Employment Court of New Zealand

Liu v South Pacific Timber (1990) Limited [2011] NZEmpC 100 (10 August 2011)

Last Updated: 29 August 2011

IN THE EMPLOYMENT COURT AUCKLAND

[2011] NZEmpC 100

ARC 106/10

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

BETWEEN NANZHENG LIU Intending Plaintiff

AND SOUTH PACIFIC TIMBER (1990) LIMITED

Intended Defendant

Hearing: 22 July 2011

(Heard at Auckland)

Counsel: Rodney Hooker and Charlotte Taylor, counsel for intending plaintiff

Craig Andrews and Stephen Chan, counsel for intended defendant

Judgment: 10 August 2011

JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] Should Nanzheng Liu be able to challenge a determination of the Employment Relations Authority after the expiry of the 28-day period within which he was entitled to do so as of right? Mr Liu‟s application was part-heard before Judge BS Travis but was then adjourned to allow him to adduce further evidence and submissions on the merits of his intended challenge. For reasons that are not clear, the resumed hearing was then scheduled before me. The parties have agreed, however, that they are content to re-argue the application in full including the new material now before the court.

[2] The Authority found against Mr Liu on his personal grievance, alleging unjustified dismissal, in a determination[1] issued on 30 August 2010. The 28-day

period for challenging as of right expired on 27 September 2010. This application was filed, and the respondent put on notice of Mr Liu‟s wish to challenge the Authority‟s determination, on 30 September 2010, so that the delay was of three or four days after the expiry of the 28-day period. Although the Authority‟s determination was issued on 30 August 2010, it was not received in full by the applicant‟s solicitors until 9 September 2010. There were then communication difficulties between the solicitors and the applicant about his instructions to challenge the determination because Mr Liu had departed New Zealand on

8 September 2010 for a one-month business trip to China.

[3] The Authority had emailed a scanned copy of the determination to the applicant‟s solicitors on 30 August 2010 but this omitted the crucial 11th page of the determination which included, at paras 29 and 30, the Authority‟s decision. This omission was only rectified on 9 September 2010 when the solicitors received a further full copy of the determination. Although, on 10 September 2010, a full copy

of the determination was emailed to the applicant in China seeking instructions about a challenge and follow-up communications were sent by the solicitors on 15 and 21

September 2010, Mr Liu was unable to respond with a decision until overnight between 27 and 28 September 2010 when his wife (who had been in communication with his solicitors on 23, 24 and 27 September 2010) was advised by him that he wished to challenge the determination. These instructions were passed on to the solicitors early on 28 September 2010 but I infer that it was then a few days before the proceedings could be crafted and filed.

[4] The factors to be considered and weighed by the Court are well established in case law of which only recent example need be mentioned to confirm that pedigree.[2]

They are:

- 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 on the parties;
- subsequent events; and the merits.

[5] This list is not exhaustive and the overriding consideration will always be the interests of justice in the particular case. No one factor is necessarily any more important than another. In this case the intended defendant concedes, responsibly, that the application for leave will turn largely on the merits of the intended challenge. Although, through counsel, it does not concede that Mr Liu has satisfied the other guiding principles, it nevertheless does not offer evidence or put forward submissions against them. It leaves it to the Court to determine Mr Liu‟s compliance with them. Rather, the intended defendant has focused on what it intends is the absence of sufficient merit in Mr Liu‟s proposed challenge to persuade the Court that leave should not be given.

[6] In these circumstances it is necessary to determine the standard of merit in Mr Liu‟s proposed case that he must establish before considering whether he has met that standard. A consideration of the merit of the proposed challenge can only be undertaken and made superficially because, of course, the whole point of the application is that the case can be considered on its merits.

[7] What is the standard that Mr Liu must attain, or, looked at from the viewpoint of the intended defendant, what must it establish before this consideration will count against Mr Liu? I do not agree with Mr Hooker‟s submission that the same approach should be taken as in the case of applications to strike out proceedings or causes of action within them in first instance proceedings. Such an approach assumes that a plaintiff will be able to prove the allegations of fact made in the statement of claim and examines whether, assuming those facts proved, there is nevertheless no recognised cause of action. This case is, however, not first instance litigation: it is a challenge to a determination of the case advanced on the same or similar factual allegations, but that went against the applicant in the Authority. Although, if leave is granted, the applicant may proceed with a clean slate to establish his case, the

challenge is generally in the nature of an appeal, certainly as far as this application for leave and consideration of merits is concerned.

[8] In *Stevenson v Hato Paora College Trust Board*[3] Judge Shaw described this test as being “the absence of any realistic prospect of success.” Judge Perkins wrote in *Clear v Waikato District Health Board*:[4]

The Court needs to take care that in considering this issue of the merits, it is not led into an over-detailed and wide-ranging analysis of the reasoning and determination of the Authority in a situation where no record of the evidence is kept. Nevertheless, the Court can make an assessment at a reasonably basic threshold.

[9] In *Pani v Transportation Auckland Corporation Ltd*[5] I indicated that the merits criterion involved an assessment as to whether the case was so weak “that it is just to extinguish it without further consideration.”

[10] The final authority relied on by Mr Hooker is the recent judgment of Judge Ford in *Costley v Waimea Nurseries Ltd.*[6] To the extent that the judgment suggests that a pure civil litigation strike-out approach in the sense outlined above should be taken in such cases, I respectfully disagree. In *Costley* Judge Ford wrote in relation to the test set out in *Pani* above:

To this extent, the relevant principles are akin to those involved in the consideration of an application to strike out a cause of action. After all, there would be no point in permitting an out of time challenge to proceed if it were only to be later struck out as disclosing no tenable cause of action.

[11] It would, however, be so unlikely that a proceeding such as this could be struck out as disclosing no justiciable cause of action, that this possibility can be discounted. Mr Liu asserts that he was an employee of South Pacific Timber (1990) Limited (South Pacific) at the relevant times. It is indisputable that there was a commercial relationship between the two at relevant times that would have been consistent with one of employment or one of independent contractor status. Section

6 of the Act clearly permits such questions to be determined by the Authority and the

Court. In these circumstances it is very difficult to see how the case could be determined other than on its merits, however strong or weak these might be.

[12] I agree with the result in *Costley* on the merits question, but respectfully disagree with the standard set by the judge in that case which would make it virtually impossible for a respondent to succeed on a merits argument on an application for leave to challenge out of time such as this.

The Authority's determination

[13] The Authority"s determination dated 30 August 2010 was issued in writing after an investigation meeting on 27 April of that year and subsequent receipt of written submissions later in April and in May. The determination recorded that Mr Liu"s claim was a personal grievance for unjustified constructive dismissal based upon the company"s failure or refusal to pay him remuneration due. From the outset, South Pacific Timber (1990) Limited (South Pacific) denied the existence of an employment relationship with Mr Liu. It was agreed that this issue would be determined as a preliminary one by the Authority.

[14] The Authority concluded that the parties" "arrangement" entered into in October 2008 was both unwritten and its nature in dispute. The Authority recorded that payments by South Pacific to Mr Liu were for regular fixed amounts but were generated by invoices submitted by Mr Liu, initially in his own name but subsequently in the name of one of two limited companies (but which both had the same GST number) and included Goods and Services Tax. The Authority concluded that the single sale undertaken by Mr Liu on behalf of South Pacific (he having been engaged by it in a sales role) was to a Chinese baby furniture manufacturer known as Good Baby.

[15] The Authority concluded that despite the absence of any written contract between the parties at the outset, they were, in law, in a contract for services by Mr Liu to South Pacific so that he was not its employee. The Authority rejected Mr Liu"s contention that even if this was so, the arrangement morphed into one of

employment over time so that, upon its termination, the reality of the parties"

relationship was then one of employer and employee.

Decision – merits

[16] Although apparently strong indicia of a contract for services persuaded the Employment Relations Authority to dismiss Mr Liu"s grievance, there are a number of factors that are indicative more of a contract of service between the parties. These

include, non-exhaustively and in no particular order:

- Mr Liu"s work for South Pacific exclusively during the relevant

period;

- South Pacific"s wish to provide for a restraint of trade upon Mr Liu of the sort that would arguably be more consistent with employment than

an independent consultancy arrangement;

- South Pacific"s tolerance of Mr Liu"s description of himself as a

South Pacific manager including by reference to a South Pacific business card;

- Mr Liu"s activities being directed by South Pacific to an extent arguably more consistent with an employment relationship than one

of independent consultancy;

- the „crucial part of business" concession by the intended defendant –

integration test;

- the reference to Mr Liu"s remuneration as being "salary";

- the expansion of the role from sales and marketing to production for which he was not remunerated;

- longer than originally arranged hours of work at premises or associated premises;

- the inclusion in the Chinese team of another separately identified staff

member as not being an employee;

- the provision of a company laptop and computer and a company email address (albeit not used much, if at all);
- the changed nature of the relationship, that is initially not an employee but when re-engaged may have morphed into employment;
- several indicia of Mr Liu"s significant integration into South Pacific"s business that tend to point to a relationship of employment, the company itself describing him as being a crucial part of its business and emphasising its reliance upon his services when it re-engaged him on new terms at the end of March 2009;
- evidence that he was described by it as its best staff member at about a time when it differentiated another person working with it as not being „staff"; and
- the expectation that Mr Liu would comply with South Pacific policies including for the expenditure and reimbursement of money.

[17] There are, of course, numerous and powerful indicia of an independent contractor arrangement which indeed persuaded the Authority to so categorise the relationship, but for the purposes of this application the Court looks at the intending plaintiff "s case.

[18] As has been noted in another of these sorts of cases, the inquiry as to whether someone is an employee is intensely factual and usually involves a balancing of competing claims and issues to determine on which side of a line the legal categorisation of a commercial relationship falls. The Authority"s determination, despite going in South Pacific"s favour, does not give the impression that it was a completely one-sided contest despite a number of significant indicia which I do not mention here but which would certainly weigh in South Pacific"s favour in that balancing exercise.

[19] So, as to merits, I do not think it can be said that these are so obviously and predominantly with the intended defendant, and therefore that Mr Liu"s case would have such a low prospect of success at a hearing de novo of the challenge, that his claim should not be allowed to go to hearing. That is so not only when merits are looked at alone but when, as they must be, they are weighed in the balance with the other factors which tend largely to favour Mr Liu"s position.

[20] I am satisfied that the other criteria listed earlier in this judgment also favour the applicant"s position and it was fair and responsible of the respondent not to have argued that these should count against Mr Liu.

Decision

[21] I am satisfied that the overall justice of the parties" cases as now presented requires that Mr Liu have the time to challenge the Authority"s determination extended and I make an order accordingly.

[22] The statement of claim filed by the intending plaintiff as long ago as September 2010 which has, until now, been treated as a draft statement of claim, now becomes an operative pleading. The intended defendant now has the period of 30 days in which to file and serve a statement of defence to it.

[23] After that has happened, the Registrar should arrange a directions conference with a Judge to determine how and when the intending plaintiff"s challenge will go to trial.

[24] I reserve costs on the application that has been before the Court today.

GL Colgan
Chief Judge

Judgment signed at 10 am on Wednesday 10 August 2011

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[1] AA 392/10.

[2] *Costley v Waimea Nurseries Ltd* [2011] NZEmpC 59.

[3] [2002] NZEmpC 39; [2002] 2 ERNZ 103 at 109.

[4] [2007] ERNZ 338 at 345.

[5] AC45/09, 3 December 2009 at [26].

[6] [2011] NZEmpC 59 at [15].
