

**IN THE EMPLOYMENT COURT  
CHRISTCHURCH**

**[2014] NZEmpC 156  
CRC 12/10**

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

BETWEEN                      ROLLING THUNDER MOTOR  
   COMPANY LIMITED  
   Plaintiff

AND                              DIANE KENNEDY  
   Defendant

Hearing:                      (on the papers by documents dated 30 May and 23 June 2014)

Representation:          C Elles, agent for the plaintiff  
   D Clark, counsel for the defendant

Judgment:                      27 August 2014

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**JUDGMENT OF JUDGE B A CORKILL**

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**Introduction**

[1] This proceeding is a challenge to a determination of the Employment Relations Authority (the Authority) brought by the plaintiff on 29 March 2012. The Authority determined it had no jurisdiction to deal with what it described as an unpaid loan. It stated that the plaintiff should bring its claim in another jurisdiction.<sup>1</sup>

[2] The defendant now applies for an order striking out the proceeding for want of prosecution. The Court's jurisdiction to do so derives from reg 6(2)(a)(ii) of the Employment Court Regulations 2000 (the Regulations), which provides that where no form of procedure has otherwise been provided under the Employment Relations

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<sup>1</sup> *Rolling Thunder Motor Company Ltd v Kennedy* ERA Christchurch CA45/10, 3 March 2010.

Act 2000 (the Act) or Regulations or any rules made there under, the provisions of the High Court Rules affecting any similar case may apply.

[3] Rule 15.2(a) of the High Court Rules provides that an opposite party may apply to have all or part of a proceeding dismissed, and the Court may make such order as it thinks just, if “the plaintiff fails to prosecute all or part of the plaintiff’s proceeding to trial and judgment”. Cases decided pursuant to that rule make it clear that it must be shown that:

- The plaintiff has been guilty of inordinate delay;
- Such delay is inexcusable;
- The delay has seriously prejudiced the defendant.
- It is not in the overall interests of justice to allow the case to proceed.<sup>2</sup>

## **Background**

[4] The proceeding has been the subject of a tortuous process which the Court has managed with a view to having the challenge determined in a timely way.

[5] Initially the Court was required to consider an application to strike out the proceeding on the basis that the Court lacked jurisdiction to hear it. Judgment on that issue was issued on 19 August 2010, with the Court dismissing the application.<sup>3</sup> Thereafter the Court of Appeal considered an application for leave to appeal. In its judgment of 6 December 2010, leave was declined;<sup>4</sup> the Court held it was premature for it to consider the matter until there were factual findings so that it could consider whether there was a proper factual foundation for jurisdiction.

[6] The matter was then timetabled by the Court, with telephone directions conferences being conducted with the parties from time to time.

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<sup>2</sup> See *Name Suppressed v Attorney-General* HC Wellington CIV-1996-485-07, 31 March 2006 at [16]-[18].

<sup>3</sup> *Rolling Thunder Motor Company Ltd v Kennedy* [2010] NZEmpC 109.

<sup>4</sup> *Kennedy v Rolling Thunder Motor Company Ltd* [2010] NZCA 582, (2010) 8 NZELR 232.

[7] Directions were made requiring the plaintiff to provide a list of all transactions relied on for the purpose of the claim, and copies of signed vouchers relating to these transactions. By February 2012, it was necessary for the Court to say that the delay on the part of the plaintiff in disclosing the documentation which had been directed for disclosure was excessive and unacceptable. The Court came close to striking the matter out for want of prosecution at that time, but a final opportunity was given to the plaintiff to remedy its failures to provide the necessary documentation.

[8] The matter was then set down for a five-day hearing, to commence on 16 July 2012. Shortly before the hearing, it was necessary for the trial Judge to issue a minute indicating that it was apparent, from the briefs of evidence which had been filed, that documents were now being relied on which had not previously been disclosed, despite previous directions from the Court to that effect.

[9] This resulted in a substantial quantity of additional evidence, including documents being filed, immediately prior to the commencement of the trial. Inevitably the fixture had to be vacated. Further directions regarding disclosure by the plaintiff were given, with the intention that the matter would then be rescheduled for hearing. Costs were reserved.

[10] Eventually, on 30 April 2013, the solicitor then acting for the plaintiff sought an order declaring that he had ceased to be the solicitor on the record for the plaintiff.

[11] After delays in the Court being informed whether the essential pre-requisites for such an application had been met, the Court made an order to that effect on 16 May 2014. The parties were then requested to advise the Court as to what steps would then be appropriate; in particular the plaintiff was requested to advise whether the company proposed to proceed with the challenge at all.

[12] On 26 May 2014, Mr Elles, the Managing Director of the plaintiff, sent an email to the Acting Registrar stating:

I am unable to continue pursuit of the claim as I am currently working/travelling overseas with limited connectivity and do not wish to cause undue stress on witnesses who would be compelled to testify against the defendant.

[13] On 30 May 2014, a memorandum was filed for the defendant seeking an order that the proceeding be struck out save for a determination as to costs, given the multiple procedural defaults which had occurred on the part of the plaintiff. On 23 June 2014, the defendant filed a detailed memorandum in support of her application for costs.

[14] A minute was issued by the Court on 1 July 2014 stating that the Court must now consider making an order that the proceeding be struck out, which would lead to a consideration of the defendant's application for costs. The plaintiff was directed to file any response with regard to the application for costs by 4.00 pm on 14 July 2014. The Court would then consider the outstanding applications on the papers.

[15] That minute was served in accordance with the Court's directions; no submission as to costs or otherwise has since been made on behalf of the plaintiff.

[16] On the basis of the foregoing facts, it is clear that the plaintiff has been guilty of inordinate and inexcusable delay. There have been numerous directions issued by the Court to deal with documentary issues, and these have not been adequately complied with, to the point of a fixture having to be vacated.

[17] The defendant has incurred significant costs, as will be explained more fully shortly, including the costs of preparation for a defended hearing. The matter has not been progressed in a timely way. The defendant has had to contend with the undesirable situation of facing an unresolved and long-running piece of litigation. I find that the defendant has accordingly been seriously prejudiced.

[18] The overall interests of justice require this matter to be struck out for want of prosecution, and I so order.

[19] Turning to the application made for costs, the memorandum filed for the defendant attaches invoices incurred by her over the four years that the challenge has

been before the Court. The invoices indicate the extent of attendances that have been required; it is apparent from those invoices, and from the volumes of paperwork which have been filed in the Court which assist in the Court's assessment, that the matter required the defendant's counsel to analyse multiple documents, where these have been made available. It is also apparent that the defendant's invoices have been discounted from time to time.

[20] The usual practice of the Court is to take a starting point of two-thirds of costs actually and reasonably incurred.<sup>5</sup> That starting figure may then be increased or decreased as may be appropriate.

[21] The total costs incurred by the defendant are \$30,291.68. Through her counsel, she seeks approximately two-thirds of that amount, without uplift. I consider this to be a fair figure in the circumstances.

## **Conclusion**

[22] Accordingly, the orders of the Court are that:

- a) The challenge is struck out for want of prosecution.
- b) The plaintiff is to pay the defendant the sum of \$20,000.

B A Corkill  
Judge

Judgment signed at 12.15 pm on 27 August 2014

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<sup>5</sup> *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [14].