

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 410  
5421125

BETWEEN

PAULINE WISNESKI  
Applicant

A N D

THE HAMILTON  
RESIDENTIAL TRUST  
Respondent

Member of Authority: James Crichton

Representatives: Boris Samujh, Advocate for the Applicant  
Ani Bennett, Counsel for the Respondent

Submissions Received: 19 September 2014 from the Applicant  
15 September 2014 from the Respondent

Date of Determination: 8 October 2014

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**FIRST DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The respondent employer (The Hamilton Residential Trust) applies to the Authority to strike out proceedings brought by the applicant (Ms Wisneski) alleging personal grievance. Ms Wisneski resists the application.

[2] The employment relationship which grounds the personal grievance raised by Ms Wisneski ended in 2010. A Statement of Problem was first filed on 30 May 2013 and there were a number of interventions by my colleague Member Anderson after that date promoting mediation and seeking further and better particulars of the claim.

[3] The Hamilton Residential Trust has always maintained it is at a disadvantage in resisting this claim because of the passage of time and it pointed out in 2013 that after some attempts to get mediation under way in 2010, nothing more had been heard until the filing of the Statement of Problem in May 2013, some three years later.

[4] The matter came on to my list with Member Anderson's retirement and in May of this year, I convened a telephone conference with the parties' representatives and set a generous timetable for the exchange of evidence such that the matter could be heard during the winter of 2014.

[5] On 10 June 2014 I caused an email to be sent to the representatives in which I referred to ... *the continued failure of the applicant to comply with timetables set by the Authority*. This was in the context of a further delay, caused by the illness of the applicant's advocate. The applicant's advocate Mr Samujh filed a medical certificate with the Authority which indicated a return to work date of 16 June 2014, until which date it appeared that there was no prospect of Mr Samujh attending to his practice.

[6] Accordingly, in my email of 10 June 2014, I vacated the hearing date that I had set, vacated the timetable for the exchange of evidence, and directed that *If and when the applicant's advocate files the evidence in this matter, the respondent is to have four calendar weeks thereafter to file its reply*. I then reminded the parties that I was overseas for a period until 20 August 2014.

[7] No evidence for Ms Wisneski was filed over a period of about three months, and on 29 August 2014, counsel for the respondent employer made an application to strike out the proceedings for want of prosecution and for the failure of Ms Wisneski to comply with the timetables variously set by the Authority including the most recent one. An application for full indemnity costs was made at the same time.

[8] After a number of prompts, a response from Mr Samujh was eventually received on 5 September 2014 in which Mr Samujh sought an extension to 1 December 2014 to file and serve Ms Wisneski's brief of evidence in the Authority.

[9] The submissions from Ms Wisneski attach a collection of medical certificates for Mr Samujh which simply record the barest information to the extent that he is unfit for work but provide no detail whatever about why he is unfit or indeed what the prognosis is.

[10] The submission also reminds both the Authority and counsel for the respondent that I had indicated in my 10 June 2014 email that I was overseas for a period which factor was advanced by Mr Samujh as part of the explanation for his failure to keep in touch with the Authority during that period.

[11] The short point was that he maintained that he was still unwell (witness the collection of medical certificates attached) that that medical situation was unforeseen and therefore out of the control of Ms Wisneski, but it was not the case (as suggested by The Hamilton Residential Trust) that Ms Wisneski had refused to file the evidence as directed but rather than she had been prevented from doing that by the illness of her advocate.

[12] Mr Samujh indicated that he was to see an orthopaedic surgeon and the hope was that with surgical intervention he would be fit to attend his practice again by 1 December 2014.

[13] A further submission from The Hamilton Residential Trust was received on 15 September 2014 in which The Hamilton Residential Trust indicates it is *deeply disappointed that the applicant and her counsel have continued to unreasonably delay these proceedings.*

[14] The submission proceeds with the contention that Mr Samujh failed to keep the Authority advised of his medical issues and the contention is made that Mr Samujh did not advise the Authority of his medical incapacity until The Hamilton Residential Trust applied to strike out the proceedings. That cannot be right; my email of 10 June 2014 which pre-dates the application to strike out, makes clear that I was aware of Mr Samujh's medical incapacity at that point.

[15] It is true, as The Hamilton Residential Trust says, that there is little or no medical information available in the parade of medical certificates and all we are told is that Mr Samujh is to see an orthopaedic surgeon.

[16] Moreover, as The Hamilton Residential Trust correctly opines, four years have elapsed since the applicant's employment ended, the statement in reply was filed on 14 March 2014, and despite the proceedings now being on foot, Ms Wisneski has not taken any steps to file her evidence in the Authority.

[17] It is suggested that Mr Samujh is asking for a three month extension, on top of the extensions already granted, to *effectively prepare his case.* But with respect, that is not what Mr Samujh is asking. Mr Samujh is asking for time to recover his health in order that he can file Ms Wisneski's statement of evidence as his contractual obligations to her require.

[18] In that regard, reliance on *Fraser v. Pan Pacific Auto Electronics Limited* [2013] NZERA Auckland 64 is misplaced. That was a case where the Authority declined a deferral to enable a case to be prepared and where there was no suggestion of any medical incapacity.

[19] I accept without reservation there are a number of employment lawyers and employment advocates available and that in principle, Ms Wisneski could obtain different representation.

[20] The Hamilton Residential Trust repeats its submission seeking a strike out of Ms Wisneski's claim or in the alternative a requirement that she file her statement of evidence as soon as possible, whether through Mr Samujh or some other advocate.

[21] A response to those submissions was filed by Ms Wisneski on 19 September 2014. In those submissions, Ms Wisneski denies that the delay was foreseen by her given it was outside her control and therefore the delay cannot be unreasonable as The Hamilton Residential Trust contend.

[22] Ms Wisneski denies she has an obligation to provide evidence of Mr Samujh's health problems in any particularity to the respondent and says it is sufficient that the respondent is advised that Mr Samujh is prevented by ill health from attending to his practice. She suggests that Mr Samujh is entitled to medical privacy.

[23] Ms Wisneski further denies that she is asking for another three months to prepare her case; what she is asking for is for her advocate to get well enough to be able to file her brief of evidence in three months.

[24] Ms Wisneski does not want to try to find another advocate; she has been using Mr Samujh since April 2010 and any change would increase the cost and might not address the delay.

[25] Ms Wisneski denies that a further delay will make it any more difficult for the respondent to resist her claims, but maintains that even if there is further prejudice, that should not entitle The Hamilton Residential Trust to succeed in its strike out application.

[26] Further and finally, I am advised that Mr Samujh is to have specialist surgical intervention from an orthopaedic surgeon on 28 October 2014, that that ought to have a one month recovery time making the 1 December 2014 deadline an achievable one.

### **Determination**

[27] The present applications before the Authority are borne of the frustration that The Hamilton Residential Trust has in being denied the opportunity of resolving this matter one way or the other in an expeditious fashion. In effect, with the subsequent modification from their more recent submission, the Trust is asking for me to either strike out the proceedings for want of prosecution or impose a new deadline which would necessitate Ms Wisneski instructing somebody other than Mr Samujh.

[28] I am not minded to grant either of the applications made by The Hamilton Residential Trust. I am as frustrated as anybody about the continuing delays in attending to this matter but I think it would be an affront to ordinary human decency for the Authority not to give some latitude to an advocate who is unable to fulfil his obligations because he is unwell. If it were simply a case of the advocate failing to observe a timetable without legitimate excuse, that would be quite another thing but here, Mr Samujh is unwell and however inconvenient that may be, the Authority ought to give Mr Samujh some latitude so that he has at least the chance to fulfil his obligations.

[29] An application to strike out proceedings is a draconian step that can only be justified in the most extreme circumstance and I am not persuaded that this is such a circumstance yet.

[30] Nor am I attracted by the suggestion that Ms Wisneski ought to obtain alternative representation immediately. She has persevered with Mr Samujh for over three years and I am satisfied that it is in the interests of both parties and of the Authority, for Mr Samujh to be involved if that is at all possible because the alternative of having Ms Wisneski instruct somebody else is likely to create further delay.

[31] However, those comments ought not to be taken as giving Mr Samujh carte blanc to take whatever time he needs to recover his health. I intend to give Mr Samujh until 1 December 2014 to file Ms Wisneski's brief of evidence but that is the last extension he will be granted. If Ms Wisneski's brief of evidence is not filed

and served by 1 December 2014 then without further application from The Hamilton Residential Trust, I will be directing Ms Wisneski to obtain alternative representation within a short timeframe, failing which I will consider the application to strike out.

[32] For the avoidance of doubt then the orders that I make are as follows:

- (a) Mr Samujh is to have until 1 December 2014 to file and serve his statement of evidence for Ms Wisneski;
- (b) If that material does not come to hand by the date specified, then without further application from The Hamilton Residential Trust I will direct Ms Wisneski to obtain alternative representation within a defined timeframe, failing which I will reconsider The Hamilton Residential Trust's application for a strike out of the proceedings; and
- (c) To enable the last step to take place appropriately, the application by The Hamilton Residential Trust to strike out the proceedings is not dismissed but simply adjourned *sine die*.

[33] It follows from the foregoing orders that I have not been prepared to grant either application of The Hamilton Residential Trust at this juncture but, without further intervention from the Trust, I will reconsider the matter if Ms Wisneski's evidence has not come to hand by 1 December 2014.

[34] I observe that Ms Wisneski could begin the process herself of preparing her account of the evidence she is prepared to swear the truth of, in anticipation of Mr Samujh being able to consider her draft material once his health is better.

James Crichton  
Member of the Employment Relations Authority