IN THE EMPLOYMENT COURT
WELLINGTON

[2013] NZEmpC 192
WRC 35/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for an order striking out amended statement of claim
BETWEEN	NEEL GUPTA Plaintiff
AND	INFOSYS TECHNOLOGIES (AUSTRALIA) PTY LIMITED Defendant

Hearing: (by memorandum filed on 25 September 2013 and 9 October 2013)

Representation: Gregory Bennett, advocate for the plaintiff
John Rooney, counsel for the defendant

Judgment: 18 October 2013

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Introduction

[1] On 25 September 2013 the defendant filed an application for an order striking out the plaintiff's amended statement of claim. On 27 September 2013, I issued a minute directing that if the strike out application was opposed by the plaintiff then Mr Bennett, advocate for the plaintiff, was to file a notice of opposition and submissions in support within 14 days. The 14-day period expired on Friday, 11 October 2013. On 9 October 2013, Mr Bennett filed an application seeking "the Court's indulgence to have an extension of 14 days to prepare and file the application and submissions." On the same day, Mr Rooney, counsel for the

defendant, filed a memorandum opposing the application for an extension of time. The issue is whether the 14-day extension sought should be granted.

The application

[2] Mr Bennett has been completely frank with the Court in explaining the unusual situation he finds himself in and the reasons why he now seeks the 14-day extension of time. His disclosures in this regard are consistent with the contents of an uninvited email exchange the Registrar has been copied into. Mr Bennett summarised his predicament in these terms:

> 3. After advising our client the plaintiff of the requirement to file a notice of opposition we received no affirmative response apart from some emails directing that we file in the Court of Appeal.
>
> 4. Although advising our client that we were unable to do this, and to seek instructions, we have spent some considerable time attempting to get instructions from our client that had included emails to Mr Gupta been sent to both the Employment Court Registry and the Court of Appeal Registry. It was not until this morning, when the registrar of the Court of Appeal emailed our client, advising him:
>
> > Good morning Mr Gupta
> > Mr Bennett is correct. The Court of Appeal is an Appellate Court. It does not hear originating cases, only cases on appeal. If there has not been a decision in the Employment Court there is no application you can make to this Court at this stage. I suggest you take the advice from your solicitor in this matter.
> > Regards
> > C M O'Brien
> > Registrar
>
> 5. ...
>
> 6. Our client is now, at last, listening to our advice and wishes to oppose the application to strike out.
>
> 7. The problem that we have is that Mr Gupta has taken us to the brink of the time limit, as well as our patience, and now has an expectation that we will file the opposition notice and submissions.
>
> 8. Although we are prepared to file the notice of opposition and submissions, the lack of instructions from Mr Gupta means that we are forced to seek the Court's indulgence to have an extension of 14 days to prepare and file the application and submissions.
>
> 9. We have made Mr Gupta aware that we are on the verge of seeking leave to withdraw from this matter given his belief in trying to bypass the Employment Court and file a raft of applications.

> 10. Given the unusual circumstances in this matter we would seek the Court to grant the extension being sought.

[3] I do not propose to refer to all the emails in the paper trail referred to above. Suffice it to say that on 4 October 2013, Mr Gupta sent an email to the Registrar of the Court of Appeal which commenced:

> Dear Registrar.
>
> I trust you are doing well. I am writing to you for a case of mine as I am/have not been advised appropriately by the attorneys. My case is currently with the employment court...

[4] The Registrar responded on 7 October 2013 advising Mr Gupta of the role of the Court of Appeal and pointing out that until such time as the Employment Court makes a decision in his case, there were no steps he was able to take in the Court of Appeal.

[5] On the same day Mr Gupta responded to the Registrar's email. I set out his response in full because it clearly underlines the problems Mr Bennett will have in trying to obtain sensible and relevant instructions from him:

> Mr. Brien,
>
> 1. My apologies. I mistook the person whom i met as the registrar of the Court of Appeal. She was a lady at the counter. I am seeking the audience of a court that would be willing to hear the case for all the matters outlined and provide me justice in addition to the matters outlined by employment relations act 2000 i.e.
>
> **1.Good Faith,**
> **2.Fair Trade**
> **3.Unconscionable Contract**
> **4.Defamation**
> **5.Loss of Reputation**
>
> 2. I had requested a direct approach to the court of appeal whose mandate was to ensure consistency in the lower courts decisions be it the employment Court and the high court so as to minimize Litigation costs
>
> From the employment court i learnt that we can approach the court of appeal to be based on a point of law not fact. **Leave may be granted where the question is one of general reasons the Court of Appeal considers justified.**

3. I believe the matters below are beyond the jurisdiction of the employment court whose **mandate is limited to the interpretation of the employment relations act.**

1.Good Faith,
2.Fair Trade
3.Unconscionable Contract
4.Defamation
5.Loss of Reputation.
and there are legal implications for everybody.

4. I have also given clear instructions to my attorney that if the matters below are beyond the employment then the same be tabled before the **high court**. I believe the high court sits above the employment court and there are precedences earlier for employment court matter to be tabled before the high court. My attorney still maintains that i have to go through the employment court.

I have provided him references as per the matter is tabled before the high court whose

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Injunctive relief in the Employment Relations Authority and Employment Court

5. I requested your guidance towards whom can i table the matters so as to minimize litigation costs and prevent any further harm i.e. A direct approach to the court of Appeal whose mandate is to ensure consistency across the lower courts

6. I looked forward to your response so as to get the following resolved at the earliest.

Sincerely,

Neel

Strike out principles

[6] The principles applicable to strike out applications in this Court are well established. They were restated relatively recently in *Newick v Working In Ltd*[1] and *Lewis v J P Morgan Chase Bank N.A*:[2]

(a) The Employment Court possesses the same power to strike out all or part of a pleading as does the High Court.

[1] [2012] NZEmpC 156 at [2]-[4].
[2] [2013] NZEmpC 148 at [44]-[45].

(b) The Court proceeds on the assumption that the facts pleaded in the statement of claim are true.

(c) The proceeding or cause of action must be so clearly untenable that it cannot possibly succeed.

(d) The jurisdiction or power is to be exercised sparingly and only in a clear case where the Court is satisfied it has the requisite material before it.

(e) The jurisdiction is not necessarily excluded where the claim raises difficult questions of law and requires extensive argument.

(f) The Court should be slow to strike out a claim in a developing area of the law.

(g) A pleading may be struck out not only because it does not constitute a cause of action known to law but also where it constitutes an abuse of the Court's process.

(h) While caution is required to prevent injustice to claimants, defendants should not be subjected to substantial costs, often only partially recoverable, in defending untenable claims.

[7] Proposition (h) is taken from the Court of Appeal judgment in *Queenstown Lakes District Council v Charterhall Trustees Ltd*.[3] It seems to have particular application to the facts of the present case.

The facts

[8] The strike out application before the Court relates to an amended statement of claim filed by the plaintiff on 7 August 2013. The original statement of claim had been filed on 19 December 2012. It purported to challenge by way of a de novo hearing the whole of a determination of the Employment Relations Authority (the Authority) dated 22 November 2012.[4] In its determination the Authority had dismissed a claim by Mr Gupta for interim reinstatement. The problem with the statement of claim, however, was that it did not seek relief for "interim reinstatement" but sought substantive relief in the form of permanent reinstatement, compensation, loss of wages and interest. Those are remedies which would normally be available only after the Authority had heard an applicant's personal grievance and

[3] [2009] NZLR 786 (CA) at [16].
[4] [2012] NZERA Wellington 144.

found in his favour. As at December 2012, the Authority had not yet investigated Mr Gupta's substantive personal grievance claim.

[9] The background to the application was that Mr Gupta had been employed by the defendant, Infosys Technologies (Australia) Pty Limited (Infosys Technologies), from 15 September 2011 until his employment was terminated on 29 May 2012. On 1 August 2012, Mr Gupta through his then solicitor (not Mr Bennett) raised a personal grievance and sought interim reinstatement which Infosys Technologies refused. On 24 October 2012, Mr Gupta filed his statement of problem with the Authority and it included his application for interim reinstatement. The Authority directed the parties to mediation. It also fixed an interim investigation meeting for 16 November 2012 and set down the substantive investigation for 6/7 March 2013. The Authority's determination of 22 November 2012 related only to Mr Gupta's application for interim reinstatement. As noted above, it dismissed his application.

[10] In dismissing the application, the Authority highlighted the delays on Mr Gupta's part in seeking interim relief. It noted that he had known since the end of May 2012 that he had lost his position and it was critical of the delay on his part, of almost three months, in claiming interim reinstatement. It determined that the overall justice of the case favoured Infosys Technologies.

[11] Mr Gupta then decided to challenge the Authority's determination and he filed a statement of claim in this Court on 19 December 2012. As noted in [8] above, however, his statement of claim purported to not only challenge the Authority's determination of 22 November 2012 on the interim reinstatement question but it sought substantive relief, even though the Authority had not yet carried out its substantive investigation into his personal grievance.

[12] The matter was referred to Judge Travis as the duty Judge during the Court's legal vacation. In a minute dated 20 December 2012, Judge Travis confirmed that the only matter before the Court was the Authority's determination declining to grant Mr Gupta interim reinstatement and he noted that the substantive grievance was scheduled to be investigated by the Authority on 6 March 2013. Judge Travis added:

> 6. In the present circumstances it was agreed by the parties' representatives that the present challenge would remain on hold and that there is no requirement for the defendant to file a statement of defence at this stage.
>
> 7. Mr Bennett will advise the Wellington Registry whether and when the challenge to interim reinstatement is to be pursued which will necessitate the filing of an appropriate statement of claim and the affidavits and undertakings as to damages in support.
>
> 8. Mr Rooney reserves his client's position to raise any appropriate objections to that course.

[13] On 24 January 2013, Chief Judge Colgan issued a brief minute referring to an email the Registrar had apparently received from Mr Gupta. The Chief Judge noted:

> 2. [Mr] Gupta's email to the Registrar of 24 January does not advance the position that Judge Travis recorded in his minute of 20 December 2012, that is whether [Mr] Gupta was seeking to challenge the Authority's refusal of interim reinstatement or, alternatively, whether [Mr] Gupta will reserve [his] position until after the Authority's investigation of [his] substantive personal grievance in March.

[14] On 22 March 2013, Mr Gupta personally filed a document described as "Memorandum of Neel Gupta". It is a voluminous document containing attachments which make little sense apart from the Authority's determination of 22 November 2012 which was included. In response, Mr Rooney filed a brief memorandum dated 27 March 2013 which fairly accurately referred to Mr Gupta's memorandum in these terms:

> 2. Although not entirely clear, it appears Mr Gupta is seeking relief in relation to a claim that is currently before the Employment Relations Authority - File No. 5399247 *Neel Gupta v Infosys Technologies (Australia) Pty Limited* **(Authority Proceedings)**.
>
> 3. In relation to the Authority proceedings, an investigation meeting was held on 12 March 2013, the deadline for the respondent's submissions in reply is 28 March 2013 and no substantive Authority determination has been issued.
>
> 4. The only matter currently before the Court is an application to challenge the Employment Relations Authority's interim reinstatement determination (*Gupta v Infosys Technologies (Australia) Pty Limited* [2012] NZERA Wellington 144) File Number: WRC 35/12 which has not been advanced.
>
> 5. There is therefore no matter currently before the Court on which Mr Gupta can seek the relief sought in his memorandum.

[15] On 8 April 2013, Mr Gupta personally re-filed the memorandum he had filed on 22 March 2013 with some subtle changes and various enclosures including (again) the Authority's determination of 22 November 2012. At that stage, the situation remained as summarised by Mr Rooney in his memorandum of 27 March 2013.

[16] The next development was on 7 August 2013 when Mr Bennett filed the amended statement of claim which the defendant has applied to strike out. The challenge in that statement of claim continues to be a challenge to the Authority's determination of 22 November 2012 dismissing Mr Gupta's application for interim reinstatement but the relief sought is, again, the substantive relief described in [11] above. No mention is made about the Authority's substantive investigation which was held in March 2013.

Defendant's submissions

[17] In support of his client's strike out application, Mr Rooney has advanced a number of compelling submissions. First, he pointed out that the Authority had completed its substantive investigation on 12 March 2013 and delivered its substantive determination on 5 April 2013 but the plaintiff had failed to file any challenge to that substantive determination within the 28-day limitation period prescribed in s 179(2) of the Employment Relations Act 2000 (the Act).

[18] Mr Rooney pointed out (correctly) that the only challenge before the Court is the challenge to the Authority's interim reinstatement determination dated 22 November 2012. Counsel submitted that the Court does not have jurisdiction on a challenge to a determination in respect of an application for interim reinstatement to order substantive relief such as the relief sought in the present case of permanent reinstatement, compensation, reimbursement of lost wages and interest.

[19] Mr Rooney also submitted that the statement of claim in question is an abuse of process and discloses no reasonably arguable case. In this regard, counsel referred to earlier delays on Mr Gupta's part in prosecuting his claim and to his failure, which still continues, to comply with the directions contained in Judge

Travis' minute of 20 December 2012 (see [12] above) in the event that he wished to proceed with his challenge.

Discussion

[20] Section 127 of the Act provides that the Authority may if it thinks fit, on the application of an employee who has raised a personal grievance with his or her employer, make an order for the reinstatement of the employee *pending* the hearing of the personal grievance.

[21] Mr Rooney submitted that the remedy of interim reinstatement is intended to preserve the position of an employee complaining of unjustified dismissal pending resolution of his or her personal grievance and, as such, it is implicit that the relief is available only for a limited period of time until determination of the employee's substantive grievance.

[22] I accept that submission. The remedies sought in the amended statement of claim in this case are the substantive remedies provided for in ss 123 and 125 of the Act which are available to an employee only if he has a personal grievance. Interim reinstatement under s 127 of the Act is a temporary remedy pending the hearing of the employee's personal grievance, and does not provide the basis for a claim to any of the substantive remedies.

Conclusions

[23] For the reasons stated, I am satisfied that Mr Gupta's claim is so hopeless that it cannot possibly succeed. I also agree with Mr Rooney's criticisms of the ongoing delays on Mr Gupta's part. The Court's lack of jurisdiction in this matter cannot be righted by any submissions Mr Bennett may be able to advance and rather than prolong the ongoing difficulties he has obviously endured in obtaining instructions from Mr Gupta (as revealed in [2] above), I decline the plaintiff's application for an extension of time in which to make further submissions.

[24] For the same reasons, and in order to avoid the defendant being subjected to further unnecessary costs, I uphold its application of 25 September 2013 to have the plaintiff's amended statement of claim struck out.

[25] Accordingly, the proceeding is struck out. The defendant is entitled to costs. If they cannot be agreed upon then Mr Rooney is to file submissions within 21 days and Mr Bennett will have a like period of time in which to file submissions in response.

A D Ford
Judge

Judgment signed at 4.00 pm on 18 October 2013