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OSS Limited v Arthur [2021] NZEmpC 90 (22 June 2021)

Last Updated: 25 June 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2021\] NZEmpC 90](#)

EMPC 8/2021

IN THE MATTER OF a challenge to a determination of
 the Employment Relations
 Authority
AND IN THE MATTER of an application for stay of
 proceedings
BETWEEN OSS LIMITED
 Plaintiff
AND BRETT ARTHUR
 Defendant

EMPC 30/2021

IN THE MATTER OF an application for leave to extend time
 to file a challenge
BETWEEN BRETT ARTHUR
 Applicant
AND OSS LIMITED
 Respondent

Hearing: (Telephone hearing held on 7 May
 2021)
Appearances: T Oldfield, counsel for OSS Limited D
 Traylor, counsel for Mr Arthur
Judgment: 22 June 2021

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL:

(Application for leave to file a challenge out of time; application for stay)

OSS LIMITED v BRETT ARTHUR [\[2021\] NZEmpC 90](#) [22 June 2021]

Introduction

[1] Mr Brett Arthur was formerly employed by OSS Limited (OSS), in a senior role. After five months, his employment ended after a restructuring process which disestablished his position.

[2] Mr Arthur raised an employment relationship problem, which had two aspects. The first concerned an assertion that his individual employment agreement (IEA) had been breached as to the calculation and payment of the variable component of his salary; the second was whether his dismissal for redundancy was justified.

[3] The Employment Relations Authority declined his claim for breach of his IEA.¹ It upheld his personal grievance, and directed OSS to pay him, within 28 days:²

- i. \$20,000 for humiliation, loss of dignity and injury to feelings;
- ii. \$52,500 as reimbursement of lost wages; and
- iii. \$4,200 in holiday pay.

[4] As I shall explain more fully shortly, OSS brought a challenge shortly before the period for doing so expired. Subsequently, two applications have been brought before the Court, which this judgment resolves.

[5] The first relates to Mr Arthur's application for leave to bring a cross-challenge out of time. The second relates to OSS's application for stay of the Authority's orders, the effect of which would be that the sums OSS was directed to pay would be paid into Court rather than to Mr Arthur, pending resolution of any challenge.

1 *Arthur v OSS Limited* [2020] NZERA 506 (Member Ulrich).

2 At [63].

Application for leave to bring a challenge

Background

[6] The Authority's determination was issued on 7 December 2020. Having regard to timing over the Christmas period, the last date for the filing of a challenge was 18 January 2021.

[7] On 14 January 2021, OSS filed a non-de novo challenge to the Authority's determination. The Court issued the challenge for service on 15 January 2021.

[8] On 18 January 2021, the final day on which a challenge was able to be lodged within time, OSS's lawyer contacted Mr Arthur's lawyer asking if he was authorised to accept service of OSS's statement of claim. This form of service was so authorised. The document was then forwarded by email the following day, 19 January 2021, at which point, Mr Arthur became aware that a challenge had been brought by OSS on a non-de novo basis.

[9] On 29 January 2021, Mr Arthur filed his application for leave. On these facts, there was a delay of seven working days.

Legal principles

[10] The legal principles in respect of such an application for leave are not in doubt. [Section 219](#) of the [Employment Relations Act 2000](#) (the Act) provides jurisdiction, with the Court exercising a broad discretion.

[11] The well-established factors with regard to the exercise of the discretion are:³

- (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;

3 *An Employee v An Employer* [2007] ERNZ 295 (EmpC) at [9]–[10].

(d) the effect on the rights and liabilities of the parties;

(e) subsequent events; and

(f) the merits.

[12] In *Almond v Reed*, the Supreme Court emphasised that the ultimate question is what the interests of justice require.⁴ It also examined the extent to which the issue of merits may be relevant when leave is sought. It concluded that in cases of insignificant delay, the Court should discourage arguments on the merits. A view as to prospects of success should only be expressed where they are obviously very strong or very weak.

Submissions

[13] In essence, Mr Arthur's case in support of his application for leave may be summarised as follows:

- (a) His failure to act within time occurred because he had decided not to pursue the matter beyond the Authority stage, having regard to the stress, time resources and costs associated with doing so. He felt he would only engage further if compelled to do so due to a challenge brought by OSS.
- (b) He has now been drawn into further proceedings where OSS has challenged only certain aspects of the

determination. Without cross-challenging, he would be faced with the prospect of the loss of the benefits he had obtained; further, he would not be able to challenge those aspects of the Authority's determination with which he disagrees.

(c) He seeks a de novo hearing because having regard to the matters OSS wishes to challenge, and to the matters he wishes to challenge, all aspects of the Authority's determination should be at large.

(d) He acted promptly on becoming aware of the existence of a challenge by OSS.

4 *Almond v Reed* [2017] NZSC 80, [2017] 1 NZLR 801 at [38].

[14] For OSS, the application for leave is opposed on these grounds:

(a) Mr Arthur made a deliberate decision not to challenge the Authority's determination, and later changed his mind.

(b) It was incumbent on him to file his own challenge within time if he was dissatisfied. This point applied particularly to the variable component aspect of the Authority's determination.

(c) The length of the delay was not insignificant.

(d) The merits of his challenge insofar as it relates to an alleged breach of any employment agreement, and the substantive justification for the redundancy (both being matters which OSS has not put in issue) are weak.

(e) Prejudice would be caused to OSS because an allegation of ulterior motive rests on a statement made by an anonymous person.

(f) Further prejudice would arise from the granting of leave because of the increased costs and management time incurred in dealing with a de novo challenge.

Analysis

Effects on rights and liabilities

[15] In order to assess the pros and cons of the grant of leave in this case, it is necessary to begin by considering the effect of OSS's election of a non-de novo challenge and the effect of Mr Arthur's proposed election of a de novo challenge.

[16] The grounds of OSS's election as set out in its amended statement of claim are in summary:

(a) In all the circumstances, the Authority erred in finding OSS was obliged to consult with Mr Arthur about a proposal made by a senior colleague

to modify his employment agreement, and whether Mr Arthur should have then been offered the modified role.

(b) If this was a procedural defect, it was minor and did not result in Mr Arthur being treated unfairly.

(c) The Authority found that there was a further error on the part of OSS because a member of the sales team resigned 10 days after Mr Arthur had been given notice of dismissal for redundancy; it considered that, in these circumstances, OSS had an obligation to offer the vacant role to Mr Arthur. This aspect of the determination was erroneous since the availability of the position arose after the decision to dismiss had been made.

(d) More generally, the Authority erred by finding there was an obligation to consult, when the available positions were substantially different to Mr Arthur's; it also erred because it did not consider whether Mr Arthur would have accepted either of the positions. If not, any failure to do so should have been regarded as minor and not resulting in unfairness.

(e) It erred in determining that any grievance was an unjustified dismissal as opposed to an unjustifiable disadvantage.

(f) It erred by awarding lost wages; by awarding compensation not only for failures in the consultation process, but as to the loss of the job itself; and by not making a reduction for contribution.

[17] In light of Mr Arthur's draft statement of claim, his election, were it to proceed, would allow him to raise the following issues which he would be unable to address if leave were not to be granted:

(a) Whether his dismissal for redundancy was justified for reasons other than those relating to redeployment. In the Authority, Mr Arthur argued as to justification that there was no genuine business reason for that

restructuring; that there was an ulterior motive for the restructuring; and that confidentiality was breached. These allegations were not accepted.

(b) Whether Mr Arthur should have been paid by OSS the variable component of his salary. As noted, this aspect of his case was dismissed.

(c) Whether the remedies should have been more substantial than those awarded.

[18] Some discussion is necessary with regard to each of these topics. I make the obvious point that my views are preliminary only and made only for the purposes of the present application.

[19] OSS says the Authority erred in determining that any grievance was an unjustified dismissal, as opposed to an unjustified disadvantage. It would be unfair if OSS was permitted to argue this limited point, but Mr Arthur could not argue that the dismissal was justified not only on the basis of flaws with regard to potential redeployment but on the grounds he has raised previously.

[20] OSS proposes to argue that the remedies awarded by the Authority were excessive. This includes lost wages which it says should not have been awarded at all. An aspect of Mr Arthur's claim for lost wages is the variable component of his package. If leave was not granted, Mr Arthur would not be able to argue that the Authority erred when assessing his lost wages by failing to take into account the variable component of his IEA.

[21] Moreover, if he should be entitled to raise the issues as to the variable component for the purposes of a post-termination wages claim, he should also be able to raise it in respect of a pre-termination wages claim.

[22] Also relevant is the point that, were leave to be granted, Mr Arthur would be able to advance a related aspect of his claim for remedies, to the effect that he should receive lost wages for more than three months; he says the Authority erred by not exercising its discretion to award wages for a longer period.

[23] A similar problem concerns the award for humiliation, loss of dignity and injury to feelings. OSS will argue Mr Arthur should have been awarded less; arguably he could not on the non-de novo challenge contend he should have been awarded more. Again, it would be unfair for him not to be able to put his position fully.

[24] Standing back, it is strongly arguable that it would be unfair for Mr Arthur not to be able to advance all his concerns on a de novo basis, given the focused nature of OSS's challenge. The issues each side wishes to raise are inter-related. This is not a case where limitations should be imposed on the grant of leave, as was submitted by Mr Oldfield, counsel for OSS. These considerations point strongly to the grant of leave.

The merits

[25] I am mindful of the point made by the Supreme Court with regard to applications for leave, that a view as to the likelihood of success is best left for circumstances where the prospects are obviously very strong or very weak.

[26] Both counsel addressed this issue, particularly with regard to Mr Arthur's claim that his IEA was breached as to the variable component of his remuneration.

[27] The main point of controversy on this claim is whether there was a concluded agreement between the parties as to the variable component.

[28] Mr Traylor, counsel for Mr Arthur, submitted the claim could not be finalised because the necessary information had not become available by the time of dismissal. This point is arguable. I do not consider the claim is "very weak".

[29] Turning to the other issues Mr Arthur proposes to raise as to liability and remedies, the Court's assessment turns on the description of evidence and reasoning adopted in the Authority's determination.

[30] Just as OSS proposes to argue that the Authority's evaluation of the factors it considered was wrong, so too, on these inter-related points, does Mr Arthur.

[31] Both sides have arguable assertions. In particular, Mr Arthur's arguments could not be characterised as "very weak".

[32] I find that a consideration of the merits is not dispositive of the application for leave.

The reasons for delay

[33] For the purposes of considering the reason for the omission to file Mr Arthur's challenge in time, it is necessary to refer to the contents of his affidavit. He referred to the impact of the Authority's proceedings on him, both at a personal level and with regard to legal costs he incurred when he engaged a lawyer to advise him in the course of the Authority's processes. He said he was not entirely satisfied with the determination, but he would move forward on the basis of what had been achieved. He concluded it would be preferable not to challenge the Authority's determination. He was aware OSS might decide to do so, but he considered this was unlikely, especially as he had received no indication from the company prior to 18 January 2021 that this would occur.

[34] Upon seeing the statement of claim filed by OSS, the day after the last day for filing, Mr Arthur said he realised the Authority's conclusions regarding his breach of contract claim, his other aspects of the determination as to his unjustified dismissal personal grievance, and the extent of his remedies, would not be reconsidered.

[35] This meant that, unless leave were to be granted, he would have no choice but to incur the stress, cost and time involved in engaging with OSS's challenge, on a limited basis. The benefits he had achieved would be at risk, and he would not be able to progress the aspects of the relationship problem about which he was concerned, as discussed earlier.

[36] Mr Oldfield referred to authorities which indicate that all parties to a determination are expected to turn their minds to whether they wish to challenge all or part of the determination, and to file their own challenge within the 28-day timeframe.

[37] Particular reliance was placed on dicta in *Sunair Aviation Ltd v Walters*, where this factor was described as not being a valid reason for the delay incurred by an employer, when filing its own challenge.⁵ However, the facts of that case were significantly different. The delay was more than 50 days. Moreover, the Court was not satisfied there was a realistic prospect of success. Nor were the complexities which arise in this case present in that one.

[38] There are cases which go the other way.⁶ Applications of this kind are inevitably case-specific.

[39] I consider that Mr Arthur's explanation as to the reasons for the delay are understandable and favour the grant of leave.

The length of the delay

[40] It is perhaps surprising that it took as long as seven working days, or 10 days in total, for the application for leave to be brought, once Mr Arthur was aware of the limited challenge brought by OSS. Although I do not agree that application was filed "promptly", I do not regard the delay as being significant having regard to the extent of documentation which had to be prepared and finalised for filing.

Other matters

[41] The issue of prejudice on the grounds of cost and management time was raised for OSS. I do not regard these factors as being significant in the overall context. If, of course, the points Mr Arthur wishes to raise prove unmeritorious, there may be cost consequences.

[42] Mr Oldfield also submitted that an aspect of Mr Arthur's proposed claim relating to ulterior motive, relied on hearsay and lacked detail. That may well be so. If the pleading is maintained, an application is able to be brought for further and better particulars. I do not regard this issue as being dispositive.

⁵ *Sunair Aviation Ltd v Walters* [2017] NZEmpC 124 at [19]–[21].

⁶ *Rayner v Director-General of Health* [2019] NZEmpC 13; and *Talent Propeller Ltd v UXK* [2021] NZEmpC 2.

Overall justice

[43] Standing back, I consider that the interests of justice require the grant of leave. Primarily, I accept that Mr Arthur would be prejudiced were he not able to fully argue the points he wishes to raise, particularly as to his alleged entitlements under the IEA and as to remedies. I accept that he was surprised by the late filing and service of OSS's statement of claim; in context, this is also a persuasive factor which supports the grant of leave.

[44] Mr Arthur's application is granted on the basis that his statement of claim is to be filed and served within seven days of this judgment.

Application for stay

Background

[45] OSS has applied for a stay of proceedings. The essence of its application is that were the awards made in Mr Arthur's favour paid, and if the company was later successful in its challenge, there could be difficulties such as the time and cost involved in recovering the awards from Mr Arthur. It was also submitted it is unclear if Mr Arthur has sufficient liquid assets at his immediate disposal to repay the award. OSS submits that, accordingly, the sum involved should be paid by it into Court, pending resolution of the proceeding.

[46] Mr Arthur submits that there is no evidence to support the proposition that he would not repay the award, or that

enforcement action would be necessary. He has stated on oath he would be prepared to repay the sums if that proved necessary, giving evidence of his financial position to support this.

Jurisdiction

[47] The application is brought under reg 64 of the [Employment Court Regulations 2000](#). The principles are well known. In exercising discretion, the Court takes into account such factors as whether the applicant's right of appeal would be ineffectual if no stay were to be granted; whether the appeal is brought and is being prosecuted for good reasons; whether the successful party would be effected injuriously by a stay; the

effect on third parties; the novelty and importance of the questions involved; any public interest; and overall balance of convenience.⁷

Analysis

[48] The main ground relied on by OSS concerns the question of whether Mr Arthur, as the successful party, would be injuriously affected by payment into Court, as distinct from payment to him. That in turn requires consideration of his ability to repay.

[49] In support of his contention that he could do so if necessary, Mr Arthur stated:

(a) He and his partner own assets that could be drawn upon to cover the sums involved. These are a family home and an investment property. It is plain there is a reasonable equity which, in total, exceeds one million dollars.

(b) The gross income which he and his partner receive is in the order of

\$300,000 per annum.

(c) The company through which Mr Arthur operates has a revolving credit facility which currently stands at approximately \$13,600. He would apply payments ordered by the Authority to this facility, which would improve his available equity, as well as reducing his interest costs.

(d) Due to a family bereavement, he has inherited assets that could also be accessed.

[50] There was debate at the hearing as to whether Mr Arthur would keep the revolving credit facility open, were OSS to pay funds and these were to be applied to that facility. The inference was that if the facility was closed it would not be available later; thus there could be difficulties in repayment. However, there is no evidence that Mr Arthur intends to close the facility.

7. *Shalini Ltd v A Labour Inspector* [2019] NZEmpC 170 at [12]; and *New Zealand Cards Ltd v Ramsey* [2013] NZCA 582 at [7].

[51] In any event, Mr Arthur would appear to have reasonable equity in his fixed assets. While there is no evidence of liquid funds, at least at the present time, there is no legal requirement for a judgment creditor in circumstances such as the present to be able to point to the availability of these.

[52] At worst, the issue is one of enforcement. As properly acknowledged by Mr Oldfield, there are various mechanisms for achieving this, either under the Act, or under the District Court Act 2014.

[53] No doubt that would be regarded as a worst-case scenario by OSS, and one it would wish to avoid due to the time and expense involved.

[54] However, there is no reason to conclude that enforcement action would not be successful.

[55] I deal briefly with other factors. There is nothing to suggest that Mr Arthur would not prosecute his case in good faith. Nor do I think that there are other relevant factors such as the effect on third parties, or that the public interest requires the making of an order.

[56] Standing back, the overall balance of convenience favours Mr Arthur. As the successful litigant in the Authority, he is entitled to the fruits of the awards made. I am satisfied on the evidence before the Court that Mr Arthur would likely have the ability to repay the awards, if the need to do so were to arise.

[57] The application for stay is dismissed.

Costs

[58] Mr Arthur has succeeded in respect of both applications. He is entitled to costs on each on a 2B basis.

B A Corkill Judge

Judgment signed at 10.10 am on 22 June 2021

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