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Lai v Gray [2024] NZEmpC 41 (11 March 2024)

Last Updated: 14 March 2024

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[\[2024\] NZEmpC 41](#)

EMPC 394/2022

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application to adjourn the hearing
BETWEEN	MATTHEW LAI Plaintiff
AND	DAVID GRAY Defendant

Hearing: 6 March 2024
(Heard at Christchurch via
telephone)

Appearances: No appearance for plaintiff
P Mathews, advocate for defendant

Judgment: 11 March 2024

INTERLOCUTORY JUDGMENT (NO 4) OF JUDGE K G SMITH

(Application to adjourn the hearing)

[1] This proceeding was to be heard on 7 and 8 March 2024. It was adjourned on 6 March 2024 with reasons to follow. These are those reasons.

[2] As recently as 5 March 2024, steps were still being taken in anticipation of the hearing, notably an application was filed by the plaintiff for leave for him to give evidence and to be represented by audio visual link.

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[3] It was therefore something of a surprise when the Registrar received an email from the plaintiff's representative, Alwyn O'Connor, on the morning of 6 March 2024, seeking an adjournment.

[4] Mr O'Connor's email gave as reasons for adjourning the fact that his company was placed in liquidation about two weeks ago and that, as a result, he was unable to continue with the retainer until authorised to do so by the liquidator. It was said the required authorisation had not materialised.

[5] The email acknowledged that the hearing would be in jeopardy given Mr O'Connor's stated inability to represent Mr Lai and the impracticality of finding alternative representation at such short notice (or more accurately with virtually no notice). The email stated that the news of his unavailability was provided by him to the plaintiff on the afternoon of 5 March 2024. An apology was given for any inconvenience caused by these circumstances.

[6] This application, the manner in which it was made, its timing and the reasons given for it, raised several potentially troubling issues. One of them was that the documents on the Court file do not refer to Mr O'Connor's appointment to act

through a company. Another was why the liquidation would prevent him from continuing to act for Mr Lai.

[7] To address the application the Registrar was instructed to arrange an urgent telephone conference with Mr O'Connor and Mr Mathews, who acts for the defendant.

[8] Several unsuccessful attempts were made to contact Mr O'Connor by telephone throughout the day. A conference scheduled for 10.30 am could not proceed because he could not be contacted. An attempt to schedule the conference for noon suffered a similar fate. A minute sent to him in the late morning, directing a telephone conference at 3.30 pm in the afternoon, did not result in Mr O'Connor's participation.

[9] At my direction, the Registrar spoke to Mr Lai (who had acted for himself in an interlocutory application decided on 5 March 2024)¹ to ask him to bring to Mr O'Connor's attention the need to attend the conference.

[10] For reasons that remain unexplained, by the time the conference was convened at 3.30 pm only Mr Mathews participated.

[11] Mr Mathews advised that the defendant was not opposed to the application to adjourn, but that concession flowed from issues the Court previously identified in a minute to Mr O'Connor, about the lack of preparedness of the plaintiff's case and that timetabled directions had not been complied with.

[12] In the circumstances it was not appropriate for Mr Lai's position to be compromised through the unavailability of his representative at short notice and so late. While the situation was unsatisfactory for all concerned, there was little option but to adjourn.

[13] There is an issue about liability for potentially wasting costs, but the appropriate course is for that subject to be addressed at the conclusion of the case.

[14] The Registrar is requested to arrange a further hearing as soon as is reasonably possible.

K G Smith Judge

Judgment signed at 2.30 pm on 11 March 2024

¹ *Lai v Gray* [2024] NZEmpC 37.

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