IN THE EMPLOYMENT COURT
AUCKLAND

[2011] NZEmpC 38
ARC 73/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	interlocutory applications
BETWEEN	SALLY-KAE NOELINE FRENCH Plaintiff
AND	THE WAREHOUSE LIMITED Defendant

Hearing: 15 April 2011
(Heard at Auckland)

Counsel: Mark Ryan, counsel for plaintiff
David Dickinson, counsel for defendant

Judgment: 15 April 2011

ORAL JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] The question for decision today is whether Sally-Kae French's challenge by hearing de novo to the determination[1] of the Employment Relations Authority, finding that she was dismissed justifiably, should now be dismissed other than on its merits.

[2] The defendant says that the proceedings should be dismissed for two reasons. First, it says that Ms French has failed to prosecute her challenge as she ought to have. Second, and not unconnected with the first ground, the defendant says that Ms French's challenge is frivolous and trivial, in effect an abuse of the court process, and so should not be permitted to go further.

[1] AA253/10, 25 May 2010.

[3] Clause 15 of Schedule 3 to the Employment Relations Act 2000 (the Act) ("Power to dismiss frivolous cases")[2] provides :

> (1) The Court may, in any proceedings, at any time dismiss any matter or defence before it which it thinks frivolous or trivial.
>
> (2) In any such case the order of the Court may be limited to an order against the party bringing the matter or defence before the Authority for payment of costs and expenses.

[4] Any such orders of the Court are subject to its special powers under s 189(1) of the Act which provides materially:

> (1) In all matters before it, the Court has … jurisdiction to determine them in such manner and to make such decisions or orders, not inconsistent with this or any other Act or with any applicable collective agreement or the particular individual employment agreement, as in equity and good conscience it thinks fit.

[5] As to frivolity (one of the tests under cl 15), commentaries and texts in cases tend to show that a frivolous case will be one that, on the face of it, no reasonable person can treat as bona fide and contend that there is a grievance that the plaintiff is entitled to bring before the Court: *Creser v Tourist Hotel Corporation of New Zealand*.[3] As Chief Judge Goddard observed in that case at 1069:

> … [T]o categorise a case as frivolous it is not necessary for the Court to be able to make a positive finding that the applicant orplaintiff is trifling with the Court or is in any way insincere or moved by wrong motives. It is sufficient if, as a result of some patent and glaring error of law, the plaintiff or applicant has brought a case which is entirely misconceived.

[6] Examples of frivolous cases include attempting to continue an appeal after the proceeding has been settled and attempting to obtain relief at common law which has already been given in a personal grievance. These are clearly not exhaustive examples but give a flavour of the gravity of the circumstances that warrant dismissal of a lawfully filed proceeding by sudden and premature death.

[7] Although the whole background to the litigation, including all relevant circumstances that have occurred since Ms French's dismissal, may be relevant to

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[2] Clause 15 was amended, with effect as from 1 April 2011, by s 39(2) Employment Relations Amendment Act 2010 (2010 No 125). The previous cl 15 applies to this application.
[3] [1990] 1 NZILR 1055.

the Court's consideration of the grounds under cl 15 of Schedule 3 because the Court needs to determine whether the proceedings are frivolous or trivial, pre-Employment Relations Authority determination events are not relevant to the application to dismiss for want of prosecution. That is because the prosecution referred to is the prosecution of the challenge in this Court.

[8] There is no express power in the Act or the Employment Court Regulations 2000 to dismiss proceedings for want of prosecution. In the circumstances, reg 6 provides recourse to the High Court Rules. Rule 15.2 of the High Court Rules ("Dismissal for want of prosecution") is applicable and provides:

> Any opposite party may apply to have all or part of a proceeding or counterclaim dismissed or stayed, and the court may make such order as it thinks just, if—
>
> (a) the plaintiff fails to prosecute all or part of the plaintiff's proceeding to trial and judgment; or
>
> (b) the defendant fails to prosecute all or part of the defendant's counterclaim to trial and judgment.

[9] There are three main requirements to be established before a proceeding should be dismissed for want of prosecution. First, the plaintiff must have been guilty of inordinate delay. Second, that delay must be inexcusable. Third, the defendant must establish serious prejudice. These are cumulative requirements that must be established and, even then, the Court retains a residual discretion to be exercised in the interests of overall justice whether to dismiss for want of prosecution. These principles are well settled and were summarised conveniently in *Lovie v Medical Assurance Soc NZ Ltd*[4] confirmed by the Court of Appeal in *Commerce Commission v Giltrap City Ltd*[5] and more recently by this Court in *Macbeth v Cookie Time Ltd.*[6]

[10] I start, also, with the presumption that a litigant who has brought a challenge within time is entitled to have that proceeding determined on its merits, justly and fairly, unless there are very good and sound reasons to deprive that litigant of access

[4] [1992] 2 NZLR 244 at 248.
[5] (1997) 11 PRNZ 573.
[6] [2010] NZEmpC 108.

to justice. Every such case will depend upon its own peculiar facts and the fundamental principle must be to do justice between the parties.

[11] The following are the relevant events. The Employment Relations Authority delivered its determination on Ms French's grievance on 25 May 2010. That is a decision with detailed reasons running to 57 paragraphs following an investigation by the Authority on 20 August 2009 and submissions made to it on 19 and 28 October 2009. The Authority's was not a determination that it felt able to reach promptly.

[12] Ms French filed her challenge in this Court on 18 June 2010 within the 28-day period allowed for doing so. On 12 August 2010 she filed an amended statement of claim incorporating a challenge to the Authority's supplementary determination[7] awarding costs in the defendant's favour. There was nothing unusual about the amended statement of claim and indeed that is the way the Court expects Authority costs determinations that are issued after a challenge is filed to be incorporated into the challenge if that is a plaintiff's wish.

[13] The defendant filed its statement of defence to the amended statement of claim on 5 November 2010. It then filed an application for security for costs. In a minute dated 5 November 2010 I directed that this interlocutory application be heard on 24 November 2010 despite Mr Ryan's unavailability as counsel on that date because of a conflict of fixtures. Shortly before that scheduled hearing, Ms French agreed to give security for costs on her challenge in the sum of $7,000 and in these circumstances, no interlocutory hearing was required.

[14] Ms French did not pay the amount that she agreed to lodge with the Court as security for costs within the timeframe that she originally indicated she would. The consequence of that delay, however, was to preclude her from taking further steps to advance her challenge, unless and until she paid the security, because an order for stay of the proceedings was made by consent until that condition was fulfilled.

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[7] AA253A/10, 30 July 2010.

[15] There were difficulties with Mr Ryan's availability, both as a result of medical circumstances beyond his control and criminal trial conflicts, which meant that the application to dismiss the proceedings could not be heard as promptly as the defendant wished. The defendant's application has, however, been heard today.

[16] I deal with the pre-Employment Relations Authority investigation meeting delays because I accept that these may be relevant to the question of whether the proceeding is frivolous or trivial. I accept from the comprehensive evidence tendered for the defendant and, indeed, Mr Ryan accepts in some respects also, that that claim made by Ms French could have been dealt with more expeditiously by her after the grievance was raised and before the Employment Relations Authority issued its determination.

Events before and during the ERA investigation

[17] The defendant emphasises the plaintiff's conduct of her proceedings in and prior to the investigation of them by the Authority. If this analysis assists the Court to determine justly the probabilities of the plaintiff's future conduct that may be predictable by her past conduct, such information is arguably relevant. On the other hand, however, conduct of an employment relationship problem taken to the Employment Relations Authority is for that body to regulate and not this Court unless the matter is properly before the Court in the course of the Authority's investigation. That is not the case here.

[18] It is significant, in my view, also that there is no reference in the Authority's determination to Ms French (or her counsel) having acted in what is called colloquially "bad faith", that is that she or they obstructed rather than facilitated the Authority's investigation or that she or they acted other than in good faith towards the defendant during that investigation.

[19] Section 181 of the Act operates to alert the Court to such issues during the course of an Authority investigation and if the Authority Member's determination identifies the existence of them, the Court is empowered to call for a report. If it considers the misconduct of the proceedings in the Authority to be serious enough,

the Court can constrain the nature of the plaintiff's challenge. Such cases do arise from time to time and Authority Members are aware of their ability to alert the Court to such cases although, of course, the Authority must justify any such allegations in a report to the Court and about which the parties are entitled to be heard.

[20] I conclude, in the absence of any reference in the Authority's determination suggesting that the Court should have called for a report, that the Authority did not consider Ms French's conduct (or that of her counsel) to have met those standards of investigation misconduct in s 181 of the Act.

Decision

[21] Although the defendant's relevant managers have become frustrated about Ms French's attempts to challenge the justification for her dismissal, especially having had a determination in the company's favour in the Employment Relations Authority, that is not a ground to strike out proceedings. In almost all litigation, an initially successful party will so regard attempts to appeal.

[22] I have to say, also, that unfortunately the matter has not been able to be progressed (as it could have been) to a substantive fixture since late last year because of the defendant's insistence that security for costs be given. Although it could not have been by any means a certainty that the Court would have ordered security for costs against Ms French in all the circumstances, she nevertheless agreed to provide these in what is, for her, the not insubstantial sum of $7,000 which exceeds significantly the costs awarded against her in the Authority.

[23] Dealing first with the application to strike out for want of prosecution, I am not satisfied that the defendant has established the first test, that of inordinate delay. Even if it could be said that there is delay between the filing of the statement of claim in the middle of last year and the filing of the application to strike out in early March this year, that cannot qualify as inordinate delay. It follows in those circumstances that it is unnecessary to determine whether the delay was inexcusable or whether prejudice has been suffered by the defendant. In that latter regard, I should comment briefly, however, that although it is likely to be so that witnesses'

memories will have dimmed since these events took place, the evidence of witnesses was recorded in the form of briefs for the Employment Relations Authority and these will be available to refresh the memories of witnesses. It is significant also that, although the defendant says now that none of its relevant witnesses is employed by the company any longer, there is no suggestion that they are not able to be located, that they are not able to be briefed, or that they are not compellable to attend and give evidence.

[24] Turning to the alternative ground to strike out, that is that the proceedings are frivolous or trivial, that case has not been made out either. Dismissal from employment for serious dishonesty is a very serious matter, both for the employer and for the employee subject to it. The challenge to the justification of that is the subject of Ms French's proceeding. She is entitled to challenge the Authority's determination by hearing de novo and she has satisfied the statutory requirements for doing so. I do not think it can be said that in all the circumstances her challenge to dismissal on these grounds is either frivolous or trivial.

[25] For those reasons I dismiss the application to strike the proceedings out.

Costs

[26] Having heard from counsel on the question of costs, I agree that the plaintiff is entitled to costs and I make an order in the sum of $1,000.

Directions for hearing

[27] The following are the directions to a hearing to which both parties are entitled and which is important because of the overall age of the case. I am satisfied that there is no realistic possibility of the case settling in mediation or further mediation although it remains open to counsel to speak about that between themselves.

[28] Neither party has any known outstanding interlocutory issues between them although leave is reserved for either to apply for any further orders or directions on reasonable notice.

[29] The plaintiff proposes calling one or two witnesses and the defendant, between three or four. Counsel agree that between two and three days will probably be required to conclude the case and, therefore, a three day fixture should be allocated. The plaintiff will present her case followed by the defendant.

[30] No later than two weeks before the start of the hearing the plaintiff will file and serve briefs of the evidence-in-chief of her intended witnesses. These should be in electronic (MS Word) format and the briefs should contain all of the evidence-in-chief that it is intended to call. The defendant may have until one week before the start of the hearing to do likewise in respect of its witnesses and the same requirements attach to those briefs.

[31] The defendant has agreed to assemble and provide to the Court a common bundle of indexed and tabulated documents no later than two working days before the hearing. This is to contain all of the documents that are intended to be produced at the hearing but is not to contain any other documents on a 'just in case' basis.

[32] The hearing of the challenge will be in the Employment Court at Auckland beginning at 9.30 am on Monday 15 August 2011 and continuing on the following two days, 16 and 17 August 2011.

GL Colgan
Chief Judge

Judgment delivered orally at 4.04 pm on Friday 15 April 2011