Employment Court of New Zealand

Metallic Sweeping (1998) Limited v Whitehead [2010] NZEmpC 23 (12 March 2010)

Last Updated: 17 March 2010

IN THE EMPLOYMENT COURT

AUCKLAND [2010] NZEMPC 23ARC 39/09

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

BETWEEN METALLIC SWEEPING (1998) LIMITED
Plaintiff

AND STEPHEN WHITEHEAD
Defendant

Hearing: By memoranda of submissions

Judgment: 12 March 2010

JUDGMENT OF JUDGE ME PERKINS

Introduction

[1] In a determination (AA 6/09) dated 9 January 2009 the Employment Relations Authority at Auckland found against Mr Whitehead in an employment relationship problem submitted to it. Mr Whitehead's allegation that he was constructively dismissed was not upheld.
[2] The issue of costs was reserved with the parties having 28 days to make submissions if the issue could not be resolved between them. Well after the expiry of that time limit, counsel for the plaintiff ("Metallic") (respondent in the proceedings before the Authority) filed a memorandum in support of a claim for costs. This memorandum was filed on 4 March 2009. Upon receipt of the memorandum Mr Whitehead's solicitors advised the Authority that they no longer had instructions.
[3] Following receipt of the memorandum of submissions in support of costs from Metallic, and in view of the indication from Mr Whitehead's solicitors, the Authority accordingly went ahead and issued a determination on costs dated 25 May 2009 (AA 6A/09). The Authority, while acknowledging that the respondent employer had good prospects of success on costs, declined to make an order in its favour. The reason for this was that the Authority Member was of the view that the delay in filing the submissions would be likely to prejudice the employee Mr Whitehead.
[4] The plaintiff has now filed a de novo challenge to that costs determination. Counsel have agreed that the challenge may be dealt with by written submissions without a hearing.

Chronology

[5] It is helpful to set out the sequence of events in respect of the determination and challenge. This is as follows:

(a) 9 January 2009 – substantive determination, costs reserved, parties given 28 days to make submissions in relation to costs.

(b) 4 March 2009 – respondent's (Metallic's) submissions on costs filed. Solicitors for applicant (Whitehead) advised they had no instructions.

(c) 25 May 2009 – determination on costs issued.

(d) 18 June 2009 – de novo challenge filed. Statement of claim filed in court.

(e) 20 July 2009 – statement of defence by Whitehead in person filed in court.

(f) 26 August 2009 – minute of Chief Judge GL Colgan directing timetabling as to filing and serving submissions on challenge – plaintiff by 16 September 2009, defendant by 7 October 2009 with final reply by 14 October 2009.

(g) 16 September 2009 – submissions on challenge filed by plaintiff's solicitors.

(h) 7 October 2009 – submissions in answer filed by defendant's solicitors.

(i) 12 October 2009 – submissions in reply filed by plaintiff's solicitors.

(j) 16 December 2009 – minute of Judge ME Perkins directing timetabling of further submissions on issue of functus officio – plaintiff given until 29 January 2010 to file and serve submissions, defendant given until 12 February 2010 to file and serve submissions in answer, plaintiff given until 19 February 2010 to file and serve reply.

(k) 26 January 2010 – plaintiff filed submissions.

(l) 19 February 2010 – counsel for defendant filed memorandum indicating inability to obtain instructions from defendant and seeking leave to withdraw from acting.

> [6] It is clear from the determination that the delay in filing any memorandum of submissions on costs resulted from counsel being on leave for an extended period after the decision was received and then overlooking the Authority's direction on a 28-day period in which to file. The Authority's indulgence was sought on the time issue on the basis that there was no prejudice to the applicant (defendant in this challenge), and that the respondent should not be punished for counsel's omission. The Authority Member has also noted that Mr Whitehead's solicitors advised that at that point they no longer had instructions in respect of the matter of costs.
> [7] It is also clear that the respondent employer was relying upon a *Calderbank* offer to settle the substantive dispute and that the total sum offered was substantially less than the costs eventually incurred by the employer in having to prepare for and attend the investigation meeting. The Authority Member mentions the sum of $5,000 as being the further costs incurred. In addition, a further sum of $1,770 is mentioned as being costs of air fares from Auckland to Christchurch.
> [8] The substance of the determination on costs is relatively short and I set out the finding in its entirety as follows:

[5] In keeping with its low level and informal character, the Authority can and does apply some flexibility in relation to compliance with timetabling directions. However it is unable to do so where this would prejudice the other party. Contrary to the submission for the applicant, I consider that would be the case here. To overlook the delay in the making of submissions would mean determining costs without hearing from the applicant.

[6] As much time again elapsed between the deadline for submissions and their arrival as was originally allowed for submissions, and this, at the end of the process. Mr Beach has not elaborated on his statement that he has no instructions but I must allow for the likelihood that his client simply ceased to retain him when, at the conclusion of the 28 day period, nothing more had been heard from the respondent. Effectively, at that point, the proceedings were at an end.

[7] It is most unfortunate that the respondent has been deprived of the opportunity to pursue a claim for costs, especially one which had good prospects of success. However, that is a result of counsel's oversight.

[8] **The application for costs is declined**.

Submissions on costs

> [9] The solicitor for Mr Whitehead indicated to the Authority in response to the original submission on costs that he had no instructions. Once the challenge was filed, Mr Whitehead appears to have prepared and filed a statement of defence on his own behalf. Subsequently, and apparently because he instructed new solicitors, the solicitor then representing him filed an address for service and also filed a submission in answer to the plaintiff's submissions, following agreement that this matter could be dealt with on the documents. It will be seen from the chronology that the plaintiff has filed a submission in support of the challenge on costs, the defendant has filed a submission in answer, and the plaintiff has in turn filed a further submission in reply.
> [10] Dealing with the point on whether the Authority was in any event functus officio when issuing the determination on costs, the solicitor for the plaintiff has filed a written submission. As I have indicated, the solicitor for the defendant has now indicated that he can no longer obtain instructions from Mr Whitehead and considers it appropriate that he cease to be on the record for the defendant.
> [11] In view of the circumstances which are now presented I, like the Authority Member when confronted with a

similar situation, intend to proceed to decide the matter.

[12] It is first submitted for the plaintiff that in reaching the conclusion that no flexibility could be allowed to the plaintiff as a result of the failure to file within time, the Authority failed to take into account the fact that the defendant also failed to file any submission on costs within 28 days. The format of the direction as to simultaneous submissions also did not contemplate any timetable for reply in that there would conceivably have been insufficient time for either party to reply to the other. In any event, if the Authority adopted a perception of prejudice, it could have allowed a further period for the defendant (the applicant in the Authority proceedings) to respond to the employer's submission on costs.

[13] Quite independently of these two issues, it is submitted on behalf of the plaintiff that the Authority's inference of prejudice was without basis. The immediate response from Mr Whitehead's then solicitors that they had no instructions was so swift that the Authority could not infer that there had been any difficulty in obtaining instructions. Accordingly, the Authority should have allowed a further period for the defendant to respond in a meaningful way.

[14] It is further submitted that the inference of likelihood of true prejudice to the employee is irrational. It is submitted that it appears to be based on a worst case scenario in that the defendant would have had to have instructed solicitors to reopen the file and refresh his mind perhaps giving rise to further costs of a nominal kind which, in any event, could have been reflected in the ultimate consideration by the Authority of the award. Further, it is submitted that the statement of defence, which was filed by Mr Whitehead, while pleading that he has been prejudiced by the delay, does not disclose prejudice in fact. What Mr Whitehead says in the statement of defence is that as a result of the fact that no submissions were filed within the 28-day period, he dispensed with the services of his then solicitors regarding the entire matter. He goes on to plead that he no longer had the financial resources to further retain his solicitors or any other professional adviser who could have filed submissions within time had the plaintiff also done so.

[15] On the basis of *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*[1], the plaintiff submits that as the Authority has not exercised its discretion on costs in accordance with principle in this matter, the Court should now put itself in the position of the Authority. The following matters would then justify a significant contribution towards costs over and above the standard tariff:

(a) The bulk of the plaintiff's costs were incurred after the *Calderbank* offer.

(b) The offer to make payment in compensation to Mr Whitehead was generous given the lack of merit in his claim and the fact that he had obtained alternative employment virtually straight away and only lost wages of $168.

(c) The defendant unnecessarily inflated his claim before the Authority and indeed is alleged to have claimed a remedy, which was not available to the Authority to consider.

(d) In defending the matter, the employer was put to considerable expense in having to fly witnesses from Christchurch to Auckland for the Authority's investigation.

[16] In submissions in answer, the solicitor for the employee Mr Whitehead has submitted, as a first point, that, in any event, the challenge is "statute barred" by virtue of s 179(5) of the Employment Relations Act 2000 ("the Act"). This submission is made on the basis that the determination against which the challenge has now been lodged was in fact a determination about the procedure that the Authority was following rather than a substantive determination on costs itself. In the event that this submission is not successful, the defendant submits that the decision denying the plaintiff's application was correct. As an alternative submission, the defendant submits that the plaintiff's claim for costs should be substantially reduced. The basis for this last submission is that, through no fault of his own, Mr Whitehead has had to incur further legal costs in defending the challenge. Accordingly, there should be a reduction of 25 per cent in the costs now claimed by the plaintiff in any event.

[17] The submission for the plaintiff in reply deals, first, with the issue of s 179(5) of the Act. I shall return to that in a minute. It then considers the final two points but really by way of repetition of the arguments in support. An explanation is given as to why alternative solicitors are now instructed by the plaintiff. This is in view of the fact that the failure to file within time was in fact counsel's failure and, for reasons probably obvious, an alternative solicitor has been instructed to act in respect of the challenge.

[18] So far as the issue of functus officio is concerned, the only submissions are from the solicitor for the plaintiff as the defendant's solicitor is now without instructions. On this point the following submissions are made:

(a) It is acknowledged in the plaintiff's original submission on costs that the submission was late, a reason was provided, and an indulgence or waiver was sought. It is submitted that, by virtue of the tenor of the Authority's determination, it acknowledged that it had a discretion to extend time but then made a substantive determination adverse to the plaintiff which is now subject to the challenge.

(b) This is not a case where the Authority was functus officio. This principle would only apply where a court has discharged its role fully having concluded a judgment on all matters that were before it. It is submitted the principle typically arises where a matter has been overlooked by a party, not adjudicated upon, and then raised as an afterthought after judgment has

been issued. *Scott v Wellington College of Education*[2] is referred to as an example. In that case the plaintiff sought interest on a judgment debt at a time when only costs had been reserved for determination.

(c) The decision of *Fleming v Brown*[3] is also referred to. In that decision the Court held it was functus officio having discharged its duty and where its role is spent and there was no jurisdiction to deal with an issue that had not been expressly reserved in the judgment or addressed at the hearing.

(d) Even though the 28-day period had passed in this case, that did not mean the Authority had no further function to perform. It is submitted that, in particular, the Authority retained jurisdiction to decide the question of costs and to consider, if necessary, a waiver or extension of time in accordance with s 221 of the Act. This section provides as follows:

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,—

(a) direct parties to be joined or struck out; and

(b) amend or waive any error or defect in the proceedings; and

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

(d) generally give such directions as are necessary or expedient in the circumstances.

(e) The Authority did not treat itself as functus officio but, instead, exercised the discretion to issue a substantive determination on the costs, albeit against the plaintiff. As confirmation of this, the Authority, in its determination, referred to the discretion to apply flexibility in respect of its own timetable directions. It is submitted that while the discretion was exercised, it was not according to principle, therefore giving rise to the challenge.

(f) It is fair, it is submitted, that there cannot be an arbitrary closing of the file simply because a timetable has passed.

(g) These submissions are consistent with the scheme of the legislation where the focus is on the substantial merits and equity of the case as is illustrated by the wording of s 221 (already referred to).

(h) In any event, the concept of functus officio is probably sidelined so far as the Employment Relations Authority is concerned because, by virtue of cl 4 in Schedule 2 to the Act, the Authority can at any time reopen an investigation on terms. Clause 4 provides as follows:

4 Reopening of investigation

(1) The Authority may order an investigation to be reopened upon such terms as it thinks reasonable, and in the meantime to stay the effect of any order previously made.

(2) The reopened investigation need not be carried out by the same member of the Authority.

(i) The authors of *Brookers Employment Law* (loose-leafed) at ERSch2.15.07 describe the relevance of functus officio to the Authority as doubtful having regard to the legislative scheme under the Act.

(j) Reference is made to two decisions under the now repealed Employment Contracts Act 1991 where, by virtue of s 140 of that Act, time was extended in a similar fashion to s 221 of the Act. Those decisions are *Ioane v Waitakere City Council*[4] and *Walker v J Jones Ltd.*[5] In both of those cases costs had been reserved by the Tribunal or Court and a timetable had expired. In each case the Court found that neither the Tribunal in *Ioane* nor the Court in *Walker* was functus officio.

(k) The decision of the Court in *Labour Inspector (Horn) v Greenlea Premier Meats Ltd*[6] was distinguished on the basis that in that situation there had been an appeal to the Court of Appeal from a decision of the Court where costs had been left outstanding without any attempt at resolution and without an application to extend time. Judge Shaw held in that case that once the Court of Appeal issued its decision, including an award of costs on appeal, the Court became functus officio and there was no inherent power to reopen the matter, even on a question of costs.

Disposition

> [19] Dealing first with the point of functus officio, I accept the submissions of Mr Abdinor on behalf of the plaintiff. The *Greenlea Premier Meats Ltd* case is a situation distinguishable from the present in that final resolution, including costs, was ordered by the Court of Appeal in a situation where costs, an issue outstanding in respect of the lower court proceedings, had not been dealt with at the time of the hearing.
> [20] The decision in *Ioane* is slightly distinguishable from the present. In that case, several years after the repeal of the Employment Contracts Act, a belated appeal had resulted in the matter of costs being referred back to the

Court, which was also required to deal with the situation before the Employment Tribunal. However, the decision in *Walker*, even though it relates to the Court rather than the Tribunal, could very closely equate with the situation now present before the Court. I agree with Mr Abdinor that while that decision was determined under the Employment Contracts Act, the statutory provision being considered is virtually identical to the provisions under the Act.

[21] It is an appropriate submission to make that, having regard to the purpose of s 221 of the Act in particular and to the substantial merits and equity of the case, and to more effectively dispose of matters before it, the Court should allow that the Authority is not functus officio in dealing with what in this case amounted to an application for an extension of time and consideration after the time limit had expired. The submission Mr Abdinor has made in respect of cl 4 in Schedule 2 to the Act is also, in my view, telling.

[22] For these reasons, I find that the application, which was made to the Authority, was not barred by the maxim. The Authority was entitled to reopen the matter and consider the application for costs.

[23] So far as the defendant's submission in respect of s 179(5) of the Act is concerned, I do not accept the submission that the Court is precluded from hearing a challenge to the determination on costs in this case by virtue of the fact that the determination is about the procedure that the Authority has followed, is following, or is intending to follow. The Authority in this case has clearly made a substantive finding on costs. It is correct that the outcome has been determined by the fact that the applicant employer did not comply with the time limits, which had been set in the substantive determination. Nevertheless, as a matter of common sense, what the Authority did in the determination on costs could not be confined within the situation contemplated by s 179(5). I accept the submission made by Mr Abdinor that *Employment Relations Authority v Rawlings*[7] applies. That decision of the Court of Appeal means that once the Authority's investigation is over and a determination has been made, the jurisdiction of the Employment Court to hear a challenge is not limited.

[24] Turning, finally, to the submission by the plaintiff that the Authority was wrong to infer that prejudice had been occasioned to the defendant, it needs to be remembered that the issue of costs is of course always a matter of discretion. The events occurring since the determination on costs are slightly unusual. First, there is the fact that immediately upon the filing of the submissions on costs with the

Authority, the solicitors for Mr Whitehead indicated that they were without instructions. That, on the face of it, would seem to confirm the stand taken by the defendant subsequently that he had taken the view, following the failure of the plaintiff to apply in time for costs in respect of the Authority proceedings, that no such application would be made. As a result, he terminated further instructions to his legal advisers. However, once the challenge was filed, Mr Whitehead appears again somewhat unusually to have acted on his own behalf in filing a statement of defence. Because of the way in which that document was constructed, it would appear that Mr Whitehead has had the benefit of some legal advice in preparing that document. Subsequent to the filing of the statement of defence and probably because it became clear that the plaintiff was intent on pursuing the challenge, Mr Whitehead instructed solicitors to deal with the matter. Following the telephone conference call-over with Chief Judge GL Colgan, the solicitors then acting for each of the parties agreed that the challenge could be dealt with on the documents. Mr Whitehead then incurred further legal costs in having Mr Coogan prepare the submissions in answer. It is stated that Mr Whitehead has incurred further legal costs of approximately $1,000 in having to deal with the challenge to this point.

[25] These costs, of course, are not quite the prejudice which the Authority Member had in contemplation in her determination on costs. She considered that the delay in filing the submissions on costs was at such a time when it was reasonable for the defendant to have concluded that there was no need for him to retain his lawyers further and he simply ceased to do so. The consequence of that, however, was that his solicitors were then unable to respond to the plaintiff's submission on costs and as the Authority Member has indicated, she then had to proceed with the matter without hearing from the applicant. That is a position which, in my view, she was entitled to take in exercising her discretion. It seems to me, however, that there is a more fundamental issue involved in this case and that is to what extent, when time limits are set, delay can be excused.

[26] The Authority Member indicated that she thought that but for the delay and the consequences occasioned by that delay, the plaintiff would have had good

prospects of succeeding on the application for costs. The issue, however, is how long the parties are entitled to delay when a time limit for further action has been set. The position is similar to the time limit for appeal. Once such time limits expire, one or other of the parties at risk from any appeal is entitled to assume that the matter is at an end and take steps accordingly in light of that decision. In the present case, I am of the view that it was not unreasonable for the Authority Member to decide that Mr Whitehead had been affected in that way. The inference she took was not irrational as the solicitor for the plaintiff suggests. I would not necessarily couch the effect as prejudice but, rather, as the inevitable consequences of failure of a party in litigation to comply with responsible time limits. The time limit of 28 days was a lengthy period. There is a suggestion that it expired over the holiday period but in fact that was not the position. The time limit expired on 9 February 2009. The time limit was set to ensure that after a reasonable period there would be some finality on the matter. While the Authority and the Court have jurisdiction to extend time, time limits cannot be allowed to run on indefinitely.

[27] Having considered the matter on the basis of a de novo challenge, I reach the same conclusion as the Authority

Member that, by exercise of the discretion, the time limit in this case should not be extended. Even if I were to come to a contrary view, in making an award of costs it would need to be substantially reduced, if not extinguished, by the fact that the defendant has had to participate in this challenge as a result of a situation which is no fault of his own.

[28] Accordingly, the challenge is dismissed. I confirm the decision of the Authority Member not to award costs and, in respect of the challenge, costs will lie where they fall.

ME Perkins

Judge

Judgment signed at 3.30 pm on Friday 12 March 2010

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[1] [2005] NZEmpC 144; [2005] 1 ERNZ 808.
[2] WC 33/99, 15 June 1999.
[3] AC 16B/02, 24 October 2002.
[4] AC 20/07, 2 May 2007.
[5] AC 36/99, 1 June 1999.
[6] AC 20/04, 2 April 2004.
[7] [2008] NZCA 15; [2008] ERNZ 26 (CA).
