

**IN THE EMPLOYMENT COURT
AUCKLAND**

**AC 2/07
ARC 66/06**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

AND IN THE MATTER OF an application for leave to file a
statement of defence out of time

BETWEEN JOHN DAVID FISHER
Plaintiff

AND ROY FISHER AND VICTORIA
FISHER
Defendants

Hearing: 1 February 2007
(Heard at Auckland)

Appearances: Mr M Beech and Ms RE Webby, Counsel for Plaintiff
Ms J Tisch, Counsel for Defendants

Judgment: 1 February 2007

INTERLOCUTORY JUDGMENT OF JUDGE ME PERKINS

[1] This is a matter in which the defendants have allowed time to expire for the filing of a statement of defence in a de novo challenge by the plaintiff to a determination of the Employment Relations Authority dated 22 August 2006. The defendants have accordingly filed an application for leave to file a statement of defence out of time. The period of delay amounts to 10 days.

[2] When the time for filing a statement of defence had expired and before the present application was filed, the plaintiff sought to have the matter set down for an undefended hearing. On 6 November 2006 I issued a brief minute directing that the challenge was to be allocated a half-day hearing. Such a hearing was set for today, 1 February 2007.

[3] The defendants subsequently filed the application for leave to file a statement of defence out of time. Accordingly, the hearing for today was then allocated as a hearing for the application for leave.

[4] In a memorandum of counsel for the plaintiff filed yesterday, 31 January 2007, the plaintiff, who has opposed the application for leave up until now, indicated he was no longer continuing with the opposition although he was not prepared to consent. In addition, he sought costs on the application.

[5] In subsequent memoranda filed by both counsel, attention has now been directed to matters of timetabling so that this challenge can proceed to a hearing. The proposed timetabling orders contained in a memorandum of counsel for the defendants is acceptable to counsel for the plaintiff except that formal timetabling orders as to discovery are sought.

[6] It is appropriate that leave be granted to the defendants to file a statement of defence out of time. There is an order accordingly. The statement of defence filed with the application for leave is to be treated as the Court copy.

[7] In accordance with the agreed position on timetabling, the following orders are made:

- (a) The plaintiff is to file all briefs of evidence in this challenge by **20 March 2007**;
- (b) The defendants are to file their briefs of evidence by **27 March 2007**.
- (c) Both plaintiff and defendants are to file and serve sworn lists of documents by **22 February 2007**.
- (d) Counsel are to liaise regarding an agreed bundle of documents.

[8] There are outstanding issues concerning security for costs and the evidence of a witness the defendants were proposing to call who is now deceased. It was agreed with counsel that both of these issues will now be the subject of formal interlocutory applications. Such applications should be filed as soon as possible.

[9] So far as the application for costs by the plaintiff on the present application for leave is concerned, the usual position taken by the Court is that the defaulting applicant should pay costs. In the present case where a period of only 10 days has elapsed, I am not satisfied that the plaintiff's opposition to the application for leave

was appropriate. While contemporaneous civil proceedings appear to have been affected by the delay, no real prejudice has been suffered in this matter by the plaintiff. The defendants have an existing determination of the Employment Relations Authority in their favour. I regard the position taken by the plaintiff, right up until the day before the hearing, to oppose the application for leave as being unreasonable.

[10] Mr Beech submitted that, as an alternative to dealing with costs now, I could reserve them until the proceedings have been determined on their merits. However, in a situation where the period of delay is so short and clearly the result of oversight, and where subsequent information shows an explanation for the delay, the plaintiff should not have continued with his opposition to the defendants filing a statement of defence out of time. Accordingly, I regard this as a situation where it is not appropriate for the opposing party to receive the benefit of an order for costs. Accordingly, there will be no order for costs on the application for leave.

ME Perkins
Judge

Judgment signed at 4.45 pm on Thursday 1 February 2007