IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 94
ARC 45/12

IN THE MATTER OF	an application for leave to challenge out of time
BETWEEN	FRANK JOHN FIFIELD Plaintiff
AND	ROTORUA CITY COUNCIL Defendant

Hearing:	24 April and 27 May 2013 (Heard at Auckland by telephone conference call)
Appearances:	Plaintiff in person Timothy Cleary, counsel for defendant Maria Dew, counsel as friend of the Court (on 27 May 2013)
Judgment:	28 May 2013

JUDGMENT OF CHIEF JUDGE G L COLGAN

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[1] Frank Fifield has applied for leave to challenge out of time the determination[1] of the Employment Relations Authority issued on 28 March 2012 dismissing his claims against Ray Kearns who appears to have been his supervisor in employment at the Rotorua District Council (the District Council) about 25 years ago.

[2] When the case was before me first on 24 April 2013, and having heard at some length from Mr Fifield in person, I became concerned that he might not be fully aware of the limited scope of the proceedings at this stage and ran the risk not only of not advancing any arguments in favour of it that he had, but also of prejudicing his case. In these circumstances I adjourned the hearing and arranged for the appointment of counsel (an amica curiae or friend of the Court) to make

[1] [2012] NZERA Auckland 110.

submissions in an attempt to ensure that the merits of Mr Fifield's case were put before the Court.

[3] I am grateful to Ms Dew for having undertaken this task at the request of the Court and am satisfied, having heard from her, that everything that might be said in favour of Mr Fifield's case has been put before the Court.

[4] The hearings were conducted by telephone conference call. Not only because there was no oral evidence to be presented but also because counsel, Mr Cleary, is based in Wellington, I heard from Mr Fifield and counsel on a conference call although Mr Fifield was, on each occasion, in the Court's premises at Auckland with a Registry officer. I was satisfied that there could be no prejudice to Mr Fifield's case by a hearing conducted in this way.

[5] The background to this application for leave is as follows. In 1989 Mr Fifield brought a personal grievance to the Labour Court alleging, among other things, that he had been dismissed unjustifiably by his then employer, the District Council. In a judgment[2] given on 11 December 1989 the Labour Court upheld Mr Fifield's claim granting him remedies which included reinstatement, arrears of wages, and distress compensation. The Labour Court's judgment cautioned Mr Fifield, however, about his conduct towards fellow employees when reinstated.

[6] It is unclear whether the Labour Court's order for reinstatement was complied with by the District Council. Mr Fifield claims to have been subsequently dismissed again by it in 1990 although no proceedings challenging that second dismissal appear to have been brought in the Labour Court or, subsequently, in the Employment Tribunal established under the Employment Contracts Act 1991, as they could have been.

[7] In 2007 Mr Fifield applied to the Court of Appeal for leave to have his grievance dealt with. Although the jurisdictional basis of his application to the Court of Appeal was far from clear, its judgment[3] records that it was treated as an

[2] [1989] 3 NZILR 495.
[3] [2007] NZCA 36; [2007] ERNZ 199.

application for leave to appeal out of time against the judgment of the Labour Court. That application was dismissed.

[8] Next, in 2012, Mr Fifield brought proceedings in the Employment Relations Authority against Mr Kearns, who had not ever been his employer although he appears to have been in a supervisory role over the plaintiff at the time of his dismissal or dismissals in 1989 and/or 1990. In a determination[4] issued by the Authority on 28 March 2012, it dismissed Mr Fifield's application under cl 12A of Schedule 2 to the Employment Relations Act 2000 (the Act) as frivolous and vexatious.

[9] Mr Fifield had the period of 28 days thereafter to challenge the Authority's determination. He did not do anything, however, until filing these proceedings with the Employment Court on 24 July 2012. Such was the state of the pleadings then filed that I directed that Mr Fifield was to amend these. Although their handwritten nature was not a disqualifying factor alone, their indecipherability was problematic.

[10] Further, Mr Fifield's draft statement of claim nominated Rotorua City Council as the intended defendant, not Mr Kearns, who had been the intended respondent in the Authority. "Rotorua City Council" is not a legal entity. The entituling to the previous proceedings in the Labour Court and the Court of Appeal discloses that Mr Fifield's employer was "Rotorua District Council", an entity that still exists under that name.

[11] There were other fundamental failures and inadequacies in Mr Fifield's original pleadings that were identified to him. He has had the benefit of legal assistance and advice through the Employment Court/Auckland District Law Society pro bono pleadings assistance scheme and has, subsequently, filed an amended application for leave, affidavit in support, and draft statement of claim.

[12] In these circumstances, and although even these documents are still less than adequate, I directed Mr Fifield to serve those pleadings and copies of the Court's Minutes on the District Council and to bring these documents to the notice of

[4] [2012] NZERA Auckland 110.

counsel who last appeared for the District Council in the proceedings in the Court of Appeal in 2007 on instructions from the Employers and Manufacturers Association (Northern), Mr Timothy Cleary.

[13] Ms Dew identified and helpfully outlined to the Court what might be a fundamental misunderstanding by Mr Fifield about his case. He says that when he was due to return to work in early 1990, after having been reinstated by the Labour Court in 1989, he presented a medical certificate to his employer evidencing his unavailability to recommence for medical reasons at the time. Mr Fifield says that he did not ever resume work for the District Council because he was dismissed by it for a second time in 1990. For reasons that are not clear, Mr Fifield did not challenge by personal grievance the justification for his second dismissal by the District Council if that is what occurred.

[14] Much of Mr Fifield's complaint is levelled at his then supervisor, Mr Kearns, the detail of which I do not propose to set out because Mr Kearns has not been a participant in the case. Mr Fifield's complaint appears to be that despite his urgings that it do so, the District Council did not dismiss Mr Kearns.

[15] Because Mr Kearns was not Mr Fifield's employer, personal grievance proceedings against him alleging unjustified dismissal were fatally flawed. As both Ms Dew pointed out and Mr Cleary acknowledged as a theoretical possibility at least, Mr Fifield may still be entitled to attempt to bring proceedings for unjustified dismissal in respect of his claimed second (1990) dismissal by the District Council. The prospects of doing so successfully must, however, be very slim given the extremely lengthy delay of about 23 years and I would urge upon Mr Fifield the desirability of seeking and acting upon competent legal advice on this issue. It is, however, a separate issue to his first dismissal in 1989 which has been heard and disposed of now in decisions and judgments.

[16] Leave to challenge the Authority's determination is now refused for the following reasons. There is no adequate explanation by Mr Fifield for the long delays between the various events that have taken place over the last almost 25 years

outlined above. The application to the Authority which is sought to be challenged was brought against someone who was not Mr Fifield's employer.

[17] The intended challenge is now brought against a non-existent legal entity but even if its identity was changed to the District Council, that is not the same party against whom the proceeding in the Authority was brought.

[18] Mr Fifield states that he is unable to pay the court filing fee which would be payable if leave were granted. There is no fees' waiver regime provided for in the legislation governing the filing of proceedings in this Court, the Employment Court Regulations 2000 made pursuant to the Employment Relations Act 2000. If a party cannot or will not pay the Court's filing fee, a proceeding cannot be accepted for filing. Mr Fifield is not legally aided (which might have allowed for an advance of the filing fee as a disbursement) and it seems unlikely that he would be granted legal aid in view of his negligible prospects of success.

[19] As the Court of Appeal noted in its judgment, delivered now more than five years ago, Mr Fifield is hopelessly late in attempting to revisit events which occurred in his employment in 1989. It would be oppressive to his former employer to expect it now to attempt to justify what Mr Fifield may complain against it, although even that is completely unclear at this point.

[20] The Employment Relations Authority was correct in its assessment of Mr Fifield's proceedings in relation to his 1989 dismissal as being vexatious.

[21] Such of Mr Fifield's current and past circumstances as can be discerned from his papers do evoke sympathy. It seems clear that he has, at least from time to time, been unwell and his financial and other family circumstances difficult. Whatever may have happened after the Labour Court granted him the remedies that he sought in 1989 still rankles with Mr Fifield but the solution is not to attempt, periodically, to sue somebody associated with those events as he has attempted to do. Such a strategy is vexatious and although the Court does not propose to award costs against Mr Fifield in the same way as the Authority and the Court of Appeal have not, that

leniency cannot be guaranteed for the future. The Court is, nevertheless, grateful to Mr Cleary and his client, the District Council, for participating in the proceeding.

[22] Leave to challenge the Authority's determination out of time is refused.

GL Colgan
Chief Judge

Judgment signed at 8 am on Tuesday 28 May 2013