New Zealand Employment Relations Authority Decisions

Rock v Stihl Limited (Auckland) [2011] NZERA 539; [2011] NZERA Auckland 351 (8 August 2011)

Last Updated: 24 August 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 351 5342522

BETWEEN

NATHAN ROCK Applicant

AND

STIHL LIMITED Respondent

Member of Authority:

Eleanor Robinson

Representatives:

Kelly Applegate, Counsel for Applicant Kylie Dunn/ June Hardacre, Counsel for Respondent

Submissions received:

10 June 2011 from Applicant

10 June and 19 July 2011 from Respondent

Determination:

08 August 2011

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

Employment Relationship Problem

[1] The Applicant, Mr Nathan Rock, is claiming that the Respondent, STIHL Limited ("STNZ") breached his employment agreement by failing (i) to pay him contractual entitlement to relocation expenses from New Zealand to Australia, (ii) to make contributions at an agreed level to the STIHL PTY Ltd Superannuation Fund, and (iii) to pay him a pro-rate payment of his management bonus for 2005.

[2] STNZ argue that Mr Rock failed to bring his claim within the 6 year limitation period as specified in s 142 of the Employment Relations Act 2000 ("the Act") and consequently cannot bring his claim before the Authority

Issues

[3] This determination addresses the preliminary issue of whether Mr Rock's claim is debarred from investigation by the Authority pursuant to s 149 of the Act.

[4] The parties agreed to the Authority determining this issue based on the submissions from the parties.

Background Facts

[5] Mr Rock was employed by STIHL PTY LTD whose head office is located in Knoxfield, Victoria, Australia, and was based in Perth, Western Australia, from January 1993 until September 1999. Mr Rock was a member of the STIHL PTY LTD Superannuation Fund.

[6] On 25 August 1999 Mr Rock was offered employment as Product Manager with STNZ. The position was based in Auckland, and reported to Mr Jim Bibby, General Manager

of STNZ.

[7] The offer of employment letter dated 25 August 1999, and the subsequent letter dated 31 August 1999, were both signed by Mr David Millar, Managing Director of STIHL PTY LTD. The letter dated 25 August 1999, stated:

a. *In addition to your salary, you will be entitled to participate in the NZ Management Bonus Scheme (paid in February of each year) at a participation rate of 0.5% of net profit before tax;*
b. *Providing you serve for a minimum of three years in New Zealand, the Company will also meet the costs of relocation back to any state capital city in Australia;*
c. *The Company will maintain your current membership of the Stihl Pty Ltd Superannuation Scheme in Australia during your period of employment in New Zealand. This will cover both the Company and your personal contribution to the Scheme, based on a notional salary of $A50,000, increasing at a rate pro-rata to your level of salary increase in New Zealand.*

[8] Mr Rock commenced employment with STNZ on 4 October 1999. On 31 January 2005 Mr Rock tendered his resignation to Mr Bibby by way of a letter dated 31 January 2005. In accordance with his employment agreement, Mr Rock worked his contractual notice period of one month and his employment with STNZ terminated on 4 March 2005.

[9] A table of relocation expenses from New Zealand to Perth, Western Australia, dated 9 February 2005 details the estimated relocation expenses for Mr Rock totalling $13,411.70.

The expenses as detailed refer to estimated shipping costs, insurance, airfares for Mr Rock and his family, hotel accommodation from 2 March to 4 March 2005, and food at the hotel.

[10] On the estimated table of expenses is a handwritten note. It is not possible to read the signature but STNZ advise that the note was made by Mr Bibby following a telephone discussion between him and Mr Rock on 10 February 2005. The note reads:

Note for the file

NR requested Stihl pay for costs of relocation back to Perth. He believes Stihl has an "obligation" based o his letter of Appointment and discussions with "Millar" at that time (09/99).

Request Declined. He has resigned already! Below the signature is the handwritten date 10/02/05.

[11] On 14 February 2005 Mr Bibby emailed Mr Daniel Sloan, the New Zealand Finance Manager. The email was headed: *'Nathan Rock - Final Pay'* and stated:

Daniel

As discussed, please include the following allowances in Nathan's final salary payments:

i. *Feb payroll - 2004 Management Bonus, as per calculation in P&P Manual*
ii. *Final Pay - $10,000 gross payment, being Bonus in respect of STIHL Navision Project - successful online implementation.*

In addition, we will pay Nathan 3 months management bonus (prorata) in respect of his 2005 Management Bonus entitlement. This payment being made in mid April 2005, based on our actual NPBT for the 1st Quarter 2005. Please ensure that you have some bank & home contact details from Nathan in the event he plans to close his current accounts before leaving NZ.

[12] Mr Rock states that he discovered on 11 September 2005 that there was a deficit in payments which should have been made into the STIHL PTY LTD Superannuation Scheme. Mr Rock also states that on 11 October 2005 he telephoned Mr Bibby to discuss the outstanding payments, and that Mr Bibby commented on the rate of payment of the superannuation payments, and also informed him that there would be no pro-rata payment of the management bonus.

[13] The details of this conversation are partly confirmed in an email sent from Mr Bibby to Mr Peter Marburg, Chief Financial Officer of STIHL PTY LTD, dated 11 October 2005:

Dear Peter,

I had a good catch up with Nathan Rock today by telephone

I have suggested that the next step is to progress any changeover requirements of Nathan's Superannuation to his new employer (or however these things work in AU), is for you and Nathan to discuss the transfer requirements.

[14] On 2 March 2011 Mr Rock faxed his application regarding the non-payment of entitlements claim to the Authority. Mr Rock also attempted to pay the filing fee to the Department of Labour ("DoL") by direct credit.

[15] On 9 March 2011 Ms Genna Saifiti, Administration Officer at the Authority, emailed Mr Rock to inform him that his application was 'on hold' until confirmation of receipt of his filing fee was received. In the email Ms Saifiti advised Mr Rock of the need to amend his application.

[16] On 11 March 2011 Mr Rock emailed Ms Saifiti advising her that he had received notification from his bank that the money transfers he had made could not be lodged. Ms Saifiti responded that same day with the account details of where the payment should be made.

[17] On 15 March 2011 Mr Rock emailed Ms Saifiti to confirm that he had made the correct payment. Ms Saifiti emailed Mr Rock on 12 April 2011 following her return to work after having taken some leave, and informed Mr Rock that the DoL finance department was unable to find or confirm the payment by Mr Rock of the correct filing fee.

[18] Mr Rock emailed Ms Saifiti on 18 April 2011 to confirm he had been to see his bank and on 26 April 2011 Ms Saifiti received confirmation from Ms Celerina Gieseke in the DoL finance department that payment of the filing fee had been received.

The Law

Limitation Period

[19] The relevant section of the Act is s 142:

***S142* Limitation period for actions other than personal grievances**

No action may be commenced in the Authority or 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.

Commencement of proceedings

[20] Regulations 4, 5(2) and 6 of the Employment Relations Authority Regulations 2000 ("the Regulations") address commencement of proceedings in the Authority:

R 4 Application

(1) These regulations are not to be strictly interpreted or applied, but are to be interpreted and applied in a way that best enables the Authority -

> *(a) to support successful employment relationships and the good faith obligations that underpin them; and*
> *(b) to determine the substantial merits of any case, without regard to technicalities; and*

(c) to deliver speedy, informal, and practical justice to the parties in any matter before it.

R 5 Commencement of proceedings

(2) A person commences proceedings by lodging with an officer of the Authority 2 copies of an application that complies with these regulations.

R6 Statement of problem or matter

(1) The application must -

> *(a) Include a statement of the problem or matter to which the application relates; and*
> *(b) Be accompanied by the prescribed fee.*

(2) The statement may deal with more than 1 problem or matter

Cause of action

[21] In *Williams v Attorney-General*[1] a cause of action was defined as accruing when *"every fact exists which it would be necessary for the plaintiff to prove in order to support the plaintiff's right to the judgement of the court."*[22] If an analysis discloses a breach of contract, the long held view is that the cause of action accrues when the

breach occurs, and that it is from that moment that time starts to run against the plaintiff.[2]

[23] It follows from these propositions that the fact that the plaintiff does not suffer damage until some time after the breach has occurred does not extend the time within he or she must bring an action.

Submissions of the Parties

[24] Ms Dunn and Ms Hardacre submit for STNZ that Mr Rock's statement of problem is a wages claim, and as such the cause of action arose on 4 March 2005, when Mr Rock's employment with STNZ ended. Consequently the six year period under which Mr Rock could make a claim pursuant to s 142 of the Act expired on 3 March 2011.

[25] Ms Dunn and Ms Hardacre further submit that even if a statement of problem was sent to the Authority prior to 4 March 2011, s 142 required that the 'action' must be 'commenced' before the six year period expires.

[26] Pursuant to the Regulations, the submission is made that Mr Rock's application was not ' *lodged with the Authority"* as it was not accompanied by the prescribed fee. Accordingly it is submitted for STNZ that Mr Rock's action was not commenced until 29 April 2011.

[27] Ms Dunn and Ms Hardacre also argue that the wording of s 142 of the Act does not accord the Authority discretion to have the time limit extended. Accordingly Mr Rock is barred from bringing his claim by s 142 of the Act and the Authority has no jurisdiction to hear Mr Rock's claim.

[28] Ms Applegate for Mr Rock submits that it is not correct that Mr Rock's claims arose on the last day of his employment. Ms Applegate submits that Mr Rock's claim arose at a later stage when he had become aware of the breach.

[29] Ms Applegate specifically points to the fact that Mr Rock claims that on 15 September 2005 he became aware that payments had not been made on his behalf to the STIHL PTY LTD Superannuation Scheme, but that he was not aware that there was any issue regarding STNZ paying his entitlements until his conversation with Mr Bibby on 11 October 2005.

Determination

Commencement of Proceedings

[30] I accept the submissions of Ms Dunn and Ms Hardacre on the application of s 142 of the Act and r5 and 6 of the Regulations as being correct.

[31] The Authority does not have discretion to extend the time period for commencing an action in the Authority under s 142 of the Act. This is in contrast to other time limits as specified in the Act which do provide for the exercise of discretion, for example s 114(4) of the Act which allows the Authority to grant leave to an employee to raise a personal grievance claim after the 90 day time period has expired under exceptional circumstances.

[32] Regulation 5 is quite clear that the commencement of proceedings must comply with the Regulations and consequently must comply with Regulation 6 by being accompanied by the prescribed fee. However these provisions must be read in the context of Regulation 4 which states that the regulations are not to be strictly interpreted or applied, but rather that they are to be interpreted and applied in a way which best enables that Authority to support successful employment relationships and the good faith obligations which underpin them, and without having regard to technicalities when determining the substantial merits of the case.

[33] Mr Rock clearly made an attempt to comply with the Regulations by lodging his application and sending the prescribed fee, but despite his efforts I find that the full amount of the prescribed fee was not actually received until 26 April 2011 when Ms Gieseke confirmed that the correct filing fee payment had been received by the Authority.

[34] I find that despite the considerable time available to him, Mr Rock did not exercise sufficient due diligence when lodging his application with the Authority and consequently Regulations 5 and 6 are to be interpreted and applied as written.

[35] I determine that proceedings were not commenced by Mr Rock until 26 April 2011.

[36] I now turn to consideration of the various heads of claim made by Mr Rock. A cause of action accrues when the breach occurs, and that is the moment from which time starts to run.

Relocation Expenses

[37] Mr Rock's employment agreement committed STNZ to meeting the costs of Mr Rock's relocation back to any state capital city in Australia. Mr Rock and his family relocated to Perth, a state capital city in Australia, at the end of February 2005.

[38] The table produced in evidence by STNZ details Mr Rock's estimated relocation expenses as advised to STNZ on 9 February 2005. The subsequently added handwritten note by the STNZ Managing Director dated 10 February 2005 is a file note and alludes to a discussion with Mr Rock and states that the request was declined. I find it reasonable to conclude that Mr Rock would have been informed that his relocation expenses request based on estimated values had been declined at this

point and he would consequently have been aware of an intended breach at this moment in time.

[39] However an alternative view could be taken, namely that the actual relocation expenses having been incurred and paid for by Mr Rock by 5 March 2005, reimbursement became due following the submission by Mr Rock of an expenses claim and actual receipts in accordance with the STNZ policy. The breach occurred at the time the relocation expenses were not paid by way of reimbursement by STNZ.

[40] STNZ's normal creditor terms are that one off creditor payments and reimbursements are processed twice a week, on Wednesdays and Fridays. Monthly supplier accounts are paid on the 25th day of each month.

[41] On the basis of this alternative scenario, Mr Rock could expect to be reimbursed following the incurring of the actual relocation expenses, and allowing two weeks for Mr Rock to submit his relocation expenses claim, he would become aware that as a 'one off creditor' that he should have received payment by Wednesday 24 March 2005, or possibly by Friday 26 March 2005. Had Mr Rock's claim been regarded as a monthly supplier account, he could have expected payment by 25 March 2005.

[42] On the evidence of the detailed table of estimated for relocation expenses dated 9 February 2005 and the actual dates of receipts relating to the accommodation (5 March 2005),

the flights on (22 February 2005), 5 March 2005, and the shipping costs (2 March 2005), I do

not accept Mr Rock's contention that he only became aware of the non-payment of the relocation expenses on 11 October 2005 when he spoke to Mr Bibby, but find that Mr Rock would have been aware of the non-payment by late March, or at the very latest, by 25 April

2005.

[43] In the event that Mr Rock did not submit an expense claim together with the receipted accounts to STNZ, and I note Mr Rock's statement made via his counsel that he does not have any specific recollection of submitting the accounts for reimbursement, he could not have a reasonable expectation that reimbursement would occur.

[44] I determine that Mr Rock failed to bring a claim in respect of the relocation expenses back to Australia within the 6 year limitation period as specified in s 142 of the Act.

Management Bonus

[45] In the email dated 14 February 2005, Mr Bibby confirmed that Mr Rock's pro-rata management bonus would not be paid until mid-April 2005. I consider that the bonus, (had indeed any bonus been due, noting that Mr Bibby alluded in an email to Mr Marburg dated 11 October 2005 that any bonus payment would in fact have been a *"zero"* amount) became due for payment in mid-April 2005 thus the non-payment event at that point in time constituted the breach, and Mr Rock would have known at that time that the bonus had not been paid..

[46] I do not find the fact that Mr Rock states he only became aware of the non-payment of the pro-rata bonus on 11 October 2005 when he spoke to Mr Bibby on the subject, acts to extend the time period within which an action must be commenced.

[47] I determine that Mr Rock failed to bring a claim in respect of the pro-rate bonus payment within the 6 year limitation period as specified in s 142 of the Act.

Superannuation Scheme

[48] Mr Rock was entitled to the transfer of his superannuation entitlements upon the termination of his employment on 4 March 2005. Mr Rock stated that on 11 September 2005 he became aware that there was a deficit in payments made by STNZ into the STIHL PTY LTD Superannuation Scheme.

[49] On 11 October 2005 Mr Rock spoke to Mr Bibby and at this point Mr Bibby informed him of his understanding that the Superannuation payments made by STNZ to the STIHL PTY LYD Superannuation Scheme were only payable at the rate of Mr Rock's salary at the time of his departure from STIHL PTY LTD. In addition, the email dated 12 October 2005 from Mr Marburg confirms the fact that Mr Rock was making enquiries about the level of his superannuation fund.

[50] Whilst Mr Bibby stated in the email to Mr Marburg dated 11 October 2005 that: *"His package was effectively negotiated by me exclusive of the AU Super."*, there is no employment agreement between Mr Rock and STNZ produced in evidence which supports the contention that there were any negotiations which superseded the terms of Mr Rock's employment in New Zealand that were set out by Mr Millar in the 25 August 2005 letter.

[51] Based on the 25 August 2005 letter from Mr Millar, Mr Rock had an expectation that STNZ would make payments into the STIHL PTY LTD Superannuation Scheme during his employment in New Zealand. The commitment made by Mr Millar I find to have been a commitment made by STIHL PTY LTD and intended as an instruction to be implemented by

Mr Bibby acting on behalf of STNZ.

[52] I find no evidence that Mr Bibby negotiated new terms with Mr Rock in 1999 such as to remove the reasonably held expectation by Mr Rock as to the rate at which STNZ would make contributions to the STIHL PTY LTD Superannuation Scheme.

[53] I find that Mr Rock only became aware of the deficit in payments into the STIHL PTY LTD Superannuation Scheme on 11 September 2005. I determine that Mr Rock has brought a claim to remedy deficits in his superannuation payment entitlement within the 6 year limitation period as specified in s 142 of the Act.

[54] **Costs**

[55] Costs are reserved pending the final determination of the matter.

Eleanor Robinson

Member of the Employment Relations Authority

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[1] [1990] NZCA 20; [1990] 1 NZLR 646 at 678 per Richardson J, citing *Coburn v Colledge* [1897] UKLawRpKQB 62; [1897] 1 QB 702 at 706 per Lord Esher MR
[2] White v Taupo Totara Timber Co [1960] NZLR 547
