

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**[2010] NZEMPC 127
CRC 40/10**

IN THE MATTER OF an application for extension of time within
 which to challenge a determination of the
 Employment Relations Authority

BETWEEN TIM BROWNIE
 Applicant

AND PASCAL FUSTER
 Respondent

Hearing: on the papers

Judgment: 22 September 2010

JUDGMENT OF JUDGE A A COUCH

[1] The issue in this case is the effect of bankruptcy on proceedings before the Authority and the Court.

[2] On 24 May 2010, Mr Fuster lodged a claim with the Employment Relations Authority that he was employed by Mr Brownie and not paid for his work. The period of employment relied on was from mid November 2008 until about 18 January 2009. The Authority upheld Mr Fuster’s claim. It ordered Mr Brownie to pay Mr Fuster more than \$9,000 in arrears of wages, interest and expenses. That determination was issued on 3 August 2010.

[3] On 2 September 2010, the registrar received a letter from Mr Brownie saying that he wished to “appeal” the Authority’s determination. The letter did not meet the minimum requirements for a statement of claim and was not accompanied by the required filing fee. In any event, it was received by the Court outside the 28 day period prescribed by s179(2) of the Employment Relations Act 2000 within which a

challenge may be made as of right. Mr Brownie was told that, if he wished to pursue the matter further, he would need to seek an extension of that time period.

[4] On 17 September 2010, the registrar received further documents from Mr Brownie including what was effectively an application to extend time and an application for stay of proceedings. Mr Brownie also sent a cheque for the filing fee payable on a statement of claim even though he had lost the right to file such a document. At that point, the file was referred to me.

[5] In his original letter to the registrar, Mr Brownie said “Unfortunately, In April last year I was Adjudicated Bankrupt. The Debt to Pascal Fuster, is covered in my Bankruptcy.”

[6] This statement caused me to have a search made of the insolvency register maintained by the Ministry of Economic Development. This confirmed that Christopher Timothy Mark Brownie was adjudicated bankrupt in the High Court at Invercargill on 8 April 2009 and that he remains an undischarged bankrupt.

[7] Mr Brownie’s status as an undischarged bankrupt has significant consequences for Mr Fuster’s claim. Section 76(1) of the Insolvency Act 2006 provides:

76 Effect of adjudication on court proceedings

- (1) On adjudication, all proceedings to recover any debt provable in the bankruptcy are halted.

[8] Because Mr Brownie’s debt to Mr Fuster for arrears of wages was incurred prior to the adjudication on 8 April 2009, that debt was provable in the bankruptcy. The effect of s76(1), therefore, is that Mr Fuster was not entitled to commence his proceedings in the Authority and the Authority did not have jurisdiction to order payment by Mr Brownie.

[9] In these circumstances, I suggest the Authority may wish to reopen its investigation and set aside the orders it made. For his part, Mr Fuster may wish to take the necessary steps to prove his debt in Mr Brownie’s bankruptcy. The Authority’s confirmation of the debt may assist Mr Fuster in this regard.

[10] Mr Brownie’s status as a bankrupt also affects his own right to litigate. Sections 101(1) and 102(1) of the Insolvency Act 2006 provide:

101 Status of bankrupt's property on adjudication

- (1) On adjudication,—
- (a) all property (whether in or outside New Zealand) belonging to the bankrupt or vested in the bankrupt vests in the Assignee without the Assignee having to intervene or take any other step in relation to the property, and any rights of the bankrupt in the property are extinguished; and
 - (b) the powers that the bankrupt could have exercised in, over, or in respect of any property (whether in or outside New Zealand) for the bankrupt's own benefit vest in the Assignee.

102 Status of property acquired during bankruptcy

- (1) Between the commencement of bankruptcy and discharge of the bankrupt,—
- (a) all property (whether in or outside New Zealand) that the bankrupt acquires or that passes to the bankrupt vests in the Assignee without the Assignee having to intervene or take any other step in relation to the property, and any rights of the bankrupt in the property are extinguished; and
 - (b) the powers that the bankrupt could have exercised in, over, or in respect of that property for the bankrupt's own benefit vest in the Assignee.

[11] In this context, “property” includes intangible personal property rights such as the right to litigate. It follows that, as an undischarged bankrupt, Mr Brownie is not entitled to commence proceedings without the consent of the Assignee. There is no suggestion that such consent has been given. In the absence of a right to commence proceedings, an application for an extension of time to do so is therefore pointless. The application currently before the Court is dismissed. The registrar should return to Mr Brownie the cheque he tendered in payment of a filing fee.

[12] I have issued this judgment at an early stage of the matter being before the Court and without inviting submissions from the parties. That is because the outcome is the inevitable consequence of the application of statutory provisions to undisputed facts.

[13] There will be no order as to costs because, at this early stage of the matter, none should have been incurred by Mr Fuster.

A A Couch
JUDGE

Signed at 12.30pm on 22 September 2010.