

[68] In the result, I am not persuaded that the interests of justice require SDMG to be joined. The application to do so is dismissed.

Sime Darby Automobiles NZ Ltd

[69] Mr Lorigan said that this company should be joined, though he was unclear as to why that should be the case.

[70] As Mr Towner submitted, no personal grievance has ever been raised against that company. He submitted that it had never been suggested by Mr Lorigan in correspondence from his various lawyers, or in his statement of problem or amended statement of problem in the Authority, that this company ever employed him.

[71] Again, Mr Lorigan has not filed an application in the Authority for leave to bring a personal grievance out of time against this company, and no intention to do so has ever been expressed. The problems regarding s 114(6), discussed earlier, apply again.

[72] Nor is there any evidence or contention from Mr Lorigan that the company should be party to a claim which is not based on a personal grievance.

[73] I dismiss the application to join this company.

North Shore Motor Holdings Ltd

[74] The evidence is that Mr Lorigan had contracts for services with this company between 24 November 2008 and 23 March 2009.

[75] Again, no application has been filed in the Authority for leave to bring a personal grievance out of time against this company; and again s 114(6) of the Act

would be a very significant impediment to such an application. Nor is any basis for contending there is a claim against this company other than with regard to a personal grievance advanced.

[76] The application to join this entity is dismissed.

Perry's Automotive Group (North Shore) Ltd

[77] As already indicated, the IEA signed by Mr Lorigan on 14 April 2009 was with Perry's. On 31 May 2009, it amalgamated

with Infinity and one further company within the Sime Darby Group, under the provisions of Part 13 of the CA. Infinity became an "amalgamated company".

[78] Section 225(e) of that Act provides that an amalgamated company succeeds to all the liabilities and obligations of each of the amalgamating companies.

[79] Mr Lorigan stated in a memorandum that he was unaware of the amalgamation, and did not consent to Infinity becoming his employer.

[80] The extent of his knowledge is a matter which would have to be resolved by evidence, but I note that on the basis of the evidence which is before the Court at this stage, that by 15 July 2011 his lawyers were able to refer to the fact of the amalgamation between Perry's and Infinity. No issue as to lack of knowledge was raised at that stage.

[81] For completeness, I have considered the question of whether the House of Lords judgment in *Nokes v Doncaster Amalgamated Collieries Ltd* should be followed.25 This decision is authority for the proposition that the right to receive the services of an employee cannot be transferred to another employer without the employee's consent. In New Zealand, the starting point is the finding made by the Court of Appeal in *Wellington City Council v Rasch*, that Parliament could legislate away the right of an employee to choose his or her employer providing the statutory

25 *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014, [1940] 3 All ER 549 (HL).

intention is clearly stated.26 In *Carter Holt Harvey Ltd v McKernan*, the Court of Appeal returned to this topic, considering the position where an amalgamation occurs under Part 13 of the CA. The Court stated:27

In our view employees in New Zealand would be seriously prejudiced if a similar interpretation [to that which was adopted under the UK Companies Act 1929] were to be given to the amalgamation provisions in our Companies Act, since it is impossible for the *obligations* of the amalgamating employer to continue in and be binding upon the amalgamated company if at the same time it does not have the corresponding *benefit* of the employment contract. It would follow that if *Nokes* were good law in New Zealand, employees of an amalgamating company who were unwanted by the amalgamated company might find themselves without any ability to pursue a personal grievance claim because the amalgamating company was deemed to have been dissolved. Amalgamation could thus become a device whereby employees were abandoned without notice and without compensation.

[82] The effect of the foregoing is that under Mr Lorigan's IEA, Infinity became Mr Lorigan's employer upon amalgamation, and that his consent was not required.

[83] Even if Mr Lorigan were to successfully establish that the IEA was void, he was apparently in an employment arrangement with an entity other than Perry's since it no longer existed following amalgamation; the employer could not have been that entity.

[84] Next, Perry's was effectively dissolved at the time of amalgamation; it was removed from the Companies Register. It is not possible for the Court to join an entity that no longer exists.

[85] Finally, the issues as to the effect of the time limitation in s 114(6) of the Act arise again here.

[86] The application in respect of Perry's is accordingly dismissed.

26 *Wellington City Council v Rasch* [1994] NZCA 205; [1995] 2 ERNZ 91 (CA) at 96.

27 *Carter Holt Harvey Ltd v McKernan* [1998] NZCA 310; [1998] 3 NZLR 403 at 414. This judgment was approved for the purposes of Part 15 of the Companies Act by the Supreme Court in *Elders New Zealand Ltd v PGG Wrightson Ltd* [2008] NZSC 104, [2009] 1 NZLR 577.

Does the Protected Disclosures Act apply?

[87] Mr Lorigan stated that he had made a protected disclosure, apparently with Sime Darby Berhad which he said is a Kuala Lumpur entity. No evidence of this step has been placed before the Court, or as to its timing, content or response. He stated that he believed this negated the various provisions relating to time in the Employment Relations Act 2000. He did not refer to any provision in the Protected Disclosures Act (the PD Act) to support this submission, but it is that statute which contains the statutory provisions which apply where an employee or former employee acts as a whistle-blower.

[88] It appears that the only material provision could be s 17 of the PD Act, which provides that where an employee who makes a protected disclosure of information claims to have suffered retaliatory action from his employer or former employer, then that person may have a personal grievance under the Employment Relations Act 2000, and Part 9 of that Act applies accordingly. It is Part 9 which contains the material provisions relating to the time limits for the bringing of a personal grievance. In short, the time limitation provisions of the Act, as discussed in this judgment, must apply even were the Court to be satisfied subsequently that Mr Lorigan had made a relevant and qualifying complaint under the PD Act, and

that there was as a result retaliatory action from his employer. There is in fact no such allegation before the Court.

Disposition

[89] Mr Lorigan's application for joinder is dismissed.

[90] Mr Towner applied for costs on behalf of Infinity with regard to this application. On a previous occasion, I deferred costs applications made by Infinity, since they needed to be dealt with in light of findings which may be made at any relevant substantive hearing. The current application, however, does not fall into that category. It was wholly misconceived. There is no reason why costs should not be fixed now.

[91] Costs must follow the event. Mr Towner sought costs on a Category 2, Band B basis. I agree this is appropriate. Accordingly, Mr Lorigan is to pay costs to Infinity on a 2B basis.

B A Corkill Judge

Judgment signed at 12.45 pm on 1 August 2018
