



Employment Court of New Zealand

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Juahm Industries Company Limited v Isnanto [2015] NZEmpC 152 (2 September 2015)

Last Updated: 16 September 2015

IN THE EMPLOYMENT COURT CHRISTCHURCH

[\[2015\] NZEmpC 152](#)

EMPC 139/2015

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

AND IN THE MATTER of an application for leave

BETWEEN JUAHM INDUSTRIES COMPANY
 LIMITED
 Plaintiff

AND APRIL ISNANTO AND 52 OTHERS
 Defendants

Hearing: (on the papers filed on 24 July, 13 and 21 August
 2015)

Appearances: T Jeffcott, counsel for the plaintiff
 C Hirschfeld, counsel for the defendants

Judgment: 2 September 2015

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] The question I must determine in this judgment is whether leave should be granted to the defendants to file a statement of defence. A statement of defence was filed and served one day after its due date; it was followed by an application for leave to file the statement of defence out of time.

[2] The plaintiff is a Korean fishing company and at all material times was the owner of the fishing vessel, *Pacinui*. The defendants are nationals of the Republic of Indonesia who were employed by the plaintiff as crew on that vessel. They commenced a claim against the plaintiff in the Employment Relations Authority (the Authority) alleging that they had not been paid for work carried out on the vessel.

The plaintiff denies the claim. The defendants' lawyer sought to obtain disclosure of

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time and wage records from the plaintiff in respect of the 53 crew members involved, in order more accurately to calculate unpaid wages, which in the Authority were estimated as being \$2,687,454. A preliminary issue arose as to whether the lawyer purporting to represent the defendants had established his authority to represent them as required by [s 236\(3\)](#) of the [Employment Relations Act 2000](#) (the Act).

[3] The Authority was satisfied that identities had been established in respect of

46 of the 53 applicants, and that in those 46 instances the lawyer had established his authority to represent them. The Authority was

not satisfied in respect of seven other persons, but considered that the action could nonetheless proceed so as not to cause unnecessary delay. The plaintiff was directed to provide copies of the wage and time records as a matter of urgency, to be provided no later than seven days from the date of the determination.¹

[4] On 2 June 2015, the plaintiff filed a challenge in respect of the Authority's determination on a de novo basis. The relief sought is that the determination be set aside, that the Court declares the defendants' lawyer failed to satisfy the requirements of [s 236\(3\)](#) of the Act in relation to the 46 defendants, and that costs be awarded.

[5] The defendants' application for leave is brought on the basis that their lawyer, Mr Peter Dawson, made a mistake as to time limits; that the defendants are resident in Indonesia and it was not possible to obtain instructions from multiple defendants prior to the expiry of the time limit; and that no prejudice has been suffered by the plaintiff.

[6] In support of that application, Mr Dawson stated in his affidavit that the statement of claim raising the challenge was served on 8 June 2015. He says that on

2 July 2015 he sought further particulars of the plaintiff's statement of claim. On

3 July 2015, the plaintiff's lawyer responded stating that further particulars would

not be provided, as it was believed the statement of claim complied with reg 11 of the [Employment Court Regulations 2000](#) (the Regulations). The letter from the

1 *Isnanto v Juahm Industries Co Ltd* [2015] NZERA Christchurch 56 at [21].

plaintiff's lawyer stated that it was expected a statement of defence would be filed "within the regulated time frame". Mr Dawson explains that he mistakenly assumed that by seeking further particulars to the plaintiff's statement of claim, the date for filing of the statement of defence would be extended.

[7] The statement of defence should have been filed and served by 8 July 2015. In fact, the Registrar contacted Mr Dawson on 9 July 2015, pointing out that it was overdue. Later that day, a statement of defence was filed albeit out of time; an application for leave was required to be filed.

[8] In opposing the application, counsel for the plaintiff asserts that leave should not be granted because the reasons cited in support of the application lack sufficient justification, and further, that it is not in the interests of justice to do so. Should leave be declined, the defendants would have a right of redress against their lawyer. The statement of defence, when filed, should have been accompanied by an application for leave. Non-compliance arose despite the statement by the plaintiff's lawyer that the statement of defence would need to be filed in accordance with the Regulations.

[9] Subsequently, counsel for the defendants submits that the overall justice of the case favoured the granting of leave because:

a) The reason for late filing was entirely a result of an oversight of the defendants' counsel, so that the delay was inadvertent rather than deliberate.

b) By virtue of serving notice to give further particulars of the statement of claim, the plaintiff was aware the claim would be defended.

c) The plaintiff had not suffered any prejudice arising from late (16 hours and 40 minutes) filing. The plaintiff's notice of opposition and memorandum did not suggest the plaintiff had suffered any prejudice material or otherwise.

d) If the defendant was barred from defending the Authority's determination in its favour, there would be considerable difficulties in determining the present matter according to its substantial merits and equities, as provided by s 221 of the Act. Since the defendant would not be taking any steps to contest the Authority's determination and the plaintiff would still have the burden of the challenge which will turn largely on the credibility of witnesses for both sides, the Court would be unable effectually to dispose of the matter according to the substantial merits and equities of the case, if leave was not granted.

This was undesirable.²

Jurisdiction issue

[10] Upon receipt of the application for leave and notice of opposition, I timetabled the application for leave. I also indicated that there was a potential issue as to jurisdiction which the Court would need to consider, arising from s 179(5) of the Act. That section provides, in summary, that the Court does not have jurisdiction to consider a challenge as to whether the Authority may follow or adopt a particular procedure. The Court was then informed that the plaintiff considers the subsection has no application to the present case, while the defendants say that it does. Accordingly, counsel for the plaintiff proposed that the question of jurisdiction should be resolved as a preliminary issue. I convened a telephone directions conference with counsel to discuss this possibility. Following discussion, I established a timetable for the filing of an application as to jurisdiction by the defendants to be followed by the filing of a notice of opposition, submissions, and a hearing on 6 October 2015. At the same time I indicated to counsel that I had considered the application for leave to file the statement of defence out of time, and that I would grant it with reasons to follow shortly. This judgment records my reasons.

Analysis

[11] The Court's jurisdiction to extend time in circumstances such as the present is

conferred by s 219(1) of the Act, which provides:

219 Validation of informal proceedings, etc

(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.

...

[12] Section 219 confers a discretion which must be exercised judicially and in accordance with established principles. These include consideration of such factors as 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 the parties, subsequent events, and the merits of the proposed challenge.³

[13] I accept the submissions made by counsel for the defendants, as summarised at para [12] above. Mr Dawson's error as to the calculation of time limits was unfortunate, but it was inadvertent rather than deliberate. Moreover, the plaintiff was, by service of the notice requesting particulars, aware the claim would be defended. There was a further difficulty with regard to obtaining instructions from overseas clients, but I infer from Mr Dawson's affidavit that these were received as a result of the conferring with the defendants by 11 July 2015. The reason for the error is satisfactorily explained.

[14] Turning to the length of the delay, it was, by comparison with some cases, minimal. As soon as Mr Dawson realised there had been non-compliance with the Regulations, he moved to overcome the difficulty. A related consideration is, as I have already mentioned, an absence of any prejudice or hardship to the plaintiff. Its rights and liabilities have not been affected, except through the time taken to deal with the leave issue. I do not regard that as being significant.

[15] As to the merits of the proposed challenge, the defendants' position as to representation has been the subject of a favourable determination in the Authority. The plaintiff challenges that determination, but there is a bona fide issue as to whether the Court has the jurisdiction to consider the challenge. It is appropriate for the defendants to take an active position in all aspects of the challenge. Moreover, the individual defendants in this case should not be prejudiced by an inadvertent error of their lawyer.

Conclusion

[16] Standing back, overall justice favours the granting of leave.

[17] The draft statement of defence is henceforth to be treated as the operative statement of defence.

[18] Costs normally follow the event. However, the defendants have been granted an indulgence, and I accordingly direct that costs should lie where they fall.

B A Corkill

Judge

Judgment signed at 3.20 pm on 2 September 2015