Employment Court of New Zealand

Canon New Zealand Limited v Hutchison [2014] NZEmpC 207 (11 November 2014)

Last Updated: 17 November 2014

IN THE EMPLOYMENT COURT WELLINGTON

[2014] NZEmpC 207

WRC 27/14

IN THE MATTER OF	of a challenge to a determination of the Employment Relations Authority
BETWEEN	CANON NEW ZEALAND LIMITED Plaintiff
AND	BRENT HUTCHISON Defendant

EMPC 255/2014

IN THE MATTER OF an application to file challenge out of time

BETWEEN BRENT HUTCHISON Applicant

AND CANON NEW ZEALAND LIMITED Defendant

Hearing:	On written submissions filed on 17 and 24 October and 7 November 2014
Appearances:	J Roberts and MJ O'Brien, counsel for Canon New Zealand Limited G O'Sullivan, counsel for Brent Hutchison
Judgment:	11 November 2014

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] The defendant has applied for leave to extend the time in which he may cross-challenge the same determination of the Employment Relations Authority

which Canon New Zealand Limited (CNZL) has challenged (by non-de novo

hearing) within time.1 The parties have agreed that the application may be dealt with by a Judge on papers filed.

[2] The relevant facts are as follows. Mr Hutchison was dismissed by CNZL. He challenged that dismissal by personal grievance (unjustified dismissal) and CNZL responded, as its primary defence, that Mr Hutchison was not entitled to do so because he was the subject of a lawful 90 day trial period.

[3] The Authority dealt with the company's contention as a preliminary issue, and on the papers rather than at an investigation

meeting. It issued its determination on 10 July 2014 finding largely, but not completely, in favour of CNZL, rejecting a number of Mr Hutchison's allegations that ss 67A and 67B of the Employment Relations Act 2000 (the Act) had not been complied with.2 The Authority did, however, conclude that there had been one material non-compliance with the statutory trial period provisions which was fatal to the company's contention. This related to compliance with the statutory requirements for termination of the employment on notice.3 The Authority then directed the parties to mediation and thereafter proposed to deal with Mr Hutchison's unjustified dismissal personal grievance.4

[4] CNZL has challenged only that part of the Authority's determination which went against it, that is the conclusion about notice of termination of Mr Hutchison's employment. CNZL's challenge was filed with the Court on 6 August 2014.

[5] A Minute was then issued by the Court on 11 August 2014 as a result of the plaintiff's statement of claim being unclear as to whether CNZL sought to challenge by hearing de novo or otherwise. That was because para 3 had indicated that the challenge related only to those parts of the Authority's determination set out at [24]- [41] (inclusive) but, later at para 14 of the statement of claim, a hearing de novo was sought. The Minute pointed out the distinction between the two types of challenge

and the necessity to specify which was elected, illustrated by the then recent

1 *Hutchison v Canon New Zealand Ltd* [2014] NZERA Wellington 72.

2 At [11]-[23].

3 At [24]-[41].

4 At [43].

judgment in *Hayne v ASG*.5 The plaintiff was required by the Court to elect which type of challenge it would bring and to advise the Court and the defendant of that election within 10 days of the date of the Minute, 11 August 2014. Until the plaintiff so indicated, the time (30 days) within which the defendant had to file and serve a statement of defence or, if its election was otherwise than by hearing de novo, any cross-challenge to the Authority's determination would not begin to run.

[6] On 13 August 2014 the plaintiff's solicitor responded to the Court's Minute of 11 August 2014 clarifying that the plaintiff elected a hearing other than de novo, that is that its only challenge was to the Authority's findings at [24]-[41] (inclusive). The time for filing a statement of defence or any cross-challenge (30 days) therefore began to run from 13 August 2014 in accordance with the Court's Minute of 11

August 2014. The defendant had been given until 12 September to file a statement of defence and any cross challenge.

[7] Mr Hutchison filed a statement of defence on 11 September 2014 within the statutory timeframe for doing so. In addition to admissions and denials of CNZL's allegations, Mr Hutchison's statement of defence seeks to support the Authority's determination and reasoning. It does not go beyond the parameters of CNZL's statement of claim.

[8] Filed at the same time, on 11 September 2014, was a memorandum from the

defendant's solicitors which included a request couched in these terms:

5. ... the Defendant seeks guidance from the Court as to whether it sees the limited nature of the Plaintiff's appeal as restricting the Court's ability to consider the full application of sections 67A and 67B to clause 6 of the Individual Employment Agreement ("IEA"), i.e. restricting the Court to considering only the issue of notice.

6. If there is any restriction on the Court's ability to consider fully the application of sections 67A and 67B of the Act to clause 6 of the IEA the Defendant believes the matter should be heard *de novo*.

[9] By a further Minute issued on 22 September 2014, the Court advised counsel

for the defendant that it was inappropriate to seek the Court's guidance in this

manner and that the defendant had to make his own election about how to participate

5 *Hayne v ASG* [2014] NZEmpC 113.

in the litigation. The Minute at para 4 contained the following directions about a cross challenge:

It is for the plaintiff to set the agenda in its statement of claim about the nature of the proceedings. If the defendant wishes to broaden that, the appropriate way to do so is to seek to cross-challenge, either by hearing de novo or otherwise. It appears that the defendant would now be out of time for filing a challenge and leave will be required if he seeks to take that course.

[10] The defendant's application for leave to cross-challenge out of time was filed on 1 October 2014. This was about 8 days after the Court's Minute of 22 September, and about 18 days after the extended period allowed by the Court for the defendant to do so.

[11] Against this unusual background in which the plaintiff has not been entirely without fault, I consider that it is just to permit the defendant to cross-challenge out of time. That is for the following reasons.

[12] The broad question that the Authority had to determine was whether there had been compliance with the requirements for a trial

period under ss 67A and 67B of the Act. On several grounds, one at least of which is unique and distinctly arguable,6 the Authority held against Mr Hutchison. The broader question than that posed by the plaintiff's restricted pleadings, whether there was compliance with ss

67A and 67B, should be before the Court to do justice between the parties. The 90 day trial provisions are, if not now new, then still substantially untested in litigation and unique. It is in the interests of justice for these parties, and indeed for others, that questions of law such as are raised by this case can be determined. The proposed cross-challenge deals with closely related elements of the same question raised by CNZL's challenge, ie whether there was a lawful trial period.

[13] Although CNZL asserts that the delay in Mr Hutchison seeking to file a challenge is substantially more than the 28 days allowed by the statute and is inordinate, that ignores the Court's direction delaying any requirement by Ms

Hutchison to respond to CNZL's challenge because of the company's failure to make

6 Whether the phrase in the employment agreement "your employment is subject to a trial period of

up to 90 days..." meets the requirements of s 67A of the Act.

clear in its statement of claim the nature of that challenge. Counting from the date of ratification of that failure by CNZL, the delay by Mr Hutchison cannot be said to be inordinate or unjustifiable.

[14] Nor do I accept that this delay will prejudice CNZL, at least more than minimally. Any prejudice can be compensated for by costs and it has not been contended otherwise by the company.

[15] On balance, the interests of justice require leave to be granted to the defendant to challenge the Authority's determination.

[16] For these reasons, leave is granted to the defendant to challenge out of time.

[17] The defendant's draft statement of claim filed on 1 October 2014 will now become the defendant's operative statement of claim and must be pleaded to by CNZL within 30 days. There will then be a further directions conference to progress the challenges to a hearing.

GL Colgan
Chief Judge

Judgment signed at 2.45 pm on Tuesday 11 November 2014
