New Zealand Employment Relations Authority Decisions

van der Zwan v Plunkett (Auckland) [2007] NZERA 173 (23 July 2007)

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

5081366 AA 214/07

BETWEEN Julia van der Zwan

Applicant

AND Plunkett

Respondent

Member of Authority: Vicki Campbell

Representatives: Henry Koia for Applicant

Andrew Scott-Howman for Respondent
Investigation Meeting: 26 June 2007 at Hamilton
Submissions Received: 26 June from Applicant

26 June from Respondent

Determination: 23 July 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In a determination dated 3 November 2006 I found that Ms Van der Zwan had failed to raise her personal grievance for alleged unjustified disadvantage and unjustified dismissal within the requisite 90 day period as required by the Employment Relations Act 2000.

[2] During a conference call with the representatives in setting down the timetable for the determination dealing with whether Ms Van der Zwan had raised her grievance within the 90 day period, Mr Hope acknowledged that the Authority did not have before it, an application for leave to raise the grievance outside the 90 day period.

[3] Following the publication of determination AA335/06 Ms van der Zwan filed an application for leave to raise her personal grievance outside the 90 period.

[4] Plunket says the matter has been finally determined by the Authority and no challenge has been made to that determination and therefore the proceeding

must be struck out. Plunket relies on the estoppel argument of res judicata in making its submissions.

[5] By consent, this determination deals only with the threshold issue of whether leave should be granted to Ms van der Zwan.

Res Judicata/Estoppel

[6] A preliminary matter which requires determination and which relates to the threshold issue is whether the applicant is estopped from having her application granted through the application of the doctrine of res judicata.

[7] In *Shiels v Blakeley* [1986] NZCA 445; [1986] 2 NZLR 262 at 266 the Court of Appeal set out the principle of issue estoppel:

Where a final judicial decision has been pronounced by a New Zealand judicial tribunal of competent jurisdiction over the parties to, and the subject matter of, the litigation, any party or privy to such litigation, as against any other party or privy thereto, is estopped in any subsequent litigation from disputing or questioning the decision on the merits.

[8] In *Reid v Fire Service Commission* (No 2) [1998] NZEmpC 302; [1998] 3 ERNZ 1237, Goddard CJ set out the test as follows:

Where a final decision has been pronounced by a Court or Tribunal of competent jurisdiction over the parties to and subject matter of litigation

then each party is estopped or precluded from disputing or questioning such decision on the merits as against the other party in subsequent litigation.

In *Waugh v Commissioner of Police* [2003] NZEmpC 186; [2003] 1 ERNZ 236 Goddard CJ held:

In a case in which res judicata is asserted, it should be possible for the party relying upon it to point to evidence that the other party may not give because of a conclusive judicial finding on the subject.

[9] The Employment Court in *Clark v Nelson Marlborough District Health Board* [2002] NZEmpC 170; [2002] 2 ERNZ 483 at 499-500, quoted extensively from Bower & Turner's *Doctrine of Res Judicata* (2nd Ed, London, Butterworths, 1969) which notes:

...that the rule is intended to promote justice and therefore it should not be used to defeat justice. They state that the doctrine of estoppel is the product of the adversary system of litigation practised in our Courts and it may not be equally relevant to the work of tribunals whose work is inquisitorial and who therefore should not be prevented by the application of technical rules from carrying out a full investigation.

Spencer Bower & Turner state at para 184 that it is essential, if estoppel is to arise, that the identity of the subject matter in the two proceedings should be established and there is a burden on the party claiming an estoppel to establish it. It has to be shown that the plaintiff is seeking to re-agitate the very same question of fact or law which has already been the subject of a final decision between the same parties by a tribunal of competent jurisdiction.

At para 206 Spencer Bower & Turner state that it is not enough that that the proceedings are similar.

[10] The problem regarding the respondent's arguments is that I am not convinced that the issue to be determined in these proceedings is identical to the issue determined in AA 335/06.

[11] In the earlier matter I gave consideration only to whether or not Ms van der Zwan had raised her personal grievance within the requisite 90 day period. As confirmed by Mr Hope during the telephone conference call preceding the investigation into that matter, the Authority had no application for leave before it at that time. Having determined that Ms van der Zwan hadn't raised her grievance within the requisite 90 day period, I am now being asked to allow Ms van der Zwan to raise her grievance outside the 90 day period. I see this as the next logical step in the process which is provided for in the Employment Relations Act 2000 through sections 114 and 115.

[12] I have borne in mind that the Employment Relations Authority is a low level and informal forum and have taken into consideration the comments in Spencer Bower & Turner regarding tribunals and inquisitorial processes.

Application for leave

[13] Section 114(4) of the Employment Relations Act provides the discretion for the Authority to grant leave where the Authority:

- • is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115); and
- • considers it just to do so.

[14] Section 115 sets out four occasions on which exceptional circumstances will exist. This case is concerned with s.115(b):

- where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time

[15] In support of her application Ms Van der Zwan says when she instructed Mr Hope to raise a personal grievance in respect of her dismissal on 22 November 2004 and Mr Hope wrote to the respondent purporting to raise a grievance, she

had made reasonable arrangements to have her grievance raised by her solicitor who, unreasonably failed to ensure the grievance was raised.

[16] Ms van der Zwan says she contacted Mr Hope every about every three weeks to find out what was happening, sometimes it was more frequent. Ms van der Zwan told me she never got to speak with Mr Hope personally because in February 2005 he had passed the file onto Mr Sam Hood another lawyer employed the firm of Till Henderson King. As far as Ms van der Zwan was aware everything that needed to be done on the file was being done.

[17] In answer to questions at the investigation meeting Ms van der Zwan told me she had received copies of the correspondence passing between Mr Hope and the representatives for Plunket. She understood that her personal grievance had been raised, and that Mr Hope was taking care of all responses to communications.

[18] At the investigation meeting Mr Hope told me that he spoke to Ms van der Zwan after he received the letter from Plunket dated 20 December 2004. In that letter Plunket advises that in order to raise her employment relationship problem in the appropriate way Ms Van der Zwan should provide the details relating to the personal grievances within the 90 day period prescribed by legislation.

[19] Mr Hope says he recalls speaking to Ms Van der Zwan and had fully intended to provide a response. Mr Hope told me he didn't think he needed to but he wanted to give more information anyway. As events transpired that response was not forth-coming until October 2005.

Exceptional circumstances

[20] The requirement is for Ms van der Zwan to make reasonable arrangements to have her grievance raised on her behalf by an agent. Ms van der Zwan discussed her grievance with Mr Hope and Mr Hope wrote to Plunket on 3 December 2004, believing he was raising a personal grievance.

[21] On 20 December 2004 Mr Scott-Howman, on behalf of Plunket, write to Mr Hope and requested further and fuller particulars, reminding Mr Hope that he had 90 days in which to properly raise the grievance an indicating his [Mr Scott-Howman's] view that Mr Hope's letter failed to do this.

[22] The evidence about discussions between Mr Hope and Ms van der Zwan following receipt of the 20 December letter was vague at best. However, I have

concluded that it is more likely than not that Ms van der Zwan instructed Mr Hope to respond to the letter as it was, according to Mr Hope's evidence, his intention to do so.

[23] Mr Hope then passed Ms van der Zwan's file onto Mr Hood, in February 2005 who also did nothing with the file until he wrote to Mr Scott-Howman in October 2005. In the meantime Ms van der Zwan continued to make contact with Till Henderson King and received responses to the effect that everything was progressing.

[24] I am satisfied that Ms van der Zwan instructed Mr Hope to raise a grievance with Plunket.

[25] The question now is whether Ms van der Zwan's delay in raising the personal grievance was occasioned by the unreasonable failure of Mr Hope, and/or the staff under his control, to properly raise her grievance. I am satisfied that the test in s.115(b) has been met. It was the unreasonable failure by by Mr Hope and Mr Hood to ensure Ms van der Zwan's grievance was raised within the requisite 90 day period.

Is it just to grant the leave

[26] The final question is whether it is just to allow the case to be brought outside the 90 day period. There have been some inordinate delays with this matter being pursued, however, I am satisfied that Ms van der Zwan has, at all times, been intent on pursuing her grievances against Plunket

[27] In its submissions Plunket says that if the application for leave is successful, it will be prejudiced by the time lapse given that events surrounding Ms van der Zwan's grievance occurred in October and November 2004. It says that the person who undertook the investigation into Ms van der Zwan's conduct and the subsequent report which led to Ms van der Zwan's dismissal is no longer employed by Plunket and lives in the UK and there are other witnesses who will be difficult to contact.

[28] As already found, the reason for the delay was not one of Ms van der Zwan's making, albeit the delay has been significant.

[29] However, Plunket were on notice from December 2004 that Ms van der Zwan was intending to challenge her dismissal. It was always open to Plunket, when staff indicated an intention to leave the organisation, to request a

statement and to record contact details in the event that they may have to provide evidence at an Authority investigation meeting.

[30] Given the limited nature of the investigation to date I can make no assessment of the relative merits of both parties' cases on the dismissal or unjustified disadvantage claims.

[31] I am satisfied that the disadvantage to Ms van der Zwan in not having the merits of her grievance investigated and determined outweighs any prejudice to the respondent. Accordingly I grant leave for Ms van der Zwan's grievance to be raised out of time.

Mediation
[32] As required by Section 114(5) of the Act there will be a direction to the parties to use mediation to seek to mutually resolve the grievance.

Costs

[33] Costs are reserved. The parties are encouraged to discuss and resolve the matter of costs between them. In the event that they are unable to do so they may lodge and serve memorandum in the Authority for consideration.

Vicki Campbell
Member of Employment Relations Authority
