Employment Court of New Zealand

Trans Otway Limited v Hall [2010] NZEmpC 76 (16 June 2010)

Last Updated: 23 June 2010

IN THE EMPLOYMENT COURT CHRISTCHURCH

[2010] NZEMPC76

CRC 3/10

IN THE MATTER OF an application to extend time within which to commence proceedings

AND

IN THE MATTER OF an application for a stay of proceedings

BETWEEN TRANS OTWAY LIMITED Applicant

AND JOHN CHARLES HALL Respondent

Hearing: on the papers - affidavits filed 22 January, 19 April, 4 May and 12

May 2010; submssions filed 21 May and 26 May 2010

Appearances: Damian Chesterman, counsel for the applicant

David Clark, counsel for the respondent

Judgment: 16 June 2010

INTERLOCUTORY JUDGMENT OF JUDGE A A COUCH

[1] This judgment decides two applications. The first is for an extension of time within which to commence a challenge to a determination of the Employment Relations Authority. The second is for a stay of proceedings pending the outcome of that challenge.

[2] The applicant employed the respondent as a driver from January 2007 until he was dismissed in September 2008. The dismissal was said to be on grounds of redundancy. The respondent pursued a personal grievance that he had been

unjustifiably dismissed. On 14 December 2009, the Employment Relations

Authority gave its determination[1] upholding the respondent's claims and awarding him remedies totalling $19,000 together with a contribution to his costs of $2,500.

[3] The applicant decided to challenge the Authority's determination. The right to do so is conferred by s179 of the Employment Relations Act 2000 (the Act), the operative parts of which are:

179 Challenges to determinations of Authority

(1) A party to a matter before the Authority who is dissatisfied with the determination of the Authority or any part of that determination may elect to have the matter heard by the court.

(2) Every election under this section must be made in the prescribed manner within 28 days after the date of the

determination of the Authority.

[4] Directly applying the words of s179(2), the time for filing a challenge as of right expired on 11 January 2010. The applicant took no steps within that time.

[5] On 22 January 2010, counsel for the applicant filed a document entitled "Application for leave Regulation 13A Employment Court Regulations 2000" accompanied by a statement of claim. Two orders were sought:

a) An order "Granting leave to the Applicant to make an election out of time" which I have treated as an application for an order extending time pursuant to s219 of the Act; or

b) "In the alternative, an order that the Statement of Claim annexed to this application is filed within the 28 day period prescribed by s179(2) in conjunction with regulation 74B(2) of the Employment Court Regulations 2000."

[6] On 9 April 2010, counsel for the applicant filed an application for stay of proceedings to prevent the respondent enforcing the orders made by the Authority until it had been decided whether the proposed challenge could proceed and, if so, until that challenge had been decided.

[7] The respondent opposes the making of any of the orders sought by the applicant.

Were proceedings commenced in time?

[8] Logically, the first issue is whether the statement of claim was filed within the time allowed by s179. Mr Chesterman submits that it was. This submission relies entirely on the proposition that regulation 74B(2) applies. Regulation 74B as a whole is:

74B What happens to timing in Christmas period

(1) This regulation applies when the period of time within which an act must be done is calculated.

(2) The 12 days starting with 25 December in one year and ending with the close of 5 January in the next year are not counted.

(3) Subclause (2) is subject to—

(a) an express provision in any Act; or

(b) an express provision in these regulations; or

(c) a direction of the court.

[9] In *Vice-Chancellor of Lincoln University v Stewart*[2], I considered a similar argument. In that case, I found that s74B(2) does not apply to the 28 day time period prescribed by s179(2). That was for two principal reasons. Firstly, subclause (3) of the regulation makes the operative provision in subclause (2) subject to "an express provision in any Act". Section 179(2) is an express provision of the Act. As such, it prevails over regulation 74B by operation of the regulation itself. Secondly, the regulations are made pursuant to the power granted by s237 of the Act. That power does not authorise the making of regulations which modify or override provisions of the Act.

[10] Mr Chesterman effectively submits that the *Lincoln University* case was wrongly decided. In doing so, he relies on three propositions. Firstly, he refers to the decision in *Shepherd v Glenview Electrical Services Limited*[3] that the Christmas and New Year holiday period could not be disregarded when calculating the 28 day period in s179(2) and submits that the purpose of regulation 74B, which was made

shortly after that decision, was to reverse its effect. He called in aid s5(1) of the Interpretation Act 1999 which provides "The meaning of an enactment must be ascertained from its text and in the light of its purpose."

[11] This was one of the submissions relied on by counsel for the plaintiff in the *Lincoln University* case – see paragraph [14] of my decision where I discussed and rejected it. I see no reason to take a different view now.

[12] Mr Chesterman's second submission is:

If the approach of the Court in *Vice-Chancellor of Lincoln University v Stewart* is correct, it is submitted that the only way in which r 74B(2) could ever apply is if the relevant statutory provision expressly provides that it applies. This proposition is untenable, given that 74B applies to any enactment, including primary legislation enacted prior to the regulation coming into existence.

[13] This appears to proceed on a misunderstanding of subclause (3) of regulation

74B. Rather than making the operation of subclause (2) dependant on there being an express provision in legislation, as Mr

Chesterman suggests, it actually operates the other way around. Where the operation of subclause (2) would be inconsistent with legislation or a direction of the Court, subclause (3) negates or limits the effect subclause (2) would otherwise have. It follows that the absurdity suggested by Mr Chesterman does not arise.

[14] Mr Chesterman's third submission is:

It is further submitted that there is no conflict between the provisions of s179 and r 74B(3), as there is nothing on the face of s179 which expressly states that no variation of that time limit is permitted. It simply states what the time limit is.

[15] This submission also proceeds on a misunderstanding, in this case what is meant by the term "an express provision in any Act". What it contemplates is a provision of an enactment which is "express" in the sense of being positively stated as opposed to implicit. Section 179(2) requires that "every" election "must" be made within the 28 day period. That wording leaves no room for variation. It may be

contrasted with expressions used in the regulations such as "as soon as practicable"[4] and "without delay"[5], which are less precise and whose application will depend on the circumstances.

[16] I do not accept Mr Chesterman's overall submission that the statement of claim in this case was filed within time.

Should time be extended?

[17] In the event that the statement of claim is found to have been filed out of time, the applicant seeks an extension of time. The Court's jurisdiction to extend time in circumstances such as this is to be found in s219 of the Act. It confers a general discretion to extend time but, like all discretions, it must be exercised judicially and in accordance with established principles.

[18] The principles guiding the exercise of that discretion are well known and are discussed in decisions such as *Stevenson v Hato Paora College Trust Board*[6]. The fundamental principle which must guide the Court is the justice of the case. In assessing whether the justice of any particular case requires that time be extended, the Court will take into account a number of factors including the length of the delay, the reason for the delay, the apparent merits of the proposed challenge and any

prejudice which might result. In this case, I am also invited to take into account the conduct of the parties since the determination was given.

[19] The length of the delay in this case was 11 days. That is significant.

[20] The reason given for the delay is that counsel incorrectly believed that regulation 74B(2) applied. Had that regulation applied, the proceeding would have been commenced in time. In that sense, the explanation covers the whole of the period of delay. I accept that the mistake was genuine and that the applicant itself did not cause or contribute to it. On the other hand, it is a mistake which ought not

have been made. The wording of regulation 74B(3) is clear and is reinforced by a reported decision of the Court.

[21] Mr Chesterman sought to rely on the view I expressed in the *Lincoln University* case that the impediments to conducting legal business during the Christmas and New Year period mitigate in favour of an extension of time. That was in the context of the explanation for delay being that counsel was unavailable during the holiday period. In this case, where the explanation is legal error by counsel, those considerations do not apply.

[22] As to the merits of the proposed challenge, Mr Chesterman set out five reasons why he submitted the Authority was in error in assessing remedies. Four of those relate to issues of fact which the Authority has directly or implicitly dealt with in its determination and it is not suggested any fresh evidence would be available. The fifth issue raised is whether the Authority ought to have taken into account that, as a result of his dismissal, the respondent received payment under an insurance policy. That is a question of law of some potential significance and which may be novel.

[23] The only other specific issue said to go to the merits of the proposed challenge is whether there was evidence on which the Authority could have reached its conclusion that the redundancy of the respondent was not genuine. On the face of the determination, this ground of challenge is difficult to sustain as the Authority discussed in some detail the evidence which led to is conclusion. Again, it is not suggested that any further evidence would be available.

[24] Overall, the merits of the proposed challenge appear to be distinctly limited.

[25] In his submissions, Mr Clark does not suggest that the respondent would be specifically prejudiced in any way by granting the extension of time sought by the applicant. That is responsible and realistic. I do take into account, however, the inevitable consequence of delay that the respondent was allowed to believe for 11 days after the time for filing a challenge had expired that the Authority's determination in his favour was final. I also take into account that a de novo

challenge will put remedies at large and may give the respondent an opportunity to seek greater or additional remedies. In

particular, it would give the respondent an opportunity to seek interest on the award of compensation.

[26] The principal ground of opposition advanced on behalf of the respondent is that the applicant has behaved inequitably since the Authority's determination was given. Specifically, it is alleged that the applicant was involved in the intimidation of a man who gave evidence for the respondent to the Authority.

[27] Mr Clark submitted that a party applying for an extension of time is seeking an indulgence from the Court for that party's failing and that all the circumstances of the case should be taken into account by the Court in deciding whether to grant the application. Although the use of the term "indulgence" is perhaps a little dated, these propositions are amply supported by authority. I note, in particular, the often quoted statement of Richmond J in *Avery v No 2 Public Service Appeal Board*[7]

When once an appellant allows the time for appealing to go by then his position suffers a radical change. Whereas previously he was in a position to appeal as of right, he now becomes an applicant for a grant of indulgence by the Court. The onus rests upon him to satisfy the Court that in all the circumstances the justice of the case requires that he be given an opportunity to attack the judgment from which he wishes to appeal.

[28] Two affidavits were filed on behalf of the respondent relating to an incident which occurred at the Blenheim Showgrounds on 6 February 2010. In response, two affidavits were filed on behalf of the applicant. It is common ground that an altercation took place and that it involved a man who had given evidence for the respondent at the Authority's investigation meeting. It is also common ground that the other protagonist was an employee of the applicant. There was an exchange of angry words regarding the giving of evidence and there were threats of violence but there is a conflict about who said what to whom. The key issue is whether the applicant had anything to do with this conflict occurring. This appears to have been assumed by the respondent's witness on the basis that the other man could only have known what happened during the Authority's investigation if he had been told by

management of the applicant. The other man denies this and says that details of the respondent's personal grievance are common knowledge in the local community.

[29] I gave the parties the opportunity for a hearing which deponents might be cross examined but they declined it. On the evidence available to me, I am unable to reach any firm conclusion about the events described. There is certainly insufficient evidence to find as a fact that the applicant had any involvement in the altercation.

[30] Taking all aspects of the matter into account, I find that the justice of the case requires that the applicant be permitted to challenge the Authority's determination. I record, however, that I have reached this conclusion by a relatively narrow margin.

[31] The statement of claim annexed to the application will be regarded as having been validly filed today. The respondent is directed to file and serve a statement of defence within 30 days after today.

Stay of proceedings

[32] The applicant did not initially seek a stay of proceedings. Rather, it was only after issues of enforcement were discussed in a telephone conference with me on 29

March 2010 that an application was made on 9 April 2010. Initially, the application was said to have been made in reliance on evidence given in the affidavit of Amy Scott filed in support of the application for extension of time and in an affidavit "to be filed". Ms Scott's affidavit contained no evidence relevant to the application for stay and it was only after Mr Clark filed a memorandum drawing attention to the lack of evidence that the affidavit of Carolyn Crisp was filed on 4 May 2010.

[33] It has become common in recent times that applications for a stay of proceedings in this Court are resolved by granting a stay on condition that the applicant pays into Court an amount of money sufficient to satisfy the orders made by the Authority. The respondent in this case is prepared to accept that outcome. The applicant is not and seeks an unconditional stay.

[34] In supporting this position, Mr Chesterman relied entirely on the affidavit of

Ms Crisp. The essential aspects of her evidence are:

Plaintiff's financial position

5. If Trans Otway Limited is unsuccessful on appeal, it will be in a position to pay the award ordered to Mr Hall.

6. However, given the amount ordered is $21,500.00, Trans Otway Limited believes this amount is too onerous to pay until determination of the matter on appeal.

Affect[sic] *on appeal if no stay granted*

7. Further, if Trans Otway Limited is required to pay this money to Mr Hall, it is concerned that if the appeal were to be successful, that he would not be able to repay the sum or to repay the sum in full. This money would then be lost to Trans Otway Limited and the right of appeal would be of little or no effect.

Affect [sic] *on Mr Hall if stay is granted*

8. In Mr Hall's memorandum dated 28 April 2010 in response to Trans Otway Limited's application for stay he does not contend that he would be injuriously affected if a stay were granted.

[35] In the absence of any supporting evidence, these expressions of opinion are of little or no probative value. In particular, it does not assist the Court at all to be told that the applicant "believes this amount is too onerous to pay" without any evidence of the company's financial position. Equally, the bare statement that the applicant is "concerned" that the respondent may not be able to repay the sums involved if the challenge was successful is worthless in the absence of any evidence about the respondent's financial position.

[36] Ironically, the only evidence which assists the applicant's position is contained in the respondent's affidavit which he swore on 12 May 2010. There, he deposes to being in a difficult financial position. He is not working at present and is supported by his wife. They have minimal savings and few assets. The logical inference from this evidence is that any money which might now be paid to the respondent would likely be used to help support him and his family and that he would have difficulty in repaying that money if he was later required to do so.

[37] The stay is granted on the following terms:

a) The stay will take effect immediately.

b) By 4pm on 30 June 2010, the applicant is to pay into Court the sum of

$21,500 to be placed in an interest bearing account pending the outcome of these proceedings. That money is to be disbursed only by order of a Judge.

c. If the applicant fails to make that payment within the time allowed, the stay will lapse.

Costs

[38] Although the applicant has succeeded to an extent in its applications, it has not done so in the terms it sought. The application for extension of time was entirely avoidable and the application for stay of proceedings was granted on the terms proposed by the respondent. I intend to fix costs now and, in these circumstances, I am inclined to order the applicant to pay a contribution to the costs incurred by the respondent. That must, however, take account of the respondent's unsuccessful opposition to the application to extend time on the grounds of alleged intimidation. Counsel are encouraged to agree on costs in relation to the applications. If they are unable to do so, Mr Clark is to file and serve a memorandum within 21 days. Mr Chesterman is then to have a further 14 days to file a memorandum in response.

A A Couch
Judge

Signed at 3.00pm on 16 June 2010

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[1] CA 213/09

[2] [2008] ERNZ 132
[3] [2004] NZEmpC 82; [2004] 2 ERNZ 118

[4] Regulation 12
[5] Regulation 16
[6] [2002] NZEmpC 39; [2002] 2 ERNZ 103

[7] [1973] 2 NZLR 86 (CA)
