

**IN THE EMPLOYMENT COURT
CHRISTCHURCH REGISTRY**

**[2013] NZEmpC 146
CRC 47/12**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN STRAWBERRY TREE LIMITED
Plaintiff

AND FRANCES TUCKETT AND SHAUN
PARR
Defendants

Judgment: 5 August 2013

JUDGMENT OF JUDGE A A COUCH

[1] The plaintiff operates a tavern in Kaikoura. It is managed by Shayne Kavanagh who is the sole director and shareholder of the company. The defendants were employed to work in the tavern as duty managers. Ms Tuckett began working there in September 2010 and Mr Parr was engaged in June 2011.

[2] The defendants are citizens of the United Kingdom. They worked in New Zealand pursuant to working holiday visas. In December 2011, the defendants gave five weeks' notice of their resignation. During that notice period, an issue arose about working on 28 December 2011. As a result of what occurred, the defendants believed they had been dismissed. Mr Kavanagh's position was that the defendants had abandoned their employment. After that date, no payments were made to the defendants. They left New Zealand shortly afterwards, going initially to Australia and then back to the United Kingdom.

[3] The defendants pursued claims for arrears of wages and holiday pay through the Employment Relations Authority (the Authority). The matter was fully investigated by the Authority which, in a detailed determination dated 1 November

2012¹, upheld the defendants' claims. The plaintiff was ordered to pay Ms Tuckett \$620 for wages and \$3,934.75 for holiday pay. Mr Parr was awarded \$640 for wages and \$1,147.70 for holiday pay.

[4] On 28 November 2012, Mr Kavanagh filed a statement of claim on behalf of the plaintiff. In that original statement, the plaintiff sought to challenge only some parts of the Authority's determination. In it, Mr Kavanagh said

I am happy to pay holiday pay but I have evidence that the two employees lied while under oath. I request a hearing as I want to deduct the last week's pay and cost of lawnmower.

[5] The statement as a whole was minimal and did not comply in several respects with the requirements of regulation 11 of the Employment Court Regulations 2000. When advised of this, Mr Kavanagh filed an amended statement which was somewhat more compliant but was still far from satisfactory. In that amended statement of claim, the plaintiff purported to challenge the whole of the Authority's determination and sought a hearing de novo. It was provisionally accepted by the Registrar and a copy returned to Mr Kavanagh for service.

[6] By this time, the defendants were living in the United Kingdom. This was not apparent from the statement of claim but, as soon as registry staff became aware of it, they advised Mr Kavanagh that service could not properly be effected on overseas parties without leave of the Court.² On 20 December 2012, Mr Kavanagh was told that such an application was required and sent copies of the relevant regulations and forms.

[7] In the meantime, Mr Kavanagh had apparently posted a copy of the amended statement of claim to the defendants. They responded to this by sending a statement of defence to the Court. This was received on 16 January 2013.

[8] Although the filing of a statement of defence showed that the defendants had actually received a copy of the amended statement of claim, the requirement for

¹ [2012] NZERA Christchurch 239.

² Clause 5A of the third schedule to the Employment Relations Act 2000 and regulation 31A of the Employment Court Regulations 2000.

leave is a statutory one and cannot simply be ignored. Accordingly, the registry staff told Mr Kavanagh that he still needed to make an application for leave in accordance with the regulations.

[9] Mr Kavanagh was extremely slow in his response to that advice. On 11 February 2013, he filed a bare application for leave but it was not accompanied by the required affidavit. Despite repeated reminders over the following three months, Mr Kavanagh took no further steps. On 7 May 2013, the Registrar told Mr Kavanagh that, unless a proper application was made by 4 June 2013, the matter would be referred to a Judge and may be struck out.

[10] Mr Kavanagh continued to do nothing. On 1 July 2013, I issued a minute setting out the relevant provisions of the Employment Relations Act 2000 and the regulations and noting the plaintiff's failure to comply. I concluded by saying "Unless the necessary documentation is filed by 4 pm on Friday 12 July 2013, the proceeding will be struck out."

[11] Mr Kavanagh filed the affidavit required by regulation 31A in the afternoon of the last day I had allowed, that is Friday 12 July 2013.

[12] I issued a second minute on 17 July 2013. I granted leave to serve the statement of claim overseas and then said:

[3] Given that the defendants have already acknowledged receiving a copy of the statement of claim and have filed a statement of defence, this is a somewhat artificial step but the requirement for leave is a statutory one which cannot simply be omitted by the plaintiff. In the circumstances, and to avoid further delay, I exercise the Court's power under s 219 of the Employment Relations Act 2000 to validate the service already effected on the defendants.

[4] In the normal course, the next step would be to have a telephone conference with the parties to make arrangements for a hearing. Having now seen the documents which have been filed, however, it is clear that the matter is not ready for that step. The statement of claim is minimal and appears to assume that the Court is aware of what was placed before the Authority in the course of its investigation. That is not the case. When a determination of the Authority is challenged, the Court receives nothing from the Authority. It is for the parties to inform the Court of the issues and their positions with respect to those issues.

[5] To assist the Court in understanding the case, the plaintiff is directed to provide the Registrar with copies of the statement of problem and statement in reply which were lodged with the Authority. That is to be done **no later than Friday 26 July 2013.**

[6] On 7 May 2013, the Registrar received a memorandum from the defendants complaining about delay by the plaintiff and difficulties they were experiencing in enforcing the orders made by the Authority. The concerns about delay were well founded. To date, the plaintiff has delayed unreasonably in taking the steps necessary to pursue its claim. No such delays will be tolerated in future.

[13] The deadline of Friday 26 July 2013 came and went without any step being taken by Mr Kavanagh. On 29 July 2013, he contacted a staff member of the Authority requesting copies of the statement of problem and the statement in reply. Those were then provided by the Authority to the Court on 31 July 2013.

[14] Having regard to the documents now before the Court and the manner in which the matter has been handled on behalf of the plaintiff, I have reached the conclusion that the principal purpose of the challenge is to delay payment of what is properly owing to the defendants rather than to pursue a genuine dispute. As such, the proceeding is vexatious and ought to struck out.

[15] I reach that conclusion for the following reasons. In terms of substance, the original statement of claim acknowledged the plaintiff's obligation to pay the arrears of holiday pay ordered by the Authority. Those sums comprise more than 80 percent of the money the plaintiff was ordered by the Authority to pay the defendants yet nothing has been paid. The amended statement of claim purports to challenge the whole of the Authority's determination but the facts alleged provide no basis whatsoever for disputing the amount of holiday pay owing.

[16] In terms of process, the plaintiff has delayed unconscionably in advancing its claim. Mr Kavanagh had been on notice for several months that unnecessary delay was unacceptable yet he entirely ignored the Registrar's warning of 7 May 2013 and left it until almost the last minute before filing an affidavit on 12 July 2013. In my second minute dated 17 July 2013, I explicitly said that no further delay would be tolerated. Despite that, Mr Kavanagh waited until the time for compliance had passed before taking any steps to do what was required.

[17] Justice requires that the defendants now be relieved of the delay, uncertainty and stress caused by this proceeding. The plaintiff's claim is struck out.

AA Couch
Judge

Signed at 2.00 pm on 5 August 2013.