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Sunair Aviation Limited v Walters [2017] NZEmpC 124 (12 October 2017)

Last Updated: 16 October 2017

IN THE EMPLOYMENT COURT AUCKLAND

[\[2017\] NZEmpC 124](#)

EMPC 130/2017

IN THE MATTER OF an application for leave to extend
 time to
 file a challenge

BETWEEN SUNAIR AVIATION LIMITED
 Applicant

AND CHRISTOPHER STEPHEN WALTERS
 Respondent

Hearing: On the papers filed on 19 and 27 June; 4, 21 and 31 July
 2017

Appearances: M Beech and T Condor, counsel for applicant
 W Reid, advocate for respondent

Judgment: 12 October 2017

JUDGMENT OF JUDGE J C HOLDEN

APPLICATION FOR LEAVE TO EXTEND TIME TO FILE A CHALLENGE

Introduction and Outcome

[1] Sunair Aviation Ltd (Sunair Aviation) applies for an extension of time to enable it to bring a cross-challenge out of time. For the reasons set out below, that application is declined.

Background

[2] Between 1988 and 2015 Sunair Aviation provided fire rescue services at Tauranga Airport. The agreement between Sunair Aviation and the Tauranga City Council, which owns the airport, was described at the Authority meeting as being on a “casual, verbal basis”. In 2015 the Tauranga City Council decided to put the Rescue Fire Services contract out for tender. Five parties tendered for the contract, including Christopher Walters who at the time was an employee of Sunair Aviation.

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Sunair Aviation also tendered for the contract, unaware of Mr Walters’ tender until it learned that Mr Walters had succeeded in his tender and contracted with the Council. Mr Walters’ tender was submitted in the name of a partnership between himself and his wife, called Advanced Aviation Services.

[3] Sunair Aviation then lodged proceedings with the Employment Relations Authority alleging that Mr Walters had breached various express and implied terms of his employment agreement.

[4] In a determination of the Authority dated 17 June 2016 the Authority held that Mr Walters had breached the terms of his employment with Sunair Aviation and in particular:1

(a) Clause 18 of his individual employment agreement prohibiting conflicts of interest; and

(b) His implied duty of fidelity.

[5] For the sake of completeness cl 18 of the individual employment agreement reads as follows:

18. Conflicts of interest: During the period of employment the Employee shall not engage in any employment with, or become involved in, any business which may compete with the Employer's business. The Employee shall not undertake any employment or activities that may impact on the Employee's attention or commitment to his/her duties under this agreement.

[6] As a result of the findings in the first determination, the Authority held that Sunair Aviation was entitled to an assessment of remedies arising out of Mr Walters' breaches. Neither party filed a challenge to the first determination.

[7] A further investigation meeting was held on remedies and in a second determination of the Authority, dated 31 March 2017, the following determinations

were made:²

1 *Sunair Aviation Ltd v Walters (No 1)* [2016] NZERA Auckland 198.

2 *Sunair Aviation Ltd v Walters (No 2)* [2017] NZERA Auckland 91.

(a) Sunair Aviation was entitled to an assessment of remedies because Christopher Walters (Mr Walters) was found to have breached an express and implied term of his employment agreement.

(b) The remedy awarded to Sunair Aviation arising out of Mr Walters'

breaches was "loss of a chance" damages in the amount of

\$66,681.90.

(c) Five percent interest was payable on the amount specified in (b) above from 17 June 2016 until 17 June 2017 or until the amount was paid in full, whichever was earlier.

(d) The parties were directed to use their best endeavours to reach agreement on a payment schedule and to submit any agreed schedule to the Authority for approval.

[8] In each of the Authority's determinations, costs were reserved. There has been no subsequent determination on costs.

[9] Mr Walters challenged the second determination within time. The challenge is made on a non-de novo basis and the election specifies that it "relates to the following part of the determination, namely those parts dealing with damages for "loss of a chance" commencing at paragraph 67 of the determination and concluding at paragraph 89". That election, specifying those particular paragraphs from the determination, means that Mr Walters is putting in issue not only the fact that he has been held liable to Sunair Aviation for "loss of a chance", but also the quantum of the damages awarded.

[10] Initially Sunair Aviation made a decision not to challenge the second determination. Mr Walters' challenge was filed on 21 April 2017, one week before the expiry of the time limit for doing so; it appears that the challenge was served upon Sunair Aviation five days after the time limit for filing a challenge had expired. As Mr Walters had filed a challenge, Sunair Aviation then decided that it did wish to challenge the determination. On 19 June 2017, more than 50 days out of time, it

filed an application for leave to extend the time to file a challenge.³ It has attached a draft statement of claim to its application. The draft statement of claim is for a de novo challenge to the determination. In it Sunair Aviation says that the Authority was incorrect to find that it was not entitled to its loss of profit for the Rescue Fire Service contract or for losses arising from potential future contracts.

[11] It is that application that is the subject of this judgment.

Summary of findings in *Sunair Aviation Ltd (No 2)*

[12] In order to give some background to the grounds upon which Sunair Aviation now seeks to file a challenge out of time, a summary of the findings of the Authority is of assistance. These are as follows:

(a) A claim made by Sunair Aviation for special damages was not adequately pleaded and the Authority held this issue of damages was not properly before it and therefore it was not considered.⁴

(b) An apparent agreement between the parties to include consequential losses in the claim (which had not been pleaded) was not accepted by the Authority Member on grounds that it would offend against the principles of natural justice towards Mr Walters. The Authority Member felt that procurement of agreement from Mr Walters' advocate was without proper consideration of the consequences by the advocate and that Mr Walters ought to have been properly informed of the evolving nature of the case.⁵

(c) The "live" damages claim (presumably meaning that pleaded and before the Authority) was a claim for loss of profits.⁶

3. On 2 June 2017 it attempted to file a statement of defence and counter-claim. That was rejected by the Employment Court Registry

as non-compliant.

4 At [17].

5 At [25]-[27].

6 At [28].

(d) A claim for “account of profits” belatedly raised in submissions had not been pleaded and was disregarded.⁷

(e) Damages for breaches of statutory duty of good faith were held to be excluded from consideration by this Court’s decision in *Hally Labels Ltd v Powell*.⁸

(f) The claim for damages for loss of profits was rejected on the ground that Sunair Aviation was unable to demonstrate that, absent Mr Walters’ determined breaches, it would have won the tender.⁹

(g) Nevertheless, Sunair Aviation was entitled to damages for loss of chance.¹⁰

(h) The quantum of damages was calculated by applying a discounting formula to Sunair Aviation’s claim for loss of profits and the final figure reached following application of that formula was

\$66,681.90.¹¹

(i) In addition to the damages Mr Walters also was ordered to pay Sunair Aviation interest, as earlier specified in this judgment.¹²

The application for leave to file an election and statement of claim out of time

[13] The grounds upon which Sunair Aviation relies in its application are:

(a) Sunair Aviation did not file a challenge¹³ within time because it did not consider the time and delay of a challenge were justified on financial grounds;

7 At [29].

8 At [30], citing *Hally Labels Ltd v Powell* [\[2015\] NZEmpC 92](#).

9 At [64].

10 At [66].

11 At [89].

12 At [93].

¹³ The application refers to an “appeal” but a challenge is meant.

(b) Mr Walters’ challenge will require all the evidence in the Authority to be traversed, even on the limited basis on which the challenge is made;

(c) The delay in filing a challenge is less than 40 days (sic);

(d) There is no unfair prejudice to Mr Walters from the proposed extension being granted.

[14] Sunair Aviation expands on these grounds in a memorandum of counsel, and Mr Power, a director of Sunair Aviation, filed an affidavit in support of the application, essentially confirming that although Sunair Aviation was disappointed in the Authority’s determination, it decided that the cost and delay of another hearing was too much and that it was better off focusing on its business. He also complains that Mr Walters’ challenge was designed to make sure that he can only benefit from the challenge, challenging only findings that he does not like and leaving anything that was bad for Sunair Aviation alone.

The application is opposed

[15] Mr Walters opposes the application on the following grounds:

(a) Sunair Aviation has failed to advance any valid reason for the omission to bring the case within time;

(b) Sunair Aviation’s case will add greatly to the time and complexity in hearing Mr Walters’ own challenge to the determination;

(c) Sunair Aviation has failed to explain why there has been a delay in filing the application since service of Mr Walters’ challenge;

(d) Mr Walters will be prejudiced if the application is granted in terms of time and expense in pursuing his own challenge;

(e) Sunair Aviation's claim has no merit.

[16] Both parties filed written submissions and agreed that the application should be dealt with on the papers.

The factors the Court will consider in such cases

[17] There are a number of factors that the Court applies in considering applications for extension of time:¹⁴

(a) The reason for the omission to bring the challenge within time; (b) The length of the delay;

(c) Any prejudice or hardship to any other person;

(d) The effects on the rights and liabilities of the parties; (e) Subsequent events; and

(f) The merits of the proposed substantive proceedings.

[18] Ultimately however, the overall principle must be the justice of the case.¹⁵

Reason for the delay not compelling

[19] The reason given for the initial decision not to file a challenge is that Sunair Aviation did not consider the time and delay of a challenge were justified on financial grounds. Sunair Aviation's position changed once it learned that Mr Walters had filed his own challenge.

[20] There had been a Practice Direction of the Employment Court, issued in

2005, that had allowed the time for cross-challenges to run past the time prescribed for filing and be filed with a statement of defence. As from 1 May 2014, that Practice Direction was revoked. The current Practice Direction is in line with the

legislation and makes it clear that if a defendant wishes to challenge a determination

14 *Stevenson v Hato Paora College Trust Board* [2002] ERNZ 103 at [8].

15 *AFT v BCM* [2015] NZEmpC 234 at [35] – [36].

of the Authority it must do so within the 28-day timeframe specified in s 179(2) of the [Employment Relations Act 2000](#) (the Act).¹⁶

[21] All parties to a determination therefore are expected to turn their minds to whether they wish to challenge all or part of the determination, and to file any challenge within the 28-day timeframe. That Mr Walters filed a challenge is not a valid reason for the delay by Sunair Aviation in filing its own challenge.

Length of delay significant

[22] The expectation is that an application for extension of time will be made as soon as possible after the timeframe for bringing a challenge has lapsed. In cases involving applications for a re-hearing, the Court has commented that the applicant must move "with all possible dispatch".¹⁷ The same principle applies to applications for extensions of time generally, including applications such as the present one.

[23] The delay here is significant.

The delay in filing does not prejudice Mr Walters

[24] Mr Walters has noted that if the application succeeds he will be faced with defending a complex claim for \$723,091 as opposed to his own, more limited challenge.

[25] While it may be correct that the case would be more complex if Sunair Aviation is granted leave to file its challenge, the issue is whether the delay in filing has caused Mr Walters prejudice. The prejudice "must arise from the delay and not merely from the bringing of a challenge with its inherent resultant delay and uncertainty".¹⁸ Examples of prejudice might be unavailability of witnesses or the loss of other evidence, or simply loss of recall as a result of time passed. Another

example may be where a respondent has changed its position after no challenge was

16 Employment Court Practice Directions <<https://www.employmentcourt.govt.nz/legislation-and-rules/>>; see also *New Zealand Nurses Organisation v Waikato District Health Board* [2015] NZEmpC 78 at [2].

17 *Empress Abalone Ltd v Langdon* [2001] NZEmpC 133; [2001] ERNZ 441 at [55]; cited in *Marx v Southern Cross*

Campus Board of Trustees [2017] NZEmpC 4 at [11].

18 *Singh v Compass Group New Zealand Ltd* [2016] NZEmpC 63 at [31]. See also *Lewis v*

Immigration Guru Ltd [2017] NZEmpC 13 at [7].

filed within time. There is no evidence of these or of any other prejudice suffered by

reason of Sunair Aviation's delay.

Sunair Aviation will be able to call evidence and make legal submissions on issues covered by the challenge

[26] In a non-de novo challenge the court must direct, in relation to the issues involved in the matter, the nature and extent of the hearing.¹⁹

[27] The Authority found that, in tendering for the Rescue Fire Services contract Mr Walters had breached the conflicts of interest clause in his employment agreement. It also found that he breached his implied duty of fidelity. Neither of those findings has been challenged by Mr Walters.

[28] Mr Walters' non-de novo challenge is directed to the award by the Authority of "loss of a chance" damages in respect of the contract with Tauranga Airport to provide Rescue Fire Services. He says the Authority erred in fact and in law in finding that Sunair Aviation was entitled to damages for loss of a chance and in its assessment of what those damages were. As noted, this means that Mr Walters is putting in issue not only the fact that he has been held liable to Sunair Aviation for loss of a chance, but also the quantum of the damages awarded.

[29] Here the evidence to be called will necessarily canvas the circumstances of the tendering for the Rescue Fire Services contract, and the question of whether Sunair Aviation would have obtained the contract had Mr Walters not tendered. If the Court finds that damages for loss of a chance are recoverable here, it also will need to canvas the quantum of such damages.

[30] Sunair Aviation will be able to call evidence and make legal submissions on those issues in the context of Mr Walters' challenge, including in an effort to demonstrate that its chances of being awarded the contract were higher than

estimated by the Authority. The Court then will have to reach its own view on the

¹⁹ [Employment Relations Act 2000, s 182\(3\)](#).

merits, which could lead to an award of damages of greater or less than those awarded by the Authority.²⁰

Subsequent events not relevant

[31] Neither party points to any subsequent events that need to be considered.

Sunair Aviation has failed to establish the merits of the claim for losses arising from potential future and/or ancillary contracts

[32] Apart from the issues already before the Court as a result of Mr Walters' challenge, Sunair Aviation also wishes to challenge the Authority's finding in relation to losses variously described as "expectation damages" and "consequential losses". These were losses claimed by Sunair Aviation arising out of the possible re-awarding of the Rescue Fire Services contract after its expiry in 2021 and the performance of "additional services" for a period of 12 years from the commencement of the Rescue Fire Services contract.

[33] Because Sunair Aviation did not file a challenge within the timeframe allowed in [s179](#) of the Act, the merits of the proposed challenge become a significant factor for the Court's consideration. Sunair Aviation now must persuade the Court that the proposed challenge has a realistic prospect of success.²¹

[34] The additional losses Sunair Aviation wishes to pursue would be difficult to establish. The breaches were in Mr Walters' tendering, and in fact his successful tendering, for the Rescue Fire Services contract while employed by Sunair Aviation. The claim for losses arising from potential future and/or ancillary contracts suffers from considerable uncertainty. I have not been persuaded that there is a realistic prospect of success. On that principle, the application founders.

Overall justice does not require the extension of time to be granted

[35] Having considered the factors outlined, I conclude that the justice of the case does not require the extension of time to be granted.

²⁰ [Employment Relations Act 2000, s 183\(1\)](#).

²¹ *Sandilands v Chief Executive of the Department of Corrections*, NZEmpC Wellington, WC23/09, 14 October 2009 at [19].

[36] In summary, the delay in filing was significant and the reason for the delay not compelling. The key issues are already before the Court in the context of Mr Walters' challenge and I have not been persuaded of the merits of the other aspects of the case that Sunair Aviation wishes to challenge.

[37] For these reasons the application for an extension of time to bring a cross-challenge is declined.

J C Holden

Judge

Judgment signed at 3.30 pm on 12 October 2017