IN THE EMPLOYMENT COURT
WELLINGTON

WC 10/07
WRC 32/06

IN THE MATTER OF	an application for leave to file a challenge out of time
BETWEEN	MAJTI ELIS NOLA AND DARRYL JAMES SMITH Applicants
AND	RONALD HARVEY Respondent

Hearing: 28 February 2007
(Heard at Wellington)

Appearances: Michael Gould, Counsel for the Applicants
Gail Irwin, Advocate for the Respondent

Judgment: 7 March 2007

JUDGMENT OF JUDGE C M SHAW

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[1] This is an opposed application for leave to elect to challenge a determination of the Employment Relations Authority out of time. The Authority found that Mr Harvey had been constructively dismissed by reason of the actions of his employers towards him and the employers want to challenge this finding.

The facts

[2] From the affidavits filed, the determination, and the Court records, the following chronology emerges.

[3] Mr Harvey lodged an employment relationship problem with the Employment Relations Authority in November 2005 alleging that he had been

constructively dismissed by DM Transport who had employed him as a driver. Ms Nola filed a statement and some accompanying material in reply to that.

[4] A second statement of problem had to be filed to correctly name the employers as Ms Nola and Mr Smith trading as D M Transport. No statement in reply was received to that.

[5] In spite of directions from the presiding Authority member and other communications from the Authority support staff, including a notice of hearing and phone calls, there was no appearance for the employers at the investigation meeting which proceeded on 5 October 2006 in their absence.

[6] The Authority issued its determination on 9 October 2006 at which time the 28 days for filing a challenge began to run. The last day for electing to challenge the determination was 6 November 2006.

[7] On 19 October 2006 Ms Nola wrote to the Authority to complain about the outcome of the determination and to explain why she had not attended the investigation meeting. She said they would like to have the case heard again and asked if it could be taken to the District Court to have it heard by a judge.

[8] On 24 October 2006 a support officer of the Authority replied to Ms Nola and Mr Smith advising that they could either apply for the investigation to be re-opened or file a challenge to the Employment Court rather than to the District Court. They were told they had 28 days from the date of the determination to do this, the amount of the fees required, and that they should contact the Employment Court for the necessary forms.

[9] At 8am on Friday, 7 November 2006, a statement of claim and the required fee were received by mail by the Employment Court. The claim was dated 3 November 2006 and an accompanying letter was dated 2 November 2006. This letter set out the reasons for the challenge to the determination.

[10] Following a request from the Registrar of the Employment Court, a copy of the Employment Relations Authority determination under challenge was sent to the Court by the applicants.

[11] On 17 November 2006 the Employment Court advised Ms Nola and Mr Smith that their challenge had been received out of time and that they would have to file an application for leave. On 23 November 2006 the application for leave and affidavit in support was filed by Ms Nola and served. In February 2007 an application for stay of execution was filed by solicitors who had by then been instructed by the applicants. They also filed an amended application for leave and a full draft statement of claim.

Opposition to application

[12] On behalf of the respondent, Mrs Irwin submitted that the applicants' correspondence with the Employment Relations Authority shows that they were fully aware of the time limits, the cost, and the mechanism for filing an appeal and this is not a case like many others where the applicants were not well served by their representatives. As they had failed to seek legal representation throughout, all fault for the belated filing must lie with them.

[13] Mrs Irwin submitted that the date on which the appeal was filed is not clear because it depends on what should be filed in order to make it a proper filing. As a copy of the Employment Relations Authority determination being appealed was not attached as required by the regulations, in her submission the challenge was not effectively filed until 15 November 2006 when the Court received a copy of the determination, 6 days after the time had expired. She relied on relevant District Court Rules to support this argument.

[14] Another factor in support of the allegation of incomplete filing was that the original application for appeal did not state the grounds with reasonable particularity and that it was somewhat unclear that the applicants were requesting a de novo appeal. In addition, she submitted that the applicants did not serve the respondent with the notice of the original appeal until 27 November 2006 and then not all of the listed documents were served.

[15] Mrs Irwin submitted that the applicants had not acted in good faith throughout the earlier procedures in the Authority and did not facilitate the Authority process in spite of warnings about this by the Authority. As the applicants do not therefore come to the Court with clean hands they cannot expect equitable relief by way of the exercise of the Court's discretion. In this regard she relied on *Masta Maintenance Services NZ Ltd v Page*[1].

Decision

[16] Whether an extension of time is to be granted is judged against well settled principles which have been fully canvassed in other cases.[2] The first question to be decided in order to determine the length of the delay is whether the material received by the Court from the applicants on 7 November 2006 amounted to a proper filing.

[17] Section 179 of the Employment Relations Act 2000 states that:

> *(1) A party to a matter before the Authority who is dissatisfied with the determination of the Authority or any part of that determination may elect to have the matter heard by the Court.*
>
> *(2) Every election under this section must be made in the prescribed manner within 28 days after the date of the determination of the Authority.*
>
> *(3) The election must—*
>
> *(a) specify the determination, or the part of the determination, to which the election relates; and*
>
> *(b) state whether or not the party making the election is seeking a full hearing of the entire matter (in this Part referred to as a* ***hearing*** **de novo***).*

[18] Regulation 7 of the Employment Court Regulations 2000 prescribes the manner of filing:

> *(1) An election under section 179 of the Act is made by filing with the Registrar of the Court, within the time prescribed by section 179(2) of the Act, 3 copies of a statement of claim in form 1.*
>
> *(2) The statement of claim must be accompanied by a copy of the determination to which the election relates.*
>
> *(3) The prescribed fee must be paid at or before the time at which the statement of claim is filed.*

[19] The substantive obligation on a party electing to challenge a determination of the Authority under s179 is to specify the determination to which the election relates

[1] Unreported, Shaw J, 28 April 2006, WC 5/06

and state whether or not the hearing is to be de novo. The regulations specify the matters of form which must be complied with. In the present case the statement of claim received by the Court on 7 November 2006 was in form 1 as required. It did not attach a copy of the determination to which the election related but stated that the applicants sought a full hearing of the entire matter. The letter in support of the statement of claim set out very briefly the reasons for the challenge to the Employment Relations Authority's determination. The statement of claim was accompanied by the appropriate fee.

[20] The applicants failed to comply with the regulations to the extent that a copy of the determination to which the election related did not accompany the statement of claim. This was rectified once the attention of the applicants was drawn to it by the Court.

[21] Section 219(1) of the Employment Relations Act 2000 provides for the validation of informal proceedings:

> *(1) If anything which is required or authorised to be done by this Act is not done within the time allowed, or is done informally, the Court, or the Authority, as the case may be, may in its discretion, on the application of any person interested, make an order extending the time within which the thing may be done, or validating the thing so informally done.*

[22] In addition, the Employment Court may dispose of cases for which no form of procedure has been provided by the Act or the regulations as nearly as may be practicable in accordance with the provisions of the High Court Rules affecting any similar case (reg 6, Employment Court Regulations 2000).

[23] Rule 5(1) of the High Court Rules provides:

> *(1) Where, in beginning or purporting to begin any proceeding or at any stage in the course of or in connection with any proceeding there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form, or content or in any other respect, the failure—*
>
> *(a) shall be treated as an irregularity; and*
> *(b) shall not nullify—*
> *(i) the proceeding; or*
> *(ii) any step taken in the proceeding; or*
> *(iii) any document, judgment, or order in the proceeding.*

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[2] *Stevenson v Hato Paora College* [2002] 2 ERNZ 103 at p105

[24] The commentary to this rule in McGechan on Procedure records that a liberal approach to rule 5 is appropriate, in order to prevent injustices caused by mindless adherence to technicalities[3]. The case law in relation to the High Court's approach to the commencement of proceedings in wrong form is summarised by the proposition that, where all necessary information is before the Court, the best course of action may be to deem the proceeding to have been correctly commenced.

[25] Turning then to what was filed, I note that the filing of the form 1 statement of claim by the applicants has the effect of commencing a proceeding. It advises the Court and the defendants of the election and that it relates to the whole of the determination. Even though the determination was not attached, the accompanying letter referred to the challenge to the determination. It referred to Mr Harvey and the Employment Relations Authority. I therefore conclude that at least the substance of the challenge was before the Court on 7 November 2006 if not entirely in its proper form. In accordance with rule 5 of the High Court Rules I treat this is an irregularity which was cured by the prompt response by Ms Nola to the Court's request for a copy of the determination.

[26] I find that the applicants' challenge was filed on 7 November 2006 and was therefore 1 day out of time.

[27] The next question is whether there was a reasonable explanation for the omission to file in time. While it is clear from Mrs Irwin's submissions that Mr Harvey is highly sceptical of the actions of the applicants including alleged discrepancies between when things were done as opposed to when they actually occurred, the evidence before the Court shows that the statement of claim was completed by 3 November 2006 and is likely to have been posted then or shortly afterwards. The Registrar's date stamp on the statement of claim shows that it was received at 8am on 7 November 2006. On the face of it, it appears that the applicants had good reason to believe that the challenge would be received by the Court by the due date of 6 November 2006. The delay was minimal. As Mr Gould submitted it was the shortest delay there can be given that the time frame is measured in days.

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[3] *Singh v Atombrook Ltd* [1989] 1 All ER 385(CA)

[28] I am satisfied that, apart from the cost of defending this application, there will be no prejudice to Mr Harvey in allowing this application for extension of time. If it had been received on 6 November 2006 he would have had no alternative other than to face the challenge as filed.

[29] In relation to whether there is any merit in the substantive case as lodged by the applicants, it was submitted by Mr Gould that the applicants had in fact put material before the Authority when they filed their statement in reply but in the absence of both applicants at the investigation meeting the Authority accepted the evidence of the respondent and his wife. He submits that there is a strong possibility that through no fault of the Authority its determination is not based on all of the relevant evidence surrounding the respondent's claim.

[30] In assessing the merits of the challenge the only material available to the Court is the determination and the pleadings. The draft statement of claim, filed in the event that this application is granted, sets out a number of issues that were in contention before the respondent left his employment. These include the treatment of tax deductions from his wages and a dispute which arose as a result of that; the correctness of other deductions from his wages for having to attend a court hearing, and the circumstances of his resignation. Finally, there is a dispute about the nature of the work which Mr Harvey was required to do. It is clear that the parties' employment relationship was troubled and that the central issue is whether the employers acted in breach of its obligations to Mr Harvey to the extent that he could not remain in their employ or whether he simply resigned.

[31] These matters were dealt with by the Authority in its determination as matters of fact, and in the absence of Ms Nola and Mr Smith at the hearing it almost inevitably preferred Mr Harvey's version. However, the pleadings reveal that there are a number of live issues between the parties which can only properly be determined if both sides are heard.

[32] These factors point towards the application for extension of time to be granted. An important factor against it being granted is the failure of the applicants to engage properly with the Authority once they had notice of the hearing. At issue

is whether their failure to attend the investigation meeting was because of their contempt for the procedures, or if they had acted out of a genuine belief that their attendance was not required and that the filing of the papers which they had put before the Authority would be sufficient.

[33] While the latter explanation appears disingenuous, it appears from other papers submitted by them that Ms Nola and Mr Smith were at best for them quite unfamiliar with the processes of the employment institutions. An example is Ms Nola's request for the matter to be heard by the District Court. It was certainly unwise of them not to obtain legal representation before deciding that it was not necessary to attend the investigation meeting.

Conclusion

[34] Balancing the interests of all parties and, particularly in the light of the outstanding disputes between them as to the circumstances of Mr Harvey's resignation, I find it would be unjust not to allow the application for extension of time. In the exercise of this discretion, however, it is appropriate that any prejudice to Mr Harvey which arises from this should be recognised and allowed for. I find that he is prejudiced by the cost of his opposition to the application.

[35] Although ultimately unsuccessful, his opposition was not without merit particularly on the issue of the applicants' failure to engage with the Authority's investigation.

[36] The Court was advised by Mrs Irwin that Mr Harvey is not in receipt of legal aid but is of modest means. In the circumstances, the application for extension of time is granted conditional on the payment of the order for costs which I make in favour of Mr Harvey. Ms Nola and Mr Smith are on notice that the Court requires strict compliance with this and any future orders including any timetable orders which may be made during the preliminary stages of the case.

[37] The draft statement of claim filed on 15 February 2007 is now to be treated as the statement of claim for the challenge. A statement of defence and counterclaim was filed in anticipation on 23 February 2007. A statement of defence to the

counterclaim is to be filed and served by the applicants within 14 days of this judgment. A call-over will then be held as soon as possible on a date to be set by the Registrar.

Costs

[38] At the conclusion of the hearing each counsel advised that the approximate costs of the application for extension of time to each party was $2,000. Although he was not successful in his opposition, for reasons given it is appropriate to award costs to Mr Harvey and I set those at $1,500. The applicants are to pay these costs no later than 14 days after the date of this decision failing which the extension of time will lapse and the applicants will not be able to proceed with their challenge.

C M Shaw
JUDGE

Judgment signed at 2.30pm on 7 March 2007