Employment Court of New Zealand

Saipe v Bethell (aka Bethell-Paice) [2019] NZEmpC 103 (20 August 2019)

Last Updated: 26 August 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKAURAU

[2019] NZEmpC 103
EMPC 188/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for a strike out order
AND IN THE MATTER	of an application to extend time under s 219 of the Employment Court Act 2000
BETWEEN	BRIAN SAIPE Plaintiff
AND	TRUDE JEAN BETHELL (ALSO KNOWN AS TRUDE JEAN BETHELL-PAICE) Defendant

Hearing:	8 August 2019
Appearances:	S Greening, counsel for the plaintiff E Davis, counsel for the defendant
Judgment:	20 August 2019

INTERLOCATORY JUDGMENT OF JUDGE B A CORKILL

(Applications for a strike out order and for leave to extend time)

Introduction

[1] Mr Saipe has challenged a determination in which the Employment Relations Authority (the Authority) dismissed an application for leave to extend time for filing a statement of problem in the Authority, under s 219 of the Employment Relations Act 2000 (the Act).1

1 *Siape v Bethel* [2018] NZERA Auckland 180.

[2] This led to Ms Bethell filing an application to strike out the challenge. She asserts that the statement of problem was not filed within the three-year time limitation period provided for in s 114(6) of the Act; thus, the Authority did not have jurisdiction to consider the employment relationship problem.

[3] This application is opposed by Mr Saipe on the basis that, analysed properly, the Court must conclude there was compliance with the section, and there is accordingly jurisdiction.

[4] Mr Saipe also filed an application under s 219 of the Act, seeking an order extending the three-year time limitation

period if necessary. This was met with the obvious objection that the Court has no statutory right to extend the limitation period, as determined by a full Court in *Blue Water Hotel Ltd v VBS*.2 As a result Mr Saipe's application was withdrawn by leave. However, it was accepted that the affidavit evidence filed by Mr Saipe in connection with his s 219 application would be considered for the purposes of the strike out application.

Indisputable facts

[5] Mr Saipe was employed by Ms Bethell as an administrator, commencing work in November 2012. There was no written employment agreement.

[6] On 24 August 2013, she emailed the hours to be worked by Mr Saipe and said she could no longer engage his services. In her letter she said:

...

We employed you on a part time casual basis on the basis that we would change this as we could afford.

That was our verbal contract – clear.

At our meeting to reduce your hours to 15 we wished to reduce your hours and though the 15 hours a week that you requested were excessive to what was comfortable for us we agreed to it at the time. Due to our present circumstances and as per our verbal contract to employ you as we could afford

– the number of hours we can afford is 12 hours as this does not suit you we regret that we cannot continue engaging your services.

2 *Blue Water Hotel Ltd v VBS* [2018] NZEmpC 128.

It is sad that despite our communication with you that had to reduce to 12 hours a week you continued without meeting with us to change from at 15 hours a week. Though you have not complied with our original verbal contract we will pay you those extra hours and any monies owing for holiday pay.

As from this date 24th August 2013 we request you not use our website, emails or any companies associated with Bethells Beach Cottages and that you hand over any login and password details relevant to all work you have undertaken on our behalf.

It is with much regret that it has come to this we have valued your input into our business.

...

[7] Mr Saipe responded by an email sent on 26 August 2013, which relevantly stated:

...

Notice of employment relationship problem re Trude's email of 24 August

2013 and therein notice of my dismissal.

For the avoidance of future doubt I deny Trude's account of our employment [contract] as expressed in her email to me dated 24 August 2013 in which she dismisses me from my position, in particular, but not limited to the so called casual nature of our employment contract. I also deny other aspects of her email in particular, but not limited to:

1.1 Your assumptions that said contract conferred any authority upon you as the employer to unilaterally reduce my paid working hours.

1.2 All allegations that I have failed to comply with said contract.

1.3 Your assumptions that said contract conferred any right upon you in the current circumstances as the employer to dismiss me.

Clearly, an employment relationship problem exists between us. I believe the best way to resolve the problem is by mediation and I have contacted the mediation service of the Labour Group within the Business Innovation and Employment and asked to be informed of dates available for a mediation.

I expect that the Auckland office of the mediation service will be in touch with me.

I invite you to take part in a mediated meeting, (which is free) as I believe the problem would be best resolved by a prompt mediation and that our working relationship may potentially improve as a result.

Please respond promptly as both the mediation service and I wish to know whether you as my employers wish to participate, so that a date for the fixture may be found.

...

[8] The next material event occurred on 26 November 2013, when Mr Saipe wrote to Ms Bethell using her Post Office Box (P O Box). This letter stated:

...

Re Confirmation of personal grievances

You have received my notifications of personal grievances. You have declined several opportunities to have the problems resolved by mediation which I offered. (The mediation service of the Labour Group within the Business Innovation and Employment Dept has confirmed that you declined mediation.)

Accordingly, I confirm that I will commence actions against you in the Employment Relations Authority in relation to personal grievances.

I was unjustifiably and summarily dismissed from my position without warning and at nil notice by you as my employer. Consequently my employment was affected to my disadvantage by your unjustifiable actions.

I challenged the unjustifiable dismissal and parts of it when they came to my notice. My employment continues to be affected by your unjustifiable actions, some of which have come to my notice since the unjustifiable dismissal.

...

[9] Delivery records produced by Mr Saipe show the letter was delivered to Ms Bethell's P O Box address on 29 November 2013. Ms Bethell says that because the P O Box was only checked weekly, it would not have been cleared until on or about 5 December 2013. She has assumed that it would not have been cleared until a full week after delivery. She says that is the date when it came to her attention.

[10] Ultimately, Mr Saipe filed a statement of problem in the Authority, on 29 August 2016.

The parties' cases

[11] Ms Bethell's application for strike out is based on the fact that the statement of problem was on these facts filed with the Authority out of time. Accordingly, there is a want of jurisdiction.

[12] She asserts that Mr Saipe's letter of 26 November 2013 contained only confirmation of what he had said in his communication of 26 August 2013; and in any event, the document did not come to Ms Bethell's attention until 5 December 2013. On either score, the statement of problem was filed out of time.

[13] For Mr Saipe, the primary submission was that although the email of 26 August 2013 may have raised an unjustified action grievance, it could not have raised a dismissal grievance, because his employment had not ended. There was an implied term providing for reasonable notice of one week, the expiration of which occurred on 2 September 2013. Accordingly, the 90-day period within which a personal grievance for unjustified dismissal had to be raised would have expired on 1 December 2013. This deadline was met because the letter of 26 November 2013 was delivered to Ms Bethell's P O Box on 29 November 2013. The statement of problem was filed with the Authority within three years of that date. Accordingly, that there was compliance with s 114(6) of the Act.

[14] A secondary submission was that Mr Saipe did not become aware of the true reasons for his dismissal until 1 November 2013. On the basis of such authorities as *Wyatt v Simpson Grierson*, the 90-day period commenced on that date, so that there was compliance with the provisions of s 114(1), and then s 114(6) of the Act.3

Strike out principles

[15] There was no controversy as to the applicable strike out principles, which are of course well settled. The Court has power to strike out all or part of a pleading on the following grounds:

a. If it discloses no reasonably arguable cause of action, is frivolous or vexatious, or is otherwise an abuse of the processes of the Court.4
b. For a cause of action to be struck out, it must be untenable. The jurisdiction is exercised sparingly and only in clear cases. The jurisdiction is not excluded by the need to decide difficult questions of

3 *Wyatt v Simpson Grierson (A Partnership)* [2007] ERNZ 489, (2007) 4 NZELR 618.

4 Employment Court Regulations 2000, reg 6(2)(a)(ii) and High Court Rules 2016, r 15.1.

law requiring extensive argument, or in a developing area of law. Pleaded facts, whether or not admitted, are assumed to be true. However, this does not extend to pleaded allegations that are speculative and without foundation. The Court may also have regard to indisputable facts.5

Section 114

[16] The material provisions of s 114 of the Act are:

114 Raising personal grievance

(1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.
(2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.
(3) Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.

...

(6) No action may be commenced in the Authority or the court in relation to a personal grievance more than 3 years after the date on which the personal grievance was raised in accordance with this section.

[17] I will refer to relevant authorities where necessary.

Discussion

Unjustified action grievance

[18] The email sent by Mr Saipe on 26 August 2013 raised a disadvantage grievance.

5 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

[19] The statement of problem, subsequently filed on 29 August 2016, incorporated a claim for such a grievance. The originating statement of problem was filed more than three years after that personal grievance was raised and is accordingly out of time. The strike out application must succeed on this point.

Unjustified dismissal grievance

[20] The chronology relating to the asserted unjustified dismissal is more complex.

[21] The first question relates to when that personal grievance was raised. Was it on 26 August, 1 November,6 or 29 November 2013?

[22] Mr Greening, counsel for Mr Saipe, submitted that the material date could not be 26 August 2013, the date of Mr Saipe's email to Ms Bethell, because his employment was still on foot. Ms Davis, counsel for Ms Bethell, submitted that her email was clear on its face. In her email of 24 August 2013, Ms Bethell plainly stated that the employment was to end that day; Mr Saipe's email of 26 August 2013 raised disadvantage and dismissal grievances which responded to that statement.

[23] To some extent there are factual issues as to precisely when the employment ended. Mr Saipe stated in his affidavit that he worked until 30 August 2013; and produced a wage schedule which suggested payment of wages being made until 2 September 2013 (although for the last three week days (or five total days) an unidentified person has handwritten the words "back pay").

[24] The short point is that if Mr Saipe's employment had not ended by the date of his email, it is arguable he could not raise a dismissal grievance at that point.

[25] The authorities on this issue were reviewed by Judge Perkins in *Underhill v Coca-Cola Amatil (NZ) Ltd*, where he said:7

[52] General principles of contract law are applicable in the employment context. This is clear from s 162 of the Act, which allows the Court to apply any rule of law relating to contracts. The principle was also stated recently by the Court of Appeal:

6 This date was referred to in Mr Greening's submission, but not Mr Saipe's affidavit.

7 *Underhill v Coca-Cola Amatil (NZ) Ltd* [2017] NZEmpC 117 (footnotes omitted).

Contracts of employment are subject to the same rules of interpretation as apply to all contracts. The express terms are the central focus of an interpretative assessment.

[53] In *Money v Westpac Trust Banking Corporation* the Employment Court emphasised that:

The contractual obligation must be taken to have been entered into deliberately by the respondent with the intention of honouring it if the occasion arose.

[54] Judge Inglis (as she then was) recently reiterated these principles in *Stormont v Peddle Thorp Aitken Ltd*. In that case, the employment contract specified that if the employee's employment was terminated, the company must consider another position for her. The company's failure to do so was considered a breach of its contractual obligations and duty of good faith.

[55] In relation to notice periods, the Court has applied a strict approach to both parties to an employment agreement. It was decided in *Poverty Bay Electrical Power Board v Atkinson* that the limitation period starts at the end of the notice period given to the employee. In that case, the employee had a three-month notice period in his contract. He was dismissed and paid in lieu of working out his notice. He raised his grievance four months after that payment was made. This was held to be on time; the period started running at the end of the three-month notice period, which means it only took him one month to raise the grievance.

[56] A similar conclusion was reached in *New Zealand Automobile Association Inc v McKay*, where Chief Judge Colgan applied *Atkinson*. In that case, the employee was given one month's notice upon dismissal. He tried to raise the grievance during that one-month period, but it was held not to be possible, as the dismissal only occurred at the end of that one-month period. It could only have been a disadvantage grievance raised during that notice period.

[57] While *Atkinson* and *McKay* involved dismissal upon notice, and the present case involves what was in effect a summary dismissal, the principle is the same. If it is accepted that the express termination clause must be strictly construed, in accordance with contract law principles, then it follows that termination of employment in this case was not perfected and did not occur on 26 May 2016. This is for the simple reason that notice was given orally in a face-to-face meeting on that date – no written notice was provided. *Since the Underhills were not technically dismissed on that date, the cause of action did not yet accrue. There cannot be a personal grievance for unjustified dismissal when the employee has not yet been dismissed.*

(Emphasis added)

[26] In one respect, the facts of this case are similar to those in *Underhill*. There, the Court had to consider a submission that the relevant contracts were terminated with immediate effect; the Court did not accept that submission for the reasons set out in the above extract.

[27] Underhill involved an express term which required the provision of written notice of termination. However, *McKay*, referred to in *Underhill*, did involve an implied term as to reasonable notice, as is alleged here.8 So that distinction is not necessarily fatal to Mr Saipe's argument opposing the application for strike out.

[28] Ms Bethell said in her email of 24 August 2013 that Mr Saipe worked on a part-time casual basis. That factor could be relevant to an ultimate finding as to the existence of an implied term as to reasonable notice and/or as to its length. However, at this stage, the Court has to proceed on the basis that the pleaded assertion as to notice is capable of proof.

[29] There is a live issue as to the date to which Mr Saipe worked. There is evidence that he was paid at least until 28 August 2013, and perhaps 2 September 2013. Again, that is not a matter which the Court can or should resolve at this interlocutory stage.

[30] For present purposes only, I adopt the conclusion expressed in *Underhill* that Mr Saipe's unjustified dismissal grievance could not be raised if he was entitled to a period of notice, and that period had not expired. Were such a finding to be made, it is conceivable the Court could conclude Mr Saipe was not technically dismissed on 24 August 2018, and that this was not the date on which his dismissal grievance action accrued. Thus, he could not raise a dismissal grievance on 26 August 2013, since the dismissal had yet to take effect.

[31] Next, I consider 1 November 2013. Although Mr Saipe pleaded, and said in his affidavit, that he learned of the "real reasons" for the dismissal at some time after 24 August 2013, he did not explain what, in his opinion, the real reasons were. Mr Greening said he had chosen not to. I cannot therefore conclude that Mr Saipe could prove there was a plausible reason for dismissal, not explained in Ms Bethell's email, which came to his attention at a later date.

8 *Underhill v Coca-Cola Amatil (NZ) Ltd,* above n 7, at [46].

[32] Finally, I consider Mr Saipe's letter dated 26 November 2013. If a dismissal grievance had not been raised previously, this letter did so. The question under s 114(2) of the Act, is whether reasonable steps were taken to make Ms Bethell aware of the grievance, and if so, the operative date.

[33] In my view, it was reasonable to send a letter by courier to Ms Bethell, so that there would be a record of delivery.

[34] The correspondence before the Court suggests that Ms Bethell used her P O Box for the purposes of the business in which Mr Saipe had been employed. The records before the Court indicate the document was delivered to the applicable post office at "07:59" on 29 November 2913; I infer that was the date of delivery to Ms Bethell's P O Box.

[35] In my view, the relevant date must be the date of delivery to that address. The assessment of time should not, in such a case, depend on when Ms Bethell elected to clear the P O Box which she used for business purposes. It was reasonable to assume that it would come to her attention when delivered, a presumption which applies to other forms of service, for instance, as described in the Employment Court Regulations 2000.9

[36] Accordingly, there is a tenable argument that the personal grievance was raised with the employer on 29 November 2013. The filing of the statement of problem on 29 August 2016 would then be within the three-year time limitation period.

Disposition

[37] The application for strike out succeeds in part.

[38] The unjustified action personal grievance was raised on 26 August 2013, and the statement of problem relating to it was filed on 29 August 2016. Accordingly, there is no jurisdiction to consider it having regard to the provisions of s 114(6) of the Act; that grievance must be struck out.

9. Employment Court Regulations 2000, reg 28(2)(a)(iii), which provides for service of a document by registered post *to* a postal box held in New Zealand.

[39] There is a tenable argument that the dismissal grievance was raised on 29 November 2013, and the statement of problem relating to it was filed within the time limitation provisions of s 114(6) of the Act. I dismiss this aspect of the application for strike out.

[40] Costs are reserved.

B A Corkill Judge

Judgment signed at 3.15 pm on 20 August 2019