

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON**

**I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA**

**[2024] NZEmpC 145
EMPC 265/2023**

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| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| AND IN THE MATTER OF | an application to dismiss proceedings |
| BETWEEN | MAH ENTERPRISES (FIJI) LIMITED First Plaintiff |
| AND | MALCOLM HERBERT Second Plaintiff |
| AND | A LABOUR INSPECTOR Defendant |

Hearing: 5 August 2024

Appearances: No appearance for the plaintiffs
J Ellison and AK Webster, counsel for defendant

Judgment: 5 August 2024

**ORAL JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS
(Application to dismiss proceedings)**

Introduction

[1] The plaintiffs filed a challenge to a determination of the Employment Relations Authority.¹ Other than filing a statement of claim they have taken no steps in the Court

¹ *A Labour Inspector v MAH Enterprises (Fiji) Ltd* [2023] NZERA 360.

to advance their proceedings. It is against this backdrop that the Labour Inspector has applied to dismiss the plaintiffs' claim.

[2] The application, affidavit in support and memorandum of counsel were served on the plaintiffs, confirmed by an affidavit of service. The plaintiffs did not file a notice of opposition to the application or take any steps in respect of it. The Labour Inspector's application was set down for hearing, at 2.15pm today.

[3] Neither plaintiff appeared at 2.15pm and nor were they present in the public waiting area when the court-taker went outside the courtroom to check whether they were there. In the circumstances I proceeded to hear the defendant's dismissal application.

Background

[4] The background to the Labour Inspector's application can be summarised as follows.

[5] The plaintiffs filed a challenge on 3 August 2023. On 1 November 2023 the plaintiffs' then solicitor sought leave to withdraw. The application was served on the plaintiffs and they took no steps in respect of it. The application came before the Court and was granted.²

[6] The Court then convened a telephone directions conference, directing that the parties file and serve memoranda in advance of the conference and no later than 26 April 2024. The plaintiffs did not file a memorandum by that date. The Registrar was directed to advise the parties that the teleconference would proceed in the absence of an application for adjournment being advanced and granted. No application for an adjournment was pursued by the plaintiffs; they did not engage with the Registry; and they did not attend the conference. The conference accordingly proceeded in their absence.

² *MAH Enterprises (Fiji) Ltd v A Labour Inspector* [2024] NZEmpC 45.

[7] The Court issued a minute following the telephone conference. The plaintiffs were directed to provide to the defendant any documents which were relevant to the matters at issue on their challenge, and which were within their possession, custody or control. That direction was to be complied with on or before 4pm Tuesday 14 May 2024. The Court drew to the plaintiffs' attention that if they did not engage with the proceedings, including by failing to meet the timetabling directions made by the Court, their challenge may be dismissed for want of prosecution.

[8] An affidavit filed by the Labour Inspector in support of the current application confirms that the plaintiffs have taken no steps to comply with the Court's direction.

Approach

[9] Although there is no express power within the Employment Relations Act 2000 or the Employment Court Regulations 2000 to dismiss proceedings for want of prosecution, I have no difficulty concluding that the Court has the power to take such a step.³

[10] What is the procedure to be followed in determining an application? As reg 6(2) provides:

- (2) If any case arises for which no form of procedure has been provided by the Act or these regulations or any rules made under section 212(1) of the Act, the court must, subject to section 212(2) of the Act, dispose of the case-
 - (a) as nearly as may be practicable in accordance with-
 - (i) the provisions of the Act or regulations or rules affecting a similar case; or
 - (ii) the provisions of the High Court Rules 2016 affecting any similar case...
 - (b) if there are no such provisions, then in such manner as the court considers will best promote the object of the Act and the ends of justice.

³ See *AB Roofing Ltd v Lane* [2021] NZEmpC 192 at [17].

[11] The High Court Rules 2016 state that an opposing party may apply to dismiss a proceeding if the plaintiff fails to prosecute the proceeding to trial and judgment.⁴

[12] It is well accepted that a proceeding will only be dismissed for want of prosecution where it is in the interests of justice to do so.⁵ Three factors are generally considered – has the plaintiff been guilty of inordinate delay? Is the delay inexcusable? Has the defendant been seriously prejudiced?

[13] The challenge was filed just over a year ago. No steps have been taken by the plaintiffs to pursue the challenge and nor have they had any engagement with the defendant or the Registry. The delay is inordinate and inexcusable. I note in passing an observation made by counsel for the Labour Inspector, namely that the conduct in respect of the proceedings in this Court appears to be broadly consistent with the conduct of the plaintiffs in the Authority (which was obliged to proceed with its investigation in their absence).⁶

[14] I accept that the delays have been prejudicial in terms of time and expense, and the diversion of valuable (and limited) Labour Inspectorate (publicly funded) resources. Moreover, the ongoing delays are prejudicing the 14 employees at the centre of the proceedings who were to be paid a portion of the penalties awarded by the Authority⁷ and who are facing ongoing uncertainty as to their position. They are entitled to closure.

Outcome

[15] Standing back, I consider that it is in the overall interests of justice that the plaintiffs' challenge be dismissed for want of prosecution and make orders accordingly.

⁴ High Court Rules 2016, r 15.2.

⁵ *Lovie v Medical Assurance Society New Zealand Ltd* [1992] 2 NZLR 244 (HC).

⁶ *A Labour Inspector*, above n 1, at [9]-[12].

⁷ At [45].

[16] The Labour Inspector sought costs on a 2B basis. I accept that is appropriate. A costs memorandum should be filed within five working days outlining steps in accordance with the Guideline Scale.

Christina Inglis
Chief Judge

Judgment delivered orally at 2.39 pm on 5 August 2024