Employment Court of New Zealand

Tamarua v Toll Tranzlink Limited WC 11/06 [2006] NZEmpC 64; [2006] ERNZ 599 (EMC) (11 July 2006)

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Last Updated: 31 March 2011

IN THE EMPLOYMENT COURT WELLINGTON

WC 11/06

WRC 40/05

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

BETWEEN PERO TAMARUA Plaintiff

AND TOLL TRANZLINK LIMITED Defendant

Hearing: Submissions received: 20 February, 2 and 4 March 2006

Judgment: 11 July 2006

JUDGE C M SHAW

[1] In late December 2004 Mr Tamarua was dismissed by Toll Tranzlink Ltd following 18 years of unblemished employment as a forklift operator. He had accepted that he had removed eight jars of marmalade from the rubbish at the Hastings depot where he had observed that damaged stock had been placed. Toll dismissed him on the basis that the relationship of trust and confidence between them had been completely destroyed.

[2] Mr Tamarua brought a personal grievance alleging unjustifiable dismissal and was represented at the Employment Relations Authority investigation by an advocate, Dave McLeod. The Authority's determination was issued on 1 November

2005. On 9 November 2005, Mr McLeod sent a letter to Mr Tamarua which said:

We have received the judgement from the Employment Relations Authority regarding your claim of unjustified dismissal from Toll Tranzlink.

Unfortunately Denis Asher from the Authority did not agree that your dismissal was unjustified, and he has determined that Toll were allowed to dismiss you in the manner they did.

I know this will be disappointing for you and not at all what you or your family had hoped for.

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Please read the attached determination and consider your position. If I may be of further assistance please contact our office.

[3] Mr Tamarua considered the matter and later advised his advocate that he wanted to proceed with a challenge. However, by then the 28 days for filing the challenge had expired. Mr Tamarua signed an application for leave to challenge out of time on 2 December 2005 (a Friday) and it was filed by Mr McLeod on 5

December, the following Monday. This made the application 4 days out of time.

[4] Mr Tamarua's application and a subsequently filed affidavit set out the grounds for leave to be granted. By consent it was heard on the papers. He says that, although the application is out of time from the date of the determination, it is still within the 28 days of his receiving a copy of the determination. He also says that it took him a while to evaluate the contents of the Authority's findings and to decide what to do. He was devastated at the outcome and the financial and other implications of the decision.

[5] In considering this application I have regard to the settled principles which apply.[1]

Reasons for delay

[6] Mr Hannan, for the respondent, made four primary submissions on this point:

• The time for challenge runs from the date of the determination not of notification.

[7] I find that that is a correct interpretation of the law and the application was certainly out of time.

• The reason for delay was not inadvertence by Mr Tamarua's advocate or at least not sufficiently so to allow Mr Tamarua to bring his challenge out of time.

[8] Mr McLeod made no submissions on this point but the letter he sent to Mr Tamarua following the determination is, in my judgment, clear evidence that he failed to advise his client of the timeframe within which he had to have a challenge filed. The letter makes no mention of the time by which Mr Tamarua had to consider his position and, on the evidence before the Court, no other advice was given to him.

[9] In the circumstances of this case I find that the relatively short delay in filing the challenge is explicable. Certainly once he

received instructions, Mr McLeod acted without delay but it was his failure to advise Mr Tamarua in the first place of the time constraint that reasonably explains the delay.

- There was no reason given for the omission to bring the challenge in time other than his devastation at losing his personal grievance.

[10] I agree with Mr Hannan's submission that an applicant cannot justify delay by relying on his disappointment or upset caused by the unfavourable decision unless there is corroborating medical or other evidence. But, in this case, the fact that Mr Tamarua was not advised at the outset of the need for urgency explains the delay sufficiently.

• Late filing of affidavit.

[11] The affidavit in support of the challenge was filed late, in fact not until 27

February 2006. Mr Hannan relied on *Stevenson v Hato Paora College* as authority for the proposition that the Court should take into account the applicant's delay in filing an affidavit in support. However, the facts in the *Stevenson* case were completely different. Counsel sought to file it on the day of the hearing but the problem with the affidavit in that case was not the delay in filing it, but that counsel for the respondent was its author. The issue in *Stevenson* was whether the affidavit could be read at all. It was not a factor in the exercise of the Court's discretion about delay. The delay that is the subject of inquiry in an application for leave to challenge out of time is the delay in bringing the challenge, not in the filing of affidavits.

[12] I conclude that the delay in the present case was minimal and explicable. Once discovered, Mr McLeod moved with commendable speed to file the present application.

Merits of the case

[13] Mr Hannan submitted that this is not a marginal case but a simple case of theft which was admitted by Mr Tamarua. Therefore it does not have sufficient merit to warrant leave being granted.

[14] In a brief memorandum, Mr McLeod submitted that the Authority erred in law because it did not apply a proper interpretation of s103A of the Employment Relations Act 2000.

[15] The relevant parts of the Employment Relations Authority's determination read:

... because a single outbreak of dishonest behaviour may be so destructive of the relationship of trust and confidence between the employee and the employer (see Barratt v Effem Foods Ltd, *unreported, Goddard CJ, 21*

September 1993, WEC 24/93), I am satisfied the applicant was justifiably

dismissed in terms of the justification test provided by s.103A of the Act ...

[16] The Authority then sets out the reasons for the determination. In summary these were that the company's position was clearly that staff would not remove customer product whether they believe it is destined for the rubbish or otherwise without appropriate authority; Mr Tamarua had no authority to take jars of jam and could not point to any authority or evidence for his belief that he could legitimately remove the product destined to be dumped; he was clearly informed of the company's policy and was equally aware of its practice; and should have known that unauthorised removal of customer product can and did result in staff being dismissed.

[17] The Authority concluded:

Objectively measured, as required by s.103A of the Act, I am satisfied that the employer's action and how it acted were open to it, in all the circumstances at the time the dismissal occurred, as a fair and reasonable employer.

[18] Since that determination, the Employment Court has examined the test for justification in some depth in *Air New Zealand Ltd v Hudson*[2]. It was held in that case that the effect of s103A is to separate out the employer's actions for evaluation by the Authority or the Court against the specified objective standard of what a fair and reasonable employer would have done in the circumstances.

[19] The approach taken by the Authority in Mr Tamarua's case differed from this test in a subtle but very important way. Its finding that the employer's action was one open to it as a fair and reasonable employer is virtually the same as the test for unjustified dismissal applied by the Court of Appeal in *W&H Newspapers v Oram*[3].

This focused on whether the employer's actions were open to it as a fair and reasonable employer.

[20] In the present case, In spite of the Authority stating that this was an objective test, it is questionable whether it actually stood back and judged the employer's actions from the standpoint of whether a fair and reasonable employer would have acted in the same way. The Authority did not have the benefit of the *Hudson* judgment when it reached its decision.

[21] In a case such as this where a single act against company policy has led to dismissal, the change in the test for justification introduced by s103A could arguably lead to a different result. I hold that there are sufficient merits to warrant a challenge to the Authority's determination.

Prejudice to the applicant

[22] Mr Hannan's main point on prejudice is that, since the application for leave to challenge was filed, the Authority has heard and determined a costs application and ordered Mr Tamarua to pay $1,500 towards the costs of the successful employer. He has not paid that amount but has produced financial records in support of his inability to pay even this modest sum.

[23] Mr Tamarua has applied to the Authority for a stay of execution of the order. In the light of Mr Tamarua's evidence as to his straitened financial position, I do not regard the outstanding order to be a factor against the exercise of the discretion in the light of the other factors in favour of it.

Decision

[24] Mr Tamarua exceeded the statutory time limit for filing the challenge by 4 days but I find that the delay was, firstly, so short as to be regarded as minimal and, secondly, in the circumstances was explicable. More importantly, I find that there is merit in his challenge. He has an arguable case that the wrong test for justification was applied by the Authority. He therefore has a realistic prospect of success on the challenge which he should not be denied by virtue of a very short delay in filing the challenge. It is in the interests of justice that he be granted leave.

[25] The application is granted. Mr Tamarua now has leave to file his statement of claim. The filing fee will need to be paid before the challenge can be advanced.

The time for filing a statement of defence will run from that date as advised to the defendant by the Registrar.

Costs

[26] In the circumstances these are reserved.

JUDGE

Judgment signed at 3.30 on 11 July 2006

Solicitors:

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[1] *Stevenson v Hato Paora College* [2002] NZEmpC 39; [2002] 2 ERNZ 103
[2] Unreported, Shaw J, 30 May 2006, AC 30/06
[3] [2001] NZCA 142; [2000] 2 ERNZ 448
