Employment Court of New Zealand

Waikato District Health Board v Dent [2015] NZEmpC 72 (26 May 2015)

Last Updated: 29 May 2015

IN THE EMPLOYMENT COURT AUCKLAND

[2015] NZEmpC 72

EMPC 79/2015

IN THE MATTER OF	an application for leave to file challenge out of time
BETWEEN	WAIKATO DISTRICT HEALTH BOARD Applicant
AND	ERIN THERESE DENT Respondent

Hearing:	On papers filed on 1, 14 and 29 April and 11 and 12 May 2015
Appearances:	A Russell, counsel for applicant Respondent in person
Judgment:	26 May 2015

JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] This judgment deals with the Waikato District Health Board's (the Board's) application to challenge out of time the Authority's determination on those matters in which it was unsuccessful at first instance.1 That application is opposed by Ms Dent.

[2] Ms Dent filed her challenge to the Authority's determination within the time allowed by s 179 of the Employment Relations Act 2000 (the Act) to do so (28 days). Although her original statement of claim was deficient and she was required to file and serve an amended statement of claim that complied with the Employment Court Regulations 2000 (the Regulations), that is simply background and the issue for decision now is not affected by it.

[3] The Board filed its statement of defence to Ms Dent's amended statement of claim on 27 March 2015. That was within the time allowed for defending Ms Dent's

1 *Dent v Waikato District Health Board* [2014] NZERA Auckland 526.

challenge but the Board's statement of defence also purported to contain a cross- challenge. By the time this cross-challenge was filed, more than 28 days had elapsed since delivery of the Authority's determination which the Board sought to challenge. In these circumstances, the Board has been required to seek leave to challenge out of time. It says that its grounds for leave include that:

- it mistakenly relied on a previous practice direction of the Court but which direction was revoked about one year ago;
- there is no prejudice or hardship to Ms Dent if the application for leave is granted; and
- the merits of the Board's challenge support the grant of leave.

[4] A brief chronology of relevant events is as follows.

[5] In its determination of Ms Dent's personal grievances issued on 19 December

2014, the Authority found that she was disadvantaged unjustifiably by some impugned actions of the Board but not by others. The Authority also found that Ms Dent was dismissed unjustifiably, but declined to direct her reinstatement. It also refused to make any orders for payment of lost remuneration, although it did make an order for a very modest sum of monetary compensation under s 123(1)(c)(i) of the Act, reflecting a reduction for contributory conduct under s 124.

[6] Ms Dent filed her statement of claim electing a non-de novo challenge on 16

January 2015. On 2 February 2015 the Court issued a Minute requiring her to re- plead her statement of claim because it did not comply with reg 11 of the Regulations. Ms Dent did so on 27 February 2015. By further Minute issued on 3

March 2015 the Court said that although Ms Dent's amended statement of claim still did not comply sufficiently with reg 11, the Board should then plead to that amended statement of claim, having been relieved of that obligation previously.

[7] The Board's statement of defence was filed on 27 March 2015, but on 30

March 2015 the Registry advised that the Board's cross-challenge was out of time.

The Board's application for leave was filed on 1 April 2015 with a supporting affidavit made by its Acting General Manager for Human Resources (Gregory Peploe) and its statement of defence was re-filed as a separate document.

[8] The Board relies on the provisions of both ss 219 and 221 of the Act. Section

221 provides expressly for extensions of time to be granted, whereas s 219 refers to the validation of informal proceedings. I consider that s 221 is the appropriate provision under which to deal with this application for leave.

[9] In deciding the Board's application for leave, I adopt and follow the principles set out in *Pacific Plastic Recyclers Ltd v Foo*2 and *Stevenson v Hato Paora College Trust Board*.3 These were summarised in *Stevenson* as follows:

1. the reason for the omission to bring the case within time;

2. the length of the delay;

3. any prejudice or hardship to any other person;

4. the effect on the rights and liabilities of the parties;

5. subsequent events; and

6. the merits.

[10] Ms Dent's submissions in opposition to the granting of leave are extensive and focus principally on the merits of her own case on a challenge, the alleged errors of the Authority in its determination, and upon the conduct of the Board's representatives leading to her grievances.

[11] Although Ms Dent was successful in one claim of unjustified disadvantage and in her claim that she was dismissed unjustifiably, she was unsuccessful in her

other unjustified disadvantage grievances, and was not reinstated. There were also

2 *Pacific Plastic Recyclers Ltd v Foo* [2002] NZEmpC 64; [2002] 2 ERNZ 75 (EmpC) at [24].

3 *Stevenson v Hato Paora College Trust Board* [2002] NZEmpC 39; [2002] 2 ERNZ 103 (EmpC) at[8].

very substantial remedy reductions for contributory conduct under s 124 of the Act. In this sense, therefore, each party was partially successful in the Authority.

[12] Although accepting Mr Peploe's evidence that he was unaware of the change to the Court's practice direction, which occurred about 10 months before the Board attempted to combine its cross-challenge with a statement of defence out of time so far as the cross-challenge was concerned, that is a surprising state of affairs. It is the more so because, at all material times, the Board was advised and represented by solicitors with substantial experience in employment law and practice. The Court's revocation of the practice direction and its replacement were advertised very

extensively amongst all groups representing persons who practise employment law.4

These included not only lawyers but lay advocates and publicity about the change may also have appeared in professional publications which the Court would expect human resources practitioners to receive and read. The revocation of the previous practice direction was delayed for several months while notification of these changes was made. It is difficult to understand how the Board, which has been involved in a number of employment relations issues leading to litigation (consistently with the size of the Board's workforce), could have been unaware of this change given Mr Peploe's (and I presume the Board's solicitors') awareness of the previous position. That said, however, I accept that what Mr Peploe has admitted was his error was genuine and that there was no attempt by the Board

to take improper advantage of the position.

[13] Ms Dent says that the Board waited for three months after the Authority's determination to pursue a late cross-challenge, and then only after her pleadings were accepted by the Court. Ms Dent says that this is more likely to evidence tactical behaviour than a genuine concern for the fairness of another employee affected by her conduct. I have concluded, however, that the circumstances in which the Board's challenge was late, explain adequately the Board's default. In one sense, decisions about whether to challenge an Authority determination, how and by when,

are all 'tactical' decisions but legitimate ones. I am not persuaded that the Board's

4 For example, http://www.justice.govt.nz/courts/employment-court/practice-notes, and on which website's front page there was a separate and prominent announcement of the revocation.

motives in relation to challenges to the Authority's determination are ulterior ones or

otherwise taken in bad faith.

[14] It may be, as Ms Dent alleges, that the Board's Mr Peploe refused to allow her a reasonable time to respond to allegations which led to her dismissal, which led to the Authority's conclusion that she had been unfairly dismissed. Those questions may be assessed again on the hearing of the challenge to the Authority's determination. As in the Authority, if there is a finding that the Board, through Mr Peploe, acted contrary to s 103A of the Act, then this may sound again in remedies for Ms Dent. I consider it unfair to hold against the Board allegations of Mr Peploe's misconduct as a reason for refusing it leave based on his or the solicitors' procedural ignorance.

[15] Ms Dent makes a stronger point when she says that it is insufficient for Mr Peploe to shoulder all the blame for this omission when, at all material times, the Board was represented by, and presumably acted on the advice of, its lawyers who would be expected to be aware of the statute and the Court's practice directions, even if Mr Peploe was not. Ms Dent is correct that the Board has not covered that issue by affidavit evidence in the same way that Mr Peploe has done, and as the Court would have expected.

[16] Ms Dent also points out that the Board and its solicitors failed to file a pleading on time in the Authority in September 2014 and the Board should, in these circumstances, have been expected to be particularly alert to any further procedural omissions.

[17] Ms Dent has sought to build on her successes by challenging those parts of the determination which went against her. In these circumstances, it may be unjust and inequitable for the Court to consider only part or some of the employment relationship problems between the parties. In other words, the Court will get a better appreciation of the issues affected by Ms Dent's challenge if it can examine the employment relationship holistically, as it will be able to do if leave is granted to the Board permitting it to challenge and therefore to have heard and reconsidered other relevant and inextricably linked events.

[18] I agree with the Board that Ms Dent's situation will not be prejudiced by granting leave. The delay in making the application is not unreasonable in the circumstances. It cannot be said that the Board's challenge is hopeless, although no better assessment of its prospects of success can be made at this early stage.

[19] In all the foregoing circumstances, I consider that the most just course is to extend the time within which the Board may challenge those parts of the Authority's determination set out in its draft statement of claim. That draft will now be the operative statement of claim in the Board's proceeding. Ms Dent may have the period of 30 days from the date of this judgment to file and serve a statement of defence to that statement of claim.

[20] I make a direction that both challenges are henceforth to be dealt with together.

[21] Finally in this regard, the Court is required to determine the nature and extent of the challenges, given that both parties have elected to challenge otherwise than by hearing de novo. Together, the challenges cover almost (but not completely) all the issues that were before the Authority. I consider that it will be difficult and artificial to determine only those particular issues identified by the parties in the absence of any broader consideration of the employment relationship problem between them.

[22] Accordingly, I determine that the challenges are to be heard as if the case were a challenge by hearing de novo. Therefore, it will be incumbent on Ms Dent to establish sufficient cases of unjustified disadvantage and unjustified dismissal before the onus will shift to the Board to justify its impugned acts and omissions under s

103A of the Act.

[23] Further directions to a hearing will be given at a directions conference to be arranged by the Registrar once the pleadings have been concluded and any outstanding interlocutory questions between the parties either resolved or made the subject of particular applications to the Court.

[24] Costs of the application are reserved.

GL Colgan
Chief Judge

Judgment signed at 9 am on Tuesday 26 May 2015