IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2010] NZEMPC 108
CRC 52/07

IN THE MATTER OF	a matter removed to the Court by the Employment Relations Authority
AND	
IN THE MATTER OF	an application for an order striking out the proceedings
BETWEEN	ANDREW GILLAN MACBETH Plaintiff
AND	COOKIE TIME LIMITED Defendant

Hearing: on the papers
submissions received 8 and 16 July 2010

Appearances: Tim McGinn, counsel for the plaintiff
Scott Fairclough, counsel for the defendant

Judgment: 17 August 2010

INTERLOCUTORY JUDGMENT OF JUDGE A A COUCH

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[1] The issue decided in this judgment is whether these proceedings should be struck out for want of prosecution.

[2] The plaintiff was employed by the defendant in 1996 and, by 1999, was effectively the general manager of the business. On 1 April 1999, a company controlled by the plaintiff entered into a contract with the defendant to provide his services to the defendant. Thereafter, the plaintiff continued to act as general manager of the business but management service fees were paid to his company. On 29 August 2006, the relationship between the parties ended.

[3] The primary issue is whether, after 1 April 1999, the plaintiff was an employee of the defendant. The plaintiff says that he remained an employee of the defendant and that, in dispensing with his services, the defendant unjustifiably dismissed him. He also alleges that unjustifiable actions of the defendant affected his employment to his disadvantage. The defendant says that, following the agreement with the plaintiff's company to provide his services, it no longer employed him and that, accordingly, he has no personal grievance rights.

[4] Proceedings were commenced in the Employment Relations Authority in June 2007. On 4 December 2007, the parties made a joint application to remove the matter into the Court for hearing and determination. The Authority granted that application on 7 December 2007[1].

[5] In the Court, the matter initially proceeded in the usual way. On 24 January 2008, a statement of claim was filed. A statement of defence was filed on 26 February 2008. I then held a telephone conference with counsel on 10 April 2008, the outcomes of which were recorded in a minute issued the following day. The plaintiff was directed to file an amended statement of claim including further particulars of certain allegations of fact and of the remedies sought. I then gave the following directions:

> [5] Both parties require discovery of documents. By agreement, each party is to specify in writing to the other party the scope of discovery sought. This should be in the form of a list of appropriately described categories of documents. Those lists are to be provided within 14 days after the provision of further particulars by the plaintiff.
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> [6] Each party is to respond to the other party's request for discovery by providing a list of documents in the form commonly used in High Court civil proceedings. I note that the range of documents potentially relevant to the matters at issue in this proceeding may include documents held by professional advisers and/or companies controlled by a party. All such documents will be within the power of the party and should be discovered. If privilege is claimed in respect of any document, the document should nonetheless be described and the ground of privilege stated.
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> [7] Once discovery and inspection are complete, a further directions conference will be held to set a timetable for any further interlocutory procedures and to set the parameters of a hearing. That will also be an appropriate time to discuss further the possibility of a judicial settlement

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> conference. Counsel should advise the Registrar when they are ready for that further directions conference to be held.
>
> [8] Leave is reserved to seek amendment of the directions given or for further directions to be given.

[6] An amended statement of claim in the form required was filed on 24 April 2008. Thereafter, neither party informed the Registrar that they were ready for a further directions conference as directed in paragraph [7] of my minute. Equally, neither party sought further directions pursuant to the leave reserved in paragraph [8] of my minute. At my direction, the Registrar made regular enquiries of counsel about the matter but, on each occasion, was told that it was in hand.

[7] The last enquiry by the Registrar was made on 19 February 2010. Mr McGinn provided a detailed reply in which he said that the plaintiff wished to proceed with his case. Mr Fairclough responded with an application to strike out the claim for want of prosecution which was filed on 18 March 2010. Each party has filed an affidavit in relation to this application: by the plaintiff on his own behalf and by Mr Pope-Mayell for the defendant. By agreement, counsel have made submissions in writing.

Principles

[8] The principles applicable to an application to strike out for want of prosecution were clearly established in *Lovie v Medical Assurance Society NZ Limited.*[2]

> Turning to the principles applicable to the substantive issue, the applicant must show that the plaintiff has been guilty of inordinate delay, that such delay is inexcusable, and that it has seriously prejudiced the defendant. Although these considerations are not necessarily exclusive, and at the end one must always stand back and have regard to the interests of justice, in this country, ever since *New Zealand Industrial Gases Ltd v Andersons Ltd* [1970] NZLR 58 it has been accepted that if the application is to be successful, the applicant must commence by proving the three factors listed.

[9] The essential nature of what is in the interests of justice was illuminated by the Court of Appeal in *Commerce Commission v Giltrap City Limited.*[3]

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[2] [1992] 2 NZLR 244 at 248
[3] (1997) 11 PRNZ 573 at 579

> In cases of delay and alleged want of prosecution, the right of all citizens and organisations to have access to the Courts for the determination of the issues they have raised should be denied only if that important right is outweighed by a stronger right vested in the defendant to have the case dismissed because justice can no longer be done in the light of the delay.

Discussion and decision

[10] Without recording the evidence in detail, I am satisfied that both parties delayed inordinately in complying with the directions I gave on 10 April 2008. I am also satisfied that the plaintiff further delayed inordinately after providing his list on 13 August 2008 by then taking no steps for 19 months.

[11] Where delay is inordinate, the natural inference is that it is inexcusable and the onus is on the plaintiff to establish a credible excuse for it. In his affidavit, the plaintiff provided a detailed explanation for the delay but did not satisfy me that it was entirely excusable.

[12] As to the effect of the delay on the defendant, Mr Pope-Mayell says that, until 31 December 2006, he was effectively the manager of the defendant's business. Since then, he has withdrawn from the day to day operations of the company and has moved his home to Queenstown. He says that, although he initially remained in close contact with the defendant's business, he has developed new business and personal interests over the last 18 months and that his involvement with the defendant is now solely as a director. Mr Pope-Mayell says that, if the matter proceeds, he will need to manage the defence of it on behalf of the defendant and that this will distract him from his current commitments.

[13] This evidence does no more than establish that, if the matter proceeds, it will be inconvenient to Mr Pope-Mayell and may impact on his other business and personal interests. It does not establish that the defendant will be prejudiced at all in its defence, let alone seriously prejudiced.

[14] In the absence of prejudice to the defendant, there is no reason why justice cannot be done if this matter proceeds to a hearing. The application to strike out is

dismissed. The Registrar should now arrange another telephone conference with counsel to give further directions.

Comments

[15] The principles upon which the Court decides applications such as this are settled and well known. Counsel both set them out in their memoranda. Given the lack of evidence of potential prejudice to the defendant, it must have been obvious this application could not succeed and it ought not to have been made. Rather, the defendant should have sought further directions from the Court setting a timetable for discovery.

Costs

[16] Given my comments above, the plaintiff is entitled to costs on this application regardless of the outcome of the proceedings as a whole. I fix costs at $1,200 to be paid within 15 working days after the date of this judgment.

A A Couch
Judge

Signed at 3.30pm on 17 August 2010