



# Employment Court of New Zealand

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## Pretorius v Marra Construction (2004) Limited [2016] NZEmpC 43 (19 April 2016)

Last Updated: 13 May 2016

### IN THE EMPLOYMENT COURT AUCKLAND

#### [\[2016\] NZEmpC 43](#)

EMPC 14/2016

IN THE MATTER OF an application for special leave to remove matter to the Employment Court pursuant to [s 178\(3\)](#) of the [Employment Relations Act 2000](#)

BETWEEN FREDRICK PRETORIUS Applicant

AND MARRA CONSTRUCTION (2004) LIMITED

Respondent

Hearing: (on the papers filed 26 January, 25 February, 11 and 23 March 2016)

Counsel: D Jacobson, counsel for the applicant

K Patterson, counsel for the respondent

Judgment: 19 April 2016

### JUDGMENT OF JUDGE B A CORKILL

#### Introduction

[1] Mr Fredrick Pretorius seeks special leave to remove part of a relationship problem which is currently before the Employment Relations Authority (the Authority) for investigation to this Court. When it considered the issue, the Authority declined an application made by Mr Pretorius for removal of the matter to the Court.<sup>1</sup>

[2] Before describing the basis on which the application for special leave for removal to the Court is made, it is necessary to outline the background circumstances.

#### Background

[3] Mr Pretorius raised an employment relationship problem claiming that he had been unjustifiably dismissed by Marra Construction (2004) Limited (Marra). He also claimed that the company exhibited misleading and deceptive conduct by denying a promise to remunerate him for a greatly increased workload during the period 2007 to 2010; that it failed to protect him from physical and mental harm in the workplace resulting from a high workload; and that it breached its duty of good faith.

[4] In addition, Mr Pretorius claimed that Marra breached an oral agreement made in 2007 to pay him an increased salary rate and a bonus.

[5] For its part, Marra denied each and every allegation. The company also counter-claimed for alleged losses arising from Mr Pretorius' work performance.

[6] In a determination as to a preliminary issue, the Authority addressed the question of whether or not the remuneration arrears claimed by Mr Pretorius were outside the six-year limitation period described in [s 142](#) of the [Employment Relations](#)

[Act 2000](#) (the Act), so that the claim was statute-barred.<sup>2</sup>

### **The Authority's determination of the pre-trial issue**

[7] The Authority found that in mid-2004 Mr Pretorius commenced employment as a Quantity Surveyor for Marra, which is a construction company. No employment agreement was signed at that date, but there was an oral agreement that an annual salary of \$55,000 would be paid. During 2007, Marra entered an agreement with another company to construct a multi-level apartment building. Mr Pretorius claims he was told at the time that he would be working on the building site and would receive the same conditions as employees of the third party company, which he claimed included enhanced remuneration because of the extra hours to be worked, as well as a bonus. He commenced working on the site in December 2007. His work at that location was substantially completed by May 2010. He says he understood he would be paid the increased remuneration and the bonus once work was completed.

Those payments were not forthcoming. The Authority recorded that Mr Pretorius

accordingly lodged a claim for:

- \$125,000, to include increased salary and bonus; or alternatively
- payment on a quantum meruit basis for all hours worked in excess of a 40-hour week; or
- a payment for extra hours under the Minimum Wage Provisions of the

[Minimum Wage Act 1983](#) (MW Act).

[8] The Authority concluded that any claims had to arise on or after

3 March 2008 since the statement of problem was filed on 3 March 2014. Then the

Authority held:

a) The claim for honouring the oral understandings of late 2007 was outside the limitation period and could not be pursued since all the elements necessary for prosecuting the claim had come into existence by 3 March 2008.

b) Since it was possible that liability for a bonus payment would not crystallise until the conclusion of a project, the bonus claim was not time-barred.

c) [Section 11B\(2\)](#) was a potentially applicable provision of the MW Act, and Mr Pretorius was not time-barred from pursuing a claim under that section for unpaid wages in excess of 40 hours per week where those arose after 3 March 2008.

[9] It will be necessary to discuss later in this judgment the consequence in law of these findings.

### **The challenges brought to this Court**

[10] On 3 November 2015, Mr Pretorius filed a de novo challenge in respect of the determination, although the challenge specifically focused on one only of the

three issues which had been resolved by the Authority. This was the finding which was adverse to him, to the effect that the enhanced salary claim was time-barred.

[11] Marra wished to bring a challenge in respect of those parts of the determination which were adverse to it; that is, that the claims for a bonus and for entitlements under the MW Act were in time. In a judgment of 11 December 2015, I extended leave for this purpose; 3 Marra has now initiated its challenge.

### **Mr Pretorius' application for transfer**

[12] In its determination of 7 January 2016, the Authority recorded that Mr Pretorius had sought what was described as "an order for removal to the Employment Court for hearing and final determination of his remuneration arrears claims".<sup>4</sup>

[13] Mr Jacobson, counsel for Mr Pretorius, submitted in effect that since the Court was already seized of the time limitation issues relating to the remuneration arrears claim, the Court should also consider the substance of that claim since it would be more efficient for it to do so.

[14] Counsel for Marra, Mr Patterson, opposed the application; essentially he submitted that the circumstances did not justify transfer, that there were other issues which the Authority would have to determine including an alleged unjustified dismissal as well as what was described as a “very significant counter-claim” brought by Marra; and that it was illogical to have claims split as had been suggested.

[15] The Authority found that it was appropriate for the factual issues relating to the remuneration arrears claim to be investigated in the usual way. The Authority said that if the challenge as to time-limitation issues was allowed, it would be appropriate for the matter to be remitted back to the Authority to be investigated in light of the Court’s judgment. The Member also noted that there would be an

absolute right of challenge to the Court on any subsequent determination. The

<sup>3</sup> *Marra Construction (2004) Ltd v Pretorius* [2015] NZEmpC 222.

<sup>4</sup> *Pretorius v Marra Construction*, above n 1, at [4].

Authority accordingly determined that the matter should not be removed to the Court pursuant to s 178(2)(d) of the Act.

## **The application for special leave to remove the matter to the Employment**

### **Court**

[16] The application now made for Mr Pretorius proceeds on the basis that there is an important question of law involved in the application of s 142 of the Act, either with regard to when a cause of action arises on a breach of promise to provide increased remuneration to a salaried employee, or alternatively with regard to a claim for quantum meruit. It is submitted that the Court, as a consequence of the challenges which have been filed, has proceedings before it which are between the same parties and which involve the same or similar or related issues as would be considered if the challenge as to time limitation is successful, and if the substantive aspects of that claim then needed to be considered.

[17] It is argued that the remuneration arrears claims are a distinct and separate matter from the unjustifiable dismissal claim, which remains before the Authority. Then it is submitted that the Authority has, by determining that the claims are time-barred, apart from the issue of a bonus payment, effectively determined in a final way both the remuneration claim and the quantum meruit claim. Finally, it is submitted that it is in the interests of justice that the applicant not be put to the cost of having his remuneration arrears claim referred back to the Authority when those claims can be more efficiently dealt with by the Court, when it considers the challenges which have been raised.

[18] For Marra, it is submitted that the question of transfer has already been considered by the Authority, which reached a correct conclusion having regard to the requirements of s 178 of the Act. Specifically it is submitted that the Authority did not finally determine the remuneration claims and that it was not in the interests of justice for the Court to consider this issue, when there are other matters which the Authority would need to determine.

### **Discussion**

[19] The Authority’s determination of a preliminary issue proceeded on the basis of s 142 of the Act, which provides:

#### **142 Limitation period for actions other than personal grievances**

No action may be commenced in the Authority or in the court in relation to an employment relationship problem that is not a personal grievance more than 6 years after the date on which the cause of action arose.

[20] When considering the claim made by Mr Pretorius in respect of oral understandings of late 2007, the Authority expressed its conclusion in these terms:<sup>5</sup>

I determine that [Mr Pretorius] is time-barred from bringing a claim for monies in respect of a salary increase being outside the six year limitation period.

[21] Since that finding was made for the purposes of s 142, the consequence in law was that the claim for remuneration arrears was an action that could not have been “commenced in the Authority”, because it was not a personal grievance and it arose more than six years after the date in which the cause of action arose.

[22] I interpolate the observation that this particular time-limitation provision is different in kind from the time-limitation mechanism adopted in the Limitation Act

2010. That Act provides that a defendant has a defence to a claim if it is time-barred;<sup>6</sup> it goes on to provide that if the defendant establishes a defence under the Act against a claim, and providing certain orders applicable to such claims have not been made, “the establishment by the defendant of the defence does not extinguish, as against the defendant or any other person, any entitlement, interest, right, or title of the claimant on which the claim is based.”<sup>7</sup>

[23] By contrast, when enacting s 142 of the Act, Parliament adopted a different approach to limitation periods in respect of actions; it did not stipulate that the cause

of action would survive; it stipulated that a time-barred action may not be

<sup>5</sup> *Pretorius v Marra Construction [2004] Ltd*, above n 2, at [46].

<sup>6</sup> For example [ss 11, 29, 32, 35](#) and [37](#) of the [Limitation Act 2010](#).

<sup>7</sup> [Limitation Act 2010, s 43\(b\)](#).

commenced; it follows that a time-barred action may not be investigated by the

Authority.

[24] In order to deal with the present application, it is necessary to look ahead to the possible outcome of the challenge. What would the consequence in law be if the Court were to allow the challenge brought by Mr Pretorius? Such an outcome would reverse the conclusion reached in effect by the Authority that the relevant cause of action should not have been commenced. An order allowing the challenge would amount to a conclusion that the action had been commenced within time, and was properly before the Authority. In those circumstances, the underlying cause of action could be the subject of an application for removal under s 178 of the Act.

[25] Although the application for special leave must proceed on a hypothetical basis (that the challenge will succeed), I am prepared to deal with it now, since it appears the intention is that the time-limitation issue and the underlying cause of action might be heard concurrently. I deal with the application on that basis.

[26] First, it is necessary to identify the correct criteria of the principles for removal. Section 178 provides:

#### **178 Removal to court**

(1) The Authority may, on its own motion or on the application of a party to a matter, order the removal of the matter, or any part of it, to the court to hear and determine the matter without the Authority investigating it.

(2) The Authority may order the removal of the matter, or any part of it, to the court if—

(a) an important question of law is likely to arise in the matter other than incidentally; or

(b) the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the court; or

(c) the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or

(d) the Authority is of the opinion that in all the circumstances the court should determine the matter.

(3) Where the Authority declines to remove any matter on application under subsection (1), or a part of it, to the court, the party applying for the removal may seek the special leave of the court for an order of the court that the matter or part be removed to the court, and in any such

case the court must apply the criteria set out in paragraphs (a) to (c) of subsection (2).

(4) An order for removal to the court under this section may be made subject to such conditions as the Authority or the court, as the case may be, thinks fit.

(5) Where the Authority, acting under subsection (2), orders the removal of any matter, or a part of it, to the court, the court may, if it considers that the matter or part was not properly so removed, order that the Authority investigate the matter.

(6) This section does not apply—

(a) to a matter, or part of a matter, about the procedure that the Authority has followed, is following, or is intending to follow; and

(b) without limiting paragraph (a), to a matter, or part of a matter, about whether the Authority may follow or adopt a particular procedure.

[27] An applicant for special leave under s 178(3) must establish one of the three alternative grounds under s 178(2); and the Court retains a discretion whether to remove the matter, a discretion that must be exercised on a consideration of other relevant grounds.<sup>8</sup>

[28] It is also the case that an application for special leave is an independent proceeding where the Court is not required to

take into account the determination of the Authority under s 173(2), although it may.<sup>9</sup>

[29] The primary ground relied on for Mr Pretorius is based on the first of the alternative grounds, in s 178(2)(a); Mr Jacobson submits that the following important questions of law will arise other than incidentally:

In relation to an ongoing employment relationship in which there are ongoing obligations to pay remuneration:

a) Does the cause of action arise under s 142 of the Act on the very first occasion an employer fails to pay agreed remuneration or does a separate cause of action arise on each breach of agreement by the employer to pay agreed remuneration?

b) Does the cause of action arise under s 142 of the Act in a claim in

*quantum meruit* on the initial promise by an employer to pay for

8 *New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc v Carter Holt*

*Harvey Ltd* [2002] NZEmpC 85; [2002] 1 ERNZ 74 (EmpC), at [28].

9 At [3].

services rendered, or does it arise when an employer breaches its promise to remunerate services rendered.

[30] These may well be legitimate issues which the Court could be asked to consider when it deals with time limitation issues for the purposes of s 142. However, they are issues of principle which are readily understood. It would not be necessary for the Court to determine the actual claims for the purposes of resolving them, albeit an evidential foundation will be required so as to establish the context within which the issues may be considered.

[31] Mr Jacobson raises a further issue with regard to the challenge brought by Marra, which concerns the payment of bonuses which the Authority determined were not time-barred under s 142 of the Act. Counsel submits that this gives rise to an important question of law which he expresses in this way:

In relation to a contractual promise to pay a bonus, does the date in which the cause of action arises for the purposes of s 142 limitation arise on the making of a promise to pay the bonus, or on the breach of promise to make payment?

[32] The same reasoning applies to this potential issue as applies to the earlier issues he raised. It is an issue of principle which can be resolved as a preliminary question, without the Court having to determine the underlying cause of action. Moreover, the Authority was not asked to remove this cause of action, and the Court accordingly does not have jurisdiction to consider an application for special leave to remove that matter, under s 178(3) of the Act.

[33] I also observe that if Marra's challenge does not succeed, the causes of action which are the subject of its challenge will then be investigated by the Authority. They relate to remuneration issues. It would be undesirable to have one remuneration issue being considered separately from two others.

[34] Next, Mr Jacobson argues that removal would provide an opportunity for the Court to provide guidance to the Authority for the purposes of such cases. In effect it is asserted that the Court's statements on time-limitation issues will potentially be useful. In my view, any such guidance can arise from the determination of the

challenge; it is not necessary for the cause of action itself to be removed in order to achieve this objective.

[35] Then Mr Jacobson submits that the remuneration-arrears claim will inevitably come to the Court by way of challenge in any event. This case involves a range of issues and claims which are not limited to those which arise from Mr Pretorius' challenge; it is in my view appropriate therefore that the Authority investigate all matters (including the claim for arrears of remuneration if the challenge succeeds). Thereafter, the statutory rights of challenge may be exercised by either or both parties.

[36] It is also submitted that as the Court will need to hear evidence for the purposes of the time-limitation issue, it would be more efficient and would avoid duplication were the Court to be able to go on and resolve the claims for remuneration. Such a contention might be attractive if Mr Pretorius' challenge involved the entire relationship problem. But it does not. There are plainly other matters which the Authority has yet to investigate including what is described as a substantial counter-claim brought by Marra.

[37] It is in my view preferable for the Authority to investigate the various claims before it in the usual way, including the matter or matters which may fall for investigation after the Court has resolved the challenges which are before it.

[38] Accordingly, the application for special leave is dismissed. [39] I reserve costs.

Judgment signed on 19 April 2016 at 4.30 pm

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