



Employment Court of New Zealand

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Allwaze Designs Limited v Cawthorne [2014] NZEmpC 176 (22 September 2014)

Last Updated: 27 September 2014

IN THE EMPLOYMENT COURT WELLINGTON

[\[2014\] NZEmpC 176](#)

WRC 13/14

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

AND IN THE MATTER of an application for leave to file
 statement of defence out of time

BETWEEN ALLWAZE DESIGNS LIMITED Plaintiff

AND ALICE CAWTHORNE Defendant

Hearing: (on the papers by way of affidavits and
 memoranda filed
 22 August and 2 September 2014)

Representation: F Wong, representative for the plaintiff
 S Govender, counsel for the defendant

Judgment: 22 September 2014

INTERLOCUTORY JUDGMENT OF JUDGE A D FORD

The application

[1] The defendant has made application for leave to file her statement of defence out of time. The application is opposed by the plaintiff. Having received memoranda from both parties, I am dealing with the matter on the papers.

[2] Regulation 19(2)(a) of the [Employment Court Regulations 2000](#) (the

Regulations) provides that a defendant must file a statement of defence within

30 clear days after the date of service of the statement of claim. Regulation 19(4)

provides that a defendant who fails to comply with that requirement may defend the proceedings only with the leave of the Court.

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[3] The statement of claim in this case was served on the defendant on

23 June 2014 meaning that the statement of defence was required to be filed by Wednesday, 23 July 2014. The defendant's application for leave, with a statement of defence in draft form attached, was filed on 22 August 2014, virtually one month out of time.

[4] The reason for the delay is explained in sworn affidavits from the defendant, Ms Alice Cawthorne, and her former solicitor Mr David Oliver. In essence, Ms Cawthorne deposes that when she approached Mr Oliver after having been served with the statement of claim, Mr Oliver informed her that he was about to embark on an overseas trip and he would, therefore, instruct another solicitor in the matter, namely, the defendant's present counsel, Mr Satchie Govender. Ms Cawthorne deposed that she was unaware of the time

requirements and that she trusted Mr Oliver would take the necessary steps when he returned from his overseas trip.

[5] Mr Oliver deposed that when he attempted to then contact Mr Govender he discovered that he had also recently left for overseas and was not expected to return until the end of July 2014. Mr Oliver further deposed:

8. I could not take the matter any further as I, immediately thereafter, left for my overseas trip.

9. I confirm that [the] primary reason for the late filing of the pleadings in this matter, is the unavailability of the Defendant's lawyers, and is not in any way the fault of the Defendant.

10. When I returned from the overseas leave, towards the end of July

2014, and after I had ascertained that Mr Govender was also back I referred the matter to Mr Govender, by when, the time for filing the defendant's response had recently passed.

Principles

[6] The Court has an unqualified discretion under reg 19(4) to grant a defendant leave to defend the proceedings but, as with other such discretions, it must be exercised judicially and in accordance with established principles.

[7] In essence, the Court will take into account factors such as the extent of the delay, the reasons for the delay, any resulting prejudice from the delay and, insofar as can be ascertained from the documentation before the Court, whether the defendant has an arguable defence. The overriding consideration in every case must always be the interests of justice.¹

The plaintiff's objection

[8] The thrust of Ms Wong's objections on behalf of the plaintiff centres around the delays to date associated with the case and the failure of the defendant and her counsel to respond to various settlement proposals which the plaintiff had put forward. Ms Wong submitted that the employment dispute arose from events which occurred more than three years ago in August 2011. She attributes much of the delay to the time taken by the plaintiff, after an unsuccessful mediation, to seek legal aid.

[9] Ms Wong claims that as a result of the time delay, "witnesses were no longer available" to assist the defendant but no supporting particulars were provided.

Discussion

[10] I must say that I do not find the reasons for the delay advanced by Mr Oliver particularly convincing. They seem to show a rather cavalier approach to the timeframes imposed under the Regulations. The timelines for filing documentation prescribed in the Regulations are intended to be strictly complied with. What is not explained in the affidavits filed on behalf of the defendant in the present case is precisely when she approached Mr Oliver about the need to file a statement of defence, nor is any explanation provided as to why it took Mr Govender so long to file his application for leave after the problem had been drawn to his attention.

[11] As a type of quid pro quo argument, the defendant stated in her application that, although the plaintiff's statement of claim was filed on 15 May 2014, it was not served on her until 24 June 2014 whereas reg 12 of the Regulations require service of a statement of claim to be carried out "as soon as practicable" after its filing.

Ms Wong submitted that the delay in service of the statement of claim was

1 *Pacific Plastic Recyclers Ltd v Foo* [\[2002\] NZEmpC 64](#); [\[2002\] 2 ERNZ 75 \(EmpC\)](#) at [\[24\]](#).

occasioned by the plaintiff's, "lack of experience with service options, and the mistaken belief the documents needed to be served in person."

[12] In the context of the delay in service of the statement of claim, the delay in seeking leave to defend the matter is not as significant as it might otherwise have been. Although I have reservations about the explanation advanced for the delay in filing a defence, I am satisfied that it did not result from any lack of diligence on the part of the defendant herself. No specifics have been provided of any prejudice to the plaintiff. On the pleadings as they stand, it cannot be said that the defendant does not have an arguable case.

[13] In all the circumstances, I am satisfied that the justice of the case requires the Court to grant leave for the defendant to defend the proceedings and such leave is granted accordingly. The draft statement of defence filed with the application is to be accepted as the substantive statement of defence and the Registrar is directed to arrange a telephone conference with the parties' representatives in order to allow the Court to make timetabling orders for the disposition of the proceedings.

[14] The plaintiff is entitled to costs on the application which will be fixed at a later date.

A D Ford

Judge

Judgment signed at 11.20 am on 22 September 2014

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