IN THE EMPLOYMENT COURT
WELLINGTON

[2014] NZEmpC 212
WRC 29/13

IN THE MATTER OF	an application for leave to file challenge out of time
AND IN THE MATTER	of an application for leave for joinder
BETWEEN	CUDBY AND MEADE LIMITED Applicant
AND	NEW ZEALAND FURNITURE MANUFACTURING AND ASSOCIATED WORKERS' UNION INCORPORATED First Respondent
AND	DAVID STEVENS Second Respondent

Hearing: (on the papers - Court minutes dated 7 April, 11 September and 21 October 2014)

Appearances: H Memelink, representative for the applicant
G Clarke, advocate for the resondents

Judgment: 14 November 2014

JUDGMENT OF JUDGE A D FORD

Background

[1] The Court has before it an application by Cudby and Meade Limited (Cudby & Meade) for leave to challenge out of time a determination of the Employment Relations Authority (the Authority) dated 18 March 2013.[1] The application, which was filed on 23 December 2013, is opposed by the respondents.

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[1] *New Zealand Furniture Manufacturing & Associated Workers' Union Inc v Cudby & Meade Ltd* [2013] NZERA Wellington 27 [Determination under challenge].

[2] The Authority's determination was issued in a proceeding between the New Zealand Furniture Manufacturing & Associated Workers' Union Incorporated (the Union) as first applicant, Mr David Stevens, as second applicant, and Cudby & Meade, as respondent. The applicants in that proceeding had claimed that Cudby & Meade had failed to comply with the terms of a consent determination and that it had also failed to pay Mr Stevens, one of its former employees, holiday pay on the termination of his employment.

[3] The earlier consent determination of the Authority had been issued on 15 September 2009.[2] It followed on from a settlement agreement of the same date signed by a representative of the Union and Mr Harry Memelink, director of Cudby & Meade. The settlement agreement apparently related to a claim that had been brought against Cudby & Meade by the Union relating to various matters including the non-payment of certain wages and the non-payment to the Union of union fees deducted from workers' wages. Under the settlement agreement, Cudby & Meade undertook to remit union fees to the Union at fortnightly intervals and it also agreed to make a payment to Mr Stevens of $2,000. I explain more about the $2,000 payment in [6] below.

[4] In the determination under challenge dated 18 March 2013, the Authority confirmed that Cudby & Meade had failed to comply with the consent determination requiring union fees to be remitted fortnightly to the Union and it recorded that Mr Memelink accepted that union fees totalling $490 were outstanding.[3] Although there was no specific finding by the Authority on the point, it would seem that Cudby & Meade duly paid the $2,000 it had agreed to pay to Mr Stevens.

[5] Apart from finding that Cudby & Meade had failed to pay the Union the sum of $490 payable under the Authority's earlier consent determination, the Authority in the determination under challenge also found that Cudby & Meade had failed to pay Mr Stevens his holiday pay entitlement upon the cessation of his employment.[4] The Authority concluded that the holiday pay owing to Mr Stevens amounted to $6,720.[5]

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2 *New Zealand Furniture Manufacturing & Associated Workers' Union v Cudby & Meade Ltd* WA132/09 unreported.
3 Determination under challenge, above n 1, at [11].
4 At [12].
5 At [13].

In its determination, therefore, the Authority ordered Cudby & Meade to pay $490 to the Union and $6,720 to Mr Stevens on account of his holiday pay. The Union was also awarded filing costs.[6] Mr Clarke acted for both the Union and Mr Stevens. Mr Memelink represented Cudby & Meade.

[6] The Authority's consent determination dated 15 September 2009 is reproduced in its determination of 18 March 2013.[7] As noted above, putting to one side the issue of remittance of union fees, the consent agreement recorded that Cudby & Meade was to pay Mr Stevens the sum of $2,000 under s 123 of the Employment Relations Act (the Act) "for humiliation and injury to feelings". The sum of $2,000 was to be paid over a six-week time frame.

[7] Before the Authority in the present case, Mr Memelink had apparently argued that the payment of $2,000 ordered in the consent determination dated 15 September 2009 was a payment in full and final settlement of all amounts owing to Mr Stevens, including his holiday pay. He also claimed that the company could not afford to pay any holiday pay even if it was now owed. The Authority stated:[8]

> He has referred to an accident that he had in June last year that seriously impacted on his health and ability to work. In addition the sole remaining skilled employee of the company suffered a significant workplace injury in December 2011. That person has been off work for some time, only returning for spasmodic periods. Mr Memelink relies on these difficulties preventing the company from fully operating and the reason for not remitting the union fees.

[8] The Authority rejected Mr Memelink's submissions pointing out that the $2,000 referred to in the settlement agreement "was not about holiday pay" and that, in any event, an employer was not able to contract out of the Holidays Act 2003.[9]

[9] It is not without significance in terms of what has transpired subsequently in this Court that in its determination the Authority also saw fit to make the following observations:

> [4] During the Authority's investigation meeting I requested Mr Memelink to make arrangements to file the wage time and holiday

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6 At [21].
7 At [16].
8 At [17].
9 At [20].

> records for Mr Stevens. He has explained this would take some time. The records have not arrived and he has had since January 2013 to provide them or to make such arrangements for them to be produced. I consider now that he has had plenty of time to provide them and I have decided to proceed without the records.

The application

[10] The grounds specified in the application for leave to file the challenge out of time are stated in these terms:

> 1. At all material times it was apparent the Plaintiff wanted to appeal as an appeal was lodged with the Employment Court as required but the appeal was hand written and was not acceptable to the Employment Court and despite being re handwritten by a third party was still not acceptable.
>
> 2. The director of the Plaintiff was in poor health at the time of the hearing…

[11] The statement of claim filed on 24 December 2013 confirmed that the intended challenge was a non de novo challenge. Although it was not clearly expressed, the challenge appeared to relate only to the holiday pay awarded to Mr Stevens by the Authority. As noted in [7] above, it was claimed by the applicant that the settlement agreement of 15 September 2009 was a full and final settlement under s 150(3)(a) and (b) of the Act and that Mr Stevens was, therefore, unable to subsequently claim holiday pay.

[12] On 13 January 2014, Chief Judge Colgan issued a minute noting that Mr Steven's had not been made a party to the application and if Cudby & Meade intended to challenge those parts of the Authority's determination that affected Mr Stevens then he would need to be named as a party and served. The Chief Judge strongly urged Cudby & Meade to obtain expert representation. That did not happen and Mr Memelink has continued to represent the company.

[13] In his minute, Chief Judge Colgan also detailed the unsatisfactory history of the application for leave to file the challenge out of time. His Honour noted that the original statement of claim filed by Cudby & Meade on 15 April 2013 contained "some barely decipherable handwriting" and it did not comply with the minimum requirements under the Employment Court Regulations 2000. The Registry,

therefore, did not accept the document for filing although the filing fee had been paid. His Honour referred to a series of email exchanges that had passed between the Registrar and Mr Memelink over a period of several months. In the course of that exchange, the Registrar had unsuccessfully attempted to point out the deficiencies in Mr Memelink's pleadings and amended pleadings and he also encouraged Mr Memelink to obtain appropriate legal advice. I do not intend to repeat the chronology detailed in the Chief Judge's minute apart from noting that his Honour accepted that an application for leave and affidavit in support in an acceptable format was eventually filed on 23 December 2013.

Subsequent developments

[14] As noted above, the Union is represented by Mr Graeme Clarke who is its National Secretary. Mr Clarke filed a memorandum in response to the minute of the Chief Judge dated 13 January 2014 in which he noted that Cudby & Meade had made no effort to comply with the order of the Authority regarding the remittance of union fees to the Union, even though it had not challenged that part of the Authority's determination. In relation to Mr Memelink's claim of ill-health, Mr Clarke submitted:

> 5. The union does not accept the grounds given for why he should be allowed to appeal out of time, that Mr Memelink was unwell. The ERA hearing was adjourned to a time consented to by Mr Memelink. While Mr Memelink chose not to appear in person he had a telephone conference link to the hearing. Mr Memelink expressed his views fully and did not allude to any issues in so doing.

[15] In relation to Mr Stevens' holiday pay entitlement, Mr Clarke submitted:

> 6. As I understand what Mr Memelink is saying it is that he entered into a consent determination on 15/09/2009, file number 51690129, that said he should pay Mr Stevens $2,000 in full and final settlement of the matters filed with the ERA.
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> 7. Mr Stevens's final holiday pay was not a matter before the ERA at that time. He resigned his employment after the proceedings that gave rise to the consent determination had been filed. The matters filed with the ERA could not include Mr Stevens's final holiday pay as at the time he was still employed.

[16] On 31 March 2014, I issued a minute to the parties which followed on from a telephone directions conference held that same day. The Court had convened the telephone conference to ascertain whether the parties were agreeable to the application for leave being determined on the papers without a formal hearing. Mr Memelink objected to that suggestion and indicated that he would like to be heard on the matter but he said that he was too ill at that stage to attend Court and it was unlikely that he would be in a fit state to attend Court until June 2014.

[17] The Court requested Mr Memelink to obtain and file a medical report confirming the exact nature of his medical condition and his incapacity. It also ordered him to take steps within seven days of the date of the minute to apply to join Mr Stevens as a party if he intended to act on the earlier advice of Chief Judge Colgan. Both orders were complied with, although the most recent medical certificate provided to the Court was dated 20 February 2014. The certificate itself, which appeared to be a certificate for ACC purposes, confirmed that Mr Memelink was unable to resume any duties at work between 10 February 2014 and 10 May 2014.

[18] One of the other medical reports produced was a report dated 12 September 2013, which recorded that Mr Memelink was "very stressed and depressed over bankruptcy proceedings which are occurring with IRD". On 7 April 2014, the Court sought confirmation from Mr Memelink as to the current status of the IRD's bankruptcy proceedings and confirmation as to whether or not any liquidation action had been taken or threatened against Cudby & Meade. In an affidavit dated 8 May 2014, Mr Memelink confirmed that the Inland Revenue Department (the IRD) had commenced liquidation proceedings against Cudby & Meade but he deposed that he was "well advanced in arranging the money needed to satisfy the debt of the Department for 29th May when this matter is next before the High Court."

[19] For his part, Mr Clarke did not file any opposition to the application by Cudby & Meade to have Mr Stevens joined as second defendant and so, for the purposes of dealing with the application before me, I grant that application and have included Mr Stevens in the intituling as second respondent. The Union continues,

however, to oppose the application for leave to challenge the Authority's determination out of time.

[20] The Court has heard nothing further from either party regarding IRD's claim against Cudby & Meade. On 11 September 2014, the Court issued a further minute referring to the unsatisfactory history of the proceeding and confirmed that it proposed to deal with the out of time application on the papers without a formal hearing. Mr Memelink was ordered to file his submissions within 21 days from 11 September 2014 and Mr Clarke was given 10 days in which to file submissions in reply.

[21] On 21 October 2014, the Court issued a further minute in response to advice from the Registrar that Mr Memelink claimed that he had not received the minute of 11 September 2014. Mr Memelink was given a further eight days (time being of the essence) in which to file his submissions and the Registrar was ordered to serve a hard copy of that minute and the Court's earlier minute of 11 September 2014 on Mr Memelink forthwith.

[22] The Registrar has confirmed that on 29 October 2014 he received an email from Mr Memelink advising that he was unable to download "some attachments" because he has an old computer and could not afford a replacement. Mr Memelink said that he was unable to respond within the eight-day period ordered by the Court and he requested more time, stating: "My friend that is helping with this has just fractures he (sic) hand so down to one finger typing, Can we have more time to compile this info and get it into you".

[23] The Registrar then sought a response from Mr Clarke. Not surprisingly, Mr Clarke objected to any further extension of time and requested that Mr Memelink's application be struck out. The Registrar received two subsequent emails from Mr Memelink dated 4 November and 10 November 2014. Mr Memelink seems to blame his old computer for his ongoing inability to file submissions.

[24] In all the circumstances, I am satisfied that Mr Memelink has had more than adequate time in which to file submissions in support of his application to challenge

out of time and I am not prepared to defer the matter any longer. I now proceed to rule on the application based on the documentary material before the Court.

Discussion

[25] It is well established that this Court has jurisdiction under s 219 of the Employment Relations Act 2000 to make an order extending the 28-day limitation period for filing a challenge to a determination of the Authority. Under that provision the Court has a broad discretion to extend time but, as with all discretions, it must be exercised judicially and in accordance with established principles. The overriding consideration in any given case is the interests of justice. In exercising its discretion, the Court traditionally takes into account a number of factors including the length of the delay, the reasons for the delay, any prejudice resulting from the delay and the apparent merits of the proposed challenge.[10]

[26] In this case the Authority issued its determination on 18 March 2013 meaning that the 28-day limitation prescribed in s 179(2) of the Act for making a challenge expired on 15 April 2013. As Chief Judge Colgan noted in his minute of 13 January 2014, Cudby & Meade purported to file a statement of claim on 15 April 2013 challenging the determination but it was defective and it was never sealed or accepted by the Registry Office.

[27] As noted in [13] above, it was not until 23 December 2013, i.e. more than eight months later, that the application for leave to challenge out of time was filed in an acceptable format. The application was not served on the Union until mid-February 2014. The Union does not claim any specific prejudice as a result of the delay but that does not explain or excuse the inordinate delay on the applicant's part in regularising the pleadings.

[28] An even more significant factor in terms of the established criteria for considering out-of-time challenges, relates to the Court's assessment of the merits of the case. It is not always possible at this early stage of a proceeding for the Court to reach an informed view as to the merits of the proposed challenge. In this particular

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

case, however, I find that it is possible to make such an assessment based on the documentation that is currently before the Court.

[29] The challenge relates to the award made by the Authority to Mr Stevens of $6,720 on account of his holiday pay entitlement. Cudby & Meade claim that the $2,000 payment made to Mr Stevens pursuant to the earlier consent determination of 15 September 2009 was in full and final settlement of all claims Mr Stevens had against the company, including any claim for holiday pay. As noted in [15] above, however, the holiday pay award related to Mr Stevens' final holiday pay upon the cessation of his employment. Mr Stevens was still in employment when the proceedings were issued resulting in the consent determination. Moreover, as noted in [6] above, the consent determination specifically recorded that the sum of $2,000 was a payment made pursuant to s 123 of the Act for "humiliation and injury to feelings".

[30] The Authority was, therefore, correct when it stated that the settlement sum was not about holiday pay and that, in any event, an employer could not contract out of its statutory responsibilities in relation to holiday pay.

Conclusion

[31] For the reasons stated, I have concluded that the proposed challenge has no realistic prospect of success and it would not be in the interests of justice to allow the case to proceed. The plaintiff's application for leave to challenge out of time is dismissed.

[32] As the Union has been represented throughout by its National Secretary and has had minimal involvement in the issues before the Court, I make no order as to costs. The filing fee of $204.44 is to be refunded to Cudby & Meade.

A D Ford
Judge

Judgment signed at 3.15 pm on 14 November 2014