

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2014] NZEmpC 95
ARC 66/12**

IN THE MATTER OF proceedings removed

AND IN THE MATTER of an application for leave to file
 additional evidence

BETWEEN PETER DAVID HALL
 Plaintiff

AND DIONEX PTY LIMITED
 Defendant

Hearing: Following a hearing by telephone conference held at 3.30pm on
 12 June 2014
 (Heard at Auckland)

Appearances: T Drake, counsel for plaintiff
 D Erickson and M King, counsel for defendant

Judgment: 13 June 2014

INTERLOCUTORY JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] This proceeding was removed to the Employment Court from the Employment Relations Authority (Authority) by way of special leave last year.¹

[2] There were four days of hearing in February 2014 but regrettably this proved to be inadequate and new dates, namely 16 and 17 June 2014, were allocated for the conclusion of the evidence and submissions.

[3] Yesterday morning, two working days prior to the reconvened hearing, the plaintiff filed an application for leave to file an additional brief of evidence from Mr Ayers, who is said to be an expert in computer forensics. The defendant opposed the application and an urgent hearing was convened yesterday afternoon to deal with it.

¹ *Hall v Dionex Pty Ltd* [2013] NZEmpC 27, (2013) 10 NZELR 631.

At the conclusion of the hearing I granted the plaintiff's application, adjourned the hearing, made a number of timetabling orders and reserved costs. The following are my reasons for doing so.

[4] The application was opposed by the defendant on two grounds. First, on the basis that the proposed evidence was of little relevance and second on the basis of prejudice. In particular, it was said that the defendant required an opportunity to consider the proposed evidence and decide whether and how it might wish to respond to it, including by recalling one or more of its witnesses who have already given evidence and/or an expert witness.

[5] As Mr Erickson, counsel for the defendant, pointed out, that process could not realistically be completed in the one remaining work day prior to the reconvened hearing. The difficulties that the defendant faced were compounded by the fact that the person who is likely to be best placed to respond to the matters raised in Mr Ayers' proposed brief has now left the defendant's employ and is residing in Australia, although it is not currently known where.

[6] Mr Erickson fairly acknowledges that the issues he raises as to relevance essentially go to the weight that might otherwise be given to Mr Ayers' proposed evidence.

[7] Delay is relevant to the exercise of the Court's discretion. While the application came at a very late stage it appeared that this was largely the result of ongoing difficulties with the plaintiff's financial position, which has recently changed.

[8] I accepted that the proposed evidence was likely to assist the Court in resolving the issues before it, although the extent to which it might do so remains unclear. I also accepted Mr Erickson's submission that the defendant would suffer significant prejudice if the application was granted given the tight timeframes involved and the difficulties it is facing in ascertaining the whereabouts of a potential witness. I was, however, satisfied that any prejudice could be adequately addressed by way of an adjournment and costs (as appropriate). Not surprisingly Mr Drake

acknowledged that he was not in a position to oppose an adjournment in the circumstances.

[9] I was satisfied that it was in the broader interests of justice to grant the plaintiff's application. Leave was accordingly granted to file the additional brief of evidence. The hearing was adjourned to new dates to be fixed by the Registrar in consultation with counsel. As discussed, it may be that additional hearing time will be required, but counsel confirmed that they will liaise with each other and provide the Registrar with a realistic assessment of the likely hearing time required.

[10] The defendant was given 20 working days to file and serve any brief of evidence in reply.

[11] Leave was reserved for either party to apply, on reasonable notice, for any further directions or orders.

[12] I reserved costs at the request of the parties.

Christina Inglis
Judge

Judgment signed at 3.30 pm on 13 June 2014