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Rothesay Bay Physiotherapy (2000) Limited v Pryce-Jones [2014] NZEmpC 167 (10 September 2014)

Last Updated: 15 September 2014

IN THE EMPLOYMENT COURT AUCKLAND

[\[2014\] NZEmpC 167](#)

ARC 29/14

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

AND IN THE MATTER of an application to strike out
 proceedings

AND IN THE MATTER of an application to challenge out of
 time

BETWEEN ROTHESAY BAY PHYSIOTHERAPY
 (2000) LIMITED
 Plaintiff

AND KATHERINE PRYCE-JONES Defendant

Hearing: By memoranda of submissions filed on 14, 21 and 28
 May, 18,
 19 and 20 June, and 9, 18 and 21 July 2014

Appearances: P Wicks QC, counsel for plaintiff
 H White and A Parlane, counsel for defendant

Judgment: 10 September 2014

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] This interlocutory judgment decides two associated preliminary issues in a challenge to a determination of the Employment Relations Authority.¹ In chronological order of their filing, the first is the defendant's application to strike out the plaintiff's statement of claim on the basis that the challenge was not brought within time. Although that application is opposed by the plaintiff, which says that it did challenge within time as of right, the second application is the plaintiff's for

leave to challenge out of time in case the Court determines the first issue in the defendant's favour.

¹ *Pryce-Jones v Bomer* [2014] NZERA Auckland 111.

ROTHESAY BAY PHYSIOTHERAPY (2000) LIMITED v KATHERINE PRYCE-JONES NZEmpC AUCKLAND [\[2014\] NZEmpC 167](#) [10 September 2014]

[2] The parties' submissions have been many and comprehensive. The length of this judgment is necessary to deal with them all because there was little, if any, common ground.

Background

[3] The background to the proceedings is unusual and relevant to, if not determinative of, both questions.

[4] Katherine Pryce-Jones issued proceedings in the Authority, alleging that she had been dismissed unjustifiably. She nominated two persons as respondents, Wendelien Bomer as first respondent, and Rothesay Bay Physiotherapy (2000) Limited as second respondent. Both respondents contended that Ms Pryce-Jones, a physiotherapist, had not been an employee of either of them. The Authority conducted an investigation meeting and received subsequent submissions from the parties in late 2012.

[5] On 7 January 2013 it issued its determination² on the preliminary issue of whether Ms Pryce-Jones was an employee and, if so, of which respondent. The Authority determined that Ms Pryce-Jones was an employee and that she had been employed by the second respondent. Although the Authority described the employer as “RBPL”,³ it had earlier referred in its determination to Rothesay Bay

Physiotherapy (2000) Limited as “RBPL”.⁴ This was the cause of some confusion as

there is an associated company Rothesay Bay Physiotherapy Limited whose acronym is likely to be RBPL.

[6] On 20 January 2013 Ms Pryce-Jones applied to the Authority to reopen its investigation pursuant to cl 4 of sch 2 to the [Employment Relations Act 2000](#) (the

Act) which provides:

² *Pryce-Jones v Bomer* [2013] NZERA Auckland 7.

³ At [32].

⁴ At [1].

4 Reopening of investigation

(1) The Authority may order an investigation to be reopened upon such terms as it thinks reasonable, and in the meantime to stay the effect of any order previously made.

(2) The reopened investigation need not be carried out by the same member of the Authority.

[7] The Authority was asked to consider again whether Ms Pryce-Jones was employed by Ms Bomer, Rothesay Physiotherapy (2000) Limited, or the separate legal entity, Rothesay Bay Physiotherapy Limited.

[8] On 1 February 2013, by minute, the Authority agreed to reopen its investigation. It said in that minute that its determination of 7 January 2013 included a finding that Rothesay Bay Physiotherapy Limited was Ms Pryce-Jones’s employer. For reasons already set out, it is at least possible that the 7 January 2013 determination identified Rothesay Bay Physiotherapy (2000) Limited as Ms Pryce-Jones’s employer and this may only serve to illustrate the confusion that had arisen.

In its minute⁵ the Authority directed a reopening of its investigation “to allow the

production of evidence concerning which company is the employer”. The Authority also joined, as a party to the proceeding from that point, Rothesay Bay Physiotherapy Limited. After giving timetabling directions for the resumed investigation meeting, the Authority stated:⁶ “The effect of the orders contained in the determination dated 7 January 2013 is stayed under Schedule 2 cl 4 of the [Employment Relations Act](#).”

[9] Rothesay Bay Physiotherapy (2000) Limited disagreed with the Authority’s conclusion of 7 January 2013 that Ms Pryce-Jones was an employee rather than, as it had contended, an independent contractor to the physiotherapy business. The plaintiff nevertheless elected to await the outcome of the Authority’s reopened investigation, relying on its order staying the effects of the orders made on 7 January

2013, including any orders consequent upon the determination of the employment

relationship.

⁵ At [4].

⁶ At [11].

[10] Following further investigation of the issues, the Authority issued a further determination on 26 March 2014⁷ determining that “Katherine Pryce-Jones was in an employment relationship with Rothesay Bay Physiotherapy 2000 Limited”.

[11] Rothesay Bay Physiotherapy (2000) Limited filed its challenge on 17 April

2014. That is within the 28 day period allowed under [s 179](#) of the Act, calculated from 26 March 2014, although clearly beyond the 28 day period if it is to be calculated from 7 January 2013 as the defendant says it should be.

Defendant’s strike out application

[12] I deal first with the defendant’s strike out application. This is based on an assertion that the plaintiff’s challenge was not brought within time. If the challenge was brought within time, then the strike out application must fail. If it was not brought within time and

the challenge is struck out, then the Court will need to consider the plaintiff's application for leave to file a late challenge. In this case many of the defendant's arguments in support of the strike out application will also be applicable to her opposition to any extension of time.

[13] Despite basing her strike out application on the alleged lateness of filing the challenge, Ms Pryce-Jones relies on the criteria set out in r 15.1(1) of the High Court Rules in support of her application. I will address the broader questions raised by r

15.1. This sets out three particular grounds and a broader fourth related ground as follows:

15.1 Dismissing or staying all or part of proceeding

(1) The court may strike out all or part of a pleading if it—

(a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or

(b) is likely to cause prejudice or delay; or

(c) is frivolous or vexatious; or

(d) is otherwise an abuse of the process of the court.

[14] Ms Pryce-Jones invokes three of the four tests. First, she submits that the challenge discloses no reasonable cause of action. She says that because there was

7 *Pryce-Jones v Bomer*, above n 1.

evidence before the Authority that Rothesay Bay Physiotherapy (2000) Limited had confirmed her employment status for immigration purposes, "there could never reasonably be a finding Ms Pryce-Jones is anything other than employed". It follows, in her submission, that the plaintiff's challenge is incapable of succeeding.

[15] Whether a person is employed by another is a determination to be made on a range of considerations under s 6(2) of the Act. The Court and the Authority "must determine the real nature of the relationship between them". Subsection (3) requires a consideration of all relevant matters including any that indicate the parties' intentions. The Court is specifically directed, under subs (3)(b), not to treat as a determining matter any statement by the persons that describes the nature of their relationship. It must follow that the description by the defendant of Ms Pryce-Jones as an employee cannot be determinative of that status as the defendant now contends.

[16] Next, Ms Pryce-Jones says that if the plaintiff's challenge is allowed to continue, this will cause prejudice or delay. This is not elaborated on except that the defendant argues that if the case is delayed, "it cannot possibly be capable of success". Again, this cryptic and counter-intuitive statement is not further explained.

[17] Ms Pryce-Jones next says that the delay between the delivery by the Authority of its first determination and the challenge filed after the Authority's second determination, 16 or 17 months later, amounts to an abuse of process. That is because, the defendant says, counsel for the plaintiff accepted in writing on 14

November 2013 that the only outstanding question "was the identity of the employer."

[18] Even if this is the only interpretation that may be given to a statement that may have been made by counsel for the plaintiff, I do not accept that the challenge constitutes an abuse of the Court's process. As I will conclude subsequently it was logical for the plaintiff to await the final determination of the Authority after it had reopened its investigation, to decide whether it should challenge that determination. As in the case of all litigants, the plaintiff had a statutory right of challenge to the Authority's final determination and although it may have been unfortunate for the

defendant that this was not given for some time, the plaintiff did not lose that right in these circumstances.

[19] Ms Pryce-Jones does not assert that the bringing by the plaintiff of its challenge is frivolous or vexatious.

[12] Finally, the defendant says that there is no known instance of a party being limited to challenge a determination of the Authority 16 or 17 months after it was given. That may or may not be so but that submission rests on an erroneous assumption that there was such a delay. I have concluded subsequently there was not.

[21] At the heart of these issues is the propriety of the plaintiff's election not to challenge the Authority's first determination which appeared to conclude that Ms Pryce-Jones had been employed by Rothesay Bay Physiotherapy (2000) Limited. This determination was issued on 7 January 2013.⁸ Still within the 28 day period for challenging as of right, the Authority issued a Minute on 1 February 2013 in which it categorised its 7 January 2013 determination as being one that concluded that Rothesay Bay Physiotherapy Limited was Ms Pryce-Jones's employer.

[22] These directions allowed for the possibility that liability might attach to other employing entities, Rothesay Bay Physiotherapy Limited or Ms Bomer, and not to Rothesay Bay Physiotherapy (2000) Limited. The defendant submits that the plaintiff ought to have filed a timely challenge in respect of the Authority's determination that she was an employee, irrespective of the identity of her employer then being still at issue.

[23] I consider this to be unrealistic and flawed submission. Although, theoretically, it is possible to identify two separate questions (i.e. first, whether there was an employment relationship and, second, if so, with whom), in practice the consideration was a single one, i.e.

was A an employee of, or in an employment relationship with, B? Although the Authority had, on 7 January 2013, determined that question, its decision to reopen its investigation into an integral part of that (i.e.

8 Above n 2.

the identity of the person by whom Ms Pryce-Jones was employed) threw the finality of the determination of that single question into doubt.

[24] In these circumstances it was not only understandable but proper for the plaintiff to await the Authority's determination on the reopened investigation into that question before making an election to challenge the outcome. In these circumstances, it follows that the challenge is to the Authority's second determination (of 26 March 2014). The effect of that second determination is set out at the start of it: "Katherine Pryce-Jones was in an employment relationship with Rothesay Bay Physiotherapy (2000) Limited." A challenge by hearing de novo, as the plaintiff has elected, addresses the matter or matters that were before the Authority and these include whether Ms Pryce-Jones was an employee of the plaintiff.

[25] What the Authority's reopening of its investigation put in issue was:

whether Ms Pryce-Jones was employed by Rothesay Bay

Physiotherapy Limited;

whether Ms Pryce-Jones was employed by Ms Bomer; or

whether Ms Pryce-Jones was employed by Rothesay Bay

Physiotherapy (2000) Limited.

[26] Following the reopening of the investigation, there was no finality to the question whether Ms Pryce-Jones was employed by Rothesay Bay Physiotherapy (2000) Limited. If the Authority had concluded, upon reinvestigation, that she was employed by either Ms Bomer or Rothesay Bay Physiotherapy Limited, there would have been no point in Rothesay Bay Physiotherapy (2000) Limited challenging its preliminary determination that Ms Pryce-Jones was employed by that company.

[27] Although the defendant may regret both the decision by the Authority to reopen its investigation, and the delay in re-determining the employment relationship

question, those occurrences and their consequences are not attributable to the plaintiff and should not disqualify it from the challenge that it has now brought.

[28] I conclude that the plaintiff has challenged within time the determination of the Authority of 26 March 2014 which encompasses both decisions made by it; that is: "Katherine Pryce-Jones was in an employment relationship with Rothesay Physiotherapy 2000 Limited". Although the Authority was not asked to, and did not, alter that part of its 7 January 2013 determination which stated that the nature of Ms Pryce-Jones's work for the physiotherapy business was employment under s 6 of the Act, it nevertheless made a further and final decision to this effect on 26 March

2014, as can be seen from the terms of its determination.

[29] Alternatively, I consider that the specific order of the Authority on 1

February 2013 staying "[t]he effect of the orders contained in the determination dated 7 January 2013" under cl 4 of sch 2 to the Act, was also to stay the appellate consequences of that determination of 7 January 2013 pursuant to s 179 of the Act. The plaintiff was entitled to rely upon that stay ordered by the Authority on 1

February 2013 to delay its filing of a challenge until the outcome of the reopened investigation was known, as occurred when the 26 March 2014 determination was issued.

[30] The application to strike out the challenge is therefore refused.

Plaintiff's application for leave to challenge out of time

[31] I turn to the application to extend the time for filing a challenge in the event that the strike out application on limitation grounds just dealt with had been successful. I do so in case I am wrong and the challenge should have been struck out. In view of the history of the proceedings set out above and the plaintiff's explanation for any lateness that is inherently discernible from them, I will deal with the defendant's comprehensive grounds opposing this application.

[32] Ms Pryce-Jones's opposition is manifold. First, she says that the plaintiff's application for leave "is 17 months out of time". There is, of course, no time limit

for bringing such an application, although delay in doing so may be a factor in the exercise of the Court's discretion whether to grant it.⁹ The principal and decisive rejoinder to this submission is, however, that the application to extend the time to challenge was brought as a response to the defendant's application to strike out the challenge on limitations' grounds. It was brought soon after the strike-out application was filed and served.

[33] The Authority's determination was issued on 26 March 2014. The plaintiff's statement of claim was filed on 17 April 2014. The

defendant's application to strike out the proceedings was filed on 14 May 2014. The plaintiff's application to extend time was filed on 28 May 2014. The reference to 17 months' delay is misleading because it relates to the Authority's original determination, which it subsequently stayed pending a reopening and redetermination of Ms Pryce-Jones's claims by the Authority.

[34] In these circumstances, there is no substance to the defendant's point concerning delay.

[35] The next ground of opposition advanced by Ms Pryce-Jones is that the plaintiff's application "is made broadly under [ss219 to 221\(c\)](#) of the [Employment Relations Act 2000](#) which are miscellaneous provisions and do not provide the relief sought by the plaintiff." The pertinent sections are [ss 219](#) and [221\(c\)](#). Although the plaintiff's expression of its statutory grounds could be stated more precisely, they encompass nevertheless a provision which does allow the Court to make an order such as is sought. [Section 219\(1\)](#) provides relevantly:

If anything which is required or authorised to be done by this Act is not done within the time allowed, ... the court ... may in its discretion ... make an order extending the time within which the thing may be done ...

[36] In this case, also, because the plaintiff's proceedings have been before the Court and will continue to be so unless and until struck out, [s 221\(c\)](#) provides relevantly:

9 [Employment Relations Act 2000, s 219\(1\)](#).

In order to enable the court ... to more effectually dispose of any matter before it according to the substantial merits and equities of the case, it may, at any stage of the proceedings ...

(c) ... extend the time within which anything is to or may be done

[37] There is nothing in this second ground of opposition to the plaintiff's application to extend time.

[38] Third, the defendant seeks to rely upon what she categorises as "erroneous statements of fact" made by the plaintiff in support of its application. First, Ms Pryce-Jones said that the Authority reopened its investigation of its own volition rather than, as she says the plaintiff claims, on her application.

[39] Although it would seem to be unusual that the Authority would reopen, of its own volition, the investigation of a matter which it had recently determined, it is not material to this case where the incentive to do so came from. The important fact is that the Authority did decide to reopen its investigation fewer than 28 days after it had been issued and so advised the parties.

[40] Next, the defendant submits that it was wrong for the plaintiff to await the outcome of the reopened investigation before challenging that part of the Authority's determination that Ms Pryce-Jones was an employee, irrespective of which entity employed her. This submission is at the heart of the defendant's case but has already been addressed fully on the strike-out application.

[41] Next, the defendant says that she has not contributed in any way to the delay in the filing of the plaintiff's challenge and wishes to have her personal grievance and claim for wage arrears dealt with promptly. That may be so but neither was the delay in the Authority re-determining the case contributed to by the plaintiff.

[42] Further, the defendant alleges that the plaintiff has advised the Court erroneously that it has paid a sum of money into an interest-bearing account following her application for a freezing order. She says that another corporate identity, Rothesay Bay Physiotherapy Limited, paid a sum of money and that this fell short of the amount required to resolve her wages' claim.

[43] The question of preserving funds has been dealt with by a solicitor's written undertaking, dated 17 June 2013, that the solicitors have retained and will retain the sum of \$75,000 on interest-bearing deposit in a trust account pending the resolution of these proceedings. It is unclear from the solicitor's undertaking on whose instructions this undertaking has been given and although it may be on the instructions of Rothesay Bay Physiotherapy Limited, that is by no means certain. That uncertainty is generated, for example, because the sum retained is from the proceeds of the sale of a Rothesay Bay property, the former registered proprietor and vendor of which is not identified.

[44] In any event, it is open to someone other than an actual litigant to give (by a solicitor) an irrevocable undertaking to retain monies in a trust account even if that person is not the actual litigant as may, at best, be the case here. Such an undertaking is enforceable against the solicitor. Further, the undertaking appears to have been entered into voluntarily and not by court order. If the plaintiff is dissatisfied with the terms of the undertaking, it is open to her to apply for a further order from the Court but no such application has been made.

[45] Further, Ms Pryce-Jones asserts that there will be "detrimental tax implications such as penalties for unpaid tax that would have accrued in the last year" if the plaintiff is allowed to challenge and is successful. Although this is not elaborated on in any further detail, I am confident that these very well recorded events in the Authority and this Court would be persuasive grounds to be put before the Commissioner of Inland Revenue with a request to reassess tax decisions, if it comes to that. Alternatively, there is sufficient flexibility in the orders for compensation that the Authority and the Court can make, to compensate for any such losses if they are otherwise irremediable.

[46] Ms Pryce-Jones points to what she says is the shortfall between the funds which have been held on an undertaking in Rothesay Bay

Physiotherapy Limited's solicitor's trust account (\$75,000 plus accruing interest) and her claim for unpaid wages of \$111,000 together with a claim for compensation for stress, suffering and humiliation. She says that the \$75,000 held in trust and on undertaking by Rothesay Bay Physiotherapy Limited represents only about half of the amount of her claim.

[47] As already noted, there is nothing to prevent Ms Pryce-Jones from applying for further orders if she meets the criteria applicable to these, to seek to preserve further assets pending final determination of her substantive claims.

[48] Even if I am wrong in my conclusion regarding the 28 day period for challenging the Authority's determination, the particular circumstances outlined give the plaintiff good grounds for leave to be granted extending the time for filing the challenge under [s 219\(1\)](#) of the Act. Ms Pryce-Jones's arguments of prejudice as a result of any delay amount at best only to inconvenience. Although her concerns are understandable, they do not outweigh what I consider would be the injustice of depriving the plaintiff of any opportunity to contest the Authority's first instance findings. Whilst there will be a cost to the defendant of defending the claim, that can be compensated for by an order for costs if that is warranted. I do not consider that the delays between the Authority's investigation meetings and the probable hearing of a challenge in this Court will mean that the recollections of witnesses will be significantly diminished. Evidence was prepared for presentation to the Authority and recorded. This ought to address adequately any such consequences of delay.

Decision summary

[49] In these circumstances, the defendant's application to strike out the challenge is dismissed. Had it been necessary, the plaintiff's application to extend the time within which to challenge would have been allowed. The plaintiff is entitled to costs on the strike out application but the amount of which is reserved to be dealt with following the decision of the plaintiff's substantive challenge.

Progress of the case

[50] The defendant has already filed her statement of defence on this file. However, there are concurrent proceedings between the same parties under ARC

30/14 in which Ms Pryce-Jones is claiming that Ms Bomer, Rothesay Bay Physiotherapy (2000) Limited and Rothesay Bay Physiotherapy Limited were all, or at least in different multiple combinations, her employer, and it would be logical to

hear and decide that challenge along with this. I direct that both files be joined for the purpose of further hearings.

[51] For that purpose, the Registrar should arrange a telephone directions conference with a Judge as soon as this can be done.

GL Colgan
Chief Judge

Judgment signed at 2.30 pm on Wednesday 10 September 2014