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Smith v Nga Kairauhii Trust WC 11/07 [2007] NZEmpC 31 (9 March 2007)

Last Updated: 29 May 2007

IN THE EMPLOYMENT COURT
WELLINGTON

WC 11/07
WRC 34/06

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

BETWEEN HUIA SMITH
Applicant

AND NGA KAIRAUHII TRUST
Respondent

Hearing: 6 March 2007 by telephone conference call

Appearances: Trent Petherick, Counsel for Applicant
Elizabeth Brown, Counsel for Respondent

Judgment: 9 March 2007

JUDGMENT OF CHIEF JUDGE GL COLGAN

- [1] The question for determination is whether Huia Smith should have leave to challenge a determination of the Employment Relations Authority after expiry of the time for doing so as of right. The parties agreed to deal with this question by a telephone conference call hearing and after written submissions in opposition to the application for leave had been filed. The background to Ms Smith's failure to challenge within time is relevant and is as follows.
- [2] Ms Smith was employed by Nga Kairauhii Trust but claimed to have been dismissed unjustifiably on 24 June 2004. The Trust asserted that Ms Smith had not raised her grievance with it during the period of 90 days after she claimed to have been dismissed and, in an investigation during August 2006, the Authority considered, first, whether the grievance had been raised with the employer within the statutory period and, if it had not, whether it was just to grant leave to Ms Smith to have her personal grievance determined.
- [3] Although counsel were not agreed whether Ms Smith consented to the Trust's suggestion to the Authority that the issues be dealt with "*on the papers*", the fact is that the Authority did so. Irrespective of whether Ms Smith consented or did not oppose the course, the Authority has recorded at paragraph 5 of its determination that: "*... I directed that the claim the grievance was raised out of time be addressed first, by way of witness statements and submissions.*" It did not question witnesses, whether those whose accounts it had or others whose potential evidence may have seemed important to it. The issues the Authority had to decide were, nevertheless, important in the sense that, if the Trust was successful, there was no prospect of Ms Smith having the merits of her claims against it considered. Although the Authority has considerable freedom to determine the way in which proceedings before it are to be dealt with, it is nevertheless obliged to comply with the principles of natural justice in carrying out its role: s157(2) [Employment Relations Act 2000](#).
- [4] In a determination issued on 11 September 2006 the Authority appears to have accepted the Trust's

contention that Ms Smith's grievance was not submitted to the employer until it received a letter from her solicitor dated 9 September 2005. The Trust contended that this letter was received about 442 days after Ms Smith alleged she had been dismissed and even 398 days after the intended defendant had paid her back pay following an investigation of her entitlement to this by the Department of Labour.

- [5] Having concluded that the grievance was submitted to the employer long after the expiry of the 90-day period, the Authority considered the evidence about the delay in doing so. Although the intended defendant had failed to provide the intending plaintiff with a form of written employment agreement as the statute requires (including the mandatory statutory requirement for reference to grievance resolution procedures and the 90-day time limit), it found this was not Ms Smith's reason for failing to take up her grievance before she did. The Authority concluded that because Ms Smith had raised and concluded a wages arrears claim after seeking the assistance of the Department of Labour's Mediation Service, she could not have been unaware of the 90-day time limit.
- [6] The Authority concluded that there were exceptional circumstances relating to the delay pursuant to [s115\(c\)](#) of the [Employment Relations Act 2000](#), that is because Ms Smith's employment agreement did not contain the explanation concerning the resolution of employment relationship problems required by [s65\(2\)\(vi\)](#) of the Act.
- [7] As to whether the delay was occasioned by the exceptional circumstances, the Authority, however, rejected Ms Smith's claims. Significant in its reasoning was the fact that, at around the time she said she had been dismissed, Ms Smith approached the Department of Labour's Mediation Service instituting a claim for back and holiday pay. The Authority concluded that, if Ms Smith had believed that she had been dismissed, it would have been likely that she would have raised that concern with the Mediation Service at about that time but did not. The Authority concluded that if Ms Smith had done so, she would probably have been told of the 90-day limit. It was satisfied, on the balance of probabilities, that Ms Smith elected to leave the Trust, seek employment elsewhere, and not to pursue any outstanding claims (other than the pay issue) at that time.
- [8] There were other factors which reinforced this conclusion for the Authority. That included Ms Smith having collected, on behalf of the Trust, pamphlets outlining employment rights. It concluded Ms Smith must have looked at and understood these. Significant also was the (correct) form of employment contract that she subsequently had with another employer setting out the employee's obligation to raise a grievance within 90 days.
- [9] For these reasons the Authority concluded that there was no evidence of a causal connection between the exceptional circumstances and Ms Smith's failure to raise the grievance.
- [10] It went on to determine, even if it was wrong in that conclusion, whether it would nevertheless have been just to have allowed the grievance to proceed. It found Ms Smith's account of the circumstances of her alleged dismissal "*vague*" and indeed relied on the advice of a work colleague to the effect that Ms Smith told her that she could cease collecting her before work because she had another job and was not returning to the Trust. The Authority also concluded that Ms Smith would be unlikely to succeed in her claim that the Trust had "*locked her out*" because of the documentary evidence from the employer that it sought on several occasions to persuade her to return to work.
- [11] The Authority concluded:

An overall and informed appraisal of both Ms Smith's claims as to exceptional circumstances and to an allegation of unjustified dismissal – no matter how the latter is framed – lead me to the conclusion that the lack of an explanation of rights did not occasion the delay (or the full delay in any event) in the applicant bringing this personal grievance and, because of its substantive shortcomings, it is not just to allow the case to be brought outside of the 90-days.

- [12] I now come to the facts that concern more immediately the next delay in respect of which leave is sought from this Court. Ms Smith has filed an affidavit about these circumstances, the accuracy of which has not been challenged by the intended defendant. It is materially as follows.
- [13] On 14 September 2006 Ms Smith's solicitor wrote to her enclosing a copy of the Authority's determination dated 11 September 2006 under cover of a letter that simply asked her to contact Mr Petherick "*to discuss an appeal.*" Having received the solicitor's letter on 16 September, Ms Smith telephoned the lawyer's office on 18 September attempting to make an appointment with Mr Petherick but was unable to do so and her telephone message was not returned. Approximately 2 weeks later and, I conclude, probably within the 28-day period beginning on the day after the determination was issued, Ms Smith again telephoned the solicitors but was again unable to make an appointment to see Mr Petherick. She did not hear from him again. On 27 October, that is after the expiry of the 28-day period, Ms Smith wrote to the Employment Relations Authority but does not appear to have sent a copy of this letter to, or otherwise advised the Trust. Ms Smith's letter to the Authority emphasised the difficulties that she had in attempting to make an appointment to see her lawyer. Ms Smith's letter addressed her dissatisfaction with the outcome of the case in the Authority.
- [14] A support officer in the Employment Relations Authority wrote back to Ms Smith by letter dated 13 November 2006 noting that her letter to it of 27 October had not been received by the Authority until 8 November. The

support officer suggested that Ms Smith attempt to contact Mr Petherick or the local Law Society. The letter pointed out that she had had 28 days from the date of the determination to file a challenge in the Employment Court. Finally, the letter advised Ms Smith of her right to apply for a rehearing but suggested that in any event she should obtain legal advice, and referred her to the Hawke's Bay Community Law Centre.

- [15] After receiving this letter from the Authority, Ms Smith was able to make an appointment with Mr Petherick for 16 November and instructed him to make this application for leave to appeal out of time which was filed in the Wellington Registry of the Court on 20 November.
- [16] In opposing the application for leave to challenge out of time, the Trust points out that the delay was of about 40 days after the expiry of the 28-day period, that is some 68 days after the delivery of the Authority's determination. The Trust says that this is not a minimal delay such as those in several cases where leave has been granted after delays of 3 or 4 days. The Trust emphasises that Ms Smith has consistently attempted to bring proceedings out of time, supported by a number of what it describes as "*thin explanations*" and it complains that it is constantly incurring additional costs that it cannot afford, although Ms Smith has been legally aided. The Trust says that it was entitled to believe that the case had been concluded after the expiry of the 28-day period following the rejection by the Authority of Ms Smith's case.
- [17] The Trust also says that Ms Smith has failed to show that there is any merit to her challenge, that is that there were exceptional circumstances that occasioned the delay in notifying her grievance in the first place. As the Trust notes, although there is now some tangential suggestion from Ms Smith that she alleges the Trust withheld information from her, this is an unsupported allegation that is in any event denied.
- [18] The intended defendant is a registered charitable Trust of Ngati Kahungunu Marae, having as its objective the health and wellbeing of its peoples in their communities, and it survives on funding grants. It says that if it has to incur further expense, its beneficiaries may be prejudiced and suffer hardship in that funds that would normally be allocated to their health and wellbeing will have to be used to defend Ms Smith's claim.
- [19] The Trust also addressed the prospective merits of Ms Smith's grievance as did the Authority and it emphasised its pessimistic conclusion of success in these.
- [20] I have already referred to the Authority's credibility findings that were adverse to Ms Smith in several respects.
- [21] First, at paragraph 28 the Authority concluded:

On a balance of probabilities basis, I find that – had Ms Smith genuinely believed that she had been dismissed – she would also have raised that concern with the Mediation Service, at the same time or shortly thereafter. This is because Ms Smith clearly knew that her employment problems could be raised, freely and effectively, with the Mediation Service. Her accessing of the Mediation Service so as to obtain back and holiday pay is evidence, I find, of her familiarity with her rights.

- [22] Ms Smith's uncontradicted evidence in this Court is, however, that she did not ever receive advice that any personal grievance had to be taken up with her employer within 90 days of its occurrence or coming to her notice. Counsel are agreed that there was no evidence before the Authority that anyone had told or otherwise informed Ms Smith of this 90-day requirement. As the Authority found, the Trust had failed to provide her with a written employment agreement meeting the statutory minimum requirements that include such advice. Indeed, Ms Smith's evidence in support of her application goes further and identifies the person with whom she spoke at the Mediation Service but says that this person, who appears to have been a receptionist, did not advise her to seek legal assistance and simply helped her to recover wages and holiday pay. The Authority appears to have decided, contrary to Ms Smith's evidence but without the support of any other evidence to the contrary, that she must have known of the 90-day limit.

- [23] At paragraph 29 of its determination, the Authority found:

I am similarly satisfied that, had she raised her concern, she would have been informed by the Mediation Service that, amongst other things, she had 90-days within which to raise the matter with her employer. If she did not raise her concerns with the Mediation Service, at the same time she successfully obtained its intervention in respect of outstanding wages and holiday pay, it is – I find – because she did not believe herself to have been dismissed. I am therefore satisfied that, in all probability Ms Smith elected to leave the Trust and seek employment elsewhere.

- [24] Again, these conclusions appear to be contrary to Ms Smith's evidence that the Authority had before it. The conclusions were unsupported by any contrary evidence so that the Authority has simply assumed, no doubt invited by submissions filed by the Trust, that Ms Smith's evidence was wrong.

- [25] Similarly, at paragraph 30 of its determination, the Authority concluded:

The credibility of Ms Smith's claim that she was entirely dependent on a non-existent employment agreement is further weakened by the admission at par. 16 of her statement that, "Around August (2003) Mihi and I went to Napier to obtain pamphlets and advice for employment contracts to be prepared for the office and future staff." As she had been pressing for an employment agreement, I am satisfied those pamphlets would also have provided Ms Smith with some understanding as to her employment rights, including in respect of personal grievances.

[26] Again it seems that the Authority has made some significant leaps of reasoning in the absence of evidence to contradict Ms Smith's but without having either seen or heard the applicant or having tested her evidence before disbelieving it and relying on an hypothesis.

[27] Finally, at paragraph 31 of the determination the Authority found:

My balance of probabilities conclusion is strengthened by the fact that a standard employment agreement for United Fruit Packers Limited, with whom Ms Smith says she started employment in March 2005, plainly advises of an employee's obligation to raise a grievance within 90-days If, as Ms Smith claims, she was ignorant of her rights because of the absence of an employment agreement with the respondent, it is reasonable to expect that – having read her new individual employment agreement – Ms Smith would then have moved sooner, not 6 months later, to pursue her personal grievance.

[28] It appears – and I accept – that the Authority had before it Ms Smith's subsequent employment agreement with United Fruit Packers Limited and that this contained advice of the 90-day period for taking up personal grievances in or after that employment. However it does not necessarily follow, as the Authority found, that Ms Smith would therefore have known of the limitation period in respect of her employment with the Trust and therefore moved more swiftly to bring her personal grievance forward. Although that may have been the position, that conclusion was speculative on the part of the Authority whose investigation extended only to reading the papers that the parties had filed and not to interviewing them or anyone else.

[29] For the foregoing reasons, I am satisfied that Ms Smith has meritorious arguments and submissions about the correctness of the Authority's determination and dismissal on preliminary procedural grounds of her personal grievance. She has satisfied the "merits" consideration of this application for leave.

[30] One relevant factor in the exercise of the Court's discretion is that the Trust failed in its statutory duty to provide a written employment agreement. Irrespective of whether this failure was causative of Ms Smith's own failure to take up her grievance within time (that is a disputed question), it is not in the interests of justice that an employer should both breach its statutory obligation and then be able to oppose an employee's application for leave on grounds that rely on that breach. Although that is not determinative of the question, it is a factor in Ms Smith's favour.

[31] Addressing the relevant criteria for granting leave to challenge out of time, I conclude:

The reason for the omission has been explained by Ms Smith. It is principally a human and systems failure in the office of her solicitors rather than any omission on her own part. She has satisfied me that she took active and timely steps to challenge the Authority's determination.

The length of the delay (40 days) is more gross than minor but is reasonably explicable in terms of the steps that Ms Smith took and the failures on the part of her solicitors.

Although I accept that the Trust genuinely considers that it is and will be prejudiced by the delay, and even that it will face additional hardship, what is relevant is prejudice or hardship that would not have been experienced had the challenge been brought within time. The Trust's grounds of prejudice and hardship do not fall into that category. They are prejudice and hardship that would have been as attributable to the bringing of a timely appeal as they are to a delayed one. This is a neutral factor.

As to the effect on rights and liabilities of any persons, I accept that precious funds that might otherwise be spent on the Trust's health objectives may have to be employed in defending litigation. On the other hand, no defendant wishes to expend its resources on legal costs in proceedings such as these and many claims are able to be and are brought against employers who perform valuable social services with limited funding. The injustice to the intending plaintiff of not being able to have her case considered on its merits must be weighed against these effects on the Trust and its beneficiaries. That balanced is likewise in equipoise in this case.

There are no remarkable events subsequent to the application for leave being made that would warrant my discretion being exercised against the intending plaintiff.

Finally, the merits of the case cannot be said to be either entirely or even so strongly with the Trust that leave should be refused. It is strongly arguable that the Authority's conclusions adverse to Ms Smith have been reached not merely against the weight of the evidence but, in some respects, against all of the evidence put before the Authority and in the absence of any contrary evidence. The Authority is required statutorily to comply with the principles of natural justice. The making of credibility findings against a party/witness in that person's absence and on assumptions rather than evidence, is not compliance with the principles of natural justice.

[32] I grant leave to challenge the Authority's determination out of time and extend the time for filing the challenge accordingly. The draft statement of claim filed with the application for leave will henceforth be treated as the plaintiff's statement of claim and the defendant may have 30 days within which to file a statement of defence.

[33] I reserve costs on the application.

[34] After the statement of defence is filed, the Registrar should arrange for this case to be called over for the allocation of a fixture. All parties are located in the Hawke's Bay region and the case should be set down for hearing on the next available occasion when the Court is there on circuit.

[35] I make a direction to further mediation that should be undertaken as soon as possible. Although the case was initially the subject of unsuccessful mediation in early 2006, Ms Smith's counsel has advised me that her concern in pursuing this litigation is not so much the monetary relief she seeks, but a vindication of her position with her former employer. Such an attitude to employment litigation strongly indicates that mediation may be the more appropriate dispute resolution mechanism than a court hearing that may, potentially and at significant cost to the parties, see the case remitted to the Employment Relations Authority with the possibility of fresh rights of appeal.

[36] Counsel should keep the Registrar informed of the outcome of further mediation as soon as that is known.

GL Colgan
Chief Judge

Judgment signed at 3.30 pm on Friday 9 March 2007

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