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Gilbert v Transfield Services (New Zealand) Ltd [2010] NZEmpC 144 (28 October 2010)

Last Updated: 6 December 2010

IN THE EMPLOYMENT COURT CHRISTCHURCH

[\[2010\] NZEMPC 144](#)

CRC 25/10

IN THE MATTER OF application for leave to file challenge out of time

BETWEEN DEREK WAYNE GILBERT Applicant

AND TRANSFIELD SERVICES (NEW ZEALAND) LTD

Respondent

Hearing: By submissions filed by the plaintiff on 2 August and the defendant on 16 August 2010

Judgment: 28 October 2010

JUDGMENT OF JUDGE B S TRAVIS

[1] The applicant, Derek Gilbert, has applied to extend the time to challenge a determination of the Employment Relations Authority. The parties agreed that this matter would be determined on the basis of written submissions and the papers filed which include an affidavit sworn by Mr Gilbert on 18 June 2010 and an affidavit sworn by his advocate Mr Yukich on 21 June 2010.

[2] Mr Gilbert had raised personal grievances of unjustified dismissal and unjustified disadvantage and a dispute concerning the interpretation of the relevant employment agreement. These matters arose out of Mr Gilbert's selection for redundancy. The Employment Relations Authority found that the applicant was not

unjustifiably dismissed on grounds of redundancy and had not suffered any

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disadvantage or discrimination by reason of his union activities. The Authority's determination was issued on 14 May 2010.

[\[1\]](#)

[3] Mr Yukich, in his affidavit, deposed that during a telephone conference call with the Authority Member, at which a preliminary investigation on the issue of interim reinstatement was set down for Monday 11 January 2010, he requested that all documents be served on both Mr Gilbert and himself by email. He explained that this was important as Mr Gilbert was the applicant in the proceedings and Mr Yukich was away from his office for periods of up to a month at a time, in particular in the summer months when he was on leave. He deposed that following this request all documents were received by email up until 15 January 2010. However, the determination relating to the interim reinstatement application, issued by the Authority on 15 January 2010, was not served by email on either Mr Gilbert or Mr Yukich. Mr Yukich suggested that this may have been an understandable oversight as the support officer dealing with the matter was on leave at the time the determination was issued.

[4] Mr Yukich deposed that on 2 February 2010 he reiterated to an Authority support officer the request for service of the substantive determination by email to Mr Gilbert and himself.

[5] Mr Yukich deposed that he first became aware of the substantive determination, which Mr Gilbert now seeks to challenge,

through an email dated 2

June 2010 from the respondent's counsel, Gillian Service, enquiring as to a contribution towards costs. Ms Service advised Mr Yukich that the determination had been issued on 14 May and received by mail on 18 May.

[6] Mr Yukich deposed that, due to a high workload, Ms Service's email was not dealt with by him until the following Tuesday, 8 June 2010. At that point he advised Ms Service that neither he nor Mr Gilbert had received the Authority's determination and that he would be contacting the Authority that morning. He referred to his earlier request of the Authority to serve the determination by email but stated to Ms Service that this had not happened and requested her agreement to an extension of time in the event that Mr Gilbert decided to pursue an appeal of the Authority's determination, once he had received and studied it.

[7] That same day Mr Yukich deposed that he contacted the Authority, reminded them of the request for service by email and requested a copy of the determination, which he received later that day and which he copied to Mr Gilbert.

[8] Mr Gilbert then informed the respondent's counsel and the Employment Court Registry, by close of business on 11 June 2010, of his intention to file a statement of claim and sought a 7 day extension of time for this purpose. The reason for this extension was said to be that, despite earlier requests for the determination to be sent by email, he had not received a copy of the determination until 10am on Tuesday 8 June 2010, that he wished to appeal that determination and sought an extension of time to allow for preparation of the statement of claim. At this time Mr Gilbert was acting for himself. That communication was sent in writing and was described as a "Memorandum as to extension of time" and contained a notice to the respondent advising of the steps to be taken within 14 days if it intended to oppose the application. At the stage when he filed this document Mr Gilbert was still within the 28 day period for lodging a challenge.

[9] On 16 June Mr Gilbert was advised by the Employment Court Registry, that his application needed to be accompanied by a draft of the statement of claim he wished to file, together with affidavit evidence of any facts he sought to rely on in support of the application to extend time. He was also advised to serve copies of all documents on the proposed respondent and to advise it, or its counsel, that he wished to challenge the Authority's determination and that he sought an extension of time to do so.

[10] On 25 June the respondent, by its counsel, filed a notice of opposition to Mr Gilbert's application for an extension of time.

The submissions

[11] Mr Gilbert submitted that whilst seven days had elapsed prior to him filing his statement of claim, both the Court and counsel for the respondent were informed of the delay and the reason for it within the 28 day period. He also submitted that both the merits of his challenge and the relatively brief delay warranted the grant of leave. His submissions dealt in considerable detail with the Authority's determination, pointing out what he submitted were errors of fact and law and citing

Nee Nee v TLNZ Auckland Ltd^[2] in relation to the issue of the selection process

adopted by the respondent.

[12] Mr Gilbert submitted that, given the deficiencies he alleged in the determination and the total absence of compliance by the respondent with its contractual duty to consult over features of its proposed restructuring in a timely manner, at the very least the procedural deficiencies amounted to an unjustified disadvantage, citing *SAS Technologies Ltd v Hollis*.^[3]

[13] Mr Gilbert submitted that it would be unjust for him to be denied his right of challenge and to be further disadvantaged in the circumstances, through no fault of his own, if he was to be deprived of the opportunity to have the Court address his employment relationship problems. He cited *Stevenson v Hato Paora College Trust*

Board^[4] which stated that the principles for the exercise of the Court's discretion to

make orders extending time were well established and the overriding consideration was the justice of the case. The other relevant issues were: the reason for the omission to bring the case within time; the length of the delay; any prejudice or hardship to any other person; the effect on the rights and liabilities of any person; subsequent events and the merits of the substantive case.

[14] The respondent's submissions focused on whether the Court should exercise its discretion in favour of Mr Gilbert to allow him to file his partial challenge to the Authority's determination out of time. The submissions acknowledged receipt of the advice on 11 June that Mr Gilbert was seeking an extension of time to challenge the determination and the receipt, on 18 June, of the draft statement of claim and the affidavit from Mr Gilbert and later the affidavit of Mr Yukich .

[15] The respondent's counsel also cited the *Stevenson* case and *An Employee v An Employer*,^[5] which affirm the factors that

the Court should look at in determining whether to grant an extension and in particular the merits of the proposed challenge.

[16] In relation to the length of delay the respondent acknowledged that the delay was short and the consent to the extension was sought within the 28 day time limit but submitted that it was not for the respondent to agree to an extension as that discretion lay solely with the Court. That is so, but it was open to the respondent to have advised whether it would either consent to or not oppose the application for extension, or, if it intended to oppose, advised of that intention within the 28 days.

[17] The respondent's submissions complain of a lack of detail as to why the notification of the decision on 2 June by Ms Service was not dealt with by Mr Yukich until 8 June, and that there was insufficient detail as to the workload of Mr Yukich which prevented him from responding earlier. Counsel accepted that Monday 7 June was a public holiday but claimed there was no explanation as to why the challenge was not filed between 8 and 11 June.

[18] The respondent's submissions then turned to the merits of the case and contended that Mr Gilbert's challenge would have had very little chance of success. Counsel cited *Clear v Waikato DHB*^[6] where Judge Perkins stated that, in considering the merits of the case, the Court should not be led into an overdetailed analysis of the reasoning and determination given by the Authority where no record of evidence has been kept, but the Court should make an assessment at a reasonably basic threshold.

[19] Counsel observed that Mr Gilbert has only raised a partial challenge to the decision of the Authority, addressing the adequacy of consultation, discrimination and the respondent's compliance with the terms of the employment agreement. They complain that the challenge lacks clarity, does not specifically state that it intends to displace the finding the dismissal was unjustified, and fails to specify the remedies sought.

[20] The draft statement of claim, especially in referring to a subsequent claim which may be made as to remedies, may lack some specifics, but these can be addressed by further and better pleadings. Any inadequacies in the draft statement of claim do not adversely reflect on the merits of the challenge.

[21] Counsel for the respondent then submitted that the respondent's restructuring had stood the test of the Authority's scrutiny in two substantive investigation meetings which found that the process it followed was substantively justified, procedurally fair and in compliance with the collective agreement. It claims that Mr Gilbert received a full and fair hearing of his claim over two days, in which he filed five affidavits, and submissions, totalling 197 pages, and all issues were thoroughly canvassed and understood by the Authority. Furthermore, counsel submitted that a different Authority Member also found no issue in another case with the process followed by respondent. Counsel submitted that as the Authority has thoroughly canvassed these issues there is no merit in a further challenge.

[22] I note however, that the other determination *Croft & Ors v Transfield Services (New Zealand) Ltd*,^[7] is the subject of a *de novo* challenge and is awaiting the determination of this leave application before it progresses further. That suggests that, at least from the perspective of some of the former employees of the respondent, the Authority's determinations on the redundancy issue are not accepted as final.

[23] As to the claim of discrimination on the grounds of union membership, counsel submit that there was nothing in the evidence that suggested this was taken into account by the respondent in making him redundant. It is submitted therefore that there was no material on which the Court could exercise its discretion in favour of Mr Gilbert.

[24] As to the challenges to the Authority's determination put forward by Mr Gilbert, it is contended that the Authority made no fundamental errors and the issues raised were not of consequence. One was the Authority's use of the term "field officer" in describing the positions to be made redundant, whereas Mr Gilbert's title

was that of "communications technician". The argument of the respondent was that the descriptions were interchangeable.

[25] In counsel's description, a similar consequential point was raised in Mr

Yukich's affidavit, where the determination refers to a meeting of all staff on 4

December 2009, which was after Mr Gilbert had been dismissed, whereas the date should have read, 4 September 2009 and that this was only a clerical error. Whilst counsel accept that every argument raised for both parties are not all dealt with in the determination, they submit that the Authority clearly took them into account. They sought to distinguish *SAS Technologies* where the determination did not refer to some submissions or was contrary to uncontradicted evidence.

[26] Counsel submit that the restructuring affected 700 employees who allegedly went through the same consultation process as Mr Gilbert did and that the respondent should now be allowed to move on and rebuild. That submission is not supported by any affidavit evidence from the respondent.

[27] Counsel submit that it goes against the overall justice of the case to allow this litigation to continue and the Court should be hesitant in exercising its discretion and creating a situation where the respondent will incur more costs to debate the same

issues on which it has already been successful. Finally they submit that Mr Gilbert has failed to provide the Court with sufficient material upon which the Court can exercise its discretion in his favour because of the very remote prospect of success of his proposed challenge. They also submit there had not been any compelling reasons to justify his omission to file the challenge within the 28 day timeframe and contend that if the respondent is not permitted to rely on the statutory rules this would be contrary to the interests of justice and the principle that it is desirable that litigation be finite.

[28] Counsel submit that the time limit should not be extended and certainty should be provided over a restructuring process that occurred over 12 months ago.

Discussion

[29] Although the reasons for the delay have not been fully explained other than the reference to Mr Yukich's work burdens, it does appear that the first advice received by him of the determination was 2 June from Ms Service and he did not deal with the matter, either on that day or on the subsequent Thursday or Friday. The following days were Saturday or Sunday and then a public holiday on the Monday. Mr Yukich dealt with it on the following Tuesday morning. This was a complex matter as the respondent's summary of the material that was put before the Authority demonstrates. Further, Mr Gilbert was going to be acting for himself in relation to any challenge and he did not receive the determination until 8 June. He acted promptly in advising both the Court and the respondent's counsel of his likely intentions once he had a chance to study the determination. The delay was not lengthy and in itself did not cause any prejudice to the respondent. I note also that it is usually the delay after the 28 day period that must be fully explained in support of an application for extension of time.

[30] The main issue for consideration as a result of the respondent's submissions is the merits of the proposed challenge. This is not an easy exercise for the Court as it has before it only the determination, the affidavit evidence from Mr Gilbert and Mr Yukich and the submissions concerning the application for extension of time.

[31] As I have, observed the draft statement of claim may present some difficulties but these do not of themselves demonstrate that the challenge is without merit.

[32] I am not persuaded that because aspects of the restructuring have already been the subject of challenged determinations of the Authority that this means that Mr Gilbert's challenge is without merit. Mr Yukich has deposed that, before the Authority, employer representatives responsible for conducting assessments in the redundancy selection process admitted that they had taken Mr Gilbert's activities as a union delegate into consideration when assessing him for redundancy. They allegedly admitted that this had been weighed against him. Such evidence may well establish Mr Gilbert's claim that he was discriminated against and may undermine his selection for redundancy. It is not possible to dismiss his proposed challenge simply because the restructuring in some cases has been held to be genuine in other

matters before the Authority (now under challenge), if Mr Gilbert has elements which are personal to him alone.

[33] Mr Yukich's affidavit also deposed to other findings of the determination which may be contrary to the pleadings and the evidence. For example the Authority stated that "[c]uriously the applicant made no claim in respect of lost wages nor of compensation in the event his personal grievance claims are made out". Mr Yukich deposed that the statement of problem and submissions as to remedies refer to compensation for lost wages and an award for pain and suffering and humiliation under [s 123\(1\)](#) of the [Employment Relations Act 2000](#). Even if the Authority's determination made a typographical error in referring to a presentation to all staff on

4 December when Mr Gilbert's employment was terminated on 29 October 2009, it is deposed that there is a substantive error where the Authority held that the process was identical for all staff across the country. Mr Yukich has deposed that this was contrary to the evidence before the Authority on how particular categories of work and particular employees were selected. Other evidence is pointed to which suggests that a contrary view to some aspects of the determination might be reached on the challenge. This is particularly so in relation to position descriptions for positions advertised as vacant since Mr Gilbert's dismissal which were allegedly removed in the restructuring.

[34] The respondent's counsel may turn out to be correct in their assessment of the matter when the case is heard, but I am unable at this stage to say that the challenge is without merit. To the contrary, on the assumption that the allegations made in the draft statement of claim are proven at trial the challenge may well succeed. In these circumstances, I consider it would be an injustice to deprive Mr Gilbert of what would have been his statutory right to challenge had he not been disadvantaged by the late receipt of the determination. Further I take into account the communications from Mr Yukich and Mr Gilbert to the respondent's counsel during the 28 day period which made it clear that Mr Gilbert intended to lodge a challenge. This is not a case where the delay in lodging a challenge led the respondent to understand that the matter was at end. The communications for Messrs Yukich and Gilbert within the

28 days had exactly the opposite effect. The overall justice of the case clearly favours Mr Gilbert.

[35] The applicant's application for the extension of time for filing the statement of claim is granted under [s 219](#) of the [Employment Relations Act 2000](#). Mr Gilbert should now proceed to file and serve his statement of claim. Any issues as to the

adequacy of that statement of claim can be dealt with by way of interlocutory applications.

Costs

[36] As the notice of opposition and the respondent's submissions properly did not seek costs, and as Mr Gilbert has succeeded, there will be no order.

Judgment signed at 3.45pm on 28 October 2010

B S Travis

Judge

[1] CA 5A/10.

[2] [2006] NZEmpC 17; [2006] ERNZ 95.

[3] [2003] NZEmpC 94; [2003] 2 ERNZ 98.

[4] [2002] NZEmpC 39; [2002] 2 ERNZ 103.

[5] [2007] ERNZ 295.

[6] [2007] ERNZ 338.

[7] ARC 92/09.

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