

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**CC 7/07
CRC 28/06**

IN THE MATTER OF	an application for leave to extend time to challenge
BETWEEN	ROONEY EARTHMOVING LIMITED Applicant
AND	KELVIN DOUGLAS MCTAGUE, CLARENCE WHITING AND KERRY WAYNE BARTLETT Respondents

Hearing: On papers filed on 18 December 2006, 16 and 30 January, 16 February, and 2, 19 and 27 March 2007

Judgment: 11 May 2007

JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] The sole question now for determination in this Court between these parties is whether the applicant (REL) should have leave to extend the time for filing its challenge to a determination of the Employment Relations Authority that dismissed its claim for damages against the respondents, Kelvin McTague, Clarence Whiting and Kerry Bartlett. The application is decided under s219 of the Employment Relations Act 2000: the Court may, in its discretion, make an order extending the time within which to file the challenge.

[2] It is sometimes thought that s221 of the Employment Relations Act 2000 (*“Joinder, waiver, and extension of time”*) is applicable in cases such as this. That is not so because of the qualification in that section that proceedings must be before the Court. Cases such as this, however, are ones that seek to bring proceedings before the Court. The appropriate section is therefore 219 (*“Validation of informal proceedings, etc”*) and the material parts of which are:

- (1) *If anything which is required ... to be done by this Act is not done within the time allowed, ... the Court, ... may in its discretion, on the application of any person interested, make an order extending the time within which the thing may be done, ...*

[3] REL brought proceedings in the Employment Relations Authority against its former employees alleging breaches by them of their contracts of employment and claiming damages of about \$2 million. The Authority investigated these claims over 8 days in August and September 2005. On 16 November 2006 the Authority issued its determination, finding that Messrs Whiting and Bartlett (but not Mr McTague) had breached their employment contracts but that these breaches were not causative of financial losses to REL whose claim was therefore dismissed. The 28-day period within which REL was entitled to challenge the Authority's determination expired on 14 December 2006. This application was made to the Court on 18 December 2006 and was accompanied by an affidavit and a draft statement of claim. The intended challenge was, therefore, 4 days out of time, or, excluding a weekend, 2 working days.

[4] Although this is not the briefest application for leave to challenge out of time considered by me, the opposition of the respondents is certainly the most comprehensive that I have encountered, not only in terms of the volume of affidavit evidence, but also as reflected by the combined total of 66 pages of written submissions, including those made to the Authority, relying on no fewer than 46 previously decided cases to persuade me to refuse leave.

The applicant's case

[5] The applicant offers one simple reason for its failure. In the Authority it was represented by senior counsel. In a brief affidavit in support of the application for leave, senior counsel says that less than a week after the Authority's determination was issued, on 21 November 2006, he took part in a telephone conference call with his instructing solicitor and the managing director of REL, Gary Rooney. Counsel undertook to draft a statement of claim following instructions from Mr Rooney to challenge the Authority's determination and although counsel began to do so later that day, he was then distracted by other and more urgent work. Counsel overlooked completing the draft statement of claim for sending to his instructing solicitors until Friday, 15 December 2006, when he noted that the time for doing so had expired on the previous day.

[6] Counsel completed the draft statement of claim and sent a copy of it by e-mail to the solicitor (and leading counsel) for the intended defendants, informing him that he, REL's counsel, had overlooked the expiry of the period for challenging the determination and that it was intended to file and serve this application for leave on Monday, 18 December 2006. Counsel sent these advices to the respondents' solicitor by e-mail at 5.12 pm on Friday, 15 December 2006.

[7] In these circumstances the applicant emphasises the short time between the expiry of the statutory period and the filing and service of papers including a full draft statement of claim and the reasons for its failure (the inadvertence of its counsel).

[8] Other aspects of the case for the applicant for leave can be summarised as follows. First, REL says that what it describes as "*significant aspects of the evidence*" were not referred to by the Authority in its determination. It does not identify, at least sufficiently, these significant aspects of the evidence. It says, nevertheless, that the failure to deal with it has prejudiced REL.

[9] Next, REL says that there were serious witness credibility issues that faced the Authority. It asserts that the delays in issuing the determination necessarily mean that the Authority Member must have had a diminished recollection of the evidence and especially of witness demeanour. REL claims that the Authority was under "*considerable pressure to deliver a decision - any decisions - rather than a fully considered one.*" There is no evidence to support this serious allegation against the Authority Member and I do not give it any credence.

[10] Although REL says that the Authority analysed the facts perfunctorily, arguably following the statutory requirement of s174(b) of the Employment Relations Act 2000, the Court is unable at this point to assess whether the Authority's conclusions were justified. Next, REL says that difficult questions of law arose in the Authority but were not analysed by it. It says that these included whether Mr McTague owed fiduciary obligations to REL and the law of obligations on departing employees.

[11] Next, REL says that the Authority failed to address questions of law relating to damages where there is what is known as a "springboard" departure of an employee. It says that, despite this requiring close analysis, that did not happen or at least is not

demonstrated by the Authority's reasoning. Penultimately, REL says that the Authority's interlocutory processes did not allow for sufficient disclosure of documents before the investigation and, in particular, its inability to order non-party disclosure prejudiced REL's case. It says that the ability of the Court to direct non-party disclosure and the likelihood of fresh material for the Court to consider weighs in favour of granting leave.

[12] Finally, the applicant points out that a legally complex case was determined by an Authority Member without qualifications in law. That was so, but it is the statutory scheme that members of the Authority need not be qualified professionally or academically and that cases are not allocated to adjudicators with particular qualifications or expertise.

The respondents' grounds of opposition to the grant of leave

[13] As already mentioned, these are comprehensive and extremely detailed. The respondents accept that the over-riding consideration is the justice of the case and that the tests espoused in *Stevenson v Hato Paora College Trust Board* [2002] 2 ERNZ 103 are appropriate in this case. Although counsel for the respondents submit that "*an assessment of the prospects of success of the applicant's claim is to be given more weight than other factors in the exercise of the Court's discretion*", I do not accept that this is so. Authority for this controversial proposition is said to be the *Stevenson* case itself and the judgment in *Varney v Tasman Regional Sports Trust* unreported, Judge CM Shaw, 16 December 2003, CC 25/03.

[14] This proposition of primacy of prospects of success is based upon a misreading of the Court's reasons in *Stevenson*. Although, as the headnote records, "*The delay and the prejudice were not the main determining factors in the application. The merits had to be assessed in light of the justice of the case.*", that is an analysis of the significance of the several factors on the facts of that case. So the Judge's statement at paragraph [13]: "*This [merits] is the most significant principle in considering this application*" must be read in light of her conclusion at paragraphs [11] and [12] that delay that was neither so minimal nor substantial as to be the main deciding factor in the application and that prejudice was not an important factor in the case. That is not the same thing as elevating the importance of one test (merits) over all others in all cases. The six factors identified in *Stevenson* must all be weighed in assessment of

the justice of the case. In some cases, including this, some factors will assume greater prominence than others. But none is predominant in principle. Doing justice in the particular case is always the yardstick.

[15] I accept the well established proposition that the merits of the case is a shorthand for requiring the party seeking leave to establish that the party's case has some real prospects of success or, put another way, that the case cannot be said to be hopeless. Cases such as (most recently) *Motorpol Australasia Limited v Roche* unreported, Judge CM Shaw, 10 April 2006, AC 23/06 reiterate what was said to this effect in previous judgments such as *Stevenson* and *Pacific Plastic Recyclers Limited v Foo* [2002] 2 ERNZ 75.

[16] I accept also the respondents' (unspoken) premise in this case that, the other relevant factors appearing to be at least neutral or even in the applicant's favour, the merits of its proceedings against the respondents are what is focused upon principally in their opposition to leave, hoping that a demonstrated absence of merit will be sufficient to persuade the Court to disallow the application.

[17] Next, the respondents submit that the Court should not only consider the Authority's determination in ascertaining the merits or otherwise of the intended challenge but, following the judgment of the Court of Appeal in *Coutts Cars Ltd v Baguley* [2001] 1 ERNZ 660; [2002] 2 NZLR 533, the Court should not deny itself the benefits of the considered views of the Authority following an investigation. Those statements of the Court of Appeal were not, however, in the context of assessing an application for leave such as this. Rather, they were for the guidance of the Court when considering a challenge itself. Further, some doubt may have been expressed subsequently as to the significance of a determination at first instance when the Court is considering a challenge de novo, by Justice William Young in *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 at para [2]. However, on an application for leave such as this, the Authority's determination is a relevant factor among others.

[18] Counsel for the respondents says that the Authority "*effectively dismissed the applicant's case, holding that there was no evidence of a breach in Mr McTague's case and, while breaches had occurred by Mr Whiting and Mr Bartlett, they were not causative of any loss by the applicant.*" I think it goes too far to say that REL's

case was effectively dismissed. Breaches were found in the cases of two of the three former employees but the cases against them failed because the Authority concluded that REL's proven losses were not attributable to those breaches.

[19] Although the respondents submit that "*there are no material errors on the face of the determination*" I do not think that an assessment of merits can be undertaken so superficially. Often, what is not referred to on the face of the determination may be as powerful an indicator of merits of an applicant seeking to challenge that determination than what is there. A more sophisticated examination of the determination, in light of the issues raised in the case, is required.

[20] The respondents say that the Authority's decision was that any loss sustained by REL was caused by a combination of factors including the respondents' "*high impact advertising campaign*", the impact of past experience and performance on the ground by the respondents, and a possible negative impact from Mr Rooney's involvement with the Fish and Game Council. The respondents say that this crucial conclusion was available on the evidence put before the Authority and was reasonable. So, too, in the respondents' submission, was the finding that, although Mr Bartlett attempted unsuccessfully to persuade an employee to leave REL, no loss or damage to it ensued and that this was a reasonable conclusion for the Authority to make. That was likewise said to be the lack of consequence of the Authority's finding against Mr Whiting which is that he consented to act as a director of a competitor whilst employed by REL.

[21] The respondents submit that REL has not either pointed to error in the Authority's determination or to any new evidence that might establish a plausible connection between any breach and loss suffered by REL.

[22] The respondents submit that the standard to be attained by an applicant such as REL on an argument of merits is that of "*arguable case*". Authorities for this proposition are said to include the judgments in *Stevenson, SAS Technologies Ltd v Hollis* [2003] 2 ERNZ 98 and *Weston v Warwick Henderson Gallery Ltd* [2003] 2 ERNZ 723. I note, however, that in *Stevenson*, the test was said by the Judge to be whether the intending plaintiff had a "*realistic chance of success*". Indeed that was the test counsel for the respondents in this case elsewhere invited me to find had not been met.

[23] Although the respondents say that the applicant's grounds are insufficient because they "*amount to nothing more than a desire to dispute the findings and the result*", that is not a strong argument, or certainly a decisive one, in this particular jurisdiction and in light of the differences between a challenge to an investigative inquiry by a lay tribunal and an appeal from a judgment of a court at first instance.

[24] Significantly, the respondents say that REL is not now entitled to raise an argument or cause of action that it abandoned before the Authority. This relates to the argument that Mr McTague owed the duties of a fiduciary to REL. As the evidence establishes, counsel for REL wrote to counsel for the individuals by a letter dated 14 September 2005 alerting him to the likely change of tack to be taken by REL in relation to what had been contended for Mr McTague's implied obligations of fidelity. This letter included advice: "... *I have come to a tentative view that we are unlikely to get home on the allegation that Mr McTague had duties to REL as a fiduciary.*" The letter indicated that it was likely that, in substitution, REL would contend that Mr McTague's seniority and the high degree of trust placed in him imposed a duty on him to disclose his plans to REL.

[25] It is not correct to assert that an allegation abandoned before the Authority cannot be raised on a challenge by hearing de novo to the Court: the position is not governed by the law of the courts of general jurisdiction and as is exemplified by the recent judgment of the Supreme Court in *Henkel KGAA v Holdfast New Zealand Limited* [2006] NZSC 102. As a fall-back position and in reliance on cases decided in this Court, the respondents say that Mr McTague's obligations towards REL of trust and confidence are better expressed as part of the contractual duty of fidelity rather than as a fiduciary obligation: *Jerram v Franklin Veterinary Services (1977) Ltd* [2001] 1 ERNZ 157. Counsel points out that fiduciary duties arise from a relationship between the parties (usually other than simply an employer/employee relationship) in which equity imposes onerous obligations: *AC Nielson (NZ) Ltd v Pappafloratos* [2003] 1 ERNZ 363, 374. The respondents also rely on other judgments of this Court to like effect including *Korbond Industries Ltd v Jenkins* [1992] 1 ERNZ 1141 and *Predict (NZ) Ltd v Morgan* (No 1) [1993] 2 ERNZ 867. Mr McTague was not a director of the company.

[26] However, the interface between fiduciary obligations, duties of good faith, and duties of mutual trust, confidence, and loyalty in commercial relationships (including

employment relationships) is, if not in a state of change, at least in one of re-evaluation by courts at present. That is illustrated by cases decided recently by the Supreme Court including as recently as several days ago in *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26. Addressing the incidence of a fiduciary duty, Blanchard J, giving the judgment of the Supreme Court, wrote at para [31]:

When parties have formed a contract the correct approach is first to decide exactly what they have agreed upon. Only then should the Court consider whether any particular aspect of their agreement gives rise to a relationship which can properly be characterised as fiduciary, imposing an obligation of loyalty on one or both parties, which supports the express or implied contractual terms. It is not enough to attract an obligation of loyalty that one party may have given up more than the other in entering into the contract or the contract may be more advantageous for one party than for the other. Nor is a relationship fiduciary in nature merely because the parties may be depending upon one another to perform the contract in its terms. That will be true of many commercial contracts which require co-operation. A fiduciary relationship will be found when one party is entitled to repose and does repose trust and confidence in the other.

[27] And in the Supreme Court's earlier judgment in *Chirnside v Fay* [2007] 1 NZLR 433, Tipping J, delivering the judgment of Blanchard J and himself, wrote at para [85], addressing a proposition that before fiduciary duties can arise there must be an express undertaking or agreement by the proposed fiduciary to act in the interests of the other party:

... There is ... no basis for concluding ... that the Judges[appealed from] were intending to confine fiduciary relationships to cases of express undertaking or agreement. Nor were the Judges professing to lay down that a mandatory ingredient of a fiduciary relationship is an express undertaking to act for or on behalf of another. At the very least the undertaking can be implicit from the circumstances, and the true principle, in our view, resides in the idea that the circumstances must be such that one party is entitled to repose and does repose trust and confidence in the other. The existence of an agreement or undertaking is no more than a frequent manifestation of such a circumstance.

[28] These judgments illustrate that the courts are examining critically and, where appropriate, re-evaluating the nature of obligations owed between parties to commercial transactions and employment law may not necessarily be immune from that process.

[29] Although counsel for the respondents lists in detail the areas of law on which the Authority was addressed at the conclusion of its investigation including a

recitation of the particular cases cited, there is no mention of these in the determination. These legal questions are said to have included the Authority's jurisdiction; repudiation; the law of fiduciary obligations; the nature of duties of fidelity owed by an employee; the law of restraint on economic activity; misuse of confidential information; and the tests for causation and remoteness of damage. It is surprising that these were not referred, or at least alluded, to in the Authority's determination.

[30] Addressing REL's point that full inter partes discovery of documents was not undergone (or able to be achieved) in the Authority, and that there is likely to be fresh material for the Court to consider, the respondents say that this submission is unfounded. They point out, correctly, that REL does not describe at all what further documentary evidence might be adduced. But that may beg the question: how does a litigant foretell what will be discovered by general disclosure of documents as occurs in this Court but not the Authority, before the process intended to elicit that information is undergone? They say that there was comprehensive document disclosure by both parties directed by the Authority. REL was said to have engaged a forensic computer expert to investigate the respondents' work computers and the results of that investigation were given to the Authority. They say that REL's bundle of documents in the Authority consisted of 772 pages of documents contained in four ring binder folders. Volume, however, does not necessarily equate with completeness in document discovery in adversarial civil litigation.

[31] Addressing the broad consideration of overall justice, the respondents say that a refusal to grant leave will not result in REL being denied an opportunity to have a substantive hearing of its claim because that has already taken place in its entirety. Although, however, it may be applicable to conventional adversarial civil litigation in the courts of general jurisdiction, this submission ignores or at least discounts unduly the particular regime for determining employment cases and the fact that the plaintiff has not yet had an opportunity to have its claims determined by a court according to law following adversarial trial.

[32] The respondents emphasise that the applicant's draft statement of claim is virtually identical to the operative statement of problem in the Employment Relations Authority including an allegation, that was abandoned at first instance, that Mr McTague was in a fiduciary relationship with REL. They emphasise the long (8-

day) investigation by the Authority and the extensive evidence including lengthy cross-examination. They say that REL has not established that it would be able to put forward any new evidence to establish a causal connection between the breach and loss.

[33] The respondents say they will be prejudiced if the application is granted because they are entitled to rely on the certainty of the expiration of the 28-day statutory period for challenging, especially where the events at issue occurred in May 2004. They also highlight the considerable cost to which they were put for an 8-day investigation in the Authority, which costs they say have not been recovered from REL. The Authority timetabled submissions on costs but no determination of them has apparently yet been issued.

[34] The respondents also say that REL failed to serve them promptly with the papers although acknowledging that their solicitor was provided with a copy of the intended statement of claim informally by e-mail on 15 December 2006 and subsequently by letter dated 19 December 2006. They assert that their solicitors did not have instructions to accept service of the documents on 19 December 2006 so that service was not effected on each of the respondents until 3 and 15 January 2007.

Decision

[35] I do not discount the great concern felt by the three individual respondents to the proceeding that a substantial corporate entity with much greater financial resources at its disposal than they, has allowed them to believe that no further claims would be brought against them by it. However, that is often, if not always, the position in which defendants who are successful at first instance find themselves where there is a right of appeal. Had REL filed its statement of claim with the Court on Thursday, 14 December 2006 as of right, the respondents, although no doubt feeling the same as they do now about further litigation, could not have been heard to complain or sought to block its prosecution. No litigation is a “once only” opportunity. Rights of appeal and challenge necessarily delay finality and, if exercised, frustrate successful parties.

[36] Although s219 confers a broad discretion on the Court and the question is ultimately one of whether the interests of justice dictate that the time should be extended, case law has established a number of tests that the Court applies and that

have followed, but not slavishly, the tests applied by other courts when determining similar applications. Although set out and reiterated in numerous judgments, these can be referenced for convenience to a case under the Employment Relations Act 2000, *Stevenson* (above). I summarise these factors in the context of this case before addressing the last relating to the merits:

- The reasons for the failure to file in time. This was the fault not of REL that gave timely instructions to challenge but, rather, the inadvertence of its counsel who was preoccupied with other matters. This explanation is logically explicable and not unreasonable.
- The length of the delay. This was minimal, a factor favouring a grant of leave.
- Any prejudice or hardship. This must, logically, be prejudice or hardship occasioned by the delay and not attributable to the bringing of a challenge as of right within time. The respondents' grounds of contended prejudice or hardship, even differentiated from understandable human disappointment, do not make that necessary distinction so that they are not factors favouring a refusal of leave. The case was an expensive one for the parties. Mr McTague deposes to the costs of the respondents in the Authority to have been more than \$200,000 over the 2-year life of that litigation. The applicant's costs are unlikely to have been less and were probably more than this. I make comment arising out of this question of costs at the conclusion of this judgment. There is, however, no discernible prejudice attributable to the delay.
- Any effect on rights and liabilities of the parties. Neither is there any but there is nothing to suggest that persons other than the respondents have been or will be affected adversely by the delay.
- Relevant subsequent events. There has been no delay in dealing with the applicant's application since it was filed. Because of their opposition to leave (that the respondents are perfectly entitled to advance), the application for leave must be dealt with discretely and as a preliminary question before the substantive claim and defence can be advanced. Although the respondents stress that the events around which this case

was based occurred in early to mid 2004, it is unlikely, as they claim, that any revisiting of that evidence will not occur until 4 years or more later. Had REL filed its challenge on the 28th day, as it was entitled to, such an objection could not have stopped it from adducing evidence of what happened at that time and requiring, in effect, the respondents to do likewise. The need to dispose of this preliminary application has not added materially to the delays. If the case goes to trial, it is likely to occupy between 2 and 3 sitting weeks. A fixture of that duration would probably have been allocated at about the same time if the challenge had been brought within time as it will now be if leave is granted. Although not ideal, a delay of 3 years between the occurrence of events and their recounting in evidence is not unusual in civil proceedings. In this case there is the added benefit for all witnesses that their evidence was briefed at a time much closer to the events.

[37] That brings me to the next, penultimate, and vexed question of the merits of REL's case.

[38] Unlike the civil litigation regimes in other courts and indeed the position in this jurisdiction under the previous statutory regime, there has not been a judicial determination of the parties' rights or liabilities in adversarial litigation at first instance. Although no doubt thorough, an Authority determination after an investigation is not a judgment of a court. Rather, it is the decision of an informal investigative lay tribunal charged with solving employment relationship problems without regard to technicalities and in equity and good conscience. Without in any way determining the quality of the Authority's decision-making in this case, the position is not the same as in courts of general jurisdiction. The scheme of the Employment Relations Act 2000 is to both allow and encourage parties to resolve their differences speedily, informally, and without regard to technicalities but also to preserve to them an opportunity to present their cases, for the first time, to a court for hearing and determination according to law. The applicant has not yet had an opportunity to do so.

[39] It is not insignificant that the Authority found two of the three respondents to have been in breach of their contracts of employment, although one had not been. So it is not a case of a comprehensive dismissal of the proceedings at first instance.

Nor can the respondents rely completely on what they say is a lack of merit in REL's claims because two of them have been found in breach of the employment contracts.

[40] As to the crucial part of the Authority's determination, the absence of a causative nexus between breach and loss, the Authority's reasoning is economical. This is at paragraph [68] of the Authority's determination:

... I came to the view that a considerable degree of loss sustained has been due to the high impact advertising campaign carried out by BMW [the respondents' intended new trading entity], the impact of the considerable past experience and performance on the ground of Mr McTague, Mr Whiting and Mr Bartlett. I have also considered the negative perception of some farmers to REL as an entity and also to the evidence I heard regarding Mr Rooney's involvement with the Fish and Game Council in the region. While much was made of this latter point by the respondents, I consider it to be a factor in the mix when a prospective client is considering approaching an organisation for work to be completed. It is by no means a factor in all decisions, but it was evident from those who had supplied affidavits to the Authority for this hearing that in the mind of some, it weighed considerably. (p12)

[41] Then, having found breaches by Messrs Bartlett and Whiting, the Authority simply concluded:

[73] In respect of Mr Whiting's breach, the action itself caused no financial loss to the applicant.

[74] In respect of Mr Bartlett's breach, his action of attempting to persuade Mr Galbraith was, in fact, unsuccessful as Mr Galbraith remained employed by REL. The loss to REL is therefore not established.

[42] The Authority continued:

[75] The breaches identified are technical in the sense that both employees failed to observe their obligations to REL while still employed by that company. However, as the applicant sought damages from the respondents, it was necessary for it to establish a causal link between the breaches and the losses allegedly sustained. It has failed to do so.

[43] The law of causation of loss following breach of contract is among the most complex and difficult elements of remedies for contract breach. It requires, no less in this case, a preliminary finding of breach. The Authority has found that in the cases of two of the three respondents. If there is then proven loss, a court must undertake a meticulous examination of the links or nexus between those two phenomena to ensure that particular breaches were causative of specific losses before liability for those losses can be imputed to the breacher. The applicant is entitled to such a consideration and decision of its claims.

[44] I exercise my discretion to enlarge the time for filing the challenge on the following grounds. First, the delay was minimal, 4 days or less than 2 working days. Second, on the first day out of time the applicant advised the respondents' solicitors of its intention to file a challenge (and an application for leave to do so out of time) and served a comprehensive draft statement of claim. Third, in these circumstances, there can have been little or no prejudice to the respondents beyond whatever prejudice they may have suffered if the challenge had been filed on the 28th day of the statutory period within which to do so. Fourth, I do not consider that any delays in formally serving the respondents assist their case. Although, strictly, a statement of claim in a challenge should be served upon defendants themselves because the regulations governing these things do not provide for service on representatives in the Authority, REL's solicitors took reasonable steps. They gave the respondents' solicitors in the Authority proceedings notice of their intention to challenge including a comprehensive draft statement of claim and invited those solicitors to obtain instructions to accept service. When the solicitors indicated that they had no such instructions, personal service was effected formally by mid January. Buddle Findlay have continued to act for the respondents as that firm did in the Authority. I do not think, in these circumstances, the respondents can claim prejudice by delays in service.

[45] Finally, it is appropriate to stand back and determine where the overall interests of justice lie. This includes a consideration of the merits of the intended challenge to the reduced extent that this can now be ascertained under a regime of challenges by hearing de novo from determinations of the Authority which does not create any other record of its inquiry. The Authority found two of the three respondents liable for breaches of their employment agreements but, in economical reasoning that appears to accept that the applicant suffered financial loss, the Authority concluded that this was not causatively attributable to those breaches. I do not think it can be said that REL's case is so obviously unmeritorious that it should not be allowed to proceed.

[46] REL is entitled to its days in court in all these circumstances and, leave having been granted, the draft statement of claim is now to be treated as the applicant's statement of claim on the challenge. That grant of leave is conditional upon the

applicant prosecuting promptly its proceeding. Leave is reserved to the respondents to enforce that condition if necessary.

[47] The next step is for the respondents to file their statement or statements of defence within 30 days of the date of this judgment. To ensure that the case keeps moving towards a fixture, there should then be a period of 1 month within which interlocutory matters (including document discovery) should be concluded or, if they cannot, interlocutory applications filed and served so that these can be dealt with at the one time. Whether any such interlocutory applications have to be decided by the Court or not, the Registrar should then arrange for a call-over of the case on Tuesday, 10 July 2007 at which time further timetabling directions to a hearing will be made. The case will be subject to the hearing management regime under the Employment Court Regulations 2000. I reserve costs.

[48] The following is by way of comment. The question of the costs of the litigation so far (mentioned earlier in the context of prejudice) raises for me a broader question of principle about the appropriateness of a case such as this being dealt with as a so-called “employment relationship problem”, and yet incurring for the parties combined expenditure for legal and expert witness costs that may well have approached \$500,000 without calculating the cost to the community of a lengthy investigation by the Employment Relations Authority.

[49] The matters at issue in this case are legal questions of contract interpretation, contract breach, causation of loss, and of damages for such loss. Because the issues arise out of employment contracts, the case must be dealt with in the specialist employment law system as it has been. But I question seriously the appropriateness of such a case being considered first in an investigative body that has the role of resolving employment relationship problems according to the substantial merits and equities of the case without regard to technicalities (s157(1)) and whose aim is to promote good faith behaviour and support successful employment relationships (s157(2)). This is a case about financial loss after the end of employment relationships. A process that has seen the parties expend up to \$500,000 on legal and other expert costs appears to have been one in which the “*investigative body*” has required the parties to do most of the investigating. I acknowledge that the application of s178 may have seen the case removed to the Court for hearing at first instance under either subsection (2)(a) or (d). At a relatively early stage of the case

before the Authority, the respondents applied for its transfer to the Employment Court but, by a determination given on 2 December 2004, the Authority declined that application. For reasons of which I am unaware, no challenge to that decision or application for special leave to remove was then made.

[50] The scheme of the legislation where, as here, a determination of the Employment Relations Authority is sought to be challenged, is that the parties start again forensically from scratch. I do not imagine that any party is enamoured of a return to square one in their dispute, however much the necessary preparation for a court case may be alleviated by the work they did to assist the Authority's investigation.

GL Colgan
Chief Judge

Judgment signed at 2 pm on Thursday 10 May 2007