IN THE EMPLOYMENT COURT
AUCKLAND

AC 19/08
ARC 4/07

IN THE MATTER OF	de novo challenge to determination of the Employment Relations Authority
AND	
IN THE MATTER OF	application for leave to file Statement of Defence out of time
BETWEEN	CHRISTOPHER BARRY Plaintiff
AND	ANOOP INVESTMENTS LIMITED Defendant

Hearing: 21 May 2008
(Heard at Auckland)

Appearances: Matthew Young, advocate for plaintiff
Mohammed Khan, counsel for defendant

Judgment: 3 June 2008

INTERLOCUTORY JUDGMENT OF JUDGE B S TRAVIS

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[1] The defendant has sought leave to file a statement of defence out of time.

[2] As a preliminary issue, objection was taken by the plaintiff to an affidavit filed on behalf of the defendant on 20 May 2008. There were two main grounds for the objection. The first was that the affidavit was not served on the address for service. It was served by facsimile transmission. The plaintiff's amended statement of claim provides, in addition to a physical address, a "*fax number for service*". This objection therefore is not made out.

[3] The second objection had more substance. It was that the affidavit referred to matters that had taken place on a without prejudice basis. After hearing submissions from both sides I am satisfied that the affidavit did refer to without prejudice communications, some of which had already been touched on in material supplied by the plaintiff, and I deleted four paragraphs from the affidavit which I then permitted to be read.

Background facts

[4] The Employment Relations Authority issued a determination on 18 January 2007 in which it declined to order a penalty for a failure to provide a written employment contract, concluded that Mr Barry had not negotiated with the defendant an agreement to be paid a minimum of 40-hours a week, had not been unjustifiably disadvantaged because the grievance had not been brought within time, was not entitled to a loyalty bonus and had not been constructively dismissed. The Authority found in Mr Barry's favour in relation to a claim for wage arrears but did not quantify the amount of the claim.

[5] The plaintiff filed an election on 15 February 2007 to have a de novo hearing of the whole matter.

[6] It is claimed that a copy of the election was forwarded by courier to the defendant's solicitors who apparently acted for them in the Authority. These documents were said to have been served on the defendant's solicitors on 19 February 2007. There were discussions between the representatives, culminating in an email dated 19 July 2007 from the defendant's solicitors in which they confirm that they acted for the defendant "*with regard to the Employment Authority matter as well as the Employment Court Appeal*". They regretted the delay in replying and said that they would be seeking to file a defence and went on to refer to the possibility of a settlement.

[7] Upon being advised of this communication, Chief Judge Colgan set the matter down for hearing on the basis that it would consist of evidence and submissions presented by the plaintiff for the purposes of persuading the Court that

the determination in favour of the defendant should be set aside. This was conditional upon the proof that the challenge had been served upon the solicitors who acted for the defendant. An affidavit from Mr Young was then filed.

[8] When the matter was set down before me for hearing, I observed that the manner of delivery and proof of delivery was not set out in the affidavit nor did it confirm the receipt of the documents. Because the Employment Court Regulations 2000 do not provide that the address for service given in the Employment Relations Authority applies to the service of the documents in the Employment Court, I was not satisfied that there was proof of service. Further the method of service did not comply with reg 29, which requires service personally on corporations in the manner there specified. I therefore vacated the hearing date by minute dated 6 September 2007 directed that the statement of claim and notice to the defendant be served on the registered office of the defendant, or one of its offices, in terms of the Employment Court Regulations 2000. Upon proof of that service, and the time having elapsed without a defence being filed, the matter was then be able to be set down unilaterally for hearing.

[9] On 31 October 2007 Mr Young filed a memorandum anticipating that an amended statement of claim would be filed by 7 November 2007. No further steps were taken. The registry wrote to Mr Young on 16 November asking when the documents would be filed and advising that the registry would monitor the position over the next two months. No further steps were taken by Mr Young.

[10] On 1 February 2008 I issued a further minute observing that no amended statement of claim had been filed and seeking a memorandum from the plaintiff advising what steps had been taken to serve the original statement of claim and notice to the defendant, in terms of my minute of 6 September 2007. Mr Young responded on 12 February 2008 seeking leave to serve his memorandum out of time and to file an amended statement of claim within a further 7 days. The amended statement of claim was finally filed on 28 February 2008. It made no reference to a supplementary determination of the Authority which had been issued on 2 July 2007. That supplementary determination set out the method for calculating the amount of wages arrears and it awarded Mr Barry $2,000 as a contribution towards his costs.

[11] I have been informed that $12,000 has been paid by the defendant to the plaintiff in respect of arrears and costs. There is however still an issue between the parties as to whether a further $300 or $2,000 is owing for the wage arrears.

[12] An affidavit of service was filed by the plaintiff on 7 April stating that the amended statement of claim had been served on the defendant on 29 February 2008. This provoked correspondence between the parties and further discussions concerning settlement. It did not, however, lead to any documents being filed on behalf of the defendant in the Court.

[13] Accordingly the challenge was set down for an undefended hearing on 6 May 2008. On 29 April a document, described as a notice of representation, was filed by the solicitors for the defendant. On 1 May an application for leave to adjourn the hearing of 6 May was filed by the defendant's solicitors on the grounds that the delay would allow for a statement of defence and affidavit in support to be filed. An application for leave to file the statement of defence out of time and an affidavit from Mr Singh, a director of the defendant, were filed on 2 May.

[14] Because Mr Young indicated he might wish to file an affidavit in opposition, the hearing on 6 May was adjourned until 8 May. Because of a delay in filing the affidavit in opposition the matter was adjourned again until the hearing on 21 May.

Submissions

[15] Mr Khan in support of the application for leave cited *Fordham v Xcentrix Communications Ltd* (1996) 9 PRNZ 682 which dealt with a defendant applying for leave to file a statement of defence under Rule 432 of the High Court Rules, after the proceedings were already set down for hearing. Fisher J stated: *The ultimate object is of course to exercise the discretion in the way which will best achieve justice*.

[16] Dealing with the matter under the three headings, Mr Khan submitted that because the amended statement of claim had been served directly on the defendant there had been a breakdown in communication between the defendant and its

solicitors, the defendant being of the view that its solicitors were already seized of the matter.

[17] It is difficult to follow the logic of that explanation because there was evidence in the affidavits which showed that as early as July 2007 the defendant's solicitors were aware of the challenge and had made an offer in settlement and were referring to the need to file a statement of defence.

[18] Mr Kahn was on stronger grounds when he submitted that there was evidence the defendant had been endeavouring to negotiate a final settlement with the plaintiff and had been maintaining those efforts up to a point of time shortly before the application for leave was heard.

[19] The more likely explanation, which I infer from the correspondence, is that the defendant's solicitors were seized of the matter, were attempting to settle it and therefore overlooked the need to file the statement of defence.

[20] In opposition Mr Young strenuously argued that leave ought not be granted. He cited *Hunt v Forklift Specialists Ltd* WC 30/00, 18 May 2000, a decision of Judge Shaw, which suggested the following matters needed to be considered:

a) The reasons for the defendant failing to take the necessary steps, for example whether the failure was inadvertent, deliberate, neglectful, or accidental;

b) Whether there was an adequate explanation for the delay in taking the steps;

c) Whether prejudice lies in granting or refusing an application;

d) The merits of any defence, and whether the defendant demonstrated an arguable defence to the claim.

[21] Mr Young observed that the defendant had been served twice and had still not managed to file a statement of defence within time and that two undefended

hearings had to be abandoned. This had led to applications, telephone conferences, process servers being employed and interlocutory applications, all of which have increased his client's costs considerably. He claimed that the plaintiff had been significantly prejudiced as a result, including stress from the delay. The stress is referred to in an affidavit filed in support of the plaintiff's opposition by a consultant who performs work for Mr Barry, but it is not supported by any affidavits from Mr Barry himself or medical evidence.

[22] Mr Young referred to the inadequacy of the explanation for the defendant's delay. It was some 63 days after the service on 29 February 2008 of the amended statement of claim that the application for leave was filed. I agree with Mr Young that this is a considerable delay. This is especially so because of the acknowledgment in the correspondence that the defendant's solicitors were aware of the challenge from sometime early in 2007 and had referred to the need to file a statement of defence.

[23] Mr Young submitted the defendant failed to demonstrate any defence to the plaintiff's claim. He referred to two recent cases, decided by Judge Perkins, where the delay was short, the inadvertence was clear, and leave was not granted: *Fisher v Fisher et al* AC 2/07, 1 February 2007 and *Bowles v Raukura Hauora o Tainui* AC 67/06, 30 November 2006. Mr Young submitted the present case was one where the "*tipping point*" had been reached and where the line needed to be drawn. He contended that to allow leave in this case would be to create an unacceptable precedent.

Conclusion

[24] The defendant's delays have been inordinate and are not adequately or expressly explained. However, I have already drawn from the correspondence the inference that the defendant was taking steps to deal with the matter by way of settlement offers and had made a substantial payment in settlement of the supplementary determination of the Authority. The failure to file the statement of defence was inadvertent, or negligent rather than deliberate.

[25] The mitigating factors which assist the defendant were the attempts to settle the matter on a realistic basis, the substantial payment on account of the supplementary determination, and the fact the defendant did not seek to challenge any of the Authority's findings, including the adverse one. Further, the defendant has the benefit of favourable findings by the Authority. I therefore reject the plaintiff's contention that the defendant has failed to demonstrate any defence to his claims.

[26] This is a case in which the plaintiff's claims turn on credibility findings and on which the evidence led on behalf of the defendant was preferred by the Authority. If the plaintiff was permitted to challenge those findings and the defendant is not permitted to defend its position by calling witnesses in opposition, the substantial merits of the claim would never be examined. Indeed this is a case in which it is likely that a trial Judge hearing the matter by default might wish to hear from the defendant's witnesses in order to rule on the Authority's determination, even if the defendant had not taken any steps at all to defend the challenge.

[27] In *Otago Taxis Ltd v Strong* CC 6/07, 2 March 2007, Judge Couch extended the time for filing a statement of defence by 87 days. That was in the context of extensions of time being sought by both parties to take interlocutory steps, where the defendant had received advice that was in error and thought she would be able to defend in the Court, her successful claim in the Authority on her own behalf without filing a statement of defence. Judge Couch noted that a delay of 87 days in making an application for an extension of time to file a challenge would be regarded as very substantial and, in most cases, fatal to the application. He went on to state:

> …*Where the application is for an extension of time to a file statement of defence, the importance of this factor is very much less. This is because the interests of justice are different. Permitting a party to participate in the resolution of a dispute which is already properly before the Court is fundamentally different to permitting a party to renew a dispute before the Court which the other party is entitled to believe has been finally determined by the Authority in its favour.*

[28] As Judge Couch noted in that case the Court's jurisdiction to extend time is confirmed by s221 of the Employment Relations Act 2000 which provides:

> ***221 Joinder, waiver, and extension of time***
> *In order to enable the Court or the Authority, as the case may be, to more effectually dispose of any matter before it according to the substantial merits and equities of the case, it may, at any stage of the proceedings, of its own motion or on the application of any of the parties, and upon such terms as it thinks fit, by order,—*
> …
> *(c) subject to section 114(4), extend the time within which anything is to or may be done; and*
> …

[29] The onus lies on the party who has failed to act in time to persuade the Court that leave should be granted. The overriding principle is that the discretion should be exercised according to the overall justice of the case.

[30] In this situation there have been considerable delays on the part of the plaintiff in pursuing his challenge. Much of the stress the plaintiff has claimed may be attributable to those delays. If the defendant is barred from defending the Authority's determination in its favour, there will be considerable difficulties in determining this matter according to its substantial merits and equities, as provided in s221. The defendant is not taking any steps to contest the Authority's determination and the plaintiff will still have the burden of the challenge against those aspects in respect of which he has been unsuccessful. Because that challenge will turn largely on the credibility of witnesses for both sides, I do not consider the Court will be able to effectually dispose of the matter before it, according to the substantial merits and equities of the case, unless the defendant is given the opportunity it now seeks to defend the matter.

[31] I am reinforced in that conclusion by the proper steps taken by the defendant to endeavour to settle this matter and the payments it has made on account of the matters dealt with in the Authority's supplementary determination.

[32] The prejudice from delays as a result of the defendant's inaction and the additional costs the plaintiff has incurred can be dealt with by appropriate terms on which the order granting leave to file the defence out of time is to be granted.

[33] Mr Kahn very properly did not oppose costs in favour of the plaintiff to indemnify him the reasonable expenses he had to incur as a result of the defendant's failure to file the defence in a timely manner.

[34] Further, because the parties have put before me matters which have gone to the merits of the claim and which indicate the nature of the subsequent negotiations in an attempt to settle the matter, I am firmly of the view that this is a matter which will benefit from a further attempt to resolve the issues between the parties by means of a judicial settlement conference, mediation having already failed.

[35] At the hearing I requested the plaintiff file a memorandum setting out the actual and reasonable costs and disbursements he has incurred as a result of the defendant's failure to file the statement of defence in a timely manner. The plaintiff's advocate filed a memorandum in regards to indemnity costs stating that they total $9,534.38 plus disbursements of $224.25. I am not yet satisfied that these costs are reasonable and have been actually incurred by the plaintiff. Further the defendant has not had the opportunity of addressing the plaintiff's memorandum.

[36] If the matter does not settle I will issue a supplementary judgment establishing the quantum of those costs and disbursements which the defendant will be directed to pay, notwithstanding the outcome of the challenge;

[37] For all these reasons I grant leave for the defendant to file and serve a statement of defence within 14 days from the date of this judgment on the following terms:

a) The defendant is to pay to the plaintiff $1,000 as a contribution towards the plaintiff's actual and reasonable costs incurred as a result of the defendant's failure to file a statement of claim within time or towards the plaintiff's established arrears of wages.

b) The parties are to obtain immediate instructions on the convening of a judicial settlement conference and if such a conference is convened

will comply with the further directions from the Court on the filing of the necessary memoranda for that conference.

c) The defendant will file and serve any memorandum regarding indemnity costs and the arrears of wages within 14 days of the date of this judgment.

[38] Leave is reserved to the parties to apply for any further directions to expedite the disposition of this challenge.

B S Travis
Judge

Interlocutory judgment signed at 12.45pm on 3 June 2008