

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2015] NZEmpC 31  
EMPC 269/2014**

IN THE MATTER OF      an application to enforce a compliance  
order under s 138 of the Employment  
Relations Act 2000

BETWEEN                JUDITH ANN DAVIDSON  
Plaintiff

AND                      STEPHEN ROBERT KELLY  
Defendant

**EMPC 282/2014**

AND IN THE MATTER    of a challenge and an application to have a  
matter heard in the employment Court  
under s 139 of the Employment Relations  
Act 2000

BETWEEN                JUDITH ANN DAVIDSON  
Plaintiff

AND                      STEPHEN ROBERT KELLY  
Defendant

Hearing:                20 February 2015

Appearances:          M Beresford, counsel for plaintiff  
M Locke, counsel for defendant

Judgment:              17 March 2015

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**INTERLOCUTORY JUDGMENT OF JUDGE M E PERKINS**

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[1]      Ms Davidson and Mr Kelly were previously in an employment relationship. This extended from March 2003 until Ms Davidson's employment was terminated in October 2012. They then became embroiled in an employment relationship problem

relating to money allegedly owing by Mr Kelly to Ms Davidson for unpaid salary, unpaid expense reimbursements, unpaid holiday pay and loans which Ms Davidson had apparently made to Mr Kelly over the years and which remained owing. It was debatable whether this latter item formed part of the employment relationship problem or whether it was more properly a civil dispute between them.

[2] On 19 September 2013, Ms Davidson filed an application with the Employment Relations Authority. The total sum which she sought from Mr Kelly amounted to \$1,100,232.73. The matter was referred to a mediator. On 9 December 2013 the parties entered into a complicated deed of settlement which the mediator signed and certified, pursuant to s 149(1)(3) of the Employment Relations Act 2000. The settlement therefore became final and binding between the parties.

[3] The deed contained not only requirements for Mr Kelly to make payments to Ms Davidson in settlement of the employment relationship problem, but also contained complicated provisions relating to a residential property which Ms Davidson occupied but which was owned by a trust of which Mr Kelly was the sole trustee or one of the trustees. These provisions were clearly for the purposes of Ms Davidson being reimbursed for the money which she had advanced over the years to Mr Kelly. The mediated settlement, therefore, was designed to resolve not only the employment relationship dispute but the commercial dispute between the parties.

[4] The deed recorded dates upon which Mr Kelly had to perform his various obligations to Ms Davidson. Before all of his obligations under the deed had expired, Mr Kelly was in default. Ms Davidson therefore applied for and was granted compliance orders by the Employment Relations Authority in respect of obligations requiring payment of money to Ms Davidson which had fallen due.<sup>1</sup> Mr Kelly persisted in his failure to meet those obligations. Ms Davidson applied to the Court for orders for compliance with the Authority's determination.

[5] In addition to the application to this Court, Ms Davidson commenced bankruptcy proceedings against Mr Kelly in the High Court. A mutual withdrawal of the bankruptcy proceedings was negotiated between the parties. Some of the

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<sup>1</sup> *Davidson v Kelly* [2014] NZERA Auckland 77.

correspondence and documents relating to the conditions upon which the bankruptcy proceedings were mutually withdrawn are now before the Court.

[6] Those conditions are argued by Mr Kelly to have varied the terms of the mediated deed of settlement. A requirement upon Mr Kelly to discharge a mortgage over the property Ms Davidson occupied was deleted. Mr Kelly was required to provide securities over other properties owned by him. These were to be additionally secured by caveats placed on those properties by Ms Davidson. The total underlying financial obligations of Mr Kelly to Ms Davidson on the face of the matter may not have been altered by the variations resulting from the withdrawal of the bankruptcy proceedings.

[7] As matters progressed, Mr Kelly continued to renege on his financial obligations to Ms Davidson after the expiry of the time when it could be said that all of his obligations under the mediated settlement had crystallised. A further application was made to the Employment Relations Authority for a compliance order. A further determination was issued by the Authority refusing to make the further compliance orders sought.<sup>2</sup> This was on two grounds. The first was that the Authority Member considered that compliance was now being sought for what was effectively a varied deed of settlement, which could no longer be said to constitute a mediated settlement under s 149 of the Employment Relations Act. Secondly, however, in view of the alterations and the method by which the obligations under the commercial dispute were varied and to be met by Mr Kelly, the Authority Member considered that they were outside her jurisdiction to enforce.

[8] As a result of the refusal to grant Ms Davidson further compliance orders in the determination, she filed a challenge to the Court against the whole of the determination seeking a hearing de novo. She also sought further compliance and enforcement orders.

[9] Having been served with both sets of proceedings, Mr Kelly failed within the time required to file statements of defence. Later he presented statements of defence for filing and has now filed applications for leave to file such statements of defence

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<sup>2</sup> *Davidson v Kelly* [2014] NZERA Auckland 395.

out of time. While it does not specifically say so, the application now made by Mr Kelly is in effect an application pursuant to reg 19(4) of the Employment Court Regulations 2000, seeking leave to defend the proceedings and pursuant to s 221(c) of the Act extending the time within which statements of defence may be filed. The applications are opposed by Ms Davidson.

[10] The principles applying to such applications are now well established. For instance in *Otago Taxis Limited v Strong* Judge Couch enunciated two of the general principles as follows.<sup>3</sup> First, there must be some material on which the Court can exercise its discretion; and the onus lies on the party who has failed to act in time to persuade the Court that leave should be granted. Secondly, the overriding principle is that the discretion of the Court should be exercised according to the overall justice of the case. In that case, Judge Couch referred to his earlier decision in *Peoples v Accident Compensation Corporation*<sup>4</sup> where he relied upon the judgment of Judge Shaw in *Stevenson v Hato Paora College*. That established the following headings he decided to follow:<sup>5</sup>

- 1) The reason for the omission to bring the case within time;
- 2) the length of the delay;
- 3) any prejudicial hardship to any other person;
- 4) the effect on the rights and liabilities of the parties;
- 5) subsequent events;
- 6) the merits of the proposed challenge.

[11] In the present case the first three and the final of those headings would apply, although in this case the last would involve an analysis of the merits of the proposed

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<sup>3</sup> *Otago Taxis Limited v Strong* EmpC Christchurch CC6/07, 2 March 2007 at [17].

<sup>4</sup> *Peoples v Accident Compensation Corporation* EmpC Christchurch CC 3/07, 13 February 2007.

<sup>5</sup> *Stevenson v Hato Paora College Trust Board* [2002] 2 ERNZ 103 at [8].

defences to the applications for compliance and enforcement as well as the challenge.

[12] There is a combination of factors set out by Mr Kelly in his affidavit and Mr Locke in his memorandum of counsel as to why the statements of defence were not filed within time. In his memorandum, Mr Locke has presented factual matters relating to his own inaction on the matter. These should have been dealt with by way of his filing an affidavit and standing down as counsel for the purposes of the present application. However, in order to progress this matter, which is fast developing substantial complications and delays, I have decided to deal with the applications as they stand. Clearly Mr Kelly did not act as promptly as he should have when served with the proceedings. He appears to have delayed instructing Mr Locke to deal with the matter until a point in time when Mr Locke was facing considerable difficulties in his legal practice by virtue of transferring from Nelson to Auckland. While the actions of Mr Kelly and Mr Locke have been the subject of some criticism from Mr Beresford, counsel on behalf of Ms Davidson, I do not understand Mr Beresford to be disputing the veracity of the explanations given for the delay. In the context of a challenge to a determination of the Authority in Mr Kelly's favour, it would be extremely unlikely that Mr Kelly, in such circumstances, would purposefully allow the challenge to go unanswered.

[13] The length of the delay before the statement of defence to the application for compliance was received by the Court was 10 days outside the prescribed period. In respect of the challenge, the period of the delay was six days out of time. Of course in view of the fact that Mr Kelly had not sought leave to defend the proceedings, the statements of defence filed by Mr Locke were accepted by the Registry on a contingent basis (that is, contingent on the outcome of his application for leave).

[14] So far as any prejudicial hardship is concerned, I do not understand Ms Davidson to be alleging any discrete prejudice or hardship arising from the period of delay itself. Nevertheless, this dispute has been proceeding over a considerable period of time, and having reached a mediated settlement, the terms of that settlement are still to be substantially met by Mr Kelly. Ms Davidson has received one cash payment from Mr Kelly. Mr Kelly also appears to have attended to other

non-financial obligations under the settlement, but the substantial portion of Ms Davidson's entitlement is yet to be received by her.

[15] Dealing with the merits of the proposed defences, the complicated dispute between the parties now appears to centre not upon the portions of the deed dealing specifically with the employment relationship issues, but upon how the major commercial settlement can proceed and be effected. While Mr Kelly probably has no real defence to the application for compliance with the first determination of the Authority, the financial liabilities to Ms Davidson have now been substantially muddled by the collateral matters. There is also confusion as to exactly who, or which entity is the registered proprietor of the residential property. The problem which I have on this issue is that there is no evidence before the Court as to the exact position so far as the title is concerned. I was informed by counsel that it appears the parties may have been under a misapprehension as to the true ownership before entering into the mediated settlement deed. The deed itself records that the property is owned by a trust, but on the other hand there is a clause which seems to indicate (in respect of an agreement for sale and purchase which was to be prepared) that Ms Davidson would be the vendor to Mr Kelly. That may indicate that she was the registered proprietor. Reading the deed as a whole, however, it would appear more likely that only after the compliance with clauses rearranging the trustees would Ms Davison be in a position effectively to place herself in the position of vendor. Again there is insufficient evidence before the Court to enable clarity on this issue.

[16] There is also the issue referred to in the second determination of the Authority. This relates to the extent to which variations arising out of the bankruptcy proceedings have so altered the mediated settlement that it could be argued by Mr Kelly that it is no longer enforceable under the provisions of the Employment Relations Act 2000. These were matters strongly emphasised by Mr Locke in his submissions and while, on the face of it, Mr Kelly may be taking an unconscionable position against Ms Davidson in all of this, the fact is that if the mediated settlement no longer applies, then disputes are now being raised by the parties which are well outside the jurisdiction of the Employment Court. It is only by virtue of the fact that the settlement of the commercial dispute between the parties was incorporated into a

mediated settlement also covering employment-related disputes that the Court is even able to consider the applications now made by Ms Davidson.

[17] While I have considerable sympathy for Ms Davidson, I grant Mr Kelly's application seeking leave to defend the proceedings and extending time within which the statements of defence are to be filed. The statements of defence presently before the Court have been accepted for filing on a contingent basis and will now be treated as the pleadings of the defendant in both sets of proceedings. The reasons for granting Mr Kelly's application are that the reasons for the delay have been explained; the length of the delay is in each case, a relatively short period; and it is clear that no prejudice arises to Ms Davidson discretely from that delay. Finally, on the face of it and of course only on an inferential basis at this stage, Mr Kelly has put forward arguable defences. It may well be that when the matter proceeds to a hearing and substantially more evidence is available to the Court relating to the mediated settlement and the proper interpretation to be placed on its clauses that Mr Kelly's defences will not succeed. However, it is not possible on the basis of the evidence presently before the Court to hold that arguable defences are not available to Mr Kelly.

[18] It is obviously in the interests of the parties, particularly of Ms Davidson, that both of these proceedings now proceed as soon as possible to a substantive hearing. However, Mr Kelly has indicated that one of the reasons why he believes this matter has not been resolved between himself and Ms Davidson before now is that independently of the interpretation and other issues arising under the deed of settlement, he has simply not been in a position to afford any of his financial obligation towards Ms Davidson other than those that he has already met. While Ms Davidson denies it, Mr Kelly claims that Ms Davidson has, by her own actions in the matter, frustrated his attempts to realise the equity in the residential property to thereby enable him to complete settlement. It would seem in the circumstances, therefore, that it would be of substantial benefit to both parties to attend a Judicial Settlement Conference. This has the prospect of enabling them to renegotiate a final settlement. If they both agree, then a Judicial Settlement Conference date should be urgently allocated. In view of the nature of the dispute, one day would be appropriate.

[19] Despite the fact that Mr Kelly has been successful in his application for leave to defend and time to file statements of defence, the circumstances are such that Ms Davidson is entitled to costs in respect of Mr Kelly's applications. The quantum of such order for costs is reserved pending the final outcome of the proceedings and will be taken into account in the overall consideration of costs at that time.

M E Perkins  
Judge

Judgment signed at 4 pm on 17 March 2015