IN THE EMPLOYMENT COURT
AUCKLAND

[2010] NZEMPC 85
ARC 81/09

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for leave to file an amended statement of defence out of time
BETWEEN	SERVICE AND FOOD WORKERS UNION NGA RINGA TOTA INC Plaintiff
AND	MIHIRAWHITI SEARANCKE Defendant

Hearing: By submissions filed by the plaintiff on 11 and 24 June 2010 and by the defendant on 18 June 2010
(Heard at Auckland)

Appearances: Simon Mitchell, counsel for the plaintiff
Alex Hope, counsel for the defendant

Judgment: 5 July 2010

INTERLOCUTORY JUDGMENT OF JUDGE B S TRAVIS

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[1] The defendant Ms Searancke has applied for leave to file an amended statement of defence out of time. The defendant's original statement of defence, filed within time on 19 October 2009, did not seek any relief in response to the plaintiff union's challenge and, in particular it did not include a counter-claim for reinstatement. By her application dated 26 April 2010, the defendant seeks to file an amended statement of defence, containing a counter-claim seeking reinstatement, increased reimbursement of lost wages from those awarded by the Employment Relations Authority and the sum of $20,000 for compensation, hurt, loss of dignity and injury to feelings. Ms Searancke filed an application for leave to amend the

statement of defence out of time, together with a supporting affidavit, on 26 April 2010.

[2] The opposed application for leave was set down for hearing on Monday 14 June but on 11 June new counsel who had just been instructed on behalf of Ms Searancke applied for and obtained an adjournment. This was granted partly on the basis of an agreement of counsel that the leave application could be dealt with on the papers after an exchange of submissions.

[3] Mr Hope, who has been newly instructed, filed his submissions within the agreed timetable, and explained that the filing of the application for leave was delayed for several reasons:

a) Ms Searancke's advocate did not follow instructions to seek reinstatement;

b) it took time to find new representation;

c) there were issues as to the adequacy of the instructions that she was able to give;

d) at the crucial times, shortly after the first statement of defence was filed, the defendant was self-represented and did not appreciate the importance of time.

[4] The plaintiff union has challenged parts of the Authority's determination which found that certain activities on the part of Ms Searancke were not serious misconduct and the conclusion that she was unjustifiably dismissed. The plaintiff union also seeks to argue that the remedies should have been reduced for contribution.

[5] As Mr Hope submitted, although the plaintiff union does not seek a full hearing of the entire matter, the challenge is very broad, because it challenges the remedies awarded, the findings on misconduct and the final result that the dismissal was unjustified. He submitted that this will involve at least all of the witnesses who

gave evidence at the Authority's investigation. Mr Hope correctly observed that at this point of time the Court has not considered the scope of the hearing.

[6] Mr Hope cited *Stevenson v Hato Paroa Trust Board*[1] which confirmed that the overriding consideration is the justice of the case and the following matters, where relevant, are material to the exercise of the discretion to grant leave:

a) the reason for the omission to bring the case within time;

b) the length of the delay;

c) any prejudice or hardship to any other person;

d) the effect on the rights and liabilities of the parties;

e) subsequent events; and

f) the merits.

[7] Mr Hope observed that Ms Searancke had applied for reinstatement in her original statement of problem in the Employment Relations Authority, dated 16 October 2008. He submitted there was no evidence right up until the point in time of the 8 December 2009 telephone conference call in the Court, that indicated that the union was claiming that Ms Searancke's position had been filled or that in any way time was of the essence.

[8] As to the lost wages and contribution Mr Hope submitted that these issues were intertwined in light of the Authority's determination which resulted in a refusal to exercise the discretion to award more than three months lost remuneration.

[9] As to the merits of the counter-claim, in particular as to reinstatement, Mr Hope submitted that the Authority's reasons for dismissing reinstatement were not in accordance with the current law. He pointed out that the Authority's reasoning was summarised as follows in the determination:

> Reinstating Ms Searancke would cause more than discomfort in the workplace.

[1] [2002] 2 ERNZ 103.

[10] Mr Hope cited *Clarke v Norske Skog Tasman Ltd*[2] and *South Taranaki Free Kindergarten Association v McLennan*[3] which, he submitted, would have supported reinstatement in the circumstances of this case, especially as it is the primary remedy under the Employment Relations Act 2000.

[11] Mr Hope submitted that up until the filing of the defence the plaintiff union was still under notice that reinstatement was being sought and might have expected it to have been sought by way of cross-challenge. He submitted that as the plaintiff is a national union employing staff, reinstatement would not have the same impact as it would on a much smaller employer. He also submitted that it is likely that a fellow employee with whom the defendant had some difficulties might have changed roles and therefore the issues raised by the plaintiff union against reinstatement would no longer apply. He submitted therefore, that the evidence was unlikely to be much more extensive, a hearing would not be lengthened in any way, the plaintiff union would not be prejudiced and a hearing would not be delayed. He also submitted that as remedies are awarded "in the round" the issue of reinstatement could bear on their monetary value, especially if reinstatement was granted.

[12] Mr Hope submitted that the reason for the omission to bring the case in time had been explained because of the defendant representing herself and, although the length of the delay was long, it did not prejudice the plaintiff or any other person. He accepted that the need to make another employee redundant to allow for reinstatement, if such was the case, would be a factor that the Court could take into account in determining whether or not reinstatement was practicable.

[13] Mr Hope referred to the difficulties that the defendant has had since losing her employment with the plaintiff. He summarised the factors he submitted were relevant to the overall justice of the case:

a) reinstatement is the primary remedy;

b) the plaintiff's objections can be dealt with at trial without extra cost, hearing time or delay;

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[2] [2003] 2 ERNZ 213.
[3] [2006] ERNZ 1019.

c) The defendant was unrepresented at crucial times;

d) The defendant has been unable to find work;

e) The defendant always wanted reinstatement;

f) While the delay is lengthy in the number of days, there is minimal prejudice to the plaintiff as compared with the prejudice to the defendant.

[14] Mr Mitchell, for the plaintiff union, in opposing the application, observed that the claim being sought to be brought by way of a counter-claim, seeks significantly different remedies to that in the statement of problem in the Authority and now repeats the claim for reinstatement which the Authority declined to order. He observed that the application was filed some 231 days after the issuing of the determination, being 203 days more than the period specified in s179(2) of the Act. He also submitted that the proposed amended statement of defence was deficient in not meeting the requirements of s 179 of the Act because it does not specify whether a limited hearing is sought or whether a full hearing of the entire matter is required by the defendant. That deficiency, I find, is not fatal and can be addressed by the appropriate orders when dealing with the scope of the hearing.

[15] Mr Mitchell referred to the defendant's knowledge that the statement of defence filed on her behalf had not included a cross-challenge, which he derived from an email annexed to her affidavit in support of the application. The email showed it was clear she was instructing her advocate to seek reinstatement. When the advocate refused to do so, that terminated the arrangement between them.

[16] As at 8 February 2010 when there was a further telephone conference call before me, I had recorded that she was intending to apply for reinstatement, that the defence that had been filed on her behalf did not refer to it and it would be necessary for her to apply for leave out of time to challenge the Authority's determination declining reinstatement. In spite of that direction Mr Mitchell pointed out that the application for leave was still not filed until 26 April. He observed that this delay had not been explained.

[17] Mr Mitchell's submissions accepted, in broad terms, the principles to be applied for applications of this type and in addition to the *Stevenson* case Mr Mitchell also cited *Pani v Transportation Auckland Corporation Ltd.*[4] The Court there again confirmed the broad discretion which is to be exercised in the interests of the overall justice of the case to extend the time for filing a challenge.

[18] In addition to the unexplained delays Mr Mitchell referred to the merits of the case and relied on the Authority's determination which found that the statement of problem seeking reinstatement was filed some ten months after the dismissal, and seven months after the unresolved mediation. He also relied on the finding in the determination that the defendant had been replaced by a new organiser before the plaintiff union became aware that reinstatement was being sought. He also referred to the issues between the defendant and another fellow employee. Mr Mitchell observed that these matters had not been dealt with in the defendant's affidavit in support of the leave application.

[19] Mr Mitchell submitted that the delays in raising reinstatement were unprecedented and therefore it was not just and equitable for leave to be granted. Mr Mitchell summarised the opposition as follows:

a) the delays had not been properly explained;

b) there was a finding in the Authority that the position held by the plaintiff had been filled;

c) there should be no higher test for a union employer in defending an application for reinstatement;

d) that the hearing would be lengthened substantially by evidence of the effect of the defendant returning to the workplace and that this would increase the number of witnesses required and could double the hearing time;

e) in all the circumstances the application for leave should be declined.

[4] AC45/09, 3 December 2009.

Reasoning and conclusion

[20] I accept Mr Mitchell's submissions that the delays are lengthy and have only been partly explained in the affidavit of the defendant. I am satisfied that had Mr Hope been involved at that stage the delays would have been explained and the defendants affidavit would have covered those matters.

[21] Were it not for the fact that the plaintiff's challenge, although skilfully limited, is still likely to reopen much that the defendant would now wish to rely on for her cross-challenge, I would have declined leave. However, I accept the force of Mr Hope's submission that the plaintiff's challenge is of sufficiently wide scope to incorporate many of those matters. I am also concerned that the defendant has not had her instructions regarding reinstatement carried out. There may be high hurdles for her to overcome to show the practicability of reinstatement including the length of time that has expired, the circumstances surrounding her dismissal, her dealings with a colleague who is still employed by the union and the appointment of a new organiser. To decline the leave application would be to deny the defendant the opportunity to properly put all of the matters before the Court relevant to the disposition of the challenge and in particular the remedies if the plaintiff fails on the substantive issue of unjustified dismissal.

[22] Whilst I appreciate that there may be a lengthening of the hearing as a result of allowing the counter-claim to proceed I am not at this stage persuaded that it would double the hearing time as Mr Mitchell contends. The scope of the hearing is yet to be determined. Any prejudice to the plaintiff may be able to be dealt with in costs but, for the reasons advanced by Mr Hope, which I accept, I find that the overall justice of the case favours the granting of leave.

[23] Leave to file the amended statement of defence is therefore granted.

[24] The amended statement of defence and cross-challenge filed on 15 April 2010 is to be taken as having been filed and served.

[25] The plaintiff is to have 30 days to plead to the amended statement of defence and cross-challenge.

[26] The matter can then be called over to determine the scope of the hearing and to timetable the proceedings to a fixture.

[27] Because the defendant has been granted the benefit of an indulgence in being granted leave so far out of time, I consider that a modest award of costs in favour of the plaintiff union would be appropriate. If the parties cannot agree on this matter then the plaintiff may, within 60 days from the date of this judgment, file a memorandum as to costs with the defendant having 30 days to reply.

B S Travis
Judge

Judgment signed at 11.15am on 5 July 2010