

**IN THE EMPLOYMENT COURT
AUCKLAND**

**AC 22/07
AEC 164/95**

IN THE MATTER OF an appeal to a decision of the Employment
Tribunal

AND IN THE MATTER OF an application to strike out proceedings

BETWEEN SHER AFZAL KHAN
Plaintiff

AND MAHMOOD ALAM KHAN
Defendant

Hearing: 7 May 2007
(Heard at Auckland)

Appearances: Sher Afzal Khan, plaintiff
David Ryken, counsel for defendant

Judgment: 7 May 2007

ORAL JUDGMENT OF JUDGE M E PERKINS

[1] This matter arises under the old now repealed Employment Contracts Act 1991. In proceedings before the Employment Tribunal the appellant, Mr Sher Afzal Khan was ordered to pay the respondent in these proceedings along with others, the sum of \$9,504 in lost wages and \$507.24 in holiday pay. Originally there were other parties to the proceedings but I have already dealt in interim decisions with what has happened to those persons.

[2] The remaining respondent is Mr Mahmood Alam Khan who is the applicant in an application before me today and I will come to that in a minute.

[3] As I say a decision of the Employment Tribunal was delivered on 26 July 1995. An appeal against that decision was filed with the Employment Court under

the Employment Contracts Act 1991 on 21 August 1995. Notice of that appeal was not served on Mr Mahmood Alam Khan until 5 June 2006. That substantial delay is really unexplained and in respect of the application, which I am going to come to in a minute, Mr Ryken has indicated that there is now affidavit evidence before me that over the intervening period these parties had contact with each other in respect of other litigation, which would have provided the opportunity for the notice of appeal to be served far earlier than it was.

[4] In any event, many years later, the appeal was served and the Employment Court then came to deal with the matter as it is required to under the expired Act.

[5] Some timetabling was directed and eventually the appeal was called before me on 4 October 2006 when Mr Sher Khan, the appellant, was represented by Mr Herzog. No steps had been taken in the appeal to that point but on that day the respondent in the appeal, the applicant today, appeared and was represented by his brother. It was clear to me on that day that there were substantial difficulties with the appeal proceeding in any event because the requirements for such matters to be placed before the Court under the Employment Contracts Act had not been complied with. Accordingly, I adjourned the matter. I indicated that, before the Court would embark on the reading of the substantial transcript before the Employment Tribunal and embark on the appeal, it would wish to hear preliminary argument on what seemed to me to be some quite substantial impediments to the appeal proceeding.

[6] The main point, which will become apparent from a reading of my minutes of the earlier consideration of the files and the earlier hearings, is that following the Employment Tribunal decision the appellant, Mr Sher Khan, was adjudicated bankrupt. The petition had apparently been presented before the hearing in the Employment Tribunal but the adjudication appears to have taken place after the decision of the Tribunal.

[7] Mr Mahmood Alam Khan, having the benefit of the decision and judgment by the Employment Tribunal that I have mentioned, then filed a proof of debt with the Official Assignee but the debt was never met. Certainly no dividend was ever paid according to what I am now informed.

[8] In any event, the matter came back before me on 9 February 2007. There was not a hearing on that day but simply by that stage there had been an application

made by Mr Mahmood Khan to strike out the appeal and there had been some attempts to serve the appellant. Mr Herzog, who had appeared for the appellant at the earlier hearing, had indicated that he was not authorised to accept service. Indeed, it appeared that he may not have even been instructed at that stage. I gave directions as to how service was to be formalised on the appellant of that application to strike out and how the matter was then to be dealt with by this Court by the setting down of a hearing for the application to strike out. If necessary, the Court could hear the submissions from Mr Herzog that I indicated that I would need to hear in respect of whether this matter could in any event now proceed in view of the complications from the delays, which have occurred and the bankruptcy of Mr Sher Khan.

[9] Service was formalised and affidavits as to such service in compliance with my directions have been filed.

[10] Today, the application to strike out has been set down and Mr Ryken is appearing for Mr Mahmood Alam Khan. No steps of a formal nature whatsoever have been taken before today, in respect of the application to strike out, by Mr Sher Afzal Khan but he has appeared in person this morning. He indicated to me that he has been overseas. On questioning I have ascertained that he has been overseas but only for spasmodic periods of time and I have also ascertained that he has been in contact with his legal counsel who is not present here today. I have no idea as to why Mr Herzog is not here but I can imagine some possible reasons for that.

[11] In any event, there is absolutely no excuse for Mr Sher Khan to appear today and give no explanation as to why he has taken no formal steps in the application to strike out. He indicates to me that he seeks an adjournment but I have declined that because this matter has now been going on for many, many years and it is time for it to be finally disposed of. Mr Khan sought an application for two further days to enable him to file submissions but I am not prepared to grant that because I consider that he has had ample opportunity to formally take steps in respect of the application to strike out and either have counsel represent him, or certainly have submissions presented today.

[12] Mr Ryken has spoken in support of the application to strike out. The grounds are four: The first is that in any event the proceedings are moot. That is because even if the appeal were to proceed it is unlikely that any possible effect could come

from that. The applicant in the application today and the respondent in the appeal has taken no steps whatsoever to enforce the decision of the Employment Tribunal, beyond filing a proof of debt with the Official Assignee. He has indicated that he has no intention to do so. He would in any event, now that the decision is more than 6 years old, need leave to do so, and in view of what has transpired that may not be granted.

[13] Quite apart from that, in July this year, 12 years will have expired since the decision of the Tribunal beyond which period it would not even be possible to apply for leave let alone for it be granted. But in any event Mr Mahmood Khan has indicated that he has no intention whatsoever of taking steps to enforce the decision. In view of the insolvency of the appellant he would probably not be able to do so in any event without having to resurrect the bankruptcy proceedings and get some representation from the Official Assignee. All in all it is practically unlikely that the Court would grant leave for enforcement of that decision of the Tribunal.

[14] The second submission made by Mr Ryken, which is related to the first, is that the proceedings, in light of what I have just said, are now vexatious and frivolous in any event. Under s121 of the Employment Contracts Act 1991 the Court may at any time dismiss any matter before it which it thinks frivolous or trivial and in any such case the order of the Court may be limited to an order on the party bringing the matter before the Court for payment of costs and expenses.

[15] In my view, in all of the circumstances, the attempt by Mr Sher Khan to resurrect his appeal on this matter comes within the category of frivolous and is certainly vexatious.

[16] The third point raised by Mr Ryken relates to Regulation 4(4) of the old Employment Court Regulations in which he submits that in any event there has been a breach of that Regulation and that the appeal has not been brought and served as soon as practicable. Mr Sher Khan apparently indicated when he finally served the appeal many years after the appeal was lodged that he had been unable to find the respondent, Mahmood Alam Khan, to serve him but that has proved to be incorrect upon the affidavit evidence, which has been filed in this matter now.

[17] The final ground is that Mr Sher Khan has failed to comply with the directions for preparation of the appeal. That relates specifically to the directions,

which I gave when Mr Herzog appeared on his behalf before me, when I clearly spelled out what was required in order to have the issues relating to the insolvency and the delay dealt with. No steps whatsoever were taken following that.

[18] As I say, Mr Sher Khan has appeared in person today and sought an adjournment, which I have declined. I have further declined to allow him any further opportunity to file submissions because in my view that would simply be pandering to the vexatious way in which he is trying to now proceed with this matter. He says that in light of that he opposes the application to strike out but makes no submissions. Accordingly, it has been left to me now to determine the matter.

[19] It seems to me that there are substantial impediments in the way of Mr Sher Khan pursuing his appeal. As I say, he was adjudicated bankrupt and I have had no submissions, evidence, or representations as to how he would endeavour to get around that. Even if he proceeded with the appeal, it would be in respect of a debt, which has been extinguished by the insolvency and in any event where the person, in whose favour the debt arises, has indicated that beyond the steps taken in the insolvency he has no intention to enforce. Leave would be required for him to do so now and as I have indicated it would be unlikely that such leave would be granted. In any event, in just over a month's time there would be no prospect of him even being able to apply for such leave.

[20] Accordingly, I agree with Mr Ryken's submissions that the matter is moot, that the attempts to pursue it amount to frivolous proceedings now under s121 of the Employment Contracts Act 1991.

[21] I have serious concerns and doubts as to whether Mr Sher Khan took all steps that he could have taken to have served the appeal on Mr Mahmood Khan and accordingly he did not take steps within a practicable period. Finally, he has totally ignored and acted in breach of the directions, which I gave in any event if the appeal was to proceed unopposed.

[22] Following those directions of course there has been an intervening action by the respondent in the appeal, Mr Mahmood Khan, to finally get rid of this matter once and for all and have the proceedings struck out.

[23] For the reasons, which I have accepted from the submissions of Mr Ryken, and I have enunciated in this decision, it is appropriate that these proceedings now be

brought to an end once and for all. Accordingly, there will be an order striking out the appeal of Mr Sher Khan against Mr Mahmood Khan against the decision of the Employment Tribunal delivered on 26 July 1995.

[24] As I indicated earlier, there were a number of other respondents in his appeal. Those people I understand have never been served with the appeal because some, if not all of them, are no longer resident in New Zealand. There is no point in that appeal proceeding either. But I make no formal directions in respect of the appeal against those respondents. This order relates only against the respondent, Mahmood Alam Khan, who is the applicant in the strike out application today.

Costs

[25] Mr Ryken has properly indicated to the Court today in writing and served a copy on Mr Sher Khan, that the applicant, Mr Mahmood Khan, is in respect of this application, in receipt of a grant of legal aid. Accordingly, because of the trouble that he has been put to by having the appeal served many years after the event and being required to take steps in the appeal effectively to strike it out or if it is not struck out for leave to take steps in the appeal, he should receive an order for costs. He has gone to the trouble of having Mr Ryken represent him. Mr Ryken has filed the application to strike out.

[26] Quite considerable efforts have been needed to have that application for strike out served on Mr Sher Khan, who incidentally has always had an address for service in this Court, which was in the form of a post office box number rather than a residential address. This would seem to me to have been a breach of the rules in any event. But further directions have been necessarily made by me to make an effort to ensure that Mr Sher Khan was served and given notice of the application. Of course he has come along today at the last minute indicating that he has only received the documents recently. That can't possibly be correct in view of the steps, which have been taken.

[27] The point I make is that Mr Mahmood Khan has been put to considerable extra expense in not only having to prepare, file, and argue the application today, but in having Mr Sher Khan served properly because of the elusiveness, which he has demonstrated.

[28] As I say it is appropriate that there should be an order for costs and I make an order that Mr Sher Khan is to pay Mr Mahmood Khan the sum of \$500 together with any reasonable disbursements in respect of the application to strike out, which has been successfully argued today.

M E Perkins
Judge

Oral judgment delivered at 10.05am on Monday 7 May 2007