IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2020] NZEmpC 218
EMPC 76/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	EPB LIMITED Plaintiff
AND	OST Defendant

EMPC 114/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for a non-publication order
BETWEEN	OST Plaintiff
AND	EPB LIMITED Defendant

EMPC 199/2019

IN THE MATTER OF	an application for leave to extend time to file a challenge to a determination of the Employment Relations Authority
BETWEEN	OST Applicant
AND	EPB LIMITED Respondent

Hearing:	On the papers
Appearances:	J Pietras, counsel for EPB Limited P McKenzie-Bridle, counsel for OST
Judgment:	4 December 2020

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] Although the challenges that were brought in respect of a substantive determination, and a costs determination,[1] of the Employment Relations Authority (the Authority) have been discontinued, there are two remaining issues.

[2] The first relates to whether an order prohibiting publication of the parties' names and identifying details should be made about the Court proceedings; and if leave is granted for a belated challenge, a similar order should be made with regard to the Authority's substantive determination. EPB Limited (EPB) strongly asserts that there should be non-publication orders in the Court proceedings for several reasons, including the assertion that the employment relationship problem flowed from differences between one of the directors of the employer and the employee in their personal relationships, and that non-publication is justified to avoid disclosure of salacious and personal information. It opposes the application for leave to challenge the Authority's substantive determination. If leave is granted it will presumably defend the challenge for the same reasons.

[3] The second issue relates to costs following the filing of EPB's discontinuance. Here, the issue is one of quantum.

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[1] *OST v EPB Ltd* [2019] NZERA 133 (Member Loftus) (substantive); *OST v EPB Ltd* [2019] NZERA 181 (costs).

Procedural background

[4] From April 2014 until December 2016, FRQ, a director and shareholder of EPB, and OST were in a personal relationship, although not continuously in this period.

[5] From 28 July 2016 until 7 July 2017 – as found by the Authority in its substantive determination – OST was employed by EPB as a receptionist.[2]

[6] Following the conclusion of the employment, there were a multiplicity of procedural steps. Initially, OST filed proceedings against FRQ in the Family Court on 10 July 2017, but these were withdrawn on 15 August 2017.

[7] On 12 July 2017, a personal grievance was raised asserting a constructive dismissal. Matters were unable to be resolved between the parties, and eventually an employment relationship problem was considered by the Authority. The investigation meeting took place during June and July 2018, with the substantive determination being issued on 7 March 2019. In its determination, the Authority said that OST had asked for the identity of the parties to be suppressed, citing the provisions of the Family Court Act 1980 (FCA). The Authority concluded that the provisions of that Act meant such an order had to be made, since reference was contained in the determination to the proceedings which had come before the Family Court.

[8] On 21 March 2019, EPB brought a challenge to the Authority's substantive determination as to liability and remedies; this was discontinued on 17 April 2019.

[9] On 24 April 2019, OST brought a challenge against the Authority's cost determination; this was discontinued on 6 June 2019.

[10] On 11 June 2019, EPB filed an application for a permanent non-publication order with regard to the proceedings in the Employment Court. FRQ asserts that such an order is necessary to mirror the order made by the Authority. In light of his and OST's personal history, this application is strongly opposed by OST.

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2 *OST v EPB Ltd* (substantive), above n 1, at [34].

[11] On 25 June 2019, OST filed an application for leave extending time to challenge the Authority's orders as to non-publication. She asserted there had been a misunderstanding in the Authority; her issue with regard to the Family Court proceedings related to the question of whether material filed in that context was admissible, not that the existence of those proceedings meant there needed to be an order of non-publication. FRQ strongly opposes both the grant of leave and a revocation of the non-publication order in the Authority's determination.

[12] In the materials that were filed for the purposes of the issues relating to non-publication, the Court was informed by OST that an application would be made to the Family Court, under s 11B of the FCA, seeking leave for publication of information relating to the proceedings in that Court. That application was made.

[13] In a minute dated 20 August 2019, the Court indicated that it would be preferable for the Family Court to first consider the application before the Court considered the matter further. The Family Court has now issued its judgment on the application and the Court can now proceed to consider the applications pending before it.[3]

First issue: non-publication

[14] While the costs issue can be the subject of a decision of the Court at this stage, EPB's application to the Court for permanent orders prohibiting publication cannot be treated in isolation from OST's application for leave extending the time for commencement of a challenge. The reason for this is that if the application for leave is granted, OST would then need to file a statement of claim commencing the challenge (she has filed a draft document in support of the application at this stage). The filing of the statement of claim would then entitle EPB to file a statement of defence and require the challenge to be heard. Any decision by the Court on EPB's application for permanent prohibition on publication at this stage would, therefore, effectively pre-empt the outcome of the challenge. Whichever party succeeded on EPB's application to the Court, the outcome would render either the challenge or its

[3] For reasons which are apparent from this judgment, it is appropriate at this stage for the citation of the Family Court's judgment to not be included.

defence nugatory. Also, to avoid any chance of conflicting positions being reached, it is more appropriate for EPB's application and a challenge being heard together. For these reasons I first consider the application for leave extending the time for OST to file a non-de novo challenge.

Principles applying on application for leave to extend time to file challenge

[15] The principles applying to such applications are well established in this Court. Section 219 of the Employment Relations Act 2000 (the Act) gives the Court jurisdiction to make such an extension. The relevant criteria have been established in a number of decisions of the Court. For example, in *An Employee v An Employer* the following criteria were adopted:[4]

(a) the reasons for the omission to bring the case within time;

(b) the length of the delay;

(c) any prejudice or hardship to any other person;

(d) the effect on the rights and liabilities of the parties;

(e) subsequent events; and

(f) the merits of the proposed challenge.

[16] These criteria should also now be read in the light of the Supreme Court's judgment in *Almond v Read*.[5] That decision emphasised that the ultimate question in such a case is what the interests of justice require. That is particularly pertinent in the present case where unusual circumstances exist which may not necessarily fit within the criteria established in *An Employee v An Employer*. The Supreme Court also rephrased the issue of prejudice as meaning prejudice or hardship to the respondent or to others with a legitimate interest in the outcome. It went on to say that:[6]

> Where there is significant delay coupled with significant prejudice, then it may well be appropriate to refuse leave even though the appeal appears to be strongly arguable.

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4 *An Employee v An Employer* [2007] ERNZ 295 (EmpC) at [9].
5 *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.
6 At [38(d)].

[17] In *Freeborn v Sfizio* Ltd, when analysing the *Almond v Read* statements regarding the merits, Judge Corkill stated as follows:[7]

> [22] The Supreme Court also examined the extent to which the issue of merits may be relevant when leave is sought. It referred to three particular problems. First, issues as to the merits may be overwhelmed by other factors, such as the length of the delay or the extent of prejudice to a respondent. Second, the merits would not generally be relevant in a case where there had been insignificant delay as a result of a legal advisor's error and the proposed respondent had suffered no prejudice; in such a case, a respondent who does not consent would run the risk of an adverse costs award. Third, consideration of the merits on an interlocutory application is necessarily superficial. That meant there would be cases where the court should discourage argument on the merits and reach a view about them only where they are obviously very strong or very weak.
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> [23] Although these observations were made with regard to applications for leave to appeal to the Court of Appeal, in my view there are cases under s 219 of the Act where such factors are potentially relevant, particularly if the delay is minor.

Analysis of the criteria in this case

[18] The circumstances existing in this case are somewhat different from the circumstances usually giving rise to an application of this kind. Following the challenge to the substantive determination by EPB and despite her own challenge on costs, OST was, in a de novo challenge, entitled to raise her objections on the findings on non-publication made in the determination. The issue which she wished to raise would have been completely judiciable at that point. When the substantive challenge and the challenge on costs were resolved and discontinued, the time had expired for OST to file a substantive challenge of her own, which would of course then be on a non-de novo basis dealing only with the non-publication issue. In addition, EPB, which now has outstanding its application for an order for prohibition on publication in respect of the Court proceedings, would continue to rely upon the Authority's determination prohibiting publication remaining in force.

[19] OST now points to the misunderstanding on the part of the member of the Authority as to her position on prohibition of publication in the context of the Family Court proceedings. Her position is that she does not seek prohibition on publication

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7 *Freeborn v Sfizio Ltd* [2020] NZEmpC 87 (footnotes omitted).

in either the Authority proceedings or the Court proceedings. She is opposed to both and this is the reason for her application to now seek leave to challenge and to oppose EPB's application. To deprive her of that right in the circumstances which prevail in this case, would be contrary to the overall interests of justice.

[20] Turning to the criteria established earlier, there are clear reasons for OST's omission to bring the challenge within time. She was reliant on EPB's challenge but that was discontinued. The length of delay is not so great as to be weighed against her in the context of this case. Applying the *Almond v Read* rephrasing of the issue of prejudice, there would be clear prejudice to OST, who has a legitimate interest in the outcome of this matter, if leave is refused and she is not granted the right to commence her challenge. On the other hand, it cannot be said that EPB would be prejudiced to any great extent by the grant of leave given that it has its own application on the same point pending. I am of the view that in this case it cannot be said that OST's proposed challenge is without merit, although that of course will be for the decision of the Judge who eventually hears the matter. A serious factor in that analysis will be the Family Court's decision.

[21] For these reasons, OST's application for leave extending the time for commencing a challenge is granted. She is to file and serve her statement of claim in final form commencing the challenge within seven days of the date of this judgment. EPB will then have the usual period of 30 days to file a statement of defence. In the meantime, EPB's application to the Court for prohibition on publication is deferred and will be heard together with OST's challenge. Once the statement of claim is filed, a directions conference will be convened to advance both matters to a hearing unless the parties agree, as they have before, to the remaining matters being dealt with on the papers.

[22] In the meantime, I confirm that Judge Corkill's interim order of non-publication of names and identifying details is to continue until further order of the Court. That order was made in his Minute of 24 May 2019.

Second issue: costs following the filing of EPB's notice of discontinuance

[23] After the notice of discontinuance was filed by EPB, OST sought costs based on the Court's Guideline Scale, which Mr McKenzie-Bridle, counsel for OST, assessed at $4,237. Reference was made to authorities confirming that a discontinuing plaintiff is generally liable to pay costs to the defendant up to the date of the discontinuance, although that practice is not invariable.[8]

[24] In reply, Mr Pietras, counsel for EPB, provided a sequence of correspondence between counsel in which, amongst other things, Mr McKenzie-Bridle had confirmed on 16 April 2019 that OST's actual legal aid costs in responding to the challenge were, at that date, "around $1,000 plus GST". Mr Pietras submitted that the amount originally sought would therefore exceed actual costs which would be inappropriate.

[25] In response, Mr McKenzie-Bridle accepted this point, indicating that, as best could be determined, actual legal aid costs regarding the challenge were $2,294.94, inclusive of GST.

[26] In *Curtis v Commonwealth of Australia*, the Court of Appeal said that when considering costs with regard to an appeal brought successfully by a legally aided appellant:[9]

> [22] The quantum [of costs] should be according to the Court of Appeal scale. Costs should be scale costs or the amount paid out by the [Legal Services'] Commissioner for the appeal, whichever is the lesser figure. Thus costs should not exceed scale, or (if they are less) the amount paid for legal services.

[27] This Court's discretion as to costs is derived from cl 19 of sch 3 of the Act. The normal approach is that two-thirds of costs actually and reasonably incurred by a successful party may be awarded, subject to any increase or decrease which may be just in the circumstances. I proceed based on these principles.

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8 *Direct Auto Importer (NZ) Ltd v A Labour Inspector of the Ministry of Business, Innovation and Employment* [2018] NZEmpC 39 at [7]; *Kelleher v Wiri Pacific Ltd* [2012] ERNZ 406.

9 *Curtis v Commonwealth of Australia* [2019] NZCA 126.

[28] Two-thirds of the actual legal aid costs not including GST amounts to $1,300.47. This is only slightly more than the indicative figure referred to by counsel; such an amount would be a fair and reasonable contribution to the costs incurred.

[29] I have received no information or submissions as to a GST liability where the relevant party is legally aided and so make no allowance for that factor. I note that the Court of Appeal in *Curtis* made no allowance for GST, if costs were to be paid based on the amount paid by the Legal Services Commissioner to the appellant's counsel.[10]

[30] EPB is ordered to reimburse OST, as a legally aided party, in the sum of $1,300.47.

Costs in these proceedings

[31] Costs on the present applications are reserved.

ME Perkins
Judge

Judgment signed at 3 pm on 4 December 2020

[10] *Curtis v Commonwealth of Australia*, above n 9 at [14]–[22] and [25].