

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**CC 11/09
CRC 12/09**

IN THE MATTER OF an application for extension of time within
 which to commence proceedings

AND

IN THE MATTER OF an application for a stay of proceedings

BETWEEN HERITAGE EXPEDITIONS LIMITED
 Applicant

AND GRAEME JOHN FRASER
 Respondent

Hearing: on the papers

Appearances: Rodney Russ, Agent for the Applicant
 Simon Graham, Counsel for the Respondent

Judgment: 26 August 2009

JUDGMENT OF JUDGE A A COUCH

[1] The applications currently before the Court arise out of confusion about corporate identity. The essential history of the matter is as follows.

[2] Mr Fraser was employed to manage a business known as Wild Earth Travel. After he had been working for about a year, Mr Fraser was dismissed on grounds of redundancy.

[3] Mr Fraser pursued a personal grievance alleging that his dismissal was unjustifiable. That grievance was eventually lodged with the Employment Relations Authority where Mr Fraser cited his employer as "*Rodney Russ, Director, Heritage Expeditions*".

[4] In a statement in reply prepared by Mr Russ, he asserted that Mr Fraser had been employed by Heritage Travel Group Limited.

[5] The matter was investigated and determined by the Authority on that basis. The process included an investigation meeting at which evidence was given by several witnesses, including Mr Russ and Mr Fraser. The parties subsequently provided the Authority with written submissions. At no stage did Mr Fraser suggest that his former employer was other than Heritage Travel Group Limited, as asserted by Mr Russ.

[6] On 23 October 2008, the Authority gave its determination (CA 159/08) which was in favour of Mr Fraser. It found that he had been unjustifiably dismissed and awarded him remedies totalling nearly \$14,000. That determination cited the respondent as Heritage Travel Group Limited and the orders to pay money to Mr Fraser were made against that company. This determination was not challenged.

[7] In early 2009, Mr Fraser took steps to enforce the orders made by the Authority. It is said that he "*sought to wind up the Heritage Travel Group Limited*" although it is unclear what process he adopted to do this. It appears that Mr Fraser also sought to enforce the orders of the Authority through the District Court.

[8] These processes were unfruitful. It is said that Mr Russ told the collections officer from the District Court in or about April 2009 that Heritage Travel Group Limited had been wound up. If that is so, it was untrue as the company remains on the register of companies, albeit subject to the notice "*The Registrar of Companies is satisfied that this company has ceased to carry on business and has initiated action to remove the company from the register.*"

[9] On 28 April 2009, Mr Fraser's solicitors wrote a detailed letter to the Authority. Apparently for the first time, it was asserted that Mr Fraser had been employed by Heritage Expeditions Limited rather than Heritage Travel Group Limited. On behalf of Mr Fraser, his solicitors asked the Authority to substitute Heritage Expeditions Limited as the respondent in the proceedings.

[10] In response to that request, the Authority reopened its investigation and scheduled a further investigation meeting on 4 June 2009. Notice of that meeting and a minute issued by the Authority was sent to Heritage Travel Group Limited at its address for service, which is also the registered office of the company. The notice was sent on 20 May 2009. On 25 May 2009, the notice was returned to the Authority with a letter advising that Heritage Travel Group Limited “*ceased operations on 31 May 2008.*”

[11] It appears that no notice of the reopened investigation meeting was given to Heritage Expeditions Limited notwithstanding that the purpose of the further investigation was to determine whether that company ought to be liable to Mr Fraser.

[12] Heritage Expeditions Limited was not represented at the second investigation meeting held by the Authority on 4 June 2009. In its absence, the Authority heard further evidence from Mr Fraser who produced a written employment agreement between himself and “*Heritage Expeditions New Zealand Limited*” which he said was signed during the course of his employment. The Authority records that Mr Fraser was adamant that this was the only employment agreement he signed.

[13] Following that meeting, the Authority gave a second determination dated 3 July 2009 (CA 93/09) in which it found as a fact that Heritage Expeditions Limited was Mr Fraser’s employer and substituted that company as respondent in the proceedings. The effect was to make Heritage Expeditions Limited liable to comply with the orders for payment to Mr Fraser. The Authority also ordered Heritage Expeditions Limited to fully reimburse Mr Fraser for the \$2,097.50 legal costs he had incurred.

Application to extend time for a challenge

[14] On 10 July 2009, the Registrar received a document entitled “*Application for Leave*” from Mr Russ on behalf of Heritage Expeditions Ltd. On behalf of the company, Mr Russ seeks an extension of the time provided in s179(2) of the Employment Relations Act 2000 for filing a challenge to the Authority’s second determination. Specifically, he wants an extension until 21 September 2009. As the

determination was issued on 3 July 2009, this would represent an extension of 50 days.

[15] The Court routinely receives applications to extend time which are made after the time period prescribed by s179(2) has expired. Such applications are dealt with under s219 which is headed “*Validation of informal proceedings, etc.*” The principles applicable to the exercise of the discretion conferred on the Court by s219 are well established – see, for example *An Employee v An Employer* [2007] ERNZ 295 at paragraph [9].

[16] This case is relatively unusual in that the application has been made before the prescribed time period has expired. I agree with the view expressed by the Chief Judge in *Rooney Earthmoving Ltd v McTague* [2007] ERNZ 356 that such an application falls to be decided under s221 rather than s219. The material parts of s221 are:

221 Joinder, waiver, and extension of time

In order to enable the court or the Authority, as the case may be, to more effectually dispose of any matter before it according to the substantial merits and equities of the case, it may, at any stage of the proceedings, of its own motion or on the application of any of the parties, and upon such terms as it thinks fit, by order,—

...

(c) subject to section 114(4), extend the time within which anything is to or may be done; and

(d) generally give such directions as are necessary or expedient in the circumstances.

[17] Although the wording of s221 differs from that of s219, the fundamental principle guiding the exercise of the Court’s discretion must be the same, that is the justice of the case. Many of the more specific factors to be taken into account in assessing the overall justice of the matter will also be the same:

- a) Any prejudice or hardship to any person which may result from the extension of time sought being granted.
- b) The effect on the rights and liabilities of the parties.
- c) The merits of the proposed challenge.

[18] In considering an application for an extension of time under s219, the other key factors are the reason for failing to bring the case in time and the extent of the delay. The equivalent factors under s221 will be the length of the extension of time sought and the reason for seeking that extension. How those factors are taken into account and the weight to be placed on them under s221 will, however, differ from the approach taken under s219. That is for two principal reasons.

[19] Once a party has allowed the time for exercising a right to expire, the position of that party changes radically. The right to take the step in question is gone and the party must justify the grant of an extension of time from a position of default. Where an extension of time is sought before the right has expired, the party makes the application from a more responsible position.

[20] The second difference flows from this. Where a party allows the prescribed time to expire before taking any steps, the opposing party is led to believe that the right will not be exercised. Where the right in question is one of appeal or challenge to a decision already made in favour of the other party, that party will have been led to believe that the decision at first instance was final and enforceable. In such circumstances, being deprived of that certainty is seriously prejudicial in itself. Where an application for extension of time is made before the right of appeal or challenge has expired, the respondent will never have been led to believe that the initial decision was final and will therefore not be prejudiced in the same way.

[21] The grounds on which the present application is made are:

- a) Mr Russ is the sole director of Heritage Expeditions Ltd and is the human face of the company.
- b) Mr Russ is currently on board a polar research vessel at sea in a remote part of eastern Russia. He was on the vessel from 24 April 2009 until 26 May 2009 when he disembarked at a Russian port and travelled to New Zealand where he arrived on 9 June 2009. Mr Russ rejoined the vessel on 6 July 2009 and is due to remain on board until

he disembarks in Alaska on 1 September 2009. He will then travel back to New Zealand, arriving on 8 September 2009.

- c) While on the vessel, communication is very limited and expensive.
- d) Heritage Expeditions Ltd was never served with any documents in relation to the proceedings before the Authority or offered the opportunity to be heard in response to Mr Fraser's claims.
- e) On behalf of Heritage Expeditions Ltd, Mr Russ wishes to seek legal advice about making a challenge to the Authority's second determination but, until he returns to New Zealand, he will not be able to do so. Mr Russ also says that, if it is decided that a challenge be made, he will need access to documents which are in New Zealand and to which only he has access.

[22] In response, counsel has filed a notice of opposition and an affidavit sworn by Mr Fraser.

[23] The first ground of opposition is recorded as being that the Authority sent notice of reopening the matter to Heritage Travel Group Limited "*when the company was still trading.*" No evidence is provided of this and it is inconsistent with the letter received by the Authority which records that the company ceased trading in May 2008, nearly a year prior to the notice being served. This ground also fails to address the fundamental point that it appears no notice was given to Heritage Expeditions Limited.

[24] The second ground of opposition is: "*The proceedings have been in place for over a year. The Applicant has had plenty of time to file any documents necessary to defend the claim made against it.*" This also overlooks the essential point that Heritage Expeditions Limited was never informed that it had a claim made against it until it received the Authority's second determination. The company therefore had no opportunity at all to defend the matter.

[25] In relation to these first two issues, the better point is made in Mr Fraser's affidavit to which are exhibited copies of the Companies Office records for Heritage Travel Group Limited, Heritage Expeditions Limited and Wild Earth Travel Limited. What these records show is that Mr Russ is a director and shareholder of all three companies and that they all have the same registered office and address for service. It might be inferred from this that notice given to any of these companies was likely to come to the attention of Mr Russ who would then have been in a position to respond in the interests of all three companies.

[26] This proposition presumes, however, that the notice indicates that a company other than the one to which it is directed is likely to be affected. I have not been provided with a copy of the notice or the minute which the Authority sent to Heritage Travel Group Limited on 20 May 2009. I am therefore unable to know whether those documents indicated that a claim was being made against Heritage Expeditions Limited. Mr Russ also says that he was out of New Zealand at the time the notice addressed to Heritage Travel Group Limited was received. It is therefore inappropriate in this case to draw any inference that it would have been referred to him.

[27] As a matter of principle, it must also be questionable whether it can ever be appropriate to make binding orders on the basis that a notice addressed to one company will be brought to the attention of another company because they have a director in common. In my view it is not appropriate in this case, particularly as it appears Heritage Travel Group Limited ceased trading some time ago and is about to be removed from the register of companies.

[28] The third recorded ground of opposition is that granting an extension of time "*would cause severe prejudice and hardship to the Respondent.*" Mr Fraser's affidavit contains no evidence in support of this proposition. I can therefore give it little or no weight.

[29] In addition to those grounds of opposition, it is apparent from Mr Fraser's affidavit that he must take some responsibility for the confusion about the identity of his former employer. He says "*At the time of filing the initial proceedings, I honestly*

believed that I had been employed by Heritage Travel Group Limited. I therefore filed my proceedings against that company.” Later in his affidavit, he says “... *I reiterate that I only signed one employment agreement and that I have always been employed by Heritage Expeditions Limited.*” There is no reference to this employment agreement in the Authority’s original determination, the first mention being in the supplementary determination. I infer from this that Mr Fraser failed to bring the agreement to the attention of the Authority in its initial investigation.

[30] Having regard to the evidence before me, I am satisfied both in terms of the specific considerations referred to earlier and in terms of the overall justice of the matter that an extension of time ought to be granted. Given that Mr Russ is to be back in New Zealand on 8 September 2009, the deadline for filing a challenge will be 15 September 2009.

Application for stay of proceedings

[31] In addition to an extension of time within which to file a challenge to the Authority’s determination, Heritage Expeditions Limited also seeks a stay of proceedings pending the outcome of that challenge. In particular, a stay is sought of the order requiring the company to pay Mr Fraser nearly \$16,000 within 7 days after the date on which the supplementary determination was issued.

[32] On its face, that application is made in reliance on a challenge to the Authority’s determination having been made. That, of course, has not yet occurred. In such circumstances, there may be some doubt whether an order for stay can be made under s180 which provides:

180 ***Election not to operate as stay***

The making of an election under section 179 does not operate as a stay of proceedings on the determination of the Authority unless the court, or the Authority, so orders.

[33] To the extent that there may be doubt about the applicability of s180 in these circumstances, however, the very wide discretion conferred on the Court by s221 to give such directions as are “*necessary or expedient in the circumstances*” would include power to order a stay of proceedings.

[34] The starting point in considering an application for stay must be that, once the Authority has given a determination, it remains valid and enforceable unless and until the Authority or the Court orders otherwise. Also, as a matter of principle, the Court should not make an order which affects an order of the Authority without good reason.

[35] Another fundamental principle is that there must be some material before the Court on which it can exercise its discretion before it will be proper to do so. In this case, Mr Russ has provided little such material in relation to the application for stay. In particular, there is no suggestion that Mr Fraser may be unable to repay the sums in question if he were paid now and a challenge was subsequently successful. Mr Russ says simply that a stay is sought because Heritage Expeditions Limited wishes to challenge the Authority's determination making orders against it.

[36] On the other hand, Mr Fraser expresses concern that a stay will unjustly keep him out of his money for longer than is necessary. In addition, he adduces evidence of the impecuniosity of the related company Heritage Travel Group Limited. This material is also of little assistance. It is clear from Mr Fraser's affidavit that he delayed considerably in taking steps to enforce the Authority's original determination against Heritage Travel Group Limited and, as a result, it is now nearly a year since that determination was given. The fact that two companies may be related does not, of itself, lead to a conclusion that their finances are interconnected.

[37] It seems to me that the most significant factor affecting the justice of the case is that the Authority has made orders against a party which was not properly informed of the proceedings and which has not had an opportunity to be heard. In my view, it would be fundamentally unjust for those orders to be enforced before the extended time I have allowed to challenge the Authority's determination has expired. At the same time, the presumed validity of the Authority's determination must be respected and the interests of Mr Fraser recognised.

[38] Balancing these factors, it is just to grant a stay until the time for filing a challenge has expired and then for the stay to be continued only if a challenge is filed and the principal sum in issue is paid into Court.

Conclusion

[39] I make the following orders regarding the Authority's supplementary determination dated 3 July 2009:

- a) The time within which Heritage Expeditions Limited may validly file a challenge to the determination is extended to 15 September 2009.
- b) Proceedings to enforce the orders made by the Authority in the determination are stayed until 16 September 2009.
- c) If a challenge is validly filed and served, the stay of proceedings shall continue until further order of the Court provided that Heritage Expeditions Limited pays into Court at the time the challenge is filed the sum of \$13,846.18.

[40] Costs relating to the matters dealt with in this judgment are reserved.

A A Couch
Judge

Signed at 2.30pm on 26 August 2009