IN THE EMPLOYMENT COURT
AUCKLAND

AC 67/06
ARC 50/06

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application to file statement of defence out of time
BETWEEN	LINDA MARGARET BOWLES Plaintiff
AND	RAUKURA HAUORA O TAINUI Defendant

Hearing: 30 November 2006
(Heard at Auckland by telephone conference)

Appearances: Simon Scott, Counsel for Plaintiff
Garry Pollak, Counsel for Defendant

Judgment: 30 November 2006

INTERLOCUTORY JUDGMENT OF JUDGE ME PERKINS

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[1] This is a matter in which the Employment Relations Authority at Auckland issued a determination between the parties dated 13 June 2006. Ms Bowles was disaffected by the determination and has filed a challenge in this Court against the whole of the determination and seeking a hearing de novo. The proceedings were filed in this Court on 11 July 2006.

[2] The defendant employer did not file a statement of defence within the time prescribed in the Employment Court Regulations 2000. On 6 September 2006 counsel for the defendant forwarded a statement of defence for filing and indicated that an application for leave to file the statement of defence out of time would be made. That application and an accompanying affidavit sworn by counsel for the

defendant were filed on 11 October 2006. A notice of intention to appear and oppose the application was filed by counsel for the plaintiff on 26 October 2006. That notice of intention to appear and oppose was not accompanied by any affidavit.

[3] In order to deal with the application for leave, and to avoid the need and cost for counsel for the plaintiff travelling to Auckland from Hamilton for such a short matter, it was agreed that the hearing of the application for leave would be conducted by way of a telephone link between Judge and counsel. Such a hearing took place at 10 am on 30 November 2006.

[4] Mr Harrison has acted as counsel for the defendant in the matter up to this point. He stood down as counsel for the hearing to consider the application for leave. This was on the basis that he has filed an affidavit in support of the application for leave. That was an appropriate step for him to take. In his place, Mr Pollak appeared as counsel for the defendant.

[5] At the outset of the hearing Mr Scott properly conceded that on the basis of previous authorities dealing with this type of issue, his client's opposition to the application for leave would be unlikely to succeed. He therefore agreed that rather than counsel going through the process of making submissions in support of, and in opposition to, the application for leave, the hearing could be shortened. He presented his client's position as being one that, while it did not consent to the application for leave, on the basis of authorities and the circumstances of this matter it could not oppose an order being made.

[6] In view of this concession, properly and fairly made by Mr Scott, there was no need for me to hear further from Mr Pollak.

[7] Unless the delay is substantial and clear prejudice is established, the Employment Court is in a slight difficulty with an application such as this. In this particular case, through oversight on the part of counsel for the defendant, a statement of defence was not filed within the times prescribed under the Regulations. Nevertheless, the defendant intends to oppose the challenge and of course relies upon the successful outcome from the defendant's point of view in the determination of the Employment Relations Authority. Even if the Court refused to grant leave to file a statement of defence, a defended hearing of the challenge would still need to take place. In circumstances such as this the Court, as a matter of overall justice,

could not refuse to allow the defendant to be heard in support of the determination. For the sake of good order, therefore, the Court would prefer that formal pleadings by way of a statement of defence be placed before it by the defendant.

[8] As I say, a different attitude might be taken to the defendant's position if the delay was substantial and there was evidence of real prejudice to the plaintiff as a result of delay. That is not the case here. As I have indicated, no affidavit has been filed in support of the notice of opposition suggesting that any prejudice has been occasioned to the plaintiff.

[9] In view of the circumstances, which I have set out, there will be an order granting leave to the defendant to file a statement of defence. The statement of defence already filed in anticipation of leave being granted can now be treated as the formal statement of defence on behalf of the defendant in this matter. There is no need for the defendant to file a further copy.

[10] Normally in cases such as this, the Court would give consideration to an order for costs against the defaulting defendant. However, in the circumstances of this case it is my view that any order for costs in respect of this interlocutory application should be reserved. There will be an order reserving costs accordingly.

[11] It is now necessary to progress the matter. Counsel have agreed that they will endeavour to resolve further timetabling between themselves and file a consent memorandum. However, if that cannot be achieved, then leave is reserved for either party to apply to the Court for a further telephone timetabling conference with a Judge if that is necessary.

[12] Effectively, the position now reached is that the challenge should advance to a hearing as soon as possible. I am assuming that the parties have undertaken mediation but that is a matter which should be referred to in any memorandum filed or at the telephone conference if that is required.

M E Perkins
Judge

Judgment signed at noon on Thursday 30 November 2006

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