



Employment Court of New Zealand

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Oliver v Scott Haulage 2010 Limited [2017] NZEmpC 75 (9 June 2017)

Last Updated: 14 June 2017

IN THE EMPLOYMENT COURT CHRISTCHURCH

[\[2017\] NZEmpC 75](#)

EMPC 24/2017

IN THE MATTER OF	an application for leave to extend time to file a challenge
BETWEEN	DARREN VINCENT OLIVER Applicant
AND	SCOTT HAULAGE 2010 LIMITED First Respondent
AND	STAR MOVING LIMITED Second Respondent

Hearing: On the papers filed on 13 and 28 April 2017

Appearances: S Zindel, counsel for applicant
L Acland, counsel for respondents

Judgment: 9 June 2017

JUDGMENT OF JUDGE K G SMITH

[1] Darren Vincent Oliver is seeking leave to extend the time within which he is able to challenge two determinations of the Employment Relations Authority (Authority). If leave is granted the proposed challenge is to the finding by the Authority that Mr Oliver was employed by Scott Haulage 2010 Ltd (Scott Haulage). Mr Oliver seeks judgment against Star Moving Ltd (Star Moving) because he says that company was his employer.

[2] The proposed challenge does not seek to alter the remedies Mr Oliver was awarded by the Authority.

[3] On 26 May 2016 the Authority issued a determination in a proceeding Mr Oliver brought against Star Moving and Scott Haulage.¹ The proceeding was against both companies because of some uncertainty over the identity of Mr Oliver's employer at the time his employment ended.

[4] The Authority set out in detail the circumstances in which Mr Oliver had been employed from December 2007 onwards. There was a period of time when the Authority accepted Mr Oliver had been employed by Star Moving. However, it found that Mr Oliver left Star Moving's employment in October 2011 and then returned to work in February 2012. It was the period from February 2012 onwards that concerned the Authority.

[5] In evidence before the Authority was an individual employment agreement which, on its face, was between Scott Haulage and Mr Oliver signed on 3 February

2012. The Authority's determination recorded Mr Oliver disputing that he signed the agreement and the very serious allegation made by him that the signature on the agreement was a forgery.²

[6] Mr Oliver gave the Authority several reasons to explain why he made such a strong allegation about the authenticity of the employment agreement. He disputed having ever seen an agreement prior to commencing work in 2012 and said he had not signed

one. He said that he would have completed personal details such as his address on the agreement, whereas that information had been supplied by Mr Biggs who is a director of both companies. Furthermore, he said that the agreement was more suitable for a person employed as a driver, not an office manager, which was the work for which he was employed. Mr Oliver explained that because he lived in Golden Bay, 100 kilometres away from the workplace in Nelson, he would not have travelled to Nelson prior to commencing work just to sign an employment agreement.

[7] Mr Biggs strongly denied forging the employment agreement and explained that it had been found by a staff member after an extensive search. It had been misplaced.

[8] The Authority rejected what Mr Oliver said. It accepted that some of what he had said was “plausible to a degree” but went on to say it was mostly speculative. It accepted what was said by Mr Biggs and noted that the seriousness of the allegation that had been made that would have required proof to “a high standard”.

[9] While the agreement did have features which the Authority considered more relevant to a driver than someone involved in administrative work, it did not consider the explanation offered by Mr Biggs for its use as implausible.

[10] Having analysed this competing evidence the Authority decided Mr Oliver did sign the employment agreement with Scott Haulage and was employed by that company when his employment ended. The assertions that the agreement was forged, or that Mr Biggs lied on oath about it, were rejected.

[11] Mr Oliver succeeded in his claim that he had been unjustifiably dismissed and he was awarded financial remedies for lost wages, holiday pay, payment for certain allowances, and compensation under [s 123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#) (the Act).

[12] A second determination, on 4 July 2016,³ dealt with some residual claims for holiday pay that had been left over from the determination on 26 May 2016.

[13] For completeness, in the third determination dated 23 August 2016 dealing with costs, the Authority decided that Scott Haulage should pay costs to Mr Oliver of

\$5,250 and disbursements of \$224.89.4 Mr Oliver challenged this costs

determination within the 28 days provided for under [s 179](#) of the Act.

[14] There is an absolute right to challenge a determination of the Authority in s

179(1) of the Act provided that step is taken within 28 days of the date of the determination.⁵

[15] If a challenge is not filed in time the Court has jurisdiction to extend the time for doing so under s 219(1) of the Act which reads:

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.

(2) Nothing in this section authorises the court to make any such order in respect of judicial proceedings then already instituted in any court other than the court.

[16] That discretion has to be exercised judicially and in accordance with established principles.⁶ Both Mr Zindel and Mr Acland accepted that the discretion conferred by s 219 is to determine whether, in the circumstances of the case, the interests of justice require an extension of time.⁷

[17] They also accepted that the following matters are relevant to considering that exercise of discretion:⁸

(a) The reason for the omission to bring the challenge within time; (b) the length of the delay;

(c) any prejudice or hardship to any other person;

(d) the effect on the rights and liabilities of the parties;

⁵ [Employment Relations Act 2000, s 179\(2\)](#).

⁶ *An Employee v An Employer* [2007] ERNZ 295 (EmpC) at [8].

⁷ *Roberts v Commissioner of Police* AC33/06, 27 June 2006.

(e) subsequent events; and

(f) the merits.

[18] Those principles have been applied in a number of cases including *An*

*Employee v An Employer*⁹ and *Clear v Waikato District Health Board*.¹⁰

The reason for the omission to bring the challenge within time

[19] This application was supported by an affidavit by Brooke Halcombe, from Mr Zindel's office. Exhibited to Ms Halcombe's affidavit was an affidavit sworn by Mr Oliver on 9 October 2016. No issue was taken by the respondents as to the method by which Mr Oliver's evidence was provided to the Court.

[20] The reason given for the omission to bring the challenge within time was the late discovery of evidence that might assist Mr Oliver's case. In September 2016 Mr Oliver was visited by his sister-in-law. Because of this visit he was reminded that she had visited over Waitangi weekend in 2012 when the employment agreement with Scott Haulage was signed. A search of his 2012 diary led Mr Oliver to produce some pages from it with entries for 2 and 3 February 2012, relating to a fishing trip from Golden Bay on those days.

[21] He considered the evidence provided by these diary entries, presumably combined with his own statement that he had not signed the agreement, was sufficient evidence to doubt the authenticity of his signature on the agreement.

[22] This explanation is unconvincing in its attempt to show why the challenge was not filed in time. The identity of Mr Oliver's employer was always in issue before the Authority. Evidence exchanged before the investigation meeting included the agreement between Scott Haulage and Mr Oliver. He must have known from the outset that the respondents would rely on this agreement to argue his employer was Scott Haulage at the time his employment ended. If Mr Oliver intended to maintain

that he was not employed by Scott Haulage, but by Star Moving, he was on notice

9 *An Employee v An Employer*, above n 6, at [9].

that he had to secure all evidence that might have been relevant to that subject. Mr Oliver has not explained why the diary was not located before the investigation meeting as part of his preparation.

[23] The late discovery of this diary does not explain why Mr Oliver did not file a challenge. At best the evidence may have provided some corroboration for his evidence that he did not sign the employment agreement but goes no further than that. Mr Oliver could have challenged the 26 May 2016 determination within time. That did not happen and Mr Oliver has not discharged the burden of explaining why.

[24] I find that no adequate reason has been given for not filing on time and it would not be just to extend the time to file this challenge. That conclusion is sufficient to dispose of the application. However, in case I am wrong in that assessment, brief comments will be made about the remaining elements of the test.

The length of the delay

[25] Mr Oliver is primarily seeking to challenge the 26 May 2016 determination because it dealt with the identity of his employer. His challenges to the other determinations are to preserve his remedies.¹¹ To file a challenge to that determination on time, Mr Oliver needed to have done so by 23 June 2016. On 10

October 2016 Mr Oliver's previous advisers filed an informal document in the Court that did not comply with the [Employment Court Regulations 2000](#). It is apparent from that document that the respondents knew from about 19 September 2016 that Mr Oliver intended to attempt to challenge the finding that he was employed by Scott Haulage.

[26] After several procedural directions a formal application seeking leave to extend the time within which to challenge was filed on 1 February 2017. An amended application, providing more information, was filed on 8 March 2017.

[27] The length of the delay should be assessed up to the time when a formal application was filed. However, taking the most generous approach possible in those

11 Minute 8 March 2017.

circumstances, from Mr Oliver's point of view, even if the document filed in October

2016 had complied with the Regulations the delay was still substantial.

[28] Mr Zindel did not refer to any case where the Court has granted an application when so much time had elapsed. He relied on Judge Couch's decision in *An Employee v An Employer* to support Mr Oliver's application but in that case the Court observed that a delay of more than two months would be regarded as substantial or even gross.¹²

[29] I consider that this delay is too long in the circumstances of this case to justify granting an extension of time.

Any prejudice or hardship to any other person

[30] Mr Acland submitted that the respondents are prejudiced because they expected to be able to put this litigation behind them and would lose the certainty of the decision in the Authority in their favour if leave was granted. I agree.

[31] Mr Zindel argued that the identity of Mr Oliver's employer is, nevertheless, before the Court because of the challenge to the costs determination which is in time. It follows that there is no prejudice because the respondents will need to address the subject.

[32] I reject Mr Zindel's submission. The decision that dealt with the identity of Mr Oliver's employer was the Authority's substantive determination of 26 May 2016 not the subsequent costs decision. By the time the costs determination was issued on

23 August 2016 the only respondent in the Authority was Scott Haulage. Star

Moving was no longer referred to as a party for the simple reason that the

Authority's first determination had resolved that matter completely.

12 *An Employee v An Employer*, above n 6, at [15].

Subsequent events

[33] It is possible that Mr Oliver considers the difficulty he has had in obtaining payment to be a relevant subsequent event. However, that is not relevant.

The merits of the proposed challenge

[34] It is not appropriate, and not helpful, to express any view on the merits of the proposed challenge because that would involve exploring issues over the identity of Mr Oliver's employer including the authenticity of the signature. To do that would require an examination of evidence and submissions that could only realistically be achieved at trial.

Outcome

[35] It would not be just to grant this application and it is dismissed.

[36] Costs are reserved. Mr Oliver is legally aided and that may have implications for any orders that are made in relation to costs. In any event, in the absence of agreement about costs, the respondents may file a memorandum within 20 working days. Mr Oliver has the same amount of time to respond.

KG Smith

Judge

Judgment signed at 4.50 pm on 9 June 2017

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