IN THE EMPLOYMENT COURT
AUCKLAND

[2011] NZEmpC 116
ARC 46/11

IN THE MATTER OF	an application for leave to challenge out of time
BETWEEN	NEIL POLLETT Intending Plaintiff
AND	BROWNS REAL ESTATE LIMITED Intended Defendant

Hearing: 21 September 2011 (by telephone conference call)

Appearances: Plaintiff in person
Jessie Parker, counsel for defendant

Judgment: 23 September 2011

JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] This judgment decides whether Neil Pollett should be permitted to challenge the determination[1] of the Employment Relations Authority that he was not an employee. It is necessary for Mr Pollett to have leave because he failed to file his challenge to the Authority's determination within the period of 28 days allowed for doing so. The intended defendant opposes the application for leave.

[2] Mr Pollett claimed in the Authority that he was dismissed unjustifiably from his employment with Browns Real Estate Limited (Browns). The Authority determined, following an investigation meeting, that Mr Pollett was not an employee of Browns. In a subsequent determination[2] issued on 13 May 2011 the Authority awarded costs against Mr Pollett in favour of Browns of $5,000 and also ordered him to pay disbursements (air fares and accommodation) of $520.

[1] [2011] NZERA Auckland 125.
[2] [2011] NZERA Auckland 204.

[3] The well established factors to be considered and weighed by the Court on applications such as this are:

- the reason for the omission to bring the case in time;
- the length of the delay;
- any prejudice or hardship to any other person;
- the effect on the rights and liabilities of the parties;
- subsequent events; and
- the merits of the intended challenge.

[4] No one factor is necessarily any more important than another. The list is not exhaustive and the overriding consideration will always be the interests of justice in a particular case.

[5] The intended defendant's grounds of opposition include:

- that the justice of the case does not require an extension of time;
- that the intending plaintiff's delay is 28 days;
- that the intending plaintiff has not explained sufficiently his omission to challenge the substantive determination in time;
- that to grant leave would prejudice the company; and
- that there are no established merits to Mr Pollett's claim.

[6] The intended defendant's opposition is supported by affidavit evidence from Peter Newbold, its general manager in Queenstown. Mr Pollett did not notify the intended defendant of his intention to challenge the Authority's determination, either

within the 28 day period or after its expiry. The first advice it received of this application was service upon it on 22 June 2011, the same day it was filed in this Court. That is despite Mr Pollett having communicated with the intended defendant and the Authority by email on numerous occasions during the time that the proceedings were before it.

[7] The first factor to consider is the reason for delay. Mr Pollett says that as a result of the end of his working relationship with the company in August 2010, he moved to Australia. He returned to New Zealand for a short visit on Saturday 18 June 2011 and filed, in person, this application and a draft statement of claim at the office of the Employment Court on the morning of Wednesday 22 June 2011. Mr Pollett says that before 10 June 2011, when the period for challenging the Authority's costs determination expired, he attempted to contact the Court by email although experiencing difficulties "getting a New Zealand court document evidenced in Australia by the authorities normally able to do this in New Zealand."

[8] There is, however, no requirement that the documents necessary to be filed on a challenge be "evidenced" if, by that the applicant means sworn as an affidavit or otherwise notarised. All that is required to be filed with the Registry of the Court (and served on the defendant) is a statement of claim signed by the plaintiff and a copy of the Authority determination(s) challenged.

[9] Having heard from Mr Pollett, I find the most probable explanation for his inability to have documents "evidenced" in Australia to be as follows. By the time he made contact with the Registry of the Employment Court in Auckland to seek advice about his situation, Mr Pollett was already out of time to challenge the Authority's substantive determination. In those circumstances it is logical that what he was told included a requirement to have sworn affidavit evidence in support of the application now before the Court. However, had contact been made with the Registry within the 28 day period, there would have been no advice given to Mr Pollett about having an affidavit sworn because all that was required within time was a signed statement of claim. So any delay attributable to Mr Pollett's inability to have an affidavit sworn in Australia relates not to the expiry of the 28 day period within which to challenge by right, but to delay after the expiry of that period.

[10] There is really no satisfactory explanation for Mr Pollett's delay in filing his challenge within time.

[11] Next is the length of the delay. The Authority's determination dismissing Mr Pollett's claims was issued on 30 March 2011. Although the Authority subsequently issued a costs' determination on 13 May 2011, Mr Pollett's principal challenge is to the substantive determination. In these circumstances, the 28 day period for challenging this as of right expired on 28 April 2011. As already noted, Mr Pollett's documents having been filed on 22 June 2011, the delay was therefore in the vicinity of seven weeks or almost twice the statutory period allowed after its expiry.

[12] Next is the question of prejudice or hardship to others. Browns does not assert any such prejudice or hardship.

[13] This is not unassociated with the next consideration, the rights and liabilities of the parties. Apart from disrupting Browns' belief that Mr Pollett's claim against it had been resolved, the company does not assert that its rights and liabilities have been affected adversely by the delay.

[14] Penultimately, the Court must consider whether there have been any events subsequent to the expiry of the statutory 28 day period that may affect whether leave is granted. None has been raised by either side, except that the respondent says that Mr Pollett has failed to pay the costs awarded to it by the Authority as he is obliged to. Mr Pollett says he is impecunious as a result of having lost his job at Browns and having encountered difficulties in obtaining alternative real estate work since then.

[15] Finally, the Court must make such assessment as it can of the merits of the proposed challenge. That is a relatively low threshold test based on the Authority's reasoning and on the grounds of challenge put forward by the intending plaintiff. The test has been described variously as being "the absence of any realistic prospect of success"[3] and whether the case is so weak "that it is just to extinguish it without further consideration".[4]

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[3] *Stevenson v Hato Paora College Trust Board* [2002] 2 ERNZ 103 at 109
[4] *Pani v Transportation Auckland Corporation Ltd* AC45/09, 3 December 2009 at [26].

[16] This is an exceptional case in the sense that the Court is in a good position to make a more than usually intensive and conclusive assessment of the merits of the intended challenge. That is because, on largely uncontested facts, a combination of written agreements that speak for themselves and the application of statute determines, as the Authority found, that Mr Pollett could not have been an employee of Browns.

[17] Mr Pollett was a real estate salesperson with Browns. As such, his status was affected by s 6(4) of the Employment Relations Act 2000 which provides, in relation to determination of employment status, "Subsections (2) and (3) do not limit or affect the Real Estate Agents Act 2008 …". The Real Estate Agents Act 2008 succeeded its 1976 namesake which was also subject to s 6(4) of the Employment Relations Act. As the Authority concluded, the effect of s 6(4) is that, if there is in existence an agreement dealing with the engagement of a real estate salesperson, the provisions of this agreement will prevail on the question of whether the salesperson is or is not an employee so that the tests applicable in other fields under s 6 of the Employment Relations Act are not applicable.

[18] As the Authority found, Mr Pollett and Browns were the parties to agreements both entitled "Salesperson Contract for Salesperson Engaged as Independent Contractor". The first agreement between the parties was entered into in October 2009, that is before the Real Estate Agents Act came into force on 17 November 2009. In these circumstances s 51A of the Real Estate Agents Act 1976 applied to that agreement. This provided materially:

> (1) This section applies … to a salesperson and a real estate agent at any time if—
>
> …
>
> (b) … they agree expressly that the relationship between them … should be that of employer and independent contractor.
>
> …
>
> (5) … when this section applies to a salesperson and a real estate agent, the salesperson shall for all purposes be deemed to be engaged by the agent under a contract for services.

[19] This meant that for the duration of his engagement under the October 2009 agreement, Mr Pollett was deemed in law to have not been an employee of Browns.

[20] There was, however, a subsequent agreement between the parties. This was dated March 2010 and was signed by them in April and May 2010. The provisions of this agreement were governed by the Real Estate Agents Act 2008. Section 51 of that 2008 Act reads:

> (1) A salesperson may be employed by an agent as an employee or may be engaged by an agent as an independent contractor.
>
> (2) Any written agreement between an agent and a salesperson is conclusive so far as it expressly states that the relationship between the agent and the salesperson is that of employer and independent contractor.

[21] The March 2010 agreement between the parties provided similarly that Mr Pollett was engaged as an independent contractor to, and not as an employee of, Browns. That was deemed in law to be his status when the working relationship between the parties ended. It follows, as the Authority found, that Mr Pollett cannot contend that he was dismissed unjustifiably because, not being an employee, he is not entitled to that statutory cause of action under the Employment Relations Act.

[22] It is also necessary to deal with the argument rejected by the Authority but which Mr Brown intends to revive if he has leave to challenge, which is that he was misled or deceived by Browns before the signing the October 2009 agreement that he would be an employee.

[23] Mr Pollett's allegations of misleading or deceptive conduct relate to the circumstances in which he came to sign the October 2009 agreement with Browns. He says it was only when he came to read the terms of the document proffered to him by Browns that he understood that it wished him to be an independent contractor. He asserts that in negotiations leading up to the presentation of the formal agreement to him, he was led to believe that he would be an employee of Browns.

[24] Mr Pollett has, however, not provided any evidence to support this contention, at least in addition to the assertion that he also made to the Authority but which it found was not sustained. It is notable, also, that even if Mr Pollett is correct, by his own account he appreciated before signing the October 2009

agreement with Browns that this specified he was to be an independent contractor and not an employee of Browns. Even if he had been misled previously, when he signed the October 2009 agreement he was aware of its stipulation that he was to be an independent contractor. This assertion is even weaker for Mr Pollett when it is remembered that he subsequently signed a further materially identical contract with Browns. There is no assertion by Mr Pollett that he was misled into signing that second contract by misrepresentations about his status.

[25] The Authority Member covered these issues very thoroughly in her determination of 30 March 2011 between [17] and [42]. This included reference to the fact that before he signed the October 2009 agreement Mr Pollett sought and obtained independent legal advice about its contents including his status. There were other amendments which were the subject of discussion between Mr Pollett and Browns before he signed the October 2009 agreement in November 2009, but none relating to his status.

[26] There has been nothing put before the Court that would suggest other than a correct conclusion by the Authority following a thorough examination and determination on this aspect of the case.

[27] Mr Pollett has submitted that his claim to unjustified dismissal was not dealt with properly in the sense that it has not been the subject of mediation. He says that although he requested Browns to attempt to resolve his issues by mediation, it declined to agree to do so and the Employment Relations Authority made no direction to mediation.

[28] Whilst the Act puts a strong emphasis on settlement of employment relationship problems by mediation and the Authority (and this Court) can and should usually direct parties to mediation unless there are good reasons for not doing so, mediation can only work if both parties agree to try to settle their dispute by that method. A party adamantly opposed to settlement can, to use the old truism, be led to water but cannot be compelled to drink. Mediation is not a panacea and Judges and Authority Members sometimes consider that a referral to mediation will not only not resolve a dispute, but by delaying its resolution, may exacerbate it.

[29] There is another factor in this case, however, affecting a reference to mediation. Here Browns claimed (and continues to assert) that Mr Pollett was not its employee so that the procedures under the Act (including access to mediation) are not applicable. This is a preliminary status issue, sometimes described as a jurisdictional question, which must be resolved before the merits of Mr Pollett's claim that he was unjustifiably dismissed can be considered. It is often not appropriate to attempt to settle such a preliminary status issue although I accept that sometimes mediation can assist in doing so. Either if Browns had accepted that Mr Pollett was an employee or if the Authority had so determined, it would have been appropriate for the case to have been referred to mediation.

[30] In these circumstances, although Mr Pollett's concern about the absence of mediation is understandable, that is also explicable and justifiable and does not provide Mr Pollett with a valid ground to allow his challenge to be brought out of time.

[31] Taking account of the significant delay in filing his challenge, the absence of a good explanation for this and the inherent weakness of the propositions that Mr Pollett wishes to re-advance in this Court, I am satisfied that it would not be just to extend the time for filing a challenge and Mr Pollett's application for leave to do so is refused.

[32] Browns is entitled to a contribution to its costs of defending this application which, if they cannot be agreed with Mr Pollett, may be the subject of a memorandum filed and served within six weeks of the date of this judgment, with Mr Pollett having the period of four weeks thereafter to reply by memorandum.

GL Colgan
Chief Judge

Judgment signed at 10.30 am on Friday 23 September 2011